COURT OF APPEALS
DECISION
DATED AND RELEASED

JUN 2 8 1989

No. 88-2367

STATE OF WISCONSIN IN COURT OF APPEALS
DISTRICT II

LOCAL 913, AFSCME, AFL-CIO,

Plaintiff-Appellant,

v.

WISCONSIN EMPLOYMENT
RELATIONS COMMISSION,
and MANITOWOC COUNTY,

Defendants-Respondents.

Decision No. 23591-B

APPEAL from a judgment and an order of the circuit court for Manitowoc county: DARRYL W. DEETS, Judge. Affirmed.

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

BROWN, P.J. This is an administrative review, pursuant to ch. 227, Stats., of a WERC determination that Manitowoc county's decision to lease a building formerly used by the county as a nursing home and to sell certain intangibles connected with the former use constituted a permissive rather that a mandatory subject of bargaining

between the county and the interested union. The trial court affirmed and we agree.

Manitowoc county signed a lease with a private nursing home operator in which the operator agreed to pay rent for the use of Park Lawn Home and its equipment. The lease contained an option for the operator to purchase certain supplies and also sold the nursing home business--the goodwill of the nursing home.

AFSCME Local 913 represents Manitowoc county's Park Lawn Home employees. It filed a complaint with WERC alleging prohibited practices based on the county having entered the lease arrangement without bargaining with the union. WERC's examiner issued findings of fact, conclusions of law and an order. Included was finding #16, that the lease decision was primarily related to wages, hours and conditions of employment. The examiner concluded that the decision was therefore a mandatory subject of bargaining.

The county petitioned for review by WERC. WERC adopted almost all of the examiner's findings of fact but substituted for finding #16 a finding that the lease decision was primarily related to the formulation or

management of public policy. WERC therefore concluded that the lease decision was a permissive subject of bargaining. Therefore, the county's refusal to bargain was not a prohibited practice. The trial court upheld this decision and the union appeals.

WERC has considerable experience in the area of mandatory and permissive bargaining questions. Therefore, this court will give great weight to WERC's decision and will sustain that decision if there is any rational basis for the determination. School Dist. v. WERC, 121 Wis.2d 126, 133, 358 N.W.2d 285, 288-89 (1984).

Section 111.70(1)(a), Stats., sets forth the legislative delineation between mandatory and nonmandatory subjects of bargaining. See School Dist., 121 Wis.2d at 133, 358 N.W.2d at 289 (citing sec. 111.70(1)(d), Stats. (1981-82), which was renumbered sec. 111.70(1)(a) by 1983 Wis. Act 189). Our supreme court has interpreted the statute as setting forth a "primarily related" standard. This standard requires WERC to determine whether the proposed subject of bargaining is "primarily related" to wages, hours and conditions of employment or to formulation or management of public policy. Id. at 134, 358 N.W.2d at

289. The determination is made on a case-by-case basis, by balancing the competing interests involved. Id. at 135, 358 N.W.2d at 290. If the employees' interests in wages, hours and conditions of employment outweigh the employer's concerns about the restriction of managerial prerogatives or public policy, the proposal is a mandatory subject of bargaining. Id. If management interests in public policy predominate, the matter is not a mandatory subject of bargaining. Id.

Two instructive cases where the balancing test was undertaken are Unified School Dist. No. 1 v. WERC, 81 Wis.2d 89, 259 N.W.2d 724 (1977), and City of Brookfield v. WERC, 87 Wis.2d 819, 275 N.W.2d 723 (1979).

In Unified School Dist. No. 1, the supreme court concluded that a school district's decision to subcontract a school lunch program was primarily related to wages, hours and conditions of employment. Unified School Dist. No. 1, 81 Wis.2d at 103, 259 N.W.2d at 732. The court noted that the district's decision did not change the policies or functions of the school district, but merely substituted private employees for public employees. Id. at 102, 259 N.W.2d at 732. In Brookfield, the supreme court considered

a city's decision to lay off five fire fighters because of budget restraints. The court noted that the citizens of a community have a vital interest in the continued fiscally responsible operation of its municipal services. Brookfield, 87 Wis.2d at 830, 275 N.W.2d at 728. It concluded that economically-motivated layoffs of public employees resulting from budgetary restraints are matters primarily related to the exercise of municipal powers and responsibilities and the integrity of the political process. Id.

