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WISCONSIN EMPLOYMENT
RELATIONS COMMISSION

COURT OF APPEALS
DECISION
DATED AND RELEASED

MAR 5 1986

No. 85-0158

STATE OF WISCONSIN IN COURT OF APPEALS
DISTRICT II

RACINE UNIFIED
SCHOOL DISTRICT,

Petitioner-Appellant,

v.

Decision No. 20653-C

WISCONSIN EMPLOYMENT
RELATIONS COMMISSION,

Respondent,

RACINE EDUCATION
ASSOCIATION,

Intervenor-Respondent.

APPEAL from a judgment of the circuit court for Racine county: DENNIS J. FLYNN, Judge. Affirmed.

Before Scott, C.J., Brown, P.J., and Nettesheim, J.

NETTESHEIM, J. The Racine Unified School District (district) appeals from a judgment affirming a decision by the Wisconsin Employment Relations Commission (WERC) ruling that certain proposals submitted by the Racine Education Association (REA) were mandatory subjects for

collective bargaining. Because we find a rational basis for WERC's determination as to each proposal, we affirm the judgment of the circuit court.

Because the collective bargaining agreement between the district and REA was scheduled to expire in August 1982, the parties participated in collective bargaining negotiations between December 15, 1981, and August 24, 1982. Unable to reach agreement, REA filed for mediation-arbitration, pursuant to sec. 111.70(4)(cm)6., Stats. This statute requires the parties to each submit a final offer containing only mandatory subjects of bargaining. Because of a dispute concerning the duty to bargain on certain subjects, both the district and REA filed petitions for declaratory rulings, pursuant to sec. 111.70(4)(b). Each party claimed that the final offer of the other contained proposals which were not mandatory subjects of bargaining. WERC determined that several of REA's proposals were mandatory subjects of bargaining. The district sought judicial review in the circuit court, where WERC's decision was affirmed. The district appeals.

Section 111.70(1)(a), Stats., addresses the requirements of collective bargaining under the Municipal

Employment Relations Act.[1] Municipal employers (a term which includes school districts) must bargain "with respect to wages, hours and conditions of employment." Id. A municipal employer is not, however, required to bargain on subjects "reserved to management and direction of the governmental unit except insofar as the manner of exercise of such functions affects the wages, hours and conditions of employment of the employes." Id.

The supreme court has interpreted this statute to require mandatory bargaining as to (1) matters primarily related to wages, hours and conditions of employment, and (2) the impact of educational policy which affects wages, hours and conditions of employment. See Beloit Education Association v. Employment Relations Commission, 73 Wis.2d 43, 54, 242 N.W.2d 231, 236 (1976). This "primarily related" standard is a balancing test which requires, on a case-by-case basis, that the competing interests of the municipal employer, the employees, and the public be weighed to determine the bargaining nature of a proposal. West Bend Education Association v. WERC, 121 Wis.2d 1, 9, 357 N.W.2d 534, 538 (1984). Where a proposal is one in which the governmental or policy dimensions of a decision predominate,

the proposal is a permissive subject of bargaining. Unified School District No. 1 v. WERC, 81 Wis.2d 89, 102, 259 N.W.2d 724, 732 (1977).

Our scope of review is the same as that for the circuit court. See Boynton Cab Co. v. DILHR, 96 Wis.2d 396, 405, 291 N.W.2d 850, 855 (1980). The bargaining nature of a proposal presents a question of law. West Bend at 13, 357 N.W.2d at 540. "In any case where the commission is asked to determine whether a subject matter is mandatorily or permissibly bargainable, this court will apply the great weight-any rational basis standard to its 'primary relation' conclusion." School District of Drummond v. WERC, 121 Wis.2d 126, 133, 358 N.W.2d 285, 289 (1984). That is, WERC's conclusions are entitled to great weight and we will affirm if there is any rational basis for its conclusions even though an alternative view is also reasonable. Blackhawk Teachers' Federation Local 2308 v. WERC, 109 Wis.2d 415, 421-22, 326 N.W.2d 247, 251 (Ct. App. 1982). Our standard of review is therefore quite limited.

The district argues that the proposals involved in this appeal are not mandatory subjects for bargaining and claims that WERC failed to engage in the required balancing

of competing interests before rendering a decision as to the bargaining nature of the proposals. Our review of the record reveals that WERC did engage in the required balancing. Furthermore, we conclude that there is a rational basis for each of WERC's determinations.

Several of REA's proposals relate to class size. The first is a statement that the parties recognize that the number of students assigned to a class is a matter of educational policy and the school district can assign any number of students to a class.[2] Three other proposals provide additional monetary compensation in the event that a teacher is assigned more than a specified number of students per class.

