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WISCONSIN EMPLOYMENT
RELATIONS COMMISSION

STATE OF WISCONSIN * CIRCUIT COURT * MILWAUKEE COUNTY

MILWAUKEE BOARD OF SCHOOL
DIRECTORS,

Petitioner,

vs,

WISCONSIN EMPLOYMENT
RELATIONS COMMISSION,

Respondent,

Case No. 721-287

Decision No. 21893-B

DECISION

Before the Court is a request for review pursuant to section 227.52, Wis. Stats., of an October 1, 1986 Decision and Order of the Wisconsin Employment Relations Commission ("Commission"). The Commission found the Milwaukee Board of School Directors ("District") in violation of section 111.70(3)(a)(1) and (4) of the Municipal Employee Relations Act (MERA) by failing to bargain with the Milwaukee Teachers Education Association ("MTEA") about its decision to contract with the Milwaukee Area Technical College ("MATC") for certain vocational training by two non-union MATC employees.

The Commission's decision was issued pursuant to a petition, filed by MTEA, for review of the Findings of Fact, Conclusions of Law and Order issued by a hearing examiner who was initially appointed to hear MTEA's complaint that the District had violated the specified provisions of MERA by failing to bargain about the decision to utilize two non-union employees and its impact on personnel represented by MTEA. The examiner concluded that the District was not required under MERA to bargain with MTEA about its decision to contract and that MTEA had, by its actions, waived its rights to bargain about the impact of the contracting decision on teaching personnel within the District.

MTEA petitioned the Commission for review of only that part of the examiner's decision that held that MTEA had waived its right to bargain about the impact of the contracting decision. The Commission, however, chose to review the entirety of the examiner's decision and amended that decision to conclude that the District was obligated, under the provisions of MERA, to bargain with MTEA about its decision to contract. The Commission concluded that the District's failure to do so constituted a violation of section 111.70(3)(a)(1) and (4) of MERA.

Petitioner, the District, requests review before this court of the following issues. First, petitioner alleges that the Commission committed procedural error in expanding its review to an issue not alleged in MTEA's Petition for Review;

namely, the issue of whether or not the District was required to bargain with MTEA about its decision to contract with MATC for vocational training. Secondly, petitioner contends that the Commission abused its discretion and exceeded its authority under sec. 111.07, Wis. Stats., in expanding its review to include such an issue. And finally, petitioner alleges that the Commission misinterpreted and misapplied the test required to determine whether the District's decision to contract with MATC was a mandatory or permissive subject of bargaining and that, therefore, the Commission's interpretation of law was erroneous.

After careful review of the record and law, this Court finds that the Commission's actions constituted neither material procedural error nor an abuse of discretion. For the reasons to follow, the Court concludes the Commission's actions in this case were within the bounds of authority granted by section 111.07, Wis. Stats. In addition, the Court believes the Commission's interpretation of the District's contracting decision as a mandatory subject of bargaining was based on a rational interpretation of the law. Thus, the decision and order of the Wisconsin Employment Relations Commission is affirmed.

The undisputed facts of this case are as follows. The District is a municipal employer which operates the Milwaukee

School District. As such, the District is within the purview of section 111.70, Wis. Stats., of the Municipal Employee Relations Act (MERA). MTEA is a labor organization which represents teachers and related personnel within the district. MTEA and the District are privy to a collective bargaining agreement which recognizes MTEA as the sole bargaining representative of teachers within the district.

In January of 1984, the District entered into a contract with MATC which provided that MATC would provide vocational training services at two schools within the district (the "Alternative Schools"). The District entered into this agreement under a new state program which allowed it to obtain federally funded vocational training (the "Pool Fund Project"). The District was eligible for such funds only if it contracted with a local technical and adult education district ("VTEA"), such as MTAC, and if such training did not supplant already existing programs. In addition, the District would not be eligible for funds if it offered such training utilizing its own personnel.¹

On or about January 23, two "outside" instructors, employed by MATC, began vocational training pursuant to the contract between MATC and the District. These non-bargaining

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Wisconsin Department of Instruction: Pool Fund Guidelines.

unit personnel performed virtually the same duties as bargaining unit personnel in this capacity. MTEA registered objection with the District about non-bargaining unit personnel engaging in the same kind of training traditionally performed by unit personnel. On June 28, MTEA filed a complaint with the Commission, alleging that the District had violated sections 111.70(3)(a)(1) and (4) of MERA by refusing to bargain with MTEA about its decision to contract with MATC.

Pursuant to MTEA's complaint, the examiner issued a decision in which he found that the District's decision to participate in the "Pool Fund Project" was a permissive subject of bargaining. Subjects reserved to management and direction of the District are permissive subjects of bargaining (see section 111.70(1)(d), which basically means that the District is not obligated to bargain with MTEA about such subjects. The examiner concluded that unit personnel were not primarily or adversely affected by that decision, while the District would be primarily and adversely affected if it could not participate in the project. The examiner found that while the District was not required to bargain with MTEA about its contracting decision, it was nevertheless required to bargain with MTEA about the impact of that decision. Because the District had offered to

to so,² he found that MTEA had waived its right to bargain about such impact by failing to respond to the District's offer.

