STATE OF WISCONSIN : CIRCUIT COURT : SHEBOYGAN COUNTY

CITY OF SHEBOYGAN,

Petitioner,

v.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION,

Respondent.

MEMORANDUM DECISION

Case No. 82 CV 403

Decision No. 19421-A

The Decision of the Wisconsin Employment Relations Commission is set aside, and the case remanded because the amendment allowed to Local 483's final offer was not germane to the issues subject to previous collective bargaining sessions between the Union and the City of Sheboygan. Further, the Wisconsin Employment Relations Commission's interpretation of the statute does not promote meaningful and productive negotiations between parties before arbitration as required by the "Municipal Employment Relations Act."

FACTS

Upon a review of the record submitted in answer to the Petitioner for Review, the Court will adopt the statement of facts from the July 23, 1982, Brief of Wisconsin Employment Relations Commission, p. 3 - 4, as being an accurate outline of this case:

> During the fall of 1980, the City and the Union engaged in collective bargaining negotiations for a new labor agreement. On December 17, 1980, the

Union filed a petition with the Commission to initiate final and binding arbitration, pursuant to MERA, sec. 111.77, Stats. The petition alleged that the Union and the City had reached an impasse in their collective bargaining negotiations.

The Commission appointed an investigator to determine whether an impasse had been reached. The investigator met with the parties on February 3 and on March 19, 1981, and attempted to mediate the dispute.

On February 3, 1981, the Union proposed for the first time that it be allowed "to install and maintain a bulletin board in all fire stations ... in a non-public area of each fire station". Prior to February 3, 1981, the parties had not negotiated over the subject matter of bulletin boards. The City submitted a counter-offer to the Union's bulleting board proposal but the counter-offer was rejected by the Union. On March 19, 1981, the Association submitted its final offer with a re-worded bulletin board proposal.

On March 30, 1981, while the petition for final and binding arbitration was still pending and the investigation was not yet closed, the City filed a petition with the Commission requesting a declaratory ruling. The Commission was asked to determine, among other issues, whether the bulletin board proposal lawfully could be included in the Union's final offer when it was not the subject of collective bargaining negotiations prior to the filing of the Union's petition for final and binding arbitration.

On March 2, 1982, the Commission concluded inter alia, that th; Union's bulletin board proposal was timely and lawfully could be included in the Union's final offer. On March 19, 1982, the City petitioned for rehearing. On April 5, 1982, the Commission denied the petition for rehearing. The City now seeks judicial review of the Commission's decision, with a petition filed on April 22, 1982.

DECISION

A. MOOTNESS.

On July 28, 1982, Local 483 filed a Motion to Dismiss with the Court on the grounds that this case is moot. Specifically, the Union argues that it and the City are signatories to a full and complete collective bargaining agreement, dated March 1, 1982, which was in full force and effect at the time the motion was made and the Petition for Review filed.

The City argues that although the specific issues raised in its petition may have been settled in the March 1, 1982 contract, these issues are of great public importance and arise so frequently under the "Municipal Employment Relations Act" (MERA), §§111.70 - 111.77, Stats., that this Court should retain jurisdiction.

Both parties rely on Ziemann v. Village of North Hudson, 102 Wis.2d, 705, 307 N.W.2d 236(1981), in which the Supreme Court wrote:

> A moot case has been defined as one which seeks to determine an abstract question which does not rest upon existing facts or rights, or which seeks a judgment in a pretneded controversy when in reality there is none, or one which seeks a decision in advance about a right before it has actually been asserted or contested, or a judgment upon some matter which when rendered for any cause cannot have any practical legal effect upon the existing controversy.
>
> This Court may retain a review for determination of an issue even though the review has become moot where, e.g., "the issues are of great public importance, . . . the constitutionality of a statute is involved, or . . . the precise situation under consideration arises so frequently that a definitive decision is essential to guide trial courts. [Citations Omitted.]

Ziemann, 102 Wis.2d at 712.

The basic issue presented in the City's petition is whether, under §111.77(4)(b), Stats. of 1981, a party can amend its final offer, after a petition for final and binding arbitration has been filed, but prior to the close of the commission's investigation, to include a proposal which was not the subject of collective bargaining negotiations prior to the filing of the petition.

The City has argued that this issue is of great public importance and that it arises so frequently that a definitive decision is essential to guide trial courts.

1. Public Importance.

> Although it is a general rule that (a petition for review) will be dismissed if the right in controversy has expired by lapse of the time fixed for its continuance, it is otherwise if interests of a public character are asserted under conditions that may be immediately repeated . . . .

Wisconsin E. R. Board v. Allis Chalmers W. Union, 252 Wis. 436, 441, 32 N.W.2d 190(1948).

