STATE OF WISCONSIN CIRCUIT COURT, BRANCH 5

STATE ENGINEERING ASSOCIATION,

Petitioner,

v.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION,

Respondent,

&

STATE OF WISCONSIN,

Intervenor Respondent.

MEMORANDUM DECISION

Case No. 81CV4079

Decision No. 17790-D

This is an action to review a July 24, 1981 decision and order of the Wisconsin Employment Relations Commission (Commission) under the State Employment Labor Relations Act (SELRA), secs. 111.80-111.97, Wis. Stats.

The State Engineering Association (SEA) is a certified collective bargaining representative for a group of employees of the State of Wisconsin. It alleged that the State committed unfair labor practices by refusing to bargain with the SEA regarding the closing of state offices on December 24 and 31, 1979, and the imposition of parking fees in February, 1980. The Commission found that the State of Wisconsin did not commit any unfair labor practices because the closing of the offices was a management prerogative under the bargaining agreement with the SEA, and the SEA had waived its right to bargain regarding the parking fees. The SEA now asks the Court to set aside the order of the Commission on the basis that it erred and misapplied the law and that the record does not support the Commission's Findings and Conclusions.

The SEA and the State began negotiations for a 1979-81 collective bargaining agreement in May, 1979. The negotiations concluded on September 20,

1979, and the SEA ratified the agreement shortly thereafter. The Joint Committee on Employment Relations approved the agreement on October 1, 1979. The Legislature subsequently ratified the agreement and it became effective on November 7, 1979.

The agreement contained the following pertinent provisions:

PURPOSE OF AGREEMENT

. . . .

3 The parties do hereby acknowledge that this Agreement represents an amicable understanding reached by the parties as the result of the unlimited right and opportunity of the parties to make any and all demands with respect to the employer-employe relationship which exists between them relative to the subjects of bargaining.

. . . .

ARTICLE III

MANAGEMENT RIGHTS

34 It is understood and agreed by the parties that management possesses the sole right to operate its agencies so as to carry out the statutory mandate and goals assigned to the agencies and that all management rights repose in management, however, such rights must be exercised consistently with the other provisions of this Agreement.

35 Management rights include:

1. To utilize personnel, methods, and means in the most appropriate and efficient manner possible as determined by management.

. . . .

36 It is agreed by the parties that none of the management rights noted above or any other management rights shall be subject of bargaining during the term of this Agreement. . . .

. . . .

ARTICLE VIII

LAYOFF PROCEDURE

Section 1 Application of Layoff

108 The Association recognizes the right of the Employer to layoff employes in accordance with the procedures set forth in this Article. Such procedures, however, shall not apply to:

A. Temporary layoff of less than 21 consecutive calendar days;

. . . .

ARTICLE XV

GENERAL

Section 1 Obligation to Bargain

246 This Agreement represents the entire Agreement of the parties and shall supersede all previous agreements, written or verbal. The parties agree that the provisions of this Agreement shall supersede any provisions of the rules of the Director and the Personnel Board relating to any of the subjects of collective bargaining contained herein when the provisions of such rules differ with this Agreement. The parties acknowledge that during the negotiations which resulted in this Agreement each had the unlimited right and opportunity to make demands and proposals with respect to any subject or matter not removed by law from the area of collective bargaining, and that all of the understandings and agreements arrived at by the parties after the exercise of that right and opportunity are set forth in this Agreement. Therefore, the Employer and the Association, for the life of this Agreement, and any extension, each voluntarily and unqualifiedly waives the right, and each agrees that the other shall not be obligated to bargain collectively with respect to any subject or matter referred to or covered in this Agreement, even though such subject or matter may not have been within the knowledge or contemplation of either or both of the parties at the time that they negotiated or signed this Agreement.

The agreement also provided that employes in the bargaining unit represented by the SEA would receive four holiday hours on Christmas Eve (December 24) and on New Year's Eve (December 31).

CLOSING STATE OFFICES

In 1979, Christmas Eve and New Year's Eve fell on Mondays. The subject of closing state offices for the remaining four hours on each of these days was not proposed by either party nor was it discussed by the parties during the negotiations for the agreement. Following recommendations of his staff, Governor Lee Dreyfus sent a letter on October 31, 1979 to Hugh Henderson, Secretary of the Department of Employment Relations, directing that, pursuant to his authority under sec. 230.35(5)(c), Wis. Stats., state buildings be closed all day on December 24 and 31, 1979. Employees were given the options of using 1979 or 1980 vacation or personal holiday time or accrued compensatory time; or making up the eight hours lost; or taking leave without pay.

