STATE OF WISCONSIN : DANE COUNTY : DANE COUNTY

DANE COUNTY SPECIAL
EDUCATION ASSOCIATION,

Petitioner,

v.

WISCONSIN EMPLOYMENT
RELATIONS COMMISSION,

Respondent.

NOTICE OF ENTRY
OF JUDGMENT

Case No. 80 CV 0097

Decision No. 17400-A and
17411

TO: Michael L. Stoll
101 West Beltline Hwy.
P. O. Box 8003
Madison, Wisconsin 53708
Attorney for Petitioner.

PLEASE TAKE NOTICE that a judgment, of which a true and correct copy is hereto attached, was signed by the court on the 9th day of June, 1980, and duly entered in the Circuit Court for Dane County, Wisconsin on the 9th day of June, 1980.

Dated at Madison, Wisconsin, this 12 day of June, 1980.

BRONSON C. LA FOLLETTE
Attorney General

David C. Rice /s/
DAVID C. RICE
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STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

* *

DANE COUNTY SPECIAL
EDUCATION ASSOCIATION,

Petitioner,

Case No. 80-CV-0097

v.

JUDGMENT

WISCONSIN EMPLOYMENT
RELATIONS COMMISSION,

Decision No. 17400-A and
17411

Respondent.

* *

BEFORE: Hon. GEORGE R. CURRIE, Reserve Circuit Judge

* *

The above entitled review proceeding having been heard by the Court on the 2nd day of June, 1980, at the City-County Building in the City of Madison; and the petitioner having appeared by Attorney Michael L. Stoll; and the respondent having appeared by Assistant Attorney General David C. Rice; and the Court having had the benefit of the argument and briefs of counsel, and having filed its Memorandum Decision wherein Judgment is directed to be entered as herein provided;

It is Ordered and Adjudged that the Declaratory Ruling of respondent Wisconsin Employment Relations Commission dated November 2, 1979, entered In the Matter of the Petition of Dane County Requesting a Declaratory Ruling Pursuant to Section 227.06, Stats., Involving a Dispute Between Said Petitioner and Dane County Special Education Association, Decision No. 17400, and the Order of Dismissal of said respondent Commission also dated November 2, 1979, entered In the Matter of the Petition of Dane County Special Education Association To Initiate Mediation-Arbitration Between Said Petitioner and Dane County (Handicapped Children's Education Board), Decision No. 17411, be, and the same hereby are, affirmed.

Dated this 9th day of June, 1980.

By the Court:

George R. Currie /s/
Reserve Circuit Judge

STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

* *

DANE COUNTY SPECIAL EDUCATION ASSOCIATION,

Petitioner,

Case No. 80-CV-0097

v.

MEMORANDUM DECISION

WISCONSIN EMPLOYMENT RELATIONS COMMISSION,

Decision No. 17400-A and 17411

Respondent.

* *

BEFORE: Hon. GEORGE R. CURRIE, Reserve Circuit Judge

* *

This is a proceeding commenced January 9, 1980, under secs. 111.07(8), 111.70(4)(a)-(b), and 227.16, Stats., to review a declaratory ruling of the Wisconsin Employment Relations Commission (hereafter the Commission) and an order dismissing the petition of Dane County Special Education Association (hereafter the Association) for mediation-arbitration under the Municipal Employment Relations Act (MERA), sec. 111.70(4)(cm), Stats. The Commission declared that the MERA mediation-arbitration provisions did not apply to a deadlock in negotiations between the Association and Dane County concerning the impact of the County's decision to terminate its special education program on the wages, hours and working conditions of the employees represented by the Association. The Commission concluded that the mediation-arbitration provisions are applicable only to deadlocks in (1) reopened negotiations under a collective bargaining agreement to amend or modify a specific portion of an existing collective bargaining agreement subject to a specific reopener provision, (2) negotiations over the wages, hours and working conditions to be included in a successor collective bargaining agreement for a new term, or (3) negotiations for an initial collective bargaining agreement where no such agreement exists. The Commission accordingly concluded that the mediation-arbitration provisions are inapplicable to deadlocks in other negotiations which may occur during the term of a collective bargaining agreement.

THE ISSUE

The issue to be resolved is whether the Commission committed an error of law in interpreting sec. 111.70(4)(cm)6, Stats., to be inapplicable to an impasse in the collective bargaining negotiations between the Association and Dane County with respect to the impact upon the employees in the Dane County Handicapped Children's Education Program of the County's decision to terminate operations and sever the employment relationship.