Following the issuance of the examiner's decision, MTEA filed a Petition for Review before the Commission, requesting review of that portion of the examiner's decision that held that MTEA had waived its right to bargain with the District about the impact of the District's contracting decision. MTEA subsequently submitted a brief in which was raised a further issue for review, specifically, the issue of whether the contracting decision itself was a permissive subject of bargaining.

The District filed a motion to strike and/or motion to limit scope of review, which stated objections to MTEA's briefing of an issue not alleged in its Petition for Review. At the request of the Commission, the parties filed additional briefs addressing the merits of the decision bargaining issue. The Commission then found that MTEA was not permitted review of the decision-bargaining issue as a matter of right, and granted the District's motion to strike. The Commission, however, asserted discretionary jurisdiction to review the entirety of the examiner's decision and, by so doing, expanded its review to include the decision-bargaining issue.

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In response to MTEA's objections, the District's executive director had written to MTEA's assistant executive director on May 1, 1984 to suggest a meeting on the subject, to which MTEA did not respond.

The Commission found that the District was required under section 111.70(3)(a)(1) and (4) of MERA to bargain with MTEA about its decision to contract with MATC, contrary to the examiner's initial findings, and that the District had violated the above provisions in failing to do so. The Commission further found that the District had not been shown to have failed to bargain with MTEA about the impact of its contracting decision.

The District filed for review before this Court pursuant to sec. 227.52, Wis. Stats.. Section 227.57 places limits on this Court's scope of review of agency decisions. The section provides in pertinent part:

227.57. Scope of review

. . .

(2) Unless the court finds a ground for setting aside, modifying, remanding or ordering agency action or ancillary relief under a specified provision of this section, it shall affirm the agency's action.

Furthermore, section 227.57(3) provides:

(3) The court shall separately treat disputed issues of agency procedure, interpretations of law, determinations of fact or policy within the agency's exercise of delegated discretion.

Accordingly, this Court will confine its review to grounds specified by the provisions of sec. 227.57 and will give separate consideration to issues of procedure, law, and policy.

Petitioner contends that the Commission committed material procedural error in reviewing and deciding an issue not alleged in MTEA's petition for review. Section 227.57(4) limits this Court's authority to review agency procedure and provides as follows:

(4) The court shall remand the case to the agency for further action if it finds that either the fairness of the proceedings or the correctness of the action has been impaired by a material error in procedure or a failure to follow prescribed procedure.

Therefore, with respect to procedure, this Court may set aside the Commission's decision only if it finds that the Commission committed material error of procedure that impaired the fairness or correctness of the proceedings.

Petitioner contends that the Commission failed to follow its own procedural rules, as set forth in Chapters 10-12 and 20 of the WISCONSIN Administrative Code, in expanding its review to an issue not alleged in MTEA's Petition for Review. Specifically, petitioner alleges that the Commission's expansion of review was contrary to ERB 12.09(2), which reads as follows:

(2) PETITION FOR REVIEW: BASIS FOR AND CONTENTS OF. The petition for review shall briefly state the grounds of dissatisfaction with the findings of fact, conclusions of law and order. . . .

The record indicates, however, that the Commission acted in accordance with ERB 12.09(2), and in fact, granted the District's motion to strike on the grounds that ERB 12.09(2) prohibited MTEA from amending its Petition for Review by introducing a further issue in its brief. The record reads:

"Thus, the relevant Commission rule requires that 'the petition shall briefly state the grounds of dissatisfaction with the findings of fact, conclusions of law and order. . . . [W]e do not find it appropriate to waive the above rule in this case. If we were to agree in these circumstances to waive the rule and address the mandatory/permissive issue as a matter of petitioner's [MTEA] right, the rules requiring the prompt filing of a petition. . . and revelation of the grounds for the request would be effectively rendered meaningless. Thus, we find it appropriate, technically speaking, to grant the District's motion to strike MTEA's attempt to amend its Petition for Review.'" (p.10)

The record clearly fails to support petitioner's allegation of material procedural error subject to remand by this Court under section 227.57(4), Wis. Stats.

Petitioner next submits that the Commission abused its discretion and/or exceeded its statutory authority under section 111.07 in expanding its review to include the decision-bargaining issue. Specifically, petitioner contends that the provisions of sec. 111.07, which set forth the Commission's authority to review Findings and Orders of its own commissioners and examiners upon

written petition by any party in interest, contain no language that authorizes the Commission to review sua sponte findings or orders not contained in the written Petition for Review. This Court is limited in its review of agency exercise of statutory authority and discretion by sec. 227.57(8), which provides as follows:

(8) 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.

Thus, in accordance with sec. 227.57(8), this Court must reverse or remand the Commission's decision and order if it finds that the Commission's decision to review the entirety of the examiner's decision was made outside the bounds of authority delegated to it by section 111.07, Wis. Stats.

Section 111.07(5) provides the following:

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. . . . 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.

