STATE OF WISCONSIN | CIRCUIT COURT | DANE COUNTY

DEERFIELD COMMUNITY
SCHOOL DISTRICT,

Petitioner,

v.

WISCONSIN EMPLOYMENT
RELATIONS COMMISSION,

Respondent.

NOTICE OF ENTRY
OF ORDER

Case No. 80-CV-260

Decision No. 17503

TO: David E. Shaw
Mulcahy & Wherry, S.C.
110 East Main Street
Madison, Wisconsin 53703
Attorney for Petitioner

Michael L. Stoll, Staff Council
Wisconsin Education Association
P.O.Box 8003
Madison, Wisconsin 53708
Attorney for Deerfield Education Assn.

Gerald C. Kops
Isaksen, Lathrop, Esch,
Hart & Clark
P.O. Box 1507
Madison, Wisconsin 53701

Richard V. Graylow
Lawton & Cates
110 East Main Street
Madison, Wisconsin
Attorney for Amicus Curiae

PLEASE TAKE NOTICE THAT an order, of which a true and correct copy is hereto attached, was signed by the court on the 12th day of January, 1981, and duly entered in the circuit court for Dane County, Wisconsin, on the 13th day of January, 1981.

Dated at Madison, Wisconsin, this 20th day of January, 1981.

BRONSON C. LA FOLLETTE
Attorney General

David C. Rice /s/

DAVIS C. RICE
Assistant Attorney General

Attorneys for Respondent
Wisconsin Employment
Relations Commission

P.O. Address:
114 East, State Capitol
Madison, Wisconsin 53702

Telephone: (608) 266-6823

STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

DEERFIELD COMMUNITY
SCHOOL DISTRICT,

Petitioner,

vs.

WISCONSIN EMPLOYMENT
RELATIONS COMMISSION,

Respondent.

DECISION

Case No. 80-CV-260

Decision No. 17503

This matter was submitted on the briefs of the following:

For the Petitioner--the brief of David E. Shaw and Gerald C. Kops
For the Respondent--the brief of David C. Rice, Assistant Attorney General
For Wisconsin Education Association Council--the brief of Michael L. Stoll
As Amicus Curiae--the brief of Richard V. Graylow

This case involves the provision of the petitioner's proposal as follows: "Section C. The District and Union, for the life of this Agreement, each voluntarily and unqualifiedly waive the right, and each agrees that the other shall not be obligated to bargain collectively with respect to: (1) any subject or matter specifically referred to as covered by this agreement; (2) subjects or matters that arose as a result of the parties' proposals during bargaining, but were not agreed to; (3) other subjects or matters relating to wages, hours or conditions of employment even though such subject or matter may not have been within the knowledge and contemplation of either or both of the parties at the time that they negotiated or signed this agreement."

The Union takes the position that (3) above is not the subject of mandatory bargaining. The Wisconsin Employment Relations Commission agrees with the Union. No claim is made that (1) and (2) above are not valid and are not the subject of mandatory bargaining.

The Commission in its memorandum noted that even if the parties agreed on the provision here in question "they will only be given such effect as is consistent with public policy, taking into consideration all the facts and circumstances in a given case. For example, only if it can be shown that the Union knew or should have known that the employer intended to make some changes in wages, hours and working conditions and there were other facts in the case which supported the findings of a clear and unmistakable waiver would we find that such a waiver clause could be given effect in a given case."

When a statute creates a private right, the person or entity protected by the statute cannot waive that right. Faust v. Ladysmith-Hawkins School System, 88 Wis. 2d 525, 277 NW 2d 303 (1979). Sec. 111.70(6) defines the public policy of the State to require that municipal employees be given the opportunity to bargain collectively and Sec. 111.70 (1)(d) defines the sphere of collective bargaining to be matters of wages, hours and conditions of employment.

