

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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MILWAUKEE TEACHERS'	:	
EDUCATION ASSOCIATION,	:	
	:	
Complainant,	:	
	:	Case 158
vs.	:	No. 33500 MP-1610
	:	Decision No. 21893-A
	:	
MILWAUKEE BOARD OF	:	
SCHOOL DIRECTORS,	:	
	:	
Respondent.	:	
	:	

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Appearances:

Perry, First, Reiher, Lerner & Quindel, S.C., Attorneys at Law, by Mr. Richard Perry, 1219 North Cass Street, Milwaukee, Wisconsin 53202, on behalf of the Complainant.

Ms. Anne L. Weiland, Assistant to the Executive Director, Department of Employee Relations, Milwaukee Public Schools, P. O. Drawer 10K, Milwaukee, Wisconsin 53201, on behalf of the Respondent.

FINDINGS OF FACT,  
CONCLUSION OF LAW AND ORDER

AMEDEO GRECO, Hearing Examiner: Milwaukee Teachers' Education Association, herein MTEA, filed a complaint with the Wisconsin Employment Relations Commission on June 28, 1984, alleging that the Milwaukee Board of School Directors, herein the District, had committed prohibited practices within the meaning of Secs. 111.70(3)(a)1 and 4 of the Municipal Employment Relations Act, herein MERA, by refusing to bargain with the Association over contracting out certain bargaining unit work traditionally performed by unit personnel. The Commission appointed the undersigned to make and issue Findings of Fact, Conclusions of Law and Order, as provided for in Sec. 111.07(5), Stats., and hearing was subsequently held in Milwaukee, Wisconsin, on September 20, 1984. The parties thereafter filed briefs which were received by December 13, 1984.

Having considered the arguments and the record, the Examiner makes and files the following Findings of Fact, Conclusion of Law and Order.

FINDINGS OF FACT

1. MTEA is a labor organization which represents certificated teachers and related professional personnel employed by the District. It maintains its principal offices and place of business at 5130 West Vliet Street, Milwaukee, Wisconsin 53208.

2. The District is a municipal employer which operates a school system. It maintains its principal offices at 5225 West Vliet Street Street, Milwaukee, Wisconsin 53208.

3. The parties are privy to a collective bargaining agreement which recognizes MTEA as the exclusive collective bargaining representative for teachers and certain other personnel as provided for in the bargaining unit previously certified by the Commission. As such, MTEA represents teachers at the District's Sixty-Eight Street Alternative High School and the Kilmer Alternative School, hereinafter referred to as the Alternative Schools.

4. On or about January 23, 1984, two non-bargaining unit teachers employed by the Milwaukee Area Technical College, herein MATC, began to offer vocational training at the Alternative Schools pursuant to an agreement between the District and MATC. The two, Pat Kurtin and Maureen Coffey, performed counseling duties similar to those performed by bargaining unit employes. It is undisputed that unit employes were qualified to perform those duties and that Kurtin and Coffey did not displace any members of the bargaining unit.

5. The Alternative Schools contain students who have a number of problems which make it difficult for them to attend regular high schools. They usually attend regular instructional classes in the morning and job related classes in the afternoon which stress educational, career, and job planning; job readiness skills; how to fill out job applications, etc. The latter program is taught by counselors who are in the bargaining unit, some of whom are funded by the Federally Funded Job Training Partnership Act. Kurtin and Coffey perform virtually these same functions with the same group of students in much smaller classes and they teach career classes of one hour per day to their students, five days per week. The rest of the day they spend supervising the students on job sites, placing them in jobs, trying to follow-up, etc. Like bargaining unit members, they also participate in faculty meetings, they help grade students, and they help prepare report cards. The two also work directly with guidance counselors on a collective basis within the building.