WERC found that the first proposal was "a disclaimer which seeks to ensure that the language it precedes cannot be reasonably construed as dictating any class size choice" and was essential to REA's desire to clearly set forth its intent. WERC reasoned that because the three proposals to which the first proposal related were mandatory subjects for bargaining, so also was this first proposal. As to the bargaining nature of the other three proposals, WERC relied on Beloit, 73 Wis.2d at 63-64, 242

N.W.2d at 240-41, for the proposition that while class size is a matter of basic educational policy, the impact on wages, hours and conditions of employment must be bargained. Although the court in Beloit was not addressing an impact proposal such as the one involved here, we find the following statement persuasive:

> The commission also held that the size of a class has an impact upon conditions of employment of teachers. So it concluded that: "While the School Board has the right to unilaterally establish class size, it nevertheless has the duty to bargain the impact of the class size, as it affects hours, conditions of employment and salaries." The reviewing court also affirmed this commission holding that, while class size was not bargainable, the impact of class size upon "wages, hours and conditions of employment" was mandatorily bargainable. We affirm the trial court holding, agreeing that the commission was warranted in reaching the conclusions it did.

Id. at 64, 243 N.W.2d at 241 (footnote omitted).

The proposals here are essentially compensation measures and do not restrict the right of the district to assign whatever number of students to a class it chooses. The district's right to establish student-teacher ratios remains intact. As WERC reasoned, however, "[a]s each child

yields more forms to fill out, more papers to correct, etc., it has been concluded that class size does indeed impact upon a teacher's hours and conditions of employment." In addition to what the circuit court found to be an "obvious relationship" between class size and hours or working conditions of employment, both WERC and the circuit court found credible evidence in the record to establish such a relationship. Our review of the record reveals that the testimony of the district's assistant superintendent of personnel services indicated that the number of students in a class is related to the amount of work performed by a teacher. Therefore, we find a rational basis for WERC's determination that these proposals are mandatory subjects for bargaining.

The next proposal concerns the length of the teachers' workday. The proposal provides that any work assignment given outside the specified length of the workday entitles the teacher to additional compensation for overtime assignments. The proposal also requires the district to post the starting time of the teachers' workday at each school on the first day of the teacher school year.

WERC interpreted the proposal "as setting forth the length of time which teachers can be assigned to work in return for their basic salary." We note that hours of employment is a mandatory subject of bargaining. See sec. 111.70(1)(a), Stats. WERC found the proposal to be a mandatory subject, reasoning that the district was not prevented from requiring teachers to work a longer day and therefore the proposal did not unduly restrict the provision of basic educational services. Rather, the proposal requires compensation in the event that the district requires teachers to work more than the specified number of hours. WERC further explained that proposals establishing the length of the workday have a direct and substantial relationship to both hours and wages. We agree with the circuit court's assessment that "[t]he primary impact of this proposal, as a direct product of logic, is to relate to hours of work and wages to be paid for hours worked beyond those [specified] ...." Thus, a rational basis exists for WERC's determination.

The district next challenges WERC's determination that REA's proposal concerning teachers' preparation time was a mandatory subject of bargaining. The proposal

provides for additional compensation if a teacher is not provided with a specified amount of preparation time each week.

WERC found the proposal to be "a compensation proposal which is primarily related to the additional wages a teacher will receive when his or her day is allocated in a certain manner." WERC noted that the proposal did not require the district to allocate any of the workday to preparation time and therefore the proposal did not unduly interfere with the district's right to establish educational policy.

WERC also indicated its belief that the impact of preparation time, or lack thereof, on wages, hours and conditions of employment is apparent:

> We find the impact of preparation time upon hours is clear. A teacher cannot teach, even poorly, without some knowledge of the subject to be taught. Knowledge of the subject to be taught requires preparation. Preparation requires the expenditure of time by the teacher. Time is either available as a part of the teacher's regular work day or outside the work day. If sufficient time is not available as a part of the work day, time must be spent outside the work day.

Testimony by the district's assistant superintendent of personnel services indicated that preparation time is a part of a teacher's employment and if a teacher is not given preparation time during the school day, preparation will have to be done outside of the school day. This testimony demonstrates the impact of preparation time, or lack thereof, on hours of employment. We conclude that a rational basis exists for WERC's determination.

The next proposal relates to after-school events and provides additional compensation for any required after-school event beyond one meeting per month. WERC found the proposal to be a mandatory subject, noting that it did not preclude the district from scheduling after-school meetings. The district retains all discretion in that regard. Rather, the proposal provides additional compensation when teachers are required to attend more than one after-school meeting per month. It is essentially an overtime proposal. WERC reasoned that "[c]learly, such meetings or events have a direct impact upon the hours which a teacher works. ... [and the] proposal simply reflects a different means of compensating teachers for their work." We agree.