Although the dispute between the City and the Union has been resolved, it did involve an order from the WERC interpreting a state statute. The Commission's interpretation is of great public importance because it involves the MERA, which governs labor relations between municipalities and their employes' unions. See, Allis Chalmers, 252 Wis. at 442-443.

The issue presented does not involve private rigrts which have been extinguished; rather, it involves the public's rights and interests that may flow from the decision of the Commission.

The question of what is allowed under §111.77(4)(b), Stats. of 1981, is of public importance because it directly affects the final offers that will be submitted for a selection of one to be the final agreement between the parties. The Court is aware that MERA is an actively used procedure to resolve public labor contractual disputes and believes the specific issue presented arises frequently enough to warrant a review of the decision of the Commission.

The decision of the WERC is of public importance because although it is not binding on a reviewing court, the Court must give great weight to the Commission's construction of the statute because that agency is charged with the duty of consistently applying the law. See, A.U.T.O. v. WERC, 109 Wis.2d 371, 375, 326 N.W.2d 242(Ct.App. 1982).

2. Guidance to Trial Courts. Because this Court has found that this issue is of great public importance, it is not necessary to address this reason for determining moot cases.

However, the Court will note that it will not presume that any "wisdom" imparted in this decision will be of more than passing interest to its 190 brother and sister trial judges. My fellow trial judges seek not the wisdom of one from the shores of Lake Michigan, but thirst after the wisdom of 7 from the shores of Lake Mendota and Lake Monona.

B. STANDARD OF REVIEW.

This petition to review the decision of the Commission is brought pursuant to §§111.07(8), 227.15 and 227.16, Stats. The only question

before the Court involves the WERC's construction of §111.77(4)(b), Stats. of 1981; therefore, the standard of review is clearly set forth by statute:

> The court shall set aside or modify the agency action if it finds that the agency has erroneously interpreted a provision of law and a correct interpretation compels a particular action, or it shall remand the case to the agency for further action under a correct interpretation of the provision of law.

§227.20(5), Stats.

> The court shall reverse or remand the case to the agency if it finds that the agency's exercise of discretion is outside the range of discretion delegated to the agency by law; is inconsistent with an agency rule, an officially stated agency policy or a prior agency practice, if deviation therefrom is not explained to the satisfaction of the court by the agency; or is otherwise in violation of a constitutional or statutory provision; but the court shall not substitute its judgment for that of the agency on an issue of discretion.

§227.20(8), Stats.

The specific standard of review to be applied by this Court to a decision of the Wisconsin Employment Relations Commission involving the "Municipal Employment Relations Act" was established by the Supreme Court:

> . . . . the construction of a statute is a question of law, and this court is not bound by any interpretation given to a statute by an administrative agency. However, because the application of MERA requires the expertise of the Wisconsin Employment Relations Commission, where the Commission's interpretations reflect a practice or position 'long continued, substantially uniform and without challenge by governmental authorities and courts,' we accord it great weight and sustain it if it is a rational interpretation of MERA. But where the question involved is 'very nearly [one of] first impression,'

> we do not use the 'great weight' standard but, instad, accord to the interpretation due weight in determining what the appropriate construction should be. [Citation Omitted.]

Berns v. WERC, 99 Wis.2d 252, 261, 299 N.W.2d 248(1980).

The review of the record leads the Court to conclude that the Commission's interpretation of §111.77(4)(b), Stats. of 1981, is a departure from past practice as governed by Milwaukee County Deputy Sheriff's Assoc. v. Milwaukee, 64 Wis.2d 651, 221 N.W.2d 673(1974) [hereinafter "Milwaukee County"]. The WERC specifically stated that it was departing from the Milwaukee County decision because of subsequent amendments to §111.77(4)(b), Stats. of 1973. Therefore, this Court only has to give "due weight" to the new position of the WERC.

The Wisconsin Supreme Court has also written:

> If several rules, or several applications of a rule are equally consistent with the purpose of the statute, the Court will accept the agency's formulation and application of the standard.
>
> However, (the reviewing) court has the power in the first instance to determine whether the standard or policy choice used by the agency is consistent with the purpose of the state. If upon consideration, (the reviewing court) determine(s) that a particular rule is consistent with legislative purpose, (it) must reject alternative rules regardless of whether they are 'reasonable' or grounded in adminstrative expertise.

Milwaukee Transformer Co. v. Industrial Comm., 22 Wis.2d 502, 510-511, 126 N.W.2d 6(1964).

C. AMENDMENT OF FINAL OFFER.

The principal issue, as set forth under the Court's discussion on mootness, is:

> Whether the WERC reasonably could conclude that §111.77(4)(b), Stats., perits amendment of a final offer, after a petition for final and binding arbitration has been filed but prior to the close of the commission's investigation, to include a proposal which was not the subject of collective bargaining negotiations prior to the filing of the petition.

