STATE OF WISCONSIN CIRCUIT COURT BRANCH VIII

RACINE EDUCATION ASSOCIATION,

Petitioner,

-vs-

WISCONSIN EMPLOYMENT RELATIONS COMMISSION,

Respondent.

D E C I S I O N

Case No. 84-CV-810

Decision No. 21689

INTRODUCTION

On 18 May 1984 Petitioner filed for Judicial Review of a 16 May 1984 decision of Respondent. The Racine Unified School District submitted, on 24 May 1984, a Notice of Appearance and Statement of Position. Respondent, on 14 June 1984, filed its Notice of Appearance and Statement of Position. The record of this matter was filed on 22 October 1984. All parties have submitted legal briefs and the last memorandum was due on 5 November 1984. Because the file is complete, an early decision is possible.

FACTS

The facts in this dispute are generally related to those set forth on 15 October 1984 by this Court in cases 84-CV-431 and 84-CV-855. By reference that fact statement is incorporated herein.

After ~~LIRC~~ WERC issued its 5 January 1984 decision regarding what was and what wasn't a mandatory subject of bargaining in the final offers of

Petitioner and the Racine Unified School District, the parties commenced to engage in additional negotiation to voluntarily reach an agreement. As a result of this renewed bargaining, a further mediation session was called and presided over by the Chairman of Respondent on 27 March 1984. That effort was not successful and, on 30 March 1984, "final offers" were submitted by both sides under 111.70(4)(cm), Stats. These final offers must be juxtaposed to the prior (Racine Unified School District on 31 March 1983 and REA on 11 April 1983) final offers which were reviewed in 84-CV-431 and 84-CV-855.

After the 30 March 1984 final offers were submitted, the Petitioner filed a Petition for Declaratory Ruling with respect to two matters contained in the employer's proposal.

"ARTICLE VIII - STAFF UTILIZATION AND WORKING CONDITIONS

1. a. The parties recognize that optimum facilities for both the student and teacher are desirable to insure the high quality of education that is the goal of both the Association and the Board.

   b. Reasonable efforts will be made to maintain academic subject class sizes as follows:

ELEMENTARY:	K-3 --	Recommended	25	(School years 82-
		Maximum	30	89 through 84-85)
	4-6 --	Recommended	25	(School year 82-
		Maximum	32	83)
	4-5 --	Recommended	25	(School years 83-
		Maximum	32	84 through 84-85)
SECONDARY:	7-12 --	Recommended	30	(School year 82-
		Maximum	35	83)
	6-12 --	Recommended	30	(School years 83-
		Maximum	35	84 through 84-85)

c. The foregoing standards are subject to modifications for educational organization or specialized or experimental instruction, which shall not violate the intent set forth in Article VIII, 1., a. and b. In elementary schools, the principal, working with the teaching staff, shall determine the staffing pattern and staff utilization of the school within the Board's teacher-student ratio policy; so long as students receive the instructional time designated by the Board, the principal, working with the teaching staff, may utilize staffing patterns so as to provide a minimum of 140 minutes per week indivual teacher preparation time and/or aides to assist teachers in or to assume supervisory duties."

. . .

2. a. All teachers are expected to be in their respective rooms or assigned places at least fifteen (15) minutes before the time for the tardy signal. Teachers are expected to be present and performing their teaching duties during the time that pupils are required to be there according to the hours of school as presently established by the Board. Teachers shall be available for a period of at least fifteen (15) minutes after regular pupil dismissal."

It was and is the position of Petitioner that these two proposals relate to non-mandatory subjects and thus are not properly includable in a final offer under 111.70(4)(cm 6), Stats.

The employer responded to this Petition one day before it was filed by saying that REA had waived its right to contest the two proposals because they are the same matters which were a part of the 31 March 1983 final offer which were not objected to. This statement of position is contained in the employer's letter to Respondent of 6 April 1984. Later on 11 April 1984, the employer filed a Motion to Dismiss Petition.

In Respondent's 16 May 1984 decision, it agreed with the viewpoint of the employer. The core of the decision's reasoning is contained in Paragraph 5 of the Findings of Fact:

"5. That the proposals challenged herein by the Association were present in the District's March 1983 final offer which was the subject of the declaratory ruling proceeding referenced in Finding of Fact 4; that the Association did not challenge said proposals in its April, 1983 petition for declaratory ruling; and that by failing to make said challenge, the Association waived its right under Sec. 111.70(4)(cm)(6)(a) Stats., to assert that the proposals challenged herein are permissive subjects of bargaining."

The instant dispute relates to whether or not Petitioner, under the facts of this case, waived its right to seek a declaratory ruling regarding class size and the time teachers are expected to be in their rooms. The dispute now before the Court does not concern whether the proposals are permissive or mandatory; nor does it focus on the validity or invalidity of the underlying two proposals.

