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WISCONSIN EMPLOYMENT RELATIONS COMMISSION

STATE OF WISCONSIN : IN CIRCUIT COURT : DANE COUNTY

#82 CV 6413

DRIVERS, SALESMEN, WAREHOUSEMEN, MILK PROCESSORS, CANNERY, DAIRY EMPLOYEES and HELPERS LOCAL 695,

Petitioner,

-vs-

WISCONSIN EMPLOYMENT RELATIONS COMMISSION,

Respondent.

MEMORANDUM DECISION

Decision No. 19872-A

This case comes to court as a petition for judicial review of a decision by respondent in a matter between petitioner and the city of Greenfield. Petitioner is the collective bargaining representative for the non-supervisory officers of the Greenfield Police Department, and is in the process of renegotiating their contract with the city.

In order to resolve a dispute that arose in the bargaining process, WERC issued a declaratory ruling on the subject of layoff and recall rights. Deciding in favor of the city, they held that Article 5 of the parties' previous contract (relating to layoff and recall) was a prohibited subject of bargaining. The basis of that decision was that Article 5 conflicted with Sec. 62.13(5m), Stats., and, because a contract provision cannot run counter to an express statutory command, that provision is therefore void and unenforceable.

Sec. 62.13 is not a statute that WERC administers, and as such, their statutory interpretation is not entitled to persuasive or substantial weight. City of Brookfield v. WERC, 87 Wis. 2d 819 (1978).

Sec. 62.13(5m) is a statute that was enacted in 1933. It was a bill that arose out of difficulties in the police department of Superior, and was passed in order to give police and fire department personnel some minimal protection against arbitrary layoff decisions.

Another statute concerning the topic of labor relations, Sec. 111.70, Stats. (known as the Municipal Employment Relations Act), was later passed in 1959. It gave municipal employees the right to bargain collectively.

The provisions of Sec. 111.70 are to be harmonized with other statutes governing conditions of employment (including Sec. 62.13) whenever possible. It is ironic that Sec. 62.13 (5m), passed originally to give some protective rights to police officers, is now being used to curtail their rights. The WERC decision would make the bargaining rights of police and fire departments more restrictive than those of all other municipal employees, whether they be city attorneys or courthouse janitors.

It is these bargaining rights which are at issue now. The Wisconsin Supreme Court has defined mandatory subjects of bargaining under Sec. 111.70 as those primarily related to wages, hours and conditions of employment. City of Brookfield v. WERC, supra. No one here doubts the importance of seniority in determining order of layoffs, or that it is related to conditions of employment. The Wisconsin Supreme Court ruled on the subject in Beloit Education Association v. WERC, 73 Wis. 2d 43 (1976), where it held that the issue of the recognition of seniority in order of layoff was a mandatory subject of bargaining (as long as there was a provision that the retained teachers be qualified to teach the subjects in the curriculum).

Other disputes involving conflicts between collective bargaining provisions and pre-existing statutory schemes have come before Wisconsin courts, and have been reconciled with Sec. 111.70. Such a reconciliation is also possible in the instant case.

WERC contends that Article 5 conflicts with Sec. 62.13 (5m). However, given a narrow reading of Article 5, no conflict exists. It provides that those with the least seniority in the bargaining unit shall be laid off first, and recall shall be in reverse order. This certainly complies with the statutory provision that "subordinates shall be dismissed in the order of the shortest length of service in the department." The only possible conflict occurs because seniority is defined in the contract in terms of length of service in the bargaining unit, something not contemplated by the statute, which was enacted long before police had the right to bargain collectively.

It seems this whole dispute arose as a result of discussions concerning the ability of supervisory personnel to "bump" non-supervisory officers with less seniority. Neither Sec. 62.13(5m) nor the challenged contract provision explicitly mention anything about bumping rights. It seems, therefore, that some sort of agreement could be reached between the parties on this subject consistent with the statutory scheme. Indeed, because Sec. 111.70(8) allows the separation of supervisory and non-supervisory personnel for bargaining purposes (an issue obviously not considered in the 1933 statute), both of those groups should be allowed to bargain on the subject.

The issues of layoff and recall rights are therefore ones which are subject to mandatory bargaining under Sec. 111.70.

The only qualification to these bargaining rights is that the final result must fit within the statutory scheme of Sec. 62.13. As a note of caution, certain subsections of the statute are admittedly somewhat ambiguous. For example, given an extreme interpretation of Sec. 62.13(5m), supervisory employees could bump even a union officer who had more seniority. This court does not think that was the intent of the statute.

The portion of the WERC decision prohibiting the issues of layoff and recall rights as a subject of negotiation is therefore reversed.

Dated: October 13, 1983.

BY THE COURT:

P. Charles Jones, Circuit Judge