The City answers that the Commission's decision was an error of law, citing Milwaukee County, for the proposition that issues raised after negotiations have broken off and arbitration has been commenced cannot be considered by the arbitrator.

The Union and Commission counter that certain amendments to §111.77(4)(b), Stats., of 1973, enacted after the Milwaukee County case, make that case inapplicable.

At the time the Wisconsin Supreme Court decided Milwaukee County, §111.77(4)(b), Stats. of 1973, provided:

> Parties shall submit their final offer in effect at the time that the petition for final and binding arbitration was filed. Either party may amend its final offer within 5 days of the date of the hearing. The arbitrator shall select the final offer of one of the parties and shall issue an award incorporating that offer without modification.

In the Milwaukee County case, the Union filed a Commission-approved petition on December 4, 1972, alleging that the parties had reached an impasse and asking the WERC to initiate final and binding arbitration. The

Commission appointed a hearing officer to determine if an impasse had occurred and meetings between the hearig officer and parties were held December 28, 1972 and January 8, 1973.

On December 29, 1972, the Union filed revised proposals to its final offer. On January 15, 1973, the County modified its final offer, increasing wages predicated on a two-year contract.

By an order of January 23, 1973, the Commission found an impasse existed, required final and binding arbitration, and directed the parties to file their final offers with the Commission as of January 15, 1973.

On May 8, 1973, the arbitrator selected the County's final offer which provided for a two-year contract. After the Commission refused to vacate the award, the Union petitioned the circuit court for review, and the court vacated that portion of the award relating to the 1974 contract.

In ruling on the County's appeal from the judgment of the circuit court, the Wisconsin Supreme Court held that,

> . . . under the statutes, arbitrators cannot consider issues raised for the first time after negotiations have closed and the arbitration proceeding begun.

Milwaukee County, 64 Wis.2d at 655.

After the case was decided, §111.77(4)(b), Stats. of 1973 was amended by ch. 259, Laws of 1975, effective May 21, 1976, and it now provides:

> The commission shall appoint an investigator to determine the nature of the impasse. The commission's investigator shall advise the commission in writing, transmitting copies of such advice to the parties of

> each issue which is known to be in dispute. Such advice shall also set forth the final offer of each party as it is known to the investigator at the time that the investigation is closed. Neither party may amend its final offer thereafter, except with the written agreement of the other party. The arbitrator shall select the final offer of one of the parties and shall issue an award incorporating that offer without modification.

The respondents now argue that the amendment allows either party to amend their final offer up until the time the investigator issues a finding of an impasse.

Whether or not the WERC's new interpretation of §111.77(4)(b), Stats. of 1973, as amended by ch. 259, Laws of 1975, is reasonable and rational, depends entirely on whether or not it promotes the legislatively declared policy of this state relating to municipal labor relations:

> Declaration of policy. The public policy of the state 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.

§111.70(6), Stats.

> "Collective bargaining" means the performance of the mutual obligation of a municipal employer, through its officers and agents, and the representatives of its employes, 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, or to resolve questions arising under such an agreement. The duty to bargain, however, does not compel either party to agree to a proposal or require the making of a concession.

§111.70(1)(d), Stats.

In Milwaukee County the Supreme Court extensively discussed the purpose of MERA.

> The entire structure of the statute demonstrates that good-faith negotiations are a prerequisite to the initiation of binding arbitration. The purpose of arbitration on a final offer is to induce the parties to bargain in good faith to reach an agreement or at least to narrow the differences between the parties to the greatest extent possible.
>
> The purpose of final rationale . . . is that final selection will induce bargaining since the parties will not make exorbitant demands for fear that the other party's more reasonable position will be adopted as the arbitrator's award.
>
> . . . . permitting arbitrators to consider issues raised in an offer for the first time after negotiations have closed would frustrate the legislative intent to provide meaningful and productive negotiations prior to arbitration.
>
> Other studies support the position that the public purpose of compulsory arbitration can only be attained after a narrowing of differences of opinion in respect to the matters submitted to arbitration. [Citations Omitted.]

Milwaukee County, 64 Wis.2d at 656-657.

> It seems clear that the "sudden death" result of compulsory arbitration should never result in the making of an award when the offer made in arbitration was not the subject of bargaining prior thereto.

Milwaukee County, 64 Wis.2d at 657.

In deciding that a party may amend its final offer, prior to the issuance of the report of the investigator, the Commission is permitting a party to include in its final offer items that were never the subject of collective bargaining. This defeats the "sudden death" result of MERA; it prevents meaningful and productive negotiations prior to arbitration.