6. Kurtin and Coffey were assigned by MATC to the Alternative Schools pursuant to a contract entered into by MATC and the District which provided that MATC would provide "Diversified On-The-Job Training" to District students from January 23, 1984, to June 8, 1984, at a total cost of \$42,240. That agreement further provided:

4. VTAE DISTRICT RESPONSIBILITIES. In addition to providing instructional services, the VTAE District shall:

- a) Maintain records and report to the Public School District concerning attendance on a timely and continuing basis.
- b) Maintain records and provide reports to the Public School District concerning grades and performances of students according to the regular standards and procedures of the Public School District.
- c) Provide necessary class materials and supplies. Textbooks and other materials which are to be the property of the student must be furnished or paid for by the student or the Public School District.
- d) Provide general counseling service and cooperate with and report to counselors of the Public School District as and where necessary.
- e) Cooperate with the Public School District in identifying and resolving problems of students relating to educational progress or behavior in this program.
- f) Notify the Public School District of any injury to a Public School District student while receiving instruction, or damage to any property under the control of the VTAE District caused by a Public School District student while attending the VTAE District school, of which the VTAE District has knowledge, as soon as practicable following discovery of such injury or damage.
- g) Provide student emergency health services as afforded to regular attending students.

5. SCHOOL DISTRICT RESPONSIBILITIES. In addition to payment of charges as enumerated in paragraph 3 above, the Public School District shall:

- a) Select students to participate in the program.
- b) Grant approval to students to participate in the program.
- c) Determine the amount of high school credit to be granted to students for work completed in this program.

- d) Transport students to and from the facilities of the VTAE District and provide board or lodging, if necessary, as may be required for the student's participation in this program.
  - e) Cooperate with VTAE District in identifying and resolving problems of students relating to educational progress or behavior in this program.
  - f) Be responsible for attendance of student(s) and enforcement of attendance pursuant to section 118.15 and 118.16, Stats.
6. CONDUCT OF PUBLIC SCHOOL STUDENTS. Public School students shall be subject to the code of conduct promulgated by the VTAE District while on VTAE District property receiving instruction under this agreement. Where a Public School student acts in a manner so as to disrupt the normal and ordinary operation of the VTAE District school, the VTAE District may refuse to provide further services to said Public School student.
  7. DISCRIMINATION PROHIBITED: No person shall on the basis of race, color, sex, age, religion, national origin, or handicap be excluded from participation in, be denied the benefits of, or be subjected to discrimination in any program or activity under this agreement.
  8. ATTENDING STUDENTS. Attached hereto as Appendix A and incorporated by reference is a list of students who will be attending the VTAE District under this agreement.

. . .

Subsequent thereto, the District entered into an almost identical contract with MATC which provided that the latter would offer the same vocational training from September 4, 1984, to June 6, 1985.

7. Before entering into those contracts, District representatives were told by the Wisconsin Department of Public Instruction (DPI) that the District could receive such vocational training only if it contracted with a local vocational, technical and adult education district (VTAE) and that it could not receive any extra funding if it offered such training with its own personnel. In addition, DPI mandated that such extra vocational training could not supplant any existing programs.

8. The District entered into those two contracts with MATC under a new state program which allowed it to obtain certain vocational instruction provided for by federal funding. By letter dated April 26, 1983, State Superintendent of Schools Herbert J. Grover announced details of that new program in the following letter he sent school administrators:

Dear District Administrator:

As you know, a \$1 million pool of Federal money was established in 1982-83 for vocational education contracting. To date, approximately 250 grant awards have been awarded to 120 of your school districts. I'm pleased with this new opportunity to help some of our Wisconsin high school students be better prepared for work or for post-secondary education. You and your staff are to be commended for your efforts in this accomplishment.

The set of guidelines developed by staff members from both agencies and approved by the Wisconsin Board of Vocational, Technical, and Adult Education is enclosed. The "pool" is increased to \$1.5 million for 1983-84 and the funding level for the 1983-84 fiscal year is 100% of the allowable costs; however, because funds may not supplant existing local/states funds, the projects must be new and expanded programs. School

districts with an approved pool project(s) in FY 83 (July 1, 1982 - June 30, 1983) may send in a renewal application(s) for FY 84 (July 1, 1983 - June 30, 1984).

