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WISCONSIN EMPLOYMENT
RELATIONS COMMISSION

STATE OF WISCONSIN CIRCUIT COURT BAYFIELD COUNTY

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SCHOOL DISTRICT OF DRUMMOND,

Petitioner,

vs.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION,

Respondent.

MEMORANDUM OPINION

File #82-CV-114

Decision No. 17251-B

* *

This is an appeal from a decision by the Wisconsin Employment Relations Commission, which had affirmed an examiner's order that an anti-nepotism resolution passed by the Petitioner's School District was a subject of mandatory negotiation between the School District and the labor organization representing the non-professional employees. The decision also required the District to rehire a bus driver, Eldon Kravick, who was the husband of a School Board member, and pay him backpay since his discharge in June of 1979. Proper and timely petition for review of the order of the Commission has been filed.

FACTS:

The findings of fact have been made by the examiner and Commission and enlarged slightly by the Commission, and there are facts which support such findings of the Commission, except finding 14, which is a conclusion of law. I adopt those findings except #14. There are also facts not stated by either the examiner or the Commission, which, in fairness to the District, should be mentioned and which should be included in the findings. The members of the School Board who testified, indicated they felt, for some years, pressure to do something with regard to what they considered as conflicts of interest. The matter started in approximately August of 1978 when a former Board

member was convicted of a felony sale of steel to the District. In addition, there were other pressures exerted on the District by an auditor's report and seminar, as well as pressure from the Association of Teachers to do something with respect to nepotism and conflicts of interest. Some discussion of the anti-nepotism policy had been on the agenda of the School Board since approximately March, 1979, and was generating considerable community interest. However, the union agent wrote to the District on May 9, 1979, noting that if they were considering an anti-nepotism policy, that he considered such a matter to be within the matters that mandatorily must be negotiated with the union. However, the union contract was negotiated in sessions on May 21 and 22, 1979, and although the question, apparently, of anti-nepotism was briefly raised, no bargaining was done at those sessions. On May 23, 1979, the Board of Education of the Petitioner did adopt an anti-nepotism resolution providing as follows:

> "WHEREAS, it is the general policy of the State of Wisconsin that public officials shall have a complete personal disinterest in public contracts; and
>
> WHEREAS, criminal statutes of the State of Wisconsin prohibit a school board member, in his private capacity, from negotiating or bidding for or entering into a contract which he has participated in making as a public official, and prohibit a school board member from participating in the making of such contract in his public capacity of performing some discretionary function in regard to the contract; and
>
> WHEREAS, responsibilities and duties of the board of education are comprised, to an increasingly large degree, of negotiating and entering into and executing employment contracts with school district employees, and
>
> WHEREAS, it is, to a like and increasing degree, more difficult for the active and conscientious school board member, in his private capacity, to remain sufficiently aloof from participating in the making, formation and execution of such public contracts so as not to violate such criminal statutes; and

> WHEREAS, the Board of Education of the School District of Drummond is acutely aware of the need to restore the confidence, faith and trust of the citizenry in the integrity of the manner of functioning of governmental bodies at all levels,
>
> NOW, THEREFORE, BE IT RESOLVED by the board of the School District of Drummond that it henceforth will not enter into any employment contract with a spouse or child of any board member if such contract provides for an annual compensation in excess of $5,000.00; that any individual employment contract between the board and a husband, wife or child of a member of the board entered into prior to the date of this resolution and currently in effect shall be performed to the completion of its term and it shall then terminate and be at an end; that the husband, wife or child of any current member of the board, performing services for the district at an annual compensation in excess of $5,000.00 pursuant to an arrangement other than an individual employment contract, shall resign forthwith; and that any person, hereafter performing services for the district at an annual compensation in excess of $5,000.00 pursuant to an arrangement other than an individual employment contract, whose husband, wife, or parent is hereafter elected to serve on the board, shall end such performance of services immediately when his or her husband, wife or parent assumes the office of board member."

The contract between the Association and District was ratified by the Association on May 31, 1979. On May 29, 1979, the District's administrator sent to Mr. Kravick, the school bus driver, who was the husband of the Board member, a copy of the adopted nepotism policy and also sent a copy to the union agent. On May 30, 1979, the union agent sent a letter to the president of the School Board demanding that the Board rescind its newly adopted nepotism policy and again alleging it had a legal obligation to notify the union and to negotiate such a resolution. The Board indicated they would give Mrs. Kravick and her husband some time to make a decision, but on July 16, 1979, his services were finally terminated. The complaint was filed with the WERC on August 6, 1979, and amended on September 25, 1979, but the examiner's decision was not made until June 3, 1981, and it was affirmed

by the Commission on June 15, 1982.