LAW

111.70(4)(cm)(6)(a), Stats. provides for final offers being submitted as a condition precedent to mediation-arbritration. This section also indicates that only mandatory subjects of bargaining are to be included in the final offer.

"Upon receipt of a petition to initiate mediation-arbritration, the commission shall make an investigation, with or without a formal hearing, to determine whether mediation-arbitration should be commenced. If in determining whether an impasse exists the commission finds that the procedures set forth in this paragraph have not been complied with and such compliance would tend to result in a settlement, it may order such compliance before ordering mediation-arbitration. The validity of any arbitration award or collective bargaining agreement shall not be affected by failure to comply with such procedures. Prior to the close of the investigation each party shall submit in writing its single final offer containing its final proposals on all issues in dispute to the commission. Such final offers

may include only mandatory subjects of bargaining. Permissive subjects of bargaining may be included by a party if the other party does not object and shall then be treated as a mandatory subject..."

111.70(4)(cm)(8), Stats. states that "the Commission shall adopt rules for the conduct of mediation-arbitration proceedings under subd. 6,..." As a result of that authorization, Respondent has adopted a number of rules under the Wisconsin Administrative Code:

"ERB 31.09 Informal investigation or formal hearing. (1) Purpose. It shall be the duty of the commission or its agent conducting the informal investigation or formal hearing, to adduce facts pertinent to a determination as to whether the parties are deadlocked in their negotiations, and if so, to obtain the single final offers of the parties containing their final proposals on issues in dispute, and to further obtain a stipulation executed by the parties on all matters agreed upon to be included in the new or amended collective bargaining agreement. During the informal investigation or formal hearing the commission or its agent may engage in an effort to mediate the dispute.

(2) Informal Investigation Procedure. The commission or its agent shall set a date, time and place for the conduct of informal investigation and shall notify the parties thereof in writing. The informatl investigation may be adjourned or continued as the commission or its agent deems necessary. During said investigation the commission or its agent may meet jointly or separate with the parties for the purposes described in subsection (1) above. Prior to the close of the investigation the investigator shall obtain in writing the final offers of the parties on the issues in dispute, as well as a stipulation in writing on all matters agreed upon to be included in the new or amended collective bargaining agreement. At the same time the parties shall exchange copies of their final offers, and shall retain copies of such stipulation, and if at said time, or during any additional time permitted by the investigator, no objection is raised that either final offer contains a proposal or proposals relating to nonmandatory subjects of bargaining, the commission agent shall serve a notice in writing upon the parties indicating the investigation is closed. The commission or its agent shall not close the investigation until the commission or its agent is satisfied that neither party, having knowledge of the content of the final offer of the other party, would amend any proposal contained in its final offer. Following the close of

the investigation the commission agent shall report the findings to the commission, either orally or in writing, as the commission may direct, and at the same time transmit to the commission the final offers and the stipulation received from the parties.

(3) Formal Hearing Practice and Procedure. The commission or its agent shall set a date, time and place for the conduct of the formal hearing and so notify the parties thereof by formal notice. The commission or its agent may adjourn or continue the hearing. Hearing practice and procedure shall be as set forth in chapter ERB 10, Wis. Adm. Code. Prior to the close of the hearing the commission or its agent shall obtain and exchange the final offers and stipulation in the same manner set forth in sub. (2) above.

ERB 31.10 Final Offers. Final offers shall contain proposals relating only to mandatory subjects of bargaining, except either final offer may contain proposals relating to permissive subjects of bargaining if there is no timely objection by the other party to the inclusion of such proposals in such final offer, and lacking such timely objection, such proposals shall be treated as mandatory subjects of bargaining.

ERB 31.11 Procedure For Raising Objection That Proposals Relate To Non-mandatory Subjects Of Bargaining. (1) Time For Raising Objection. Any objection that a proposal relates to a non-mandatory subject of bargaining may be raised at any time after the commencement of negotiations, but prior to the close of the informal investigation or formal hearing.

(a) During negotiations, mediation or investigation. Should either party, during negotiations or duing commission mediation or investigation raise an objection that a proposal or proposals by the other party relate to a non-mandatory subject of bargaining, either party may commence a declaratory ruling before the commission pursuant to s. 111.70(4)(b), Stats., and chapter ERB 18, Wis. Adm. Code seeking a determination as to whether the proposal or proposals involved relate to a non-mandatory subject or subjects of bargaining.