It is not difficult for this Court to envision a situation in which one of the parties files for final and binding arbitration and during the investigation of whether or not an impasse exists, and believing that it will win on its economic package, attempts to "sweeten" the final offer by amending it to include contract language, working conditions, rights, etcetera, that had never been discussed with the opposing side.

The Commission's application of §111.77(4)(b), Stats. of 1981, does not promote labor peace in the public sector; it encourages both parties to make unlimited amendments after a petition has been filed, and thus, put in their "final offers" issues that they never collectively bargained over, but hoped to win on.

MERA's sole purpose is to promote good faith, face-to-face collective bargaining; that purpose is frustrated by the Commission's decision in this case. The Commission's decision would allow either the Union or the public employer to "sneak" items into a final offer that were never subject to "peaceful discussions," such an application clearly contradicts state policy.

This Court also finds that Milwaukee County is still controlling because the amendments to §111.77(4)(b), Stats. of 1973, dealt only with the time limits within which an amendment may be made. Specifically, the amendment increased the time limit from five days after the petition was filed to until the investigation over whether or not there is an impasse is concluded.

The amendment of §111.77(4)(b), Stats. of 1973, never dealt with the subject matter of the amended final offers; in fact, neither version of the statute directly addresses the subject matter of the amended final offer. However, Milwaukee County did directly address the subject matter of the amendments to the final offer, and that is why the Court still finds Milwaukee County controlling.

After discussing the valid reasons for binding arbitration, the Wisconsin Supreme Court held:

> If unlimited counter-offers were permitted after the filing of the petition, the date of impasse could never be ascertained. The statute requires, as a jurisdictional prerequisite to compulsory arbitration, that the commission find that the impasse existed at or before the filing of the petition. The impasse can be broken before the matter finally goes to arbitration only if one party or the other accepts a final offer. The final offer, although it can be amended and submitted to final arbitration, must, if amended, be germane to the matters subject to negotiations in the prior bargaining sessions. We conclude that the interjection of a new contract time period in an amended final offer after the petition is filed presents a question not germane to the previous negotiations and is beyond the statutory jurisdiction of the arbitrators. [Emphasis Added.]

Milwaukee County, 64 Wis.2d at 658.

Ch. 259, Laws of 1979, did nothing to remove the requirement that any amendment to the final offer be germane to the issues subject to negotiations in the prior bargaining sessions. In fact, the concept of the issues being germane is "judicial gloss" on the statute which was not wiped off by any amendment.

Turning to the facts of this dispute, the Union's bulletin board proposal had never been the subject of collective bargaining before the Union filed its petition for final and binding arbitration on December 17, 1980. The Union did not submit the bulletin board proposal until its first mediation session with the Commission's investigator on February 3, 1981. The City rejected that proposal and made a counter-offer. The Union submitted its final offer with a re-worded bulletin board proposal on March 19, 1981.

The bulletin board proposal was not germane to the issues that had been the subject of collective bargaining before December 17, 1980. Although the amendment was made before the investigation was closed, within the time limits of the statute, it is not a germane amendment and should not have been allowed.

The Court finds that the Commission's decision of March 2, 1982, allowing the non-germane amendment to the final offer is an erroneous interpretation of §111.77(4)(b), Stats. of 1973, as amended by ch. 259, Laws of 1975, in that it ignores the requirements of Milwaukee County, that any amendment to the final offer be germane to the issues that had been subject to collective bargaining. The policy choice represented by the

Commission's decision is inconsistent with the purpose of MERA, §111.70(6), Stats., and with the idea that only issues previously bargained may be amended, Milwaukee County, see, Milwaukee Transformer, 22 Wis.2d at 510-511.

Pursuant to §227.20(5), Stats., the decision of the Wisconsin Employment Relations Commission is set aside, and this case is remanded to the Commission for further action consistent with this Decision.

Counsel for the City of Sheboygan shall prepare an Order consistent with this Decision and file it with the Court on or before March 15, 1984; counsel for the Commission and Local 483 shall have ten days thereafter to file written objections to the form of the Order.

So Ordered.

Dated this 22nd day of February, 1984.

BY THE COURT:

Daniel P. Anderson
Circuit Judge

PROCEDURAL ADDENDUM

PROCEEDINGS: Petition for Review, §§111.07(8), 227.15 and 227.16, Stats.

APPEARANCES: Petition by Roger E. Walsh and Kristin Bergstrom of Lindner, Honzik, Marsack, Hayman & Walsh, S.C.

Respondent WERC by David C. Rice, Assistant Attorney General

Respondent Local 483 by Richard V. Graylow of Lawton & Cates

BRIEFS FILED: Petitioner on June 16, 1982 and August 25, 1982

Respondent WERC on July 27, 1982

Respondent Local 483 on July 27, 1982

ORAL ARGUMENTS: February 28, 1983