In addition to the guidelines, the revised State Uniform Contract Agreement for Instructional Services, PI-1385, Rev. 4-83 (Pursuant to Sec. 118.15(1)(6) Wis. Stats.) for instructional programs is also enclosed. This contract must be completed and attached to your application for funding. If you need additional copies, you may duplicate them. Since the contract has been revised, please discard any "old" contract forms.

Because the Department of Public Instruction has been designated to administer these funds, a specific application form was developed for these contracted programs (PI-1384, Rev. 4-83). A copy of this application form, with instructions, is enclosed along with the guidelines and contract. The application form has been revised. Please discard any "old" application forms and instructions. If you wish to submit an application for an articulation project, you may use the existing PI-1301 form. In addition, complete a vocational education financial plan (PI-1313) and send with your application.

Applications for first semester will be accepted until June 1, 1983, for 1983-84 programs. Any proposals for first semester will be reviewed and approved when received; however, they must be approved prior to implementation. If funds are still available, additional proposals for second semester will be solicited at a later date. If you have specific questions, please contact Richard Dignan (608)267-9244 in the Bureau for Vocational Education.

The Department will be proposing a minor change in the 1983-84 guidelines. When the proposed change is reviewed and approved by the Wisconsin Board of Vocational, Technical, and Adult Education, you will be notified in writing.

I am very pleased to offer this opportunity as an incentive for programs which will provide students with positive work attitudes, job related marketable skills, and encouragement to continue their occupational training.

I encourage you to take advantage of this program. Please feel free to request the assistance of our Vocational Education staff as you develop these new and expanded programs.

9. Thereafter, DPI's Bureau of Vocational Education on October 14, 1983, issued the following bulletin:

#### POOL FUND GUIDELINE MODIFICATION

The use of Pool Fund monies has been governed by 10 guidelines (copy attached) reached by agreement between the DPI and VTAE. Recently we have been successful in extending guideline 6 to include support services necessary to allow special needs learners to benefit from the occupational preparation programs supported by pool funds. Guidelines 6 now reads:

Project approval is limited to vocational education instructional programs and/or articulation programs. These programs may include unique support services necessary to allow special needs learners to benefit by these vocational education instructional programs.

The underlined portion of the guidelines is new.

This addition will make it possible to include some of the excess costs necessarily incurred in order to effectively serve a student in a contracted VTAE vocational education instructional program. An "excess cost" is a cost you would not need to incur if the student didn't have special needs. These excess costs must support the student's enrollment in a contracted vocational education instructional program.

The following are examples of potentially reimbursable excess costs:

- instructional aide or tutorial services.
- simultaneous training in the math or vocabulary directly related to a vocational education instructional program.
- formal work evaluations which are a necessary component of a vocational education instructional program(s).
- orientation instruction necessary to permit the special needs student to function in the post-secondary setting.

Application for funds to support special needs services must be a part of the occupational prep program application. Application for support service separate from the vocational program cannot be approved utilizing pool monies.

Pool resources present a unique opportunity to expand services to special needs learners. These students can be slotted into existing vocational education classes and be provided the services they need in order to succeed. Class size contracts can incorporate needed support services which are excess costs of serving special needs learners. If neither the high school nor the VTAE school now offers a vocational education instructional program that can meet the needs of a group of special needs students, help the VTAE develop an exemplary vocational education program designed specifically to meet their needs and then contract for that! Plan to begin second semester of this school year!

If you have questions or want to discuss an idea relating to serving special needs students utilizing pool monies, call Preston Smeltzer at 608-266-7987 or Wayne Sherry at 608-267-9170.

Application for use of Pool Monies for second semester programs should be received at the DPI by December 15, 1983.