THE ISSUES:

The examiner and the Commission found that the resolution on nepotism was a subject that was a mandatory matter for collective bargaining under Section 111.70 (3)(a)(4). Having made this determination, the examiner and the Commission concluded that the refusal to issue a contract to the bus driver husband of the School Board member, Mr. Kravick, was without lawful cause and contrary to the parties' collective bargaining agreement. The finding was that the discharge was based solely on the adoption of the nepotism policy by the District's Board.

The School District challenges the decision that the nepotism resolution was a subject of mandatory bargaining. The District relates the pressure on the Board to re-establish confidence in its management of District affairs by virtue of the history of difficulty in conflict of interest matters and the need for action in this area requested by their advisors. It is their position that the policy gives effect to Wisconsin Statutes 946.13. A finding that the resolution was a managerial decision of the District and not a subject for mandatory bargaining obviously negates the need for collective bargaining on the resolution and justifies the subsequent discharge of Mr. Kravick. The District further argues that the doctrine of "virtual representation" waiver and estoppel bars the necessity for impact bargaining and negotiation (apparently conceding that there was a need for bargaining on the impact of the regulation even if the regulation itself could be adopted without such bargaining). The District further argues that the pay set aside as to the pay due to Eldon Kravick, because of the

excessive delay--over a year and three months after the last brief was filed and over a year and eight months after the hearing in the matter--was itself improper.

Essentially, the briefs of the Wisconsin Education Association Council and of the Attorney General's Office support the position of the examiner and the Commission and rejects each of the arguments of the District. Essentially, that is, that the resolution was mandatorily bargainable because it was a "condition of employment." Specific positions of the WERC and the Attorney General will be referred to in the decision.

DECISION.

As a threshhold question, we have the problem of the standard of review in this case. The Attorney General has argued that if the administrative agency's interpretation of the law within a special area has a "rational basis," the decision of the agency must be followed by the Court. Blackhawk Teachers' Federation vs. WERC, 109 Wis. 2nd 415 (1982). However, this is so only where the Commission's interpretation is the result of a "practice long continued, substantially uniform, and without challenge by governmental authorities and the courts." Where the question involved is "very nearly" one of first impression, the Court does not use the "great weight" standard but, instead, accords to the interpretation "due weight" in determining what the appropriate construction should be. Beloit Education Association vs WERC, 73 Wis 2nd 43 (1975) at pages 67-68. The matter of whether or not a nepotism resolution is one requiring mandatory bargaining is a matter of first impression for the Commission and for the Court also, and while it is true that the Commission has

been interpreting the scope of municipal collective bargaining, as pointed out in Blacknawk, the experience has not been extensive in the area of public policy matters. I do not believe there can be demonstrated in this area a "practice long continued, substantially uniform, and without challenge by governmental authorities and the courts." Under the circumstances, therefore, the decision of the Commission will be accorded "due weight."

The obligation of the School District to bargain is required by two sections of the Statutes: Section 111.70 (3)(a)(4), makes it a prohibitive practice for a municipal employer to refuse to bargain collectively with a representative of its employees, and Section 111.70 (1)(d) defines the word "collective bargaining" as

> "The performance of the mutual obligation of the municipal employer...and the representative of its employees to meet and confer at reasonable times, in good faith, with respect to wages, hours, and conditions of employment with the intention of reaching an agreement...The duty to bargain, however, does not compel either party to agree to a proposal or require the making of a concession...The employer shall not be required to bargain on subjects reserved for management and direction of the governmental unit except insofar as the manner of exercise of such functions affect the wages, hours, and conditions of employment of the employee."

Since a policy on nepotism is not concerned with "wages" or "hours," it is the "condition of employment" which requires interpretation There is room to say that a decision of a board relating to nepotism does involve a policy decision of the board that requires something more than bargaining with union representatives to achieve a decision. The Court in Beloit Education Association stated that,

> "Beyond such limit of voluntary bargaining is the area involving the exercise of the public employer's 'powers and responsibilities to act for the...good order of the municipality, its commercial benefit and the health, safety and welfare of the public.' Here the proper forum for the determination of the appropriate public policy is not the closed session at the bargaining table. More than the bilateral input of the public employer and the employees' bargaining agent is required for deciding the appropriate public policy. Here the multilateral input of employer, employees, taxpayers, citzen groups and individual citizens is an integral part of the decision-reaching process, and bargaining sessions are not to replace public meetings of public bodies in the determination of appropriate public policy."

