

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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In the Matter of the Petition of	:
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WISCONSIN STATE EMPLOYEES UNION	:
(WSEU) COUNCIL 24, AFSCME	:
	:
Requesting a Declaratory Ruling	:
Pursuant to Sec. 227.06(1), Stats.,	:
Involving a Dispute Between Said	:
Petitioner and	:
	:
STATE OF WISCONSIN	:
	:
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Case CLXVII
No. 28414 DR(S)-14
Decision No. 19341

Appearances:
Lawton & Cates, Attorneys at Law, by Mr. Richard V. Graylow and Mr. John Halla, 110 East Main Street, Madison, Wisconsin 53703, appearing on behalf of Wisconsin State Employees Union (WSEU) Council 24, AFSCME.
Mr. Sanford N. Cogas, Attorney at Law, Department of Employment Relations, Division of Collective Bargaining, 149 East Wilson Street, Madison, Wisconsin 53702, appearing on behalf of the State of Wisconsin.

FINDINGS OF FACT, CONCLUSION OF LAW
AND DECLARATORY RULING

Wisconsin State Employees Union (WSEU) Council 24, AFSCME having filed a petition with the Wisconsin Employment Relations Commission requesting the Commission to issue a declaratory ruling pursuant to Sec. 227.06(1), Stats., with respect to whether a proposal submitted to it during collective bargaining by the State of Wisconsin relates to a mandatory subject of bargaining; and the parties having waived hearing in the matter and having filed briefs, the last of which was received on October 30, 1981; and the Commission being fully advised in the premises, makes and issues the following

FINDINGS OF FACT

1. That Wisconsin State Employees Union (WSEU), Council 24, AFSCME, hereinafter referred to as WSEU, is a labor organization and has its offices at 5 Odana Court, Madison, Wisconsin 53719.
2. That the State of Wisconsin, hereinafter referred to as the State, employs numerous employees in the operation and maintenance of its various statutory functions; and that the Department of Employment Relations, Division of Collective Bargaining, having its offices at 149 East Wilson Street, Madison, Wisconsin 53702, represents the State in collective bargaining with various labor organizations representing State employees in various statutorily established collective bargaining units.
3. That at all times material herein, WSEU has been and is the certified collective bargaining representative of certain State employees; that WSEU and the State were parties to certain collective bargaining agreements covering the wages, hours and conditions of employment of certain State employees for the period of July 1, 1979 to June 30, 1981; that the term of said agreement was extended beyond June 30, 1981 by mutual agreement of the parties while they negotiated over a 1981-1983 successor agreement; that during said negotiations the State proposed the inclusion in the 1981-1983 agreement of the following provision which had been included in the 1979-1981 agreement:

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 administrator 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 Union, 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, or with respect to any subject or matter not specifically 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. (Emphasis added)

4. That during said negotiations WSEU objected to the underlined portion of the above quoted proposal alleging that it related to a permissive or prohibited subject of bargaining; that the State continued to propose the inclusion of the above quoted proposal in a successor collective bargaining agreement; and that the WSEU then filed the instant petition for declaratory ruling.

Upon the basis of the above and foregoing Findings of Fact, the Commission makes and issues the following

CONCLUSION OF LAW

That the objected to portion of the waiver of bargaining proposal submitted by the State of Wisconsin in its negotiations with the Wisconsin State Employees Union (WSEU) Council 24, AFSCME relates to a permissive subject of bargaining within the meaning of Sec. 111.91, and any other provision of the State Employment Labor Relations Act (SELRA).

Upon the basis of the above and foregoing Findings of Fact and Conclusion of Law, the Commission makes and issues the following

DECLARATORY RULING

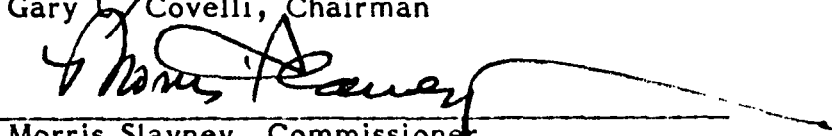
That the Wisconsin State Employees Union (WSEU) Council 24, AFSCME, has no duty to bargain with the State of Wisconsin with respect to the objected to portion of the waiver of bargaining proposal submitted in negotiations by the State of Wisconsin.