10. Throughout this time, MTEA has told the District that it objects to non-bargaining unit personnel offering the same kind of vocational training traditionally offered by unit personnel. In response to those concerns, Edward R. Neudauer, the District's Executive Director of the Department of Employee Relations, by letter dated May 1, 1984, advised MTEA Assistant Executive Director Donald D. Deeder:

In response to your letter, I met with Dr. Zirbel recently to explore the project as it exists at Kilmer. He explained to me that for a considerable number of years, vocational education money was devoted entirely to the technical schools. As a result of efforts on the part of the state superintendent, there was some money that was going to be devoted to public education. Part of this effort created a pooled fund.

The fund is mandated to provide for cooperative projects between the vocational/technical and adult education facilities and local education systems. The Board does not have access to these funds. It may sign a contract with the VTAE which can provide certain services. Historically, for

example, we always sent a number of children to MATC for programming. Part of the funds granted this year involved one staff person who worked with fifteen youngsters in a vocational readiness type of setting.

I do not believe that this type of arrangement constitutes sub-contracting. The Board is not paying funds for any type of service. The money in no case would be available to the Board to provide such services. The services are supplementary on the part of MATC. The service provided is one that could not be provided with local funds and such funds are not available. Children are all assigned to class at Kilmer; therefore, there is no diminishment in the normal teacher employment as a result of this activity.

Perhaps a meeting between you and Dr. Zirbel and myself would be profitable to further explore this. Please contact me to arrange a time for such a meeting.

Based upon the foregoing Findings of Fact, the Examiner issues the following

CONCLUSION OF LAW

The District did not violate Secs. 111.70(3)(a)1 or 4 of MERA when, pursuant to the State's Pool Fund program for vocational training, it contracted with MATC and utilized non-bargaining personnel to perform counseling duties at the Alternative Schools.

Upon the basis of the foregoing Findings of Fact and Conclusion of Law, the Examiner issues the following

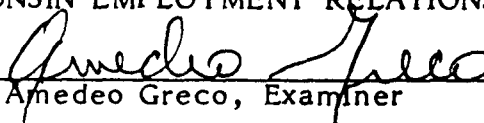
ORDER 1/

It is hereby ordered that the complaint filed herein be, and it hereby is, dismissed in its entirety.

Dated at Madison, Wisconsin this 13th day of February, 1985.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By

  
Amedeo Greco, Examiner

1/ Any party may file a petition for review with the Commission by following the procedures set forth in Sec. 111.07(5), Stats.

Section 111.07(5), Stats.

(5) The commission may authorize a commissioner or examiner to make findings and orders. Any party in interest who is dissatisfied with the findings or order of a commissioner or examiner may file a written petition with the commission as a body to review the findings or order. If no petition is filed within 20 days from the date that a copy of the findings or order of the commissioner or examiner was mailed to the last known address of the parties in interest, such findings or order shall be considered the findings or order of the commission as a body unless set aside, reversed or modified by such commissioner or examiner within such time. If the findings or order are set aside by the commissioner or examiner the status shall be the same as prior to the findings or order set aside. If the findings or order are reversed or modified by the commissioner or examiner the time for filing petition with the commission shall run from the time that notice of such reversal or modification is mailed to the last known address of the parties in interest. Within 45 days after the filing of such petition with the commission, the commission shall either affirm, reverse, set aside or modify such findings or order, in whole or in part, or direct the taking of additional testimony. Such action shall be based on a review of the evidence submitted. If the commission is satisfied that a party in interest has been prejudiced because of exceptional delay in the receipt of a copy of any findings or order it may extend the time another 20 days for filing a petition with the commission.

MADISON AREA VOCATIONAL, TECHNICAL AND ADULT EDUCATION DISTRICT

MEMORANDUM ACCOMPANYING  
FINDINGS OF FACT,  
CONCLUSION OF LAW AND ORDER

MTEA primarily charges that the District unlawfully refused to bargain with it when it subcontracted with MATC to perform the disputed vocational training herein. It argues that this work historically has been performed by unit personnel; that the source of funding for the two positions herein is immaterial in determining the District's bargaining obligations; that said subcontracting in essence was undertaken for economic reasons and that, as a result, the decision to subcontract and the impact of that decision on the bargaining unit are mandatory subjects of collective bargaining under applicable Wisconsin law. MTEA therefore requests that the District be ordered to negotiate with it over both the decision and the impact of contracting out this work and that the District also be ordered to abrogate its contract with MATC.