STATEMENT OF FACTS

The relevant facts in this case have been stipulated by the parties to the proceeding before the Commission. Until the end of the 1977-1978 school year, the County operated the Dane County Handicapped Children's Education Program under Chapter 115, Stats. The Association is a labor organization which represented the approximately 92 teachers, teaching aides, speech therapists and psychologists employed by the County in that Handicapped Children's Education Program. The Association and the County were parties to a collective bargaining agreement, with a term from August 1, 1976, through August 13, 1978, which governed the conditions of employment of the bargaining unit employees represented by the Association. This agreement contained this provision:

> "After the expiration date hereof the collective bargaining agreement shall remain in effect from year to year unless either party notifies the other in writing prior to

October 15 of any subsequent year of its desire to amend the agreement. If a request to amend the agreement is made, the parties will schedule a meeting for the purpose of discussing proposals and counterproposals which shall be in writing. Negotiations will begin by January 15th of the following years."

On October 6, 1977, the County's Board of Supervisors adopted a resolution (Substitute Resolution 1 to Resolution 167, 1977-1978) which authorized certain measures designed to terminate the County's special education programs effective at the end of the 1977-1978 school year. Pursuant to that resolution, the County took actions to cease operating its special education program, effective June 30, 1978. As a result of those actions, all of the approximately 92 employees represented by the Association were terminated effective on or about the end of the 1977-1978 school year.

Following the adoption of the above-mentioned resolution and beginning in December 1977, the Association and the County engaged in collective bargaining regarding the impact upon the bargaining unit employees of the County's decision to terminate the operations of its Handicapped Children's Education Program. This impact bargaining had been requested by the Association in order to negotiate an agreement to govern the unique conditions of employment created by the County's decision to terminate the operation and the terms of the County's severance of the unit employees.

The Association's initial bargaining proposal in these impact negotiations, which it submitted to the County on December 14, 1977, contained a variety of provisions related to the County's termination of operations and the effect of that termination upon bargaining unit employees, including proposals dealing with severance pay, the continuation of employee insurance coverage, the timing of the employees' final paycheck, compensation for accumulated sick leave, and the provision of letters of reference and leave days for job interviews and/or investigation. This proposal dealt with the employees' working conditions during the "closing down" of the program and the terms of the employees' severance from employment, these being matters not covered in the existing collective bargaining agreement. During the initial impact bargaining, the County did not make any specific proposals concerning an agreement to govern the effects which its cessation of operations would have upon bargaining unit employees and their conditions of employment, but later did submit specific proposals.

Because negotiations had reached an impasse the Association on May 31, 1978, sent a letter to the Commission advising it of such impasse. On August 15, 1978, the County filed a petition for a declaratory ruling with the Commission. In its petition the County took the position that the provisions of sec. 111.70 (4)(cm)6, Stats., were inapplicable to the impasse in the bargaining between the County and the Association over the impact of the County's decision to terminate the operations of its Handicapped Children's Education Program and sever the employment relationship of the bargaining unit employees represented by the Association. In the declaratory ruling proceeding, the Association contended that the statutory mediation-arbitration procedures were applicable to the impasse in question.

On November 2, 1979, the Commission issued and served upon the parties its Findings of Fact, Conclusion of Law and Declaratory Ruling, with Accompanying Memorandum, which was adverse to the position espoused by the Association.

Also on November 2, 1979, the Commission issued an Order of Dismissal dismissing the Association's petition for mediation-arbitration. The Commission's Order of Dismissal was based upon its declaratory ruling that the statutory provisions of sec. 111.70(4)(cm)6, Stats., were inapplicable to the bargaining impasse between the Association and the County.

On November 21, 1979, the Association filed a motion for rehearing with the Commission, pursuant to sec. 227.12, Stats., wherein the Association asked the Commission to reconsider and modify its declaratory ruling and Order of Dismissal. On December 10, 1979, the Commission issued its Order Denying Motion for Rehearing. Thereafter, the Association timely filed the instant petition for review with this Court.

STATUTES INVOLVED

Section 111.70(1)(d), Stats., provides:

"Collective bargaining" means the performance of the mutual obligation of a municipal employer . . . and the representative of its employes, to meet and confer . . . in good faith, with respect to wages, hours and conditions of employment with the intention of reaching an agreement . . . . Collective bargaining includes the reduction of any agreement reached to a written and signed document . . . .