On December 21, 1979, the SEA demanded that the State bargain with the SEA as to the closing of the state buildings. The State refused.

The Commission found that the closing of the state offices was, in effect, a temporary layoff and thus fell within the management rights section of the agreement and was not a subject of mandatory bargaining. As to the effects of the closing, the Commission found that the SEA had waived its right to bargain because the agreement clearly dealt with temporary layoff in Article VIII, and the "zipper clause" of Article XV, Section 1, precluded further negotiations on this subject.

The SEA alleges that the closing of the buildings was not a layoff because the State offered a number of options as to how employees could account for the time away from work, and this is inconsistent with the concept of layoff. The Court finds nothing inconsistent in the characterization of this closing as a temporary layoff. There is nothing in the agreement which precludes employees from using several of the options offered in the event of a layoff, and the fact that the State has offered additional options (e.g. "borrowing" from future vacation time) is nothing more than an attempt to accommodate employees in a spirit of cooperation. Furthermore, the fact that Governor Dreyfus cited his authority under sec. 230.35(5)(c), Wis. Stats., to close state offices is not inconsistent with the concept of layoff. His motive or source of authority does not change the fact that employees were, in fact, laid off for two half days.

The SEA alleges further that the State was engaged in coercing employees as to the timing of their vacation, holiday, and compensatory time. Clearly, however, employees had options. One of them was to take leave without pay, presumably the treatment the SEA views as the proper way to account for layoff time. There is no evidence that any employees were coerced in any way as to their choice of option.

Accordingly, the Court is unpersuaded that the State violated the agreement or SELRA by refusing to bargain as to the issue of closing state offices temporarily. It finds that the Wisconsin Employment Relations Commission applied the law correctly and had adequate evidence in the record to support its finding.

PARKING FEES

When the SEA and the State began negotiations in May, 1979, parking fees were charged at only two state buildings. Effective July 29, 1979, section 16.843(2), Wis. Stats., was changed so that the Department of Administration was required to charge parking fees at all state owned office buildings. Neither the SEA nor the State raised the subject of parking fees during their negotiations. In February, 1980, the State began to impose fees, and individual employees who chose to park in state facilities were assessed parking fees through payroll deduction.

An employer must bargain before it changes a past practice affecting wages, hours and conditions of employment. NLRB v. Katz, 369 U.S. 736 (1962), City of Madison (Dec. No. 15095) (12/76). A union can waive its bargaining right, but such a waiver must be clear and unmistakable; the evidence of a clear and unmistakable waiver is to be found in the negotiating history and surrounding circumstances. Wis. Fed. of Teachers, AFT, AFL-CIO, v. State of Wisconsin, Dec. 13017-D (5/77).

In this situation, it is clear that the SEA knew or should have known during the negotiations that the State would be imposing parking fees pursuant to the statute which became effective in July, 1979. Even if the SEA was unaware of the statute prior to its publication, it still had time to bring the subject to the bargaining table because negotiations continued into September, 1979. Furthermore, the SEA knew or should have known that two state buildings already charged fees and their members who may have worked at those facilities were

subject to parking fees even before negotiations began. Clearly, the subject was available to them and the Court can only conclude that they chose not to bargain on the subject of parking fees during the contract negotiations, thus unmistakably waiving their bargaining right.

As to the State's alleged refusal to bargain during the course of the contract, the Court finds no evidence in the record that there was a demand for bargaining. Indeed, the SEA concedes that it did not demand that the State bargain on the issue. It is both nonsensical and inconsistent with the public policy of peaceful labor relations which underlies SELRA to find an employer guilty of an unfair labor practice for refusal to bargain where there has been no demand to bargain.

Accordingly, the Court finds that the Commissions's decision is consistent with the provisions and purposes of SELRA, and that the record is sufficient to support the decision.

The decision of the Wisconsin Employment Relations Commission is affirmed in its entirety. Counsel for the State shall prepare Findings of Fact, Conclusions of Law and a Judgment consistent with this Memorandum Decision within thirty days, and provide it to opposing counsel for approval and then to this Court for signature.

Dated this 5th day of November, 1984

BY THE COURT:

ROBERT R. PEKOWSKY, Judge
Dane County Circuit Court, Branch 5

cc: Atty. William Haus
Asst. Atty. Gen. David Rice
Asst. Atty. Gen. John Niemisto