Beloit Education Association, supra at pages 50-51. The Court in that case indicated also that it is not all matters relating to wages, hours, or conditions of employment that are mandatorily bargainable, but only those that are "primarily so related" (emphasis supplied). Under that limitation, it seems to me the determination of the issue here primarily relates to public policy, and only secondarily to conditions of employment, and, therefore, is one for the Board to determine in an open meeting with public input. For general review of the subject, see Article. The Appropriate Scope Of Review In the Public Sector, 1977 Wisconsin Review 685.

The WERC and Attorney General's Office submit that the residency requirement cases indicating that such resolutions are subject to mandatory bargaining are authority for mandatory bargaining here. I concede that sometimes the distinctions between issues mandatorily bargainable and permissive are somewhat fine, and they are not always easy to understand. See Beloit Education Association, supra, and Blackhawk, supra, setting forth matters, some of which the Court determined to be mandatorily bargainable and some not. The present matter is one which determines whether or not one employee shall work at all, but is primarily one which affects public attitudes towards government

and credibility of the particular municipal board.

The Supreme Court has indicated in City of Brookfield vs. WERC, 87 Wis. 2nd 819 (1978) at page 829,

> "...It is not the intent of the legislature to permit the elasticity of the phrase 'bargaining topics affecting wages, hours and conditions of employment' to be stretched with each and every labor question."

That case also sets forth the Supreme Court's concern for the maintenance of the municipality's political process, and the Court quotes with approval from Unified School District No. 1 of Racine County vs. WERC, 81 Wis. 2nd 89 (1977), stating that,

> "The bargaining table is not the appropriate forum for the formulation and management of public policy. Where a decision is essentially concerned with public policy choices, no group acts as an exclusive representative; discussion should be open; and public policy should be shaped through the regular political process. Essential control over the management of the school district affairs must be left with the school board, the body elected to be responsible for those affairs under state law."

In the City of Brookfield case, the matter of economically motivated layoffs of public employees by the city resulting from budgetary restraints was held to be a matter primarily related to the exercise of municipal powers and was not a subject of mandatory collective bargaining, although the effects of such layoffs were held to be mandatory subjects of bargaining.

I am not unmindful of the Circuit Court's decision from Waukesha County, WERC Decision No. 11406-B(973), Case No. 31923, relied on by the Board, in which the Circuit Court made the broad statement, "Any change which directly relates to termination of employment has been recognized by the courts as being mandatorily bargainable." I do not

find that the federal court citations relied upon in the opinion support such a statement, at least in connection with a matter which can reasonably be interpreted as being primarily concerned with policy matters and, in my view, only incidentally with the matter of termination of one employee's position.

In addition, although I recognize that it involves interpretations of the NLRB, the Supreme Court of the United States has, at least in a concurring opinion, spoken on the subject (though in a private sector case, the principles seem applicable). In Fibreboard Paper Products Corp. vs. NLRB, 379 US 203, 13LED 2nd 233 (1964), the issue was whether "contracting out" of work being performed by employees in the bargaining unit is a statutory subject of collective bargaining under the National Labor Relations Act. That Act has the same obligation to bargain with respect to wages, hours, and "conditions of employment" as the State statute quoted above. The majority of the Court held that under the conditions there existing, where the employer after considering items of cost decided to let out maintenance work after expiration of the union contract, hired an independent contractor and refused to negotiate with the employees that the subject of contracting out was a matter of mandatory bargaining. The Court said,

> "The words even more plainly cover termination of employment which, as the facts of this case indicated, necessarily results from the contracting out work performed by members of the established bargaining unit."

In the Court's view, the basis of the decision was the promotion of industrial peace through enforced bargaining under the mandatory provision. The Court was careful to say, however, that it was not expanding the scope of mandatory bargaining with this decision, which applies

solely to the facts of this case. The fact that the case was so limited was made even more plain by the concurring opinion of Associate Justice Stewart. He pointed out,

> "The phrase 'conditions of employment' is no doubt susceptible to diverse interpretations. At the extreme, the phrase could be construed to apply to any subject which is insisted upon as a prerequisite for continued employment."

But that, in his view, would be contrary to the intent of Congress. He further stated (at page 245, Lawyer's Edition),

> "On one view of the matter, it can be argued that the question whetner there is to be a job is not a condition of employment; the question is not one of imposing conditions of employment but the more fundamental question whether there is to be employment at all. However, it is clear that the Board and the courts have on numerous occasions recognized that union demands for provisions limiting an employer's power to discharge employees are mandatorily negotiable... Yet there are other areas where decisions by management may quite clearly imperil job security or indeed terminate employment entirely...Nothing the Court holds today should be understood as imposing a duty to bargain collectively regarding such managerial decisions which lie at the core of entrepreneurial control."