Section 111.70(4)(c), Stats., provides in part:

Methods for peaceful settlement of disputes.
1. "Mediation". The commission may function as a mediator in labor disputes. . . .

* * *

3. "Fact-finding". If a dispute has not been settled after a reasonable period of negotiation . . . and the parties are deadlocked with respect to any dispute between them arising in the collective bargaining process, either party . . . may petition the commission . . . to initiate fact-finding . . . and to make recommendations to resolve the deadlock.

Section 111.70(4)(cm), Stats., provides:

Methods for peaceful settlement of disputes.
1. "Notice of commencement of contract negotiations." . . . [W]henever either party requests the other to reopen negotiations under a binding collective bargaining agreement, or the parties otherwise commence negotiations if no such agreement exists, the party requesting negotiations shall immediately notify the commission in writing. . . .

* * *

3. "Mediation". The commission . . . shall function as mediator in labor disputes. . . .

* * *

5. "Voluntary impasse resolution procedures." In addition to the other impasse resolution procedures provided in this paragraph, a municipal employer and labor organization may . . . agree in writing to a dispute settlement procedure, including authorization for a strike by municipal employes or binding interest arbitration, which is acceptable to the parties for resolving an impasse over terms of any collective bargaining agreement under this subchapter . . . .

6. "Mediation-Arbitration." If a dispute has not been settled after a reasonable period of negotiation and after mediation by the commission . . . and the parties are deadlocked with respect to any dispute between them over wages, hours and conditions of employment to be included in a new collective bargaining agreement, either party . . . may petition the commission . . . to initiate mediation-arbitration.

* * *

a. Upon receipt of a petition to initiate mediation-arbitration, the commission shall make an investigation . . . to determine whether mediation-arbitration should be commenced . . . . Prior to the close of the investigation . . . the parties shall . . . submit to the commission a stipulation . . . with respect to all matters which are agreed upon for inclusion in the new or amended collective bargaining agreement . . . .

* * *

d. . . . The mediator-arbitrator . . . shall adopt without further modification the final offer of one of the parties on all disputed issues . . . which decision . . . shall be incorporated into a written collective bargaining agreement . . . . (Emphasis supplied.)

Section 111.70(6), Stats., provides:

The public policy of the state as to labor disputes arising in municipal employment is to encourage voluntary settlement through the procedures of collective bargaining . . . . If such procedures fail, the parties should have available to them a fair, speedy, effective and, above all, peaceful procedure for settlement as provided in this subchapter.

THE COURT'S DECISION

This review is solely concerned with a matter of statutory interpretation by an administrative agency. Before addressing the arguments advanced by the parties the Court deems it advisable to set forth the reasoning of the Commission by which it arrived at its conclusion that the mediation-arbitration provision of sec. 111.70(4)(cm)6 was inapplicable to the deadlock in negotiations over the impact on the employees in the bargaining unit of the County's decision to terminate its special education program. This reasoning was set forth in the Commission's "Memorandum" filed with its declaratory ruling decision of November 2, 1979, as follows (at pages 11-12):

This is not a case where the legislature has failed to express its intent or granted the Commission considerable latitude in interpreting the statute in a way which, in its view, represents the most appropriate policy choice given the underlying purposes of the legislation. On the contrary, we view the legislation as addressing the question rather specifically.

The key phrase in the law is the phrase contained in Sec. 111.70(4)(cm)6 (introduction), Stats., to the effect that a petition for mediation-arbitration can be filed if the parties are ". . . deadlocked with respect to any dispute between them over wages, hours and conditions of employment to be included in a new collective bargaining agreement . . ." This phrase stands in marked contrast to the parallel phrase contained in the fact finding procedure (Sec. 111.70(4)(c)3, Stats.), which it displaced, to the effect that a petition for fact finding may be filed if the parties are ". . . deadlocked with respect to any dispute between them arising in the collective bargaining process . . ." We have interpreted that provision to cover deadlocks in all disputes which are subject to the collective bargaining process under Sec. 111.70, Stats.