Next, the district asserts that a proposal requiring the provision of secure storage space is not a mandatory subject of bargaining. The proposal states that "[e]ach teacher shall be provided with a lockable storage space at his/her home building." We are persuaded that the following reasoning by WERC provides a rational basis for its determination that this proposal is a mandatory subject:

> The record demonstrates that employes are held responsible for the availability of certain equipment and are expected to maintain the security of grade books. Given these requirements and expectations, we believe that it is a mandatory subject of bargaining for the Association to attempt to provide the employes with means by which they may meet those requirements and expectations. In addition, as there is no substantial basis for concluding that this proposal would interfere in any significant way with the District's ability to manage existing facilities, we believe that a proposal which would provide some lockable storage space as a matter of personal security and convenience for employes also primarily relates to conditions of employment. Support for this conclusion is found in Blackhawk, supra, wherein the provision of lounges and restroom facilities was found to be mandatory due to a primary relationship to working conditions. Thus, the proposal is a mandatory subject of bargaining.

We agree that the proposal is primarily related to conditions of employment.

The next provision challenged on appeal provides that any "[b]oard decisions, rules or policies which affect the wages, hours or conditions of employment shall be transmitted to the REA in writing and the impact thereof shall be subject to negotiations between the parties at reasonable times during the term of this agreement." If the negotiations result in impasse, the provision provides for dispute resolutions under sec. 111.70(4)(cm), Stats. WERC found the provision to be a specific contract reopener provision. It interpreted the provision to obligate the parties to engage in impact bargaining when the impact in question was not previously bargained by the parties. WERC also found the intent of the proposal was to refer only to changes in board decisions, rules or policies.

In determining that the proposal was a mandatory subject of bargaining, WERC relied on the reasoning in a prior decision of the commission. In that case, the commission held that if the scope of a reopener proposal was limited to a requirement that the district bargain over any new rule or policy which primarily related to wages, hours

and working conditions, then the proposal would be mandatory. Such a determination, stated WERC, protected the union from unknowingly waiving its rights to bargain over impact while at the same time leaving the district free to implement the new decision, policy, or rule. We agree with WERC's arguments on appeal that the proposal, by its language, primarily relates to wages, hours and conditions of employment. We are satisfied that a rational basis exists for WERC's determination.

The final proposal challenged on appeal provides a method of selecting employees for participation in extra-curricular activities. It proposes that all such assignments be voluntary unless there is no reasonable alternative. The proposal specifies how the teachers are selected and recommends the number of times they should be assigned to extra-curricular jobs.

WERC indicated that it was satisfied that management prerogatives and rights to bargain were honored by the proposal:

> Section 1(c.) ensures the District that unit personnel it finds qualified will be available for assignments while the Association's right to bargain over the criteria to be used

> when filling an assignment from qualified unit personnel is reflected through the proposal's specification that qualified volunteers be used first (the most senior getting preference) and that involuntary assignments, due to an absence of volunteers, will be made to the least senior qualified individual. The proposal leaves the District free to establish qualifications for assignments but reflects the Association's right to bargain over non-job performance related qualifications by the requirement that the qualification be "reasonable". The proposal leaves the District free to establish the extra-curricular activities which will be available to students while reflecting the Association's right to bargain over the impact of extra-curricular assignments upon hours ....

The parties agree that the type of persons (teachers or non-teachers) directing extra-curricular activities and the qualifications they must possess are not mandatory subjects of bargaining. Such decisions are primarily matters of educational policy. As WERC noted, however, the proposal does not prevent the district from providing students with qualified direction of extra-curricular activities. We are satisfied that a rational basis exists for WERC's determination.

In conclusion, we note that many of the district's

arguments relate to the cost of implementing REA's proposals, the reasonableness of the proposals and the intent of REA in submitting the proposals. However, these arguments are not relevant to the bargaining nature of the proposals. Rather, they address the merits of the proposals and are more appropriately raised at the bargaining table. We are persuaded that WERC engaged in the required balancing of interests and we find that a rational basis exists for each of its determinations. We affirm.

By the Court.--Judgment affirmed.

Not recommended for publication in the official reports.

APPENDIX

[1]Section 111.70(1)(a), Stats., provides in part:

> "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, except as provided in s. 40.81(3), 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. ... The employer shall not be required to bargain on subjects reserved to management and direction of the governmental unit except insofar as the manner of exercise of such functions affects the wages, hours and conditions of employment of the employes ....

This section was numbered sec. 111.70(1)(d) at the time this dispute occurred. The section was renumbered by 1983 Wis. Act 189, § 165.

[2]The second sentence of the first proposal stated that the parties recognized that the number of students assigned to a particular teacher affects conditions of employment and workload of that teacher. Because this statement was "of no interpretative assistance," WERC found this statement to be a permissive subject of bargaining.