Thus Stewart agreed with the majority so far as the facts of the case in hand were concerned; that is, an attempt by the employer to substitute one group of workers for another to perform precisely the same task was a matter which was within the traditional framework of collective bargaining. Mr. Stewart noted the grave problems in those involving job security and stability, which traditionally had been prerogatives and decisions of private business management. To depart from that path would be, in his judgment, a sharp departure from traditional principles of free enterprise and should only be done at the specific direction of Congress.

It is interesting to note, also, that on collections on the subject, I find no realistic support for the statement quoted and relied upon by both the examiner and the Commission as to the statement that any change directly relating to termination of employment has been recognized as being mandatorily bargainable. I wish to make clear that I do not deny that there are such cases recognizing the factor of termination as being something that is involved in conditions of employment under the particular circumstances of the particular case. As Justice Stewart points out, however, that standing by itself is certainly not sufficient to declare that the particular subject of this case must be necessarily mandatorily bargainable. See Annotation: Mandatory Collective Bargaining Under Federal Labor Relations Act, 12 ALR 2nd 265, Bargainable or Negotiable Issues In State Public Employment and Labor Relations, 84 ALR 3rd 2482.

I give due weight to the interpretation of the statute by the examiner and the Commission, but, as indicated above, I do not believe I am bound by that interpretation. I consider the statement of the responsibilities of the school board as set forth in Unified School District No. 1 of Racine County vs. WERC, supra at pages 99-100. The policy-making function is exclusively vested in the school board, which has the overall responsibility for the governance of the school district. It found itself confronted with the serious problem of public credibility with respect to the problem of conflicts of interest and reacted in setting forth a policy that in its judgment, would help to resolve its problems in that area. I do not agree with the assertions in the brief that the passage of the resolution was necessarily giving effect to Wisconsin Statutes, section 946.13. I agree, however, with

counsel, as emphasized in oral argument, that--as the Court stated in the City of Brookfield--the bargaining table with the union was not the appropriate forum for formulation of the public policy matter. The discussions should be open and were open. The union did have the opportunity to attend the School Board meeting and to lobby as citizens or even as a unit. Under the circumstances, I find as a conclusion of law, that the matter of the passage of the resolution was not a matter for mandatory bargaining.

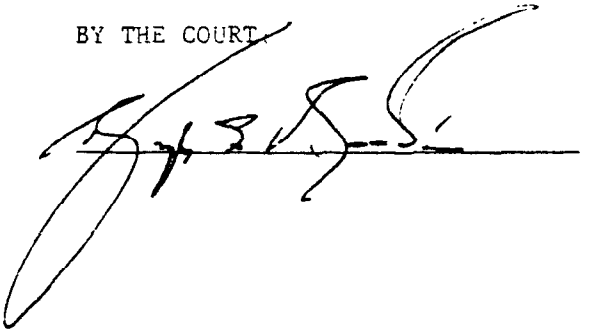
However, I do believe that the School District is required to mandatorily bargain the effects of any layoff resulting from the passage of the resolution in question. City of Brookfield, supra; Beloit Education Association, supra. I disagree with the brief of the Board that the doctrine of virtual representation waiver and estoppel by impact bargaining applies. I cannot find that the facts support such a position. It is true that Mrs. Kravick, the member of the Board, presented to the Board copies of opinions obtained from two different lawyers that indicated that if the Board member abstained from taking any part in the discussions relating to the contract in question, that there would be no violation of the criminal statute. But this is hardly negotiations contemplated to meet the statutory requirement of bargaining. The School District's attorney complains about the representative of the teachers who wished the passage of the resolution and the employees' association which did not. It is apparent that the union representative was not a lawyer, and whether or not his position is such that ethics of the union negotiator affect his dual representation is something that need not be decided in this case, nor does it affect the outcome. Nothing in the record supports a finding that

there was negotiation and bargaining with respect to Mr. Kravick's contract after passage of the resolution, and I support the findings of the Commission in this regard.

However, in view of my decision, I set aside the conclusions of the Commission as to the illegality of the resolution and the order requiring that the employee be reinstated as of the date of his discharge, and instead require that the district shall bargain with him with respect to his employment. It is noted that there were other possibilities than immediate refusal to renew his contract, two of them were whether or not Mr. Kravick could be hired for less than $5,000.00 in a given year, or whether he might have had an extended vacation. This is not to point to these matters as necessarily the ones which must be discussed, but simply possibilities that could have been discussed had there been bargaining after the passage of the resolution. All this Court can require is that there be bargaining and not the results of the bargaining. The attorney for the Board will draw findings and judgment in accordance with this Opinion.

Dated this 23rd day of June 1983.

BY THE COURT:



cc: Mr. Dale R. Clark
Mr. Michael J. Stoll
Ms. Kathryn J. Prenn
Mr. John D. Niemisto