Absent some other indication of legislative intent, the wording of this provision would appear, on its face, to limit the application of the mediation-arbitration procedure to situations where the parties are negotiating a collective bargaining agreement which either constitutes the first

collective bargaining agreement between the parties or a "new" agreement to replace an existing or expired agreement. The provisions of Sec. 111.70(4)(cm)6a, Stats., calling for the execution of ". . . a stipulation, in writing, with respect to all matters which are agreed upon for inclusion in the new or amended collective bargaining agreement . . ." and the provisions of Sec. 111.70(4)(cm)6d, Stats., regarding the incorporation of the award into a written collective bargaining agreement are consistent with this interpretation. In fact, nowhere in the procedures outlined in Sec. 111.70(4)(cm)6, Stats., is there any indication that the legislature anticipated its application to deadlocks other than those which might occur in collective bargaining for a "new" agreement in this sense.

We note, as do the parties, that the legislature used slightly different terminology in the statutory provision requiring the parties to give notice to the Commission of the "commencement of contract negotiations." In Sec. 111.70(4)(cm)1, Stats., the parties are required to so notify the Commission". . . whenever either party requests the other to reopen negotiations under a binding collective bargaining agreement, or the parties otherwise commence negotiations if no such agreement exists . . ."

On the assumption that the legislature intended the notice requirements to be co-extensive with the applicability of the mediation-arbitration procedure, we believe it is a reasonable interpretation of the legislature's intent to conclude that the reference to "new collective bargaining agreement" in Sec. 111.70(4)(cm)6 (introduction), Stats., and the reference to a "new or amended collective bargaining agreement" in Sec. 111.70(4)(cm)6a, Stats., includes any agreement reached under a reopener clause whether it be a "successor" agreement or an amended agreement reached pursuant to a partial reopener clause. On the other hand, the reference to "reopen [ing] negotiations under a binding collective bargaining agreement" and the "commence[ment of] negotiations if no such agreement exists" contained in Sec. 111.70(4)(cm)1, Stats., suggests that negotiations over new matters which arise during the term of a collective bargaining agreement are not covered by the notice requirements or the provisions of Sec. 111.70(4)(cm)6, Stats.

The chief argument advanced by the Commission is that the above quoted extract from its memorandum decision demonstrates that a rational basis existed for the statutory interpretation made by it, and it is the duty of the Court to defer to such rational interpretation, citing Milwaukee v. Wis. Employment Relations Comm., 43 Wis. 2d 596, 601-602, 168 N.W. 2d 809 (1969); Board of Ed., Brown Deer Schools v. WERC, 86 Wis. 2d 201, 210, 271 N.W. 2d 662 (1978); and Dairy Equipment Co. v. ILHR Department, 95 Wis. 2d 319, 327, 290 N.W. 2d 330 (1980).

Another argument advanced by the Commission is that the interpretation of a statute adopted by the administrative agency charged with its enforcement is entitled to great weight and has great bearing as to what the appropriate construction should be. Milwaukee v. WERC, 71 Wis. 2d 709, 714-715, 239 N.W. 2d 63 (1976). The Commission further points out the application of MERA is an area of law requiring expertise and due weight must be accorded the experience, specialized knowledge and discretionary authority of the Commission, citing Muskego-Norway C.S.J.S.D. No. 9 v. W.E.R.B., 35 Wis. 2d 540, 562, 151 N.W. 2d 617 (1967); Bucyrus-Erie Co. v. ILHR Department, 90 Wis. 2d 408, 417, 280 N.W. 2d 142 (1979); sec. 227.20(10), Stats.

The Association contends that because the instant interpretation by the Commission of sec. 111.70(4)(cm)6 was an initial one of a new statute the Court is not required to affirm the same because it rests on a rational basis,

nor is the Court obliged to accord it great weight. Therefore, the Court has the duty to make its own interpretation of the statute according to what it deems the law to be. In making such interpretation, it is pointed out that the Commission concedes that the subject of the impact on the employees of the County's decision to terminate its special education program was a subject of mandatory collective bargaining between the County and the Association. Thus it is contended the words "new collective bargaining agreement" in sec. 111.70(4)(cm)6 are broad enough to include an agreement between the Association and the County covering the impact on employees in the instant collective bargaining unit of the County's decision to terminate the special education program.

The Association further contends that the Commission's interpretation is inconsistent with other provisions of MERA, and that there are strong reasons of public policy which require sec. 111.70(4)(cm)6 be interpreted to include the agreement the Association was endeavoring to negotiate with the County.