(b) At time of call for final offers. Should either party, at such time as the commission or its agent calls for and obtains and exchanges the proposed final offers of the parties, or within a reasonable time thereafter as determined by the commission or its investigator, raise an objection that a proposal or proposals by the other party relate to a non-mandatory subject of bargaining, such offers shall not be deemed to be final offers and the commission or its agent shall not close the investigation or hearing but shall direct the objecting party to reduce the

objection to writing, identifying the proposal or proposals claimed to involve a non-mandatory subject of bargaining and the basis for such claim. Such objection shall be signed and dated by a duly authorized representative of the objecting party, and copies thereof shall, on the same date, be served on the other party, as well as the commission or its agent conducting the investigation or hearing, in the manner and within such reasonable time as determined by the commission or its investigator.

(2) Effect Of Bargaining On Permissive Subjects. Bargaining with regard to permissive subjects of bargaining during negotiations and prior to the close of the investigation shall not constitute a waiver of the right to file an objection as set forth in par. (1)(b) above.

ERB 31.12 Petition Or Stipulation To Initiate A Declaratory Ruling Proceeding To Determine Whether A Proposal Or Proposals Relate To Mandatory Subjects Of Bargaining. (1) Who May File. Either party may file a petition, or both of the parties may file a stipulation, to initiate such a declaratory ruling proceeding before the commission.

(2) Where To File. Such a petition or stipulation shall be filed with the commission at its Madison office, and if a petition is filed a copy thereof shall be served on the other party at the same time.

(3) When To File. Such a petition or stipulation may be filed with the commission during negotiations, mediation or investigation. If such a petition or stipulation is filed after the investigator calls for final offers, such a petition or stipulation for declaratory ruling must be filed within 10 days following the service on the commission or its investigator of the written objection that a proposal or proposals relate to non-mandatory subjects of bargaining. Failure to file such a petition or stipulation within this time period shall constitute a waiver of the objection and the proposay or proposals involved therein shall be treated as mandatory subjects of bargaining.

(4) Procedure Following Issuance Of Declaratory Ruling. Following the issuance and service of the declaratory ruling, the commission or its investigator shall conduct further investigation or hearing for the purpose of obtaining the final offer of each party before closing the investigation. Neither final offer may include any proposal which the commission has found to be a non-mandatory

subject of bargaining unless consented to in writing by the other party. Should the commission's decision be appealed the parties may agree to the conditional inclusion of such proposals in their final offers."

With respect to Respondent's ability to interpret its rules, the Supreme Court in Milwaukee v. WERC, 71 Wis. 2d 709 at 714 and 715 (1976) stated:

"The construction of a statute is a question of law. Board of Sch. Directors of Milwaukee v. WERC (1969), 42 Wis. 2d 637, 650, 168 N. W. 2d 92. Thus, this court is not bound by the interpretation given to a statute by an administrative agency. Nevertheless, that interpretation has great bearing on the determination as to what the appropriate construction should be: "'...the construction and interpretation of a statute adopted by the administrative agency charged with the duty of applying the law is entitled to great weight...' Cook v Industrial Comm. (1966), 31 Wis. 2d 232, 240, 142 N. W. 2d 827. See also: National Amusement Co. v. Department of Revenue, supra; Chevrolet Division, General Motors Corporation v. Industrial Comm. (1966), 31 Wis. 2d 481, 143 N. W. 2d 532. "This court does not independently redetermine every conclusion of law made by an administrative agency. "'...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.'"

If the WERC interpretation is reasonable, it is to be affirmed. Board of Education, Brown Dear Schools v. WERC, 86 Wis. 2d 201 at 210 (1978):

"This court, however, will not independently redetermine every legal conclusion of the board. If the board's construction of the agreement is reasonable, this court will sustain the board's view, even though an alternative view may be equally reasonable."

In Beloit Education Association v. WERC, 73 Wis. 2d 43 at 68 (1976), the Court stated regarding WERC interpretations:

"In this petition for declaratory rulings, addressed to the state employment relations commission, we have very nearly questions of first impression raised concerning the areas of mandatory

bargaining between a school board and a teacher's association under sec. 111.70 (1)(d).[45] Given this situation, we would hold, quoting a very recent case, that "...this court is not bound by the interpretation given to a statute by an administrative agency. Nevertheless, that interpretation has great bearing on the determination as to what the appropriate construction should be."

This standard was reaffirmed in Village of Whitefish Bay v. WERC, 103 Wis. 2d 443 at 448 (1981).

This Court reaffirms by reference its entire 15 October 1984 law statement as made in 84-CV-431 and 84-CV-855 regarding concepts of circuit court review of WERC decisions. See also School District of Drummond v. ERC, 120 Wis. 2d 1 (1984).

DISCUSSION

The theory of mediation-arbitration is clear from a review of the statute. See 111.70 (4)(cm)(6)(a). An investigation is made by WERC to see if mediation-arbitration should be commenced. If this procedure is utilized, each side "shall submit in writing its single offer containing its final proposals on all issues in dispute to the commission."