The language of sec. 111.07(5) does not explicitly state that the Commission is to confine its review to only that part of the decision or order with which the Petition for Review raises objection. The provision gives the Commission authority to review "the findings or order of a commissioner or examiner," and the Commission may "affirm, reverse, set aside, or modify such findings in whole or in part." (Emphasis supplied) The Court believes this language refers to the examiner's findings or order generally, rather than specifically to those findings objected to in the Petition for Review.

Contrary to petitioner's assertions, the Court is convinced that the legislature intended to give the Commission a wider range of discretion in which to review its examiners' decisions, as evidenced not only by the wording of the statute, but also by the authority given the Commission to take additional testimony on a discretionary basis.

The Court concludes that the absence of the decision-bargaining issue in MTEA's Petition for Review does not preclude the Commission from reviewing the same. The Commission acted within the bounds of its authority as set forth by the provisions of section 111.07, Wis. Stats.

Petitioner lastly contends that even if the Commission

had the authority to review the entire record, it nevertheless failed to properly apply the "balancing test" required to distinguish between mandatory and permissive subjects of bargaining. The supreme court in Unified School District No. 1 of Racine County v. MERC, 31 Wis.2d 89, 259 N.W.2d 724 (1977) characterized mandatory subjects of bargaining under sec. 111.70(1)³ as those "primarily related to the wages, hours and conditions of employment" of bargaining unit personnel; and permissive subjects of bargaining as those "primarily related to the formulation or management of public policy." Id. at 102. All parties agree that the balancing test as set forth in Racine is applicable here.

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111.70 Municipal employment

(1) Definitions. . . .

(d) "Collective bargaining" means the performance of the mutual obligation of a municipal employer, through its officers and agents, and the representatives of its employees, 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. Collective bargaining includes the reduction of any agreement reached to a written and signed document. 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 employees....

This Court, in reviewing agency interpretations of law, is governed by section 227.57(5):

(5) 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.

Although the construction of a statute is a question of law and the Court is not bound by the interpretation given the statute by an administrative agency, the construction and interpretation of the statute adopted by the agency charged with the duty of applying the law is nevertheless entitled to great weight. Milwaukee County v. DILHR, 80 Wis.2d 445, 455, 259 N.W.2d 113 (1977).

"This court does not 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." [Cites omitted]."

Id. at 455-56.

Generally then, the reviewing court should not upset an administrative agency's interpretation of a statute if there exists a rational basis for the interpretation. Wisconsin's Environmental Decade, Inc. v. DILHR, 104 Wis.2d 640, 644, 312 N.W.2d 749 (1981).

More specifically, the rational basis standard of review is the proper standard to apply to the commission's interpretations of whether subjects of collective bargaining are mandatory or permissive. School District of Drummond v. WERC, 121 Wis.2d 126, 133, 358 N.W.2d 285 (1984).

The Commission in this case viewed the District's decision to contract with MATC for vocational services as a mandatory subject of bargaining for several reasons. First, the Commission found that the contracting decision was not primarily related to district policy goals. The Commission reasoned that the District's contracting decision did not affect a change in the type of service offered by the District. Rather, the decision to contract expanded the vocational training program already in existence (as opposed to starting a new one), with the difference that the services were free of cost to the District. The Commission found that the District's contracting decision was therefore economically, rather than policy, related. Contrary to petitioner's contention that the Commission failed to consider the policy dimensions of the District's decision in applying the balancing test, the Commission clearly evaluated the contracting decision's effect on the District's policy goals in determining that the decision was not related to such goals.

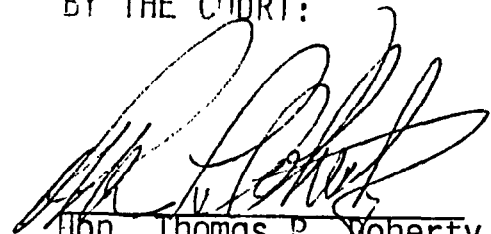
The Commission found instead that the District's contracting decision was primarily related to wages, hours, and conditions of employment of bargaining unit personnel, reasoning that the District's decision affected "future job security of bargaining unit personnel," as well as the "overall integrity of the bargaining unit." This Court finds that there is a rational basis for the Commission's conclusion that the District's contracting decision was a mandatory subject of bargaining. Although more than one rational interpretation of the law could possibly be made, the Court is bound to defer to that of the Commission if a rational basis for it exists. School Dist. of Drummond v. WERC, 121 Wis.2d 126, 135, 353 N.W.2d 285 (1984).

In sum, this Court finds that the Commission's actions in this case were proper. It did not commit procedural error, nor did it exceed its authority under sec. 111.07 or abuse its discretion by reviewing the decision-bargaining issue. In addition, its finding that the District's contracting decision was a mandatory subject of bargaining had a rational basis in the law, and accordingly, the decision and order of the Wisconsin Employment Relations Commission is hereby

AFFIRMED.

Dated this 14th day of August, 1987, at Milwaukee, Wisconsin.

BY THE COURT:



Hon. Thomas P. Voherty
Circuit Court Judge