The issue of what is the standard of review to be applied by the Court to an initial statutory interpretation by an administrative agency charged with the administration of the statute was directly dealt with by the Supreme Court in Beloit Education Assoc., Wis. Education Assoc. Council, v. WERC, 73 Wis. 2d 43, 242 N.W. 2d 231. There the issue was whether certain proposals submitted to the school board by the petitioner education association were mandatory subjects of collective bargaining under sec. 111.70(1)(d), Stats. In discussing the standard of review to be applied where the agency's interpretation is one of first impression, the Supreme Court stated (at pages 67-68):

> "As its standard of review for the commission rulings, the trial court held that standard to be '. . . whether each ruling constitutes a rational interpretation of sec. 111.70(1)(d), Stats.' The trial court held that it is '. . . only when the interpretation by the administrative agency is an irrational one that a reviewing court does not defer to it.' It is certainly true, as the trial court observed, that the general rule in this state is that '. . . the construction and interpretation of a statute adopted by the administrative agency charged by the legislature with the duty of applying it is entitled to great weight.' However, as this court has made clear, the rule that great weight is to be given and any rational basis will sustain the practical interpretation of the agency charged with enforcement of a statute '. . . does not apply unless the administrative practice is long continued, substantially uniform and without challenge by governmental authorities and courts.' In this petition for declaratory rulings, addressed to the state employment relations commission, we have very nearly questions of first impression raised concerning the areas of mandatory bargaining between a school board and a teachers' association under sec. 111.70(1)(d), Stats. Given this situation, we would hold, quoting a very recent case, that '. . . this court is not bound by the interpretation given to a statute by an administrative agency. Nevertheless, that interpretation has great bearing on the determination as to what the appropriate construction should be.' It is such 'great bearing' or 'due weight' standard, not the 'any rational basis' test, that we find here applicable. However we here hold that the applicability of such higher standard does not affect the validity of the reviewing court's upholding of the rulings of the commission. The commission's holdings were conclusions of law. We find that, under either standard of review, due weight or great weight, the holdings of the employment relations commission met either test on judicial review." (Footnotes containing citations omitted.)

While the footnotes containing case citations supporting the principles enunciated in the above quoted extract are omitted, the footnotes demonstrate such principles are well supported by prior Wisconsin cases. For example,

the case citation for the principle, that in a case of initial impression the agency interpretation has "great bearing" as to what the appropriate construction should be, was Milwaukee v. WERC, 71 Wis. 2d, supra, at page 714.

The Commission pointed out in its memorandum decision the difference in language used in sec. 111.70(4)(cm)6 confirming the application of mediation-arbitration to disputes over "wages, hours and conditions of employment to be included in a new collective bargaining agreement" and that employed in the fact finding procedure (sec. 111.70(4)(c)3) which it displaced. The language of the latter statute permitted filing of a petition for fact finding if the parties were "deadlocked with respect to any dispute between them arising in the collective bargaining process". It should also be noted that sec. 111.70(4)(cm)3 provides for voluntary mediation by the Commission "in labor disputes involving municipal employes". The difference in statutory wording affords a rational basis for the Commission's conclusion that the legislature, in using the restrictive language of sec. 111.70(4)(cm)6, did not intend that the instant impasse between the Association and the County be subject to mediation-arbitration.

The Association contends that the Commission's interpretation of sec. 111.70(4)(cm)6 is inconsistent with the declaration of policy contained in sec. 111.70(6), Stats., which states:

> "The public policy of the state as to labor disputes arising in municipal employment is to encourage voluntary settlement through the procedures of collective bargaining. Accordingly, it is in the public interest that municipal employes so desiring be given an opportunity to bargain collectively with the municipal employer through a labor organization or other representative of the employes' own choice. If such procedures fail, the parties should have available to them a fair, speedy, effective and, above all, peaceful procedure for settlement as provided in this subchapter."

It is asserted that implicit in the legislature's declaration is the intention that the application of this "procedure for settlement" is to be as broad as the mandatory duty to bargain; and where, as in this case, collective bargaining is legally required of an employer and a union, the public policy of the state is to make a peaceful procedure for impasse settlement available to the parties. The weakness in this argument is that the legislature did not word sec. 111.70 (4)(cm)6 so as to be consistent with such purpose. While public policy might favor the interpretation advanced by the Association, the Court is not inclined to disregard the Commission's reasonable interpretation of the statute, and adopt that urged by the Association. After according the Commission's interpretation due weight, the Court approves the same.

Let judgment be entered affirming the Commission's declaratory ruling and order of dismissal which are the subjects of this review.

Dated this 9th day of June, 1980.

By the Court:

George R. Currie /s/
Reserve Circuit Judge