WERC-created rules (ERB 31.09(2)) require that the final offers be submitted prior to the close of the investigation. ERB 31.10 indicates that final offers may relate only to mandatory subjects of bargaining. Objection may be made if a party feels that a proposal in a final offer concerns a permissive issue. ERB 31.11 allows an objection to be timely if it is raised "after the commencement of negotiation, but prior to the close of the informal investigation or formal hearing."

The outline of this dispute demonstrates that two sets of final offers were made. The cunnundrum is that the rules contemplate but a single final offer from each side. The intentions of Respondent and the two parties involved in the dispute were laudatory. Yet after the March-April 1983 final offers were submitted and the declaratory rulings made on 5 January 1984, the disputants and Respondent entered afresh into voluntary (at first) and supervised (27 March 1984) negotiations. When these negotiations were not productive, new final offers were submitted by both the employer and the employee.

The employer asserts that the new final offers were submitted "to conform with the WERC decisions". See Page 5 of Employer's 3 October 1984 memorandum. The plural noun "decisions" refers to the 5 January 1984 declaratory ruling and the 15 February 1984 denial of the Motion for Rehearing. The ruling regarding REA proposal #7 was not in existence until 18 days after the new final offers were submitted. This Court has reviewed all the applicable WERC decisions in this case and finds that the new final offers were not filed to conform with WERC decision. The new final offers were a reflection of the final position of the parties after the 5 January 1984 decision, the 15 February 1984 decision, and the February and March 1984 post-decision negotiations between the employer and employees.

This Court is in agreement with the position of Respondent and the Employer to the effect that one cannot, under mediation-arbitration, proceed under one theory in a dispute and then, after a decision is made,

change theories and seek a new ruling. The concept of waiver under Madison Metropolitan School District, 16598-A (1-79) would be applicable in such a case.

But that factual scenario never happened in this case.

Respondent as well as the disputants are bound by the rules. The new final offers of 30 March 1984 were not the same as the prior final offers. Metaphysically it is not possible to have two sets of final offers separated in time by over one year. Neither the statutes nor the Wisconsin Administrative Code ERB rules contemplated the procedural softness which occurred in this case.

Once Respondent, the Racine Unified School District, and Petitioner opted to reopen face-to-face negotiations in February and March of 1984 and then to submit new final offers, the legal consequence was to provide to both the employer and REA a fresh opportunity to seek declaratory rulings under 111.70(4)(cm)(6)(a), Stats and ERB 31.09 through 31.12.

The parties could have obviated this mandatory result by articulating a disclaimer or by negotiating without submitting new final offers. Something (a final offer) cannot both be and not be at the same time. The facts, and not stratagem, control in this case. Since the 30 March 1984 proposals are designated "final offers" by both sides, they are entitled to be dealt with as such. The reopening of both face-to-face negotiation and WERC-directed mediation are substantial intervening acts in this case which allow the parties to, if they wish, readjust prior positions.

The necessity of considering both substantial intervening acts and the new final offers is manifest with respect to time. Procedural softness under the WERC determination could go on for years with the parties being captive to an initial proposal which would be, in time, perhaps meaningless. Total circumstances is the standard to apply. The statute (111.70(4)(cm)(6)(a)) calling for a single final offer can only be interpreted sensibly as meaning one offer. This is consistent with the "any rational basis" test discussed by Judge Cane in School District of Drummond, supra. at Page 7. In Norwest Engineer Credit Union v. Jahn, 120 Wis. 2d 185 at 187 (1984) the Court said:

> "When statutory language is clear and unambiguous, we must give the language its ordinary and accepted meaning."

The law is clear relative to one final offer and not two or more. The intent of the law is also discernible. When the parties have their mandatory subjects final offers before the third party neutral, a choice is to be made.

Apparently, "function" tension exists within the WERC relative to this limited, pragmatic mission under mediation-arbitration and the broader, more holostic, mandate for the agency under 111.70(4), Stats.

The Court recognizes the experience and expertise of Respondent. However, the agency decision in this particular case, even when due weight is afforded it, is without any rational basis. The WERC decision conflicts with both the applicable statute and administrative rules. It is not reasonable.

Petitioner acted timely and in accord with law in seeking a declaratory ruling regarding when teachers are expected to be in their rooms and class size. Respondent errored as a matter of law in dismissing the Petition.

CONCLUSION

Respondent's decision of 16 May 1984 is ordered set aside. The matters addressed in REA's Petition for Declaratory Ruling should be resolved by WERC on their merits as either mandatory or permissive subjects of bargaining.

Dated this 25 day of October, 1984.

BY ORDER OF THE COURT

Dennis J. Flynn
Circuit Judge, Branch VIII