As the District correctly points out, there is a central flaw in MTEA's position: the fact that DPI has mandated that school district participation in the Pool Fund project is contingent upon the vocational services herein being offered by local VTAE schools, rather than the school districts themselves.

This is why the Association's reliance upon Unified School District No. 1 of Racine County 81 Wis.2d 89 (1977) is misplaced. There, the Wisconsin Supreme Court ruled that a school district was required to bargain over its decision to subcontract out its food service program to an outside business entity. In doing so, the Court restated the standard to be used in determining whether a given employer action constitutes a mandatory or permissive subject of bargaining:

The applicable standard is not that suggested by either party, but rather the "primary relationship" standard established in Beloit. The question is whether a particular decision is primarily related to the wages, hours and conditions of employment of the employees, or whether it is primarily related to the formulation or management of public policy. Where the governmental or policy dimensions of a decision predominate, the matter is properly reserved to decision by the representatives of the people. This test can only be applied on a case-by-case basis, and is not susceptible to "broad and sweeping rules that are to apply across the board to all situations . . ." Beloit, supra, at 55.

Applying that standard to the facts before it, the Court in Racine found that the subcontracting to a private food services employer was a mandatory subject of bargaining because:

The policies and functions of the district are unaffected by the decision. The decision merely substituted private employees for public employees. The same work will be performed in the same places and in the same manner. The services provided by the district will not be affected.

The work in issue here, however, is materially different from that in Racine; here the District will be adversely affected if it cannot contract with MATC because it then will be unable to receive any of the vocational services offered by the Pool Fund. The possible loss of these services therefore primarily impacts upon the District's ability to fulfill its chief duty of providing maximum educational opportunities - including vocational training - to its students. The wages, hours and conditions of employment of bargaining unit employees, on the other hand, are not primarily affected by the District's decision since: (1) no unit employees have been adversely affected by the performance of these vocational services; and (2) there is no indication that any bargaining unit employees will be able to participate in Pool Fund if the District is forced to rescind its decision. Accordingly, and pursuant to the Court's "primary relationship" balancing test, it follows that the District's decision to participate in the Pool Fund project and to enter into its agreement with MATC constituted a permissive subject of bargaining.

In support of its contrary claim, MTEA asserts, "the Commission has long held that the service for funds is not decisive in determining bargaining unit status of employees" and that, furthermore, while teachers frequently are hired from local, state and federal tax funds, "the nature of the duties performed for the public employer has been determinative of a unit placement."

This is true. But at the same time, MTEA has not cited any cases whose facts are similar to those herein. This record is unique because: (1) the two teachers remained MATC employes throughout this time; (2) they were paid by MATC through the monies generated by the State's Pool Fund project; (3) they remained under MATC's direction and control throughout their teaching assignments. These facts establish that the two teachers never entered into any employer/employee relationship with the District, thereby precluding them from being considered District employes. Accordingly, it must be concluded that the facts here are materially different from those other Commission cases which involved sources of funding and an established employer/employee relationship.

Nevertheless, while the District was not required to bargain over its decision to use MATC employes for the vocational training in issue, it also is well-recognized that an employer generally is required to bargain over the impact of any such permissive subject of bargaining. But here, MTEA has failed to show how this decision has impacted upon the bargaining unit. Moreover, even if such impact bargaining were required, the record shows, via Neudauer's May 1, 1984, letter to Deeder, that the District was willing to discuss and meet with MTEA over this general subject if so desired. Since there is no evidence that MTEA ever took up this suggestion for further talks, and in the absence of any express requests from MTEA to bargain over impact, it must be concluded that MTEA has waived whatever rights it had in this subject.

Dated at Madison, Wisconsin this 13th day of February, 1985.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By

  
Amedeo Greco, Examiner