The phrase in question contemplates that there will be no collective bargaining whatever with respect to any issue involving wages, hours or working conditions which was not bargained prior to agreement. The first two clauses relate to matters which have been or could have been bargained before the contract was completed. The clause in question contemplates that there be no bargaining about new matters which were not and could not have been bargained before the contract was completed.

The employer's effort in proposing the first two categories finalizing the bargaining do not contravene any public policy because they do no more than finalize the agreement as bargained. Both parties have an interest in stability of the

contract during its term so that neither party may compel the other during the term to re-bargain what has been once bargained. The clause in question is an agreement not to bargain about matters not known or anticipated when the agreement was reached.

A so-called "zipper clause" similar to that here in question has been quoted in federal cases, and the clause here in question seems to have been suggested by that described in some federal cases. See NLRB v. C & C Plywood Corp. 385 U.S. 421, 17 L.Ed. 486, 87 S.Ct. 559. Speaking of such a clause it was said in NLRB v. Tomco Communications, Inc. 365 F. 2d 871 (CA9-1978): "An integration or 'zipper' clause seeks to close out bargaining during the contract term and to make the written contract the exclusive statement of the parties' rights and obligations. It is nothing but a diluted form of waiver, and so is governed by the same principles that apply to a management functions clause. The existence and utility of an integration clause have been recognized by the Supreme Court. See NLRB v. C & C Plywood Corp., supra note 4, 385 U.S. at 423, 85 S.Ct. 559. The Company could rightly insist on its inclusion in the contract."

Such a clause was recognized in NLRB v. Auto Crane Co. 536 F. 2d 310 (CA10-1976) as a bar to collective bargaining.

The federal cases, while they may be of some value with respect to federal laws, are not binding on the state court operating under the state statute. The federal cases do not discuss the recognition of the clause in question other than that it was agreed to or is a proper subject for mandatory bargaining. It is true that the clause is a form of waiver as noted in Tomco, supra.

However, it is a general rule that a waiver is not effective if it contravenes public policy. 92 C.J.S. 1065.

Public policy as stated in the statute, secs. 111.70(6) and 111.70(1)(d). As we see these sections, it is clear that the statute contemplates collective bargaining to be required where disputed questions relating to wages, hours and working conditions are involved. This does not mean that when agreement is reached the parties must continue the process during the term of the contract reached after the bargaining. But where issues arise, after the contract is made, which were not and could not be contemplated at the time the agreement was reached, it does not mean that either party may be compelled to forego further attempts to resolve the new problems by further bargaining. We view the provisions above cited as expressing a public policy that all disputes over wages, hours and conditions of employment be bargained. Where they could not be bargained prior to the contract through fault of neither party, it would seem to be the clear public policy that collective bargaining be given the opportunity to solve the problem.

We do not consider whether a zipper clause voluntarily agreed to is valid and binding. The issue here is whether the proposal of such a clause is a subject of mandatory bargaining. Nor is the matter of how to apply it if it is agreed to an issue, although the respondent has indicated what it would do if it was agreed.

Since the clause in question is an agreement to waive collective bargaining, the question is raised whether WERC has the power to compel a waiver of the right to bargain on issues not previously bargained. If voluntarily agreed to, the clause in question is clearly a waiver (Tomco, supra). A compulsory denial of the right to bargain new matters is not a waiver in any sense of the word, but is no more than a denial of the right to bargain, clearly contrary to the public policy expressed in the statutes.

We are of the opinion that while the WERC expressed itself in the terms of permissive and mandatory bargaining, which is one way of referring to the issue, we see it as a question of whether WERC may impose a denial of the right to bargain. We agree that WERC was correct in determining that the clause in question was a subject that need not be bargained nor its inclusion in the contract be compelled.

For the reasons above stated it is

ORDERED: that the findings and conclusions of Wisconsin Employment Relations Commission dated December 19, 1979, are affirmed.

Dated January 12, 1981

By the Court:

W. L. Jackman /s/

Reserve Judge

Note: The petitioner has not attacked the portion of the WERC's findings or conclusions relating to the fair share agreement so we do not review those.