Given under our hands and seal at the City of
Madison, Wisconsin this 29th day of January, 1982.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By


Gary L. Covelli, Chairman


Morris Slavney, Commissioner

MEMORANDUM ACCOMPANYING
FINDINGS OF FACT, CONCLUSION OF LAW
AND DECLARATORY RULING

In this proceeding WSEU seeks a declaratory ruling from the Commission as to whether the State's waiver of bargaining or "zipper clause" proposal relates to a mandatory subject of bargaining. WSEU asserts that the proposal in question is a prohibited or, in the alternative, a permissive subject of bargaining under SELRA because said proposal seeks to impose a waiver upon WSEU of the statutory right to bargain during the term of a collective bargaining agreement over matters "which may not have been within the knowledge or contemplation of either or both of the parties at the time they negotiated or signed this agreement". WSEU alleges that such a waiver is clearly contrary to the policy objectives of SELRA which encourage resolution of disputes through collective bargaining including those which arise during the term of a collective bargaining agreement. The Union points out that Sec. 111.81(2) of SELRA explicitly defines "collective bargaining" as:

. . . the performance of the mutual obligation of the state as an employer, by its officers and agents, and the representatives of its employees, to meet and confer at reasonable times, in good faith, with respect to the subjects of bargaining provided in s. 111.91(1) with the intention of reaching an agreement, or to resolve questions arising under such an agreement. (Emphasis added)

The Union cites Commission decisions in State of Wisconsin and Deerfield Community School District as support for its position. Contending that the State's position on the proposal in question is directly contrary to said decisions, WSEU also requests that the Commission award it costs, fees and disbursements.

The State does not dispute that prior Commission decisions support the position of WSEU but seeks to establish that said decisions, most specifically Deerfield, are not controlling, given distinctions which exist between SELRA and the Municipal Employment Relations Act (MERA) under which Deerfield was decided. The State argues that statutory distinctions regarding the duration of bargaining agreements and mandatory subjects of bargaining evidence a greater legislative concern for finality and closure under SELRA than under MERA, that its "zipper clause" proposal is an attempt to meet this legislative concern, and thus that said proposal constitutes a mandatory subject of bargaining.

DISCUSSION:

The provision in issue herein is identical to the contractual provision considered by the Commission in Wisconsin Federation of Teachers, AFT, AFL-CIO vs. State of Wisconsin 1/ wherein the Commission, in affirming the decision of the Examiner, stated the following with respect to such a "zipper" provision:

Blanket waivers of the duty to bargain, generally have been construed restrictively in refusal to bargain cases, and waiver has been found only where an examination into the background shows that the union clearly and unmistakably waived its interest in the matter. The reason for not giving blanket waivers an expansive construction, as though these were mere contract interpretation cases, is that the origin of the duty to bargain is statutory, not contractual Moreover, the legislature has found as a fact that collective bargaining is an essential ingredient for labor peace. Consequently, in view of the public interest and the statutory nature of the duty to bargain, the rule has evolved that waiver of the duty to bargain can be found only on evidence which is clear and unmistakable. (footnote citations omitted)

1/ (13017-D) 5/77.

In a case involving the Deerfield Community School District, 2/ the Commission was called upon to determine whether a provision, almost identical to that involved herein, related to a mandatory subject of bargaining. Therein we referred to the above language cited in State of Wisconsin, and determined that the proposal involved related to a permissive, rather than to a mandatory subject of bargaining, because it was contrary to the public policy of favoring collective bargaining over mandatory subjects of bargaining. This same public policy is also expressed in SELRA.

Sec. 111.80 of SELRA sets forth the Legislature's statement as to "public policy of the state as to labor relations and collective bargaining in state employment." Said statement recognizes the interest of the public, the employee, and the employer in the utilization of the collective bargaining process to resolve "whatever controversies may arise". 3/ Sec. 111.81(2) of SELRA, as previously quoted herein, includes within its definition of collective bargaining the resolution of questions "arising under" collective bargaining agreements. The foregoing statutory provisions clearly demonstrate an intent to extend the availability of the collective bargaining process to disputes or questions regarding mandatory subjects of bargaining under Sec. 111.91(1) of SELRA, which would result from an action contemplated to be initiated, or actually initiated, by the State, which arise during the term of the bargaining agreement, which are not covered by the agreement, and which were unknown to the parties when the agreement was negotiated. The State's proposal herein seeks inter alia to compel the WSEU to relinquish its statutory right to invoke the collective bargaining process in such circumstances.

The fact that SELRA contains provisions other than those contained in MERA, including, but not limited to those provisions relating to "management rights", "subjects of bargaining", "tentative agreements", "terms of agreements", and the roles of the Joint Committee on Employment Relations, as well as the Legislature, in collective bargaining between agents of the State and the labor organizations representing State employees in collective bargaining, does not lessen the public policy fostering collective bargaining. Given the strong public policy supporting the collective bargaining process as the means to resolve said disputes and the concomitant statutory right of the Union to bargain in such circumstances, the State cannot insist to the point of impasse that the proposal in question be included in a bargaining agreement and thereby seek to compel WSEU to waive its statutory right to bargain. Thus the proposal in question has been found to be a permissive subject of bargaining under SELRA.

WSEU's request for costs, fees and disbursements is hereby denied as being unwarranted.

Dated at Madison, Wisconsin this 29th day of January, 1982.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Gary L. Covelli
Gary L. Covelli, Chairman
Morris Slavney
Morris Slavney, Commissioner

2/ (17503) 12/79, aff'd Dane County Cir. Ct. 1/81.

3/ Sec. 111.80(2), Stats.