The county argues that Brookfield establishes a rule that economically motivated layoff decisions are permissive subjects of bargaining, while the union argues that such a rule only applies when the deciding entity is governed by ch. 62, Stats. We decline to resolve the issue. We deem the question in this case to be whether WERC could rationally find that the county's decision was primarily related to management and direction of the governmental unit. We find that it could and did do so without relying on a "per se" rule.

WERC determined that the critical question here was whether Manitowoc county had gone out of the nursing

home business. This is not a "new" test, as the union characterizes it, wrongly substituted for the "primarily related" test; it is rather a factor in determining the interests to which the county's decision was primarily related.

Our supreme court composed a number of relevant factors in Unified School Dist. No. 1, 81 Wis.2d at 102, 259 N.W.2d at 732. In that case, it considered as relevant factors whether policies and functions of the political entity are affected; whether the same work will be performed in the same manner; and whether services provided by the district will be affected. WERC in this case determined that the most important factor in making the determination of primary relatedness was whether the county's function had changed: was it or was it not stripping itself of the function of health-care provider.

As noted, WERC has substantial experience in determining whether an employer's proposals are mandatory or permissive subjects of bargaining. School Dist., 121 Wis.2d at 133, 358 N.W.2d at 288-89. WERC's expertise is entitled to deference. We consider it part and parcel of WERC's expertise to determine what factor or factors should be

given weight when determining whether a particular decision primarily furthers a political or social goal or value. One virtue of the mandatory case-by-case analysis is that the important factors can be determined for each kind of decision.

The union then argues that the WERC decision does not show a balancing of the respective interests involved, as required by the case law. See West Bend Educ. Ass'n v. WERC, 121 Wis.2d 1, 14-15, 357 N.W.2d 534, 540-41 (1984). We reject this characterization of WERC's decision.

In its decision, WERC repeated the examiner's analysis of the parties' interests; it also included a lengthy exposition of the parties' positions. It isolated what it deemed the most important factor for determining primary relatedness. It equated this factor--the county's stripping itself of the health-care function--to a reduction in the level of services. Reducing the level of services is a policy decision. Brookfield, 87 Wis.2d at 832, 275 N.W.2d at 729. It then struck its own balance between the employees' interests and the policy goals of Manitowoc county. WERC determined that "on balance" the county's decision was permissive; that is, the policy dimensions of a

county's decision to cease providing a service and to strip itself of a function outweighed what WERC acknowledged to be the employees' "substantial" interest in wages, hours and conditions of employment. There is no set formula with which WERC must balance the parties' interests; we think WERC's decision in this case shows the necessary analysis.

The union then argues that the evidence does not support WERC's determination that the county had gotten out of the health-care business. We disagree.

The lease agreement provides a reasonable basis for concluding that the county had in fact changed its function by eliminating a county service. WERC noted that the lease does not limit the use of the facility to nursing home services, and that it does not require that county residents receive preference while the facility is used as a nursing home. Further, it found that the lease provides no role for the county as an operator of the facility. From this, WERC concluded that the function of the county had

changed.[1]

The union characterizes the lease provisions as essentially irrelevant and draws an opposite conclusion from that reached by WERC as to whether the county made a policy decision to change its role. We hold, however, that there is a reasonable basis in the evidence for WERC's conclusion.

By the Court.--Judgment and order affirmed.

Not recommended for publication in the official reports.

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[1]WERC found otherwise under the facts in Brown County v. WERC, 138 Wis.2d 254, 405 N.W.2d 752 (Ct. App. 1987). There, the county subcontracted to a private corporation the operation of its youth home. However, the county remained the employer of personnel, the arrangement with the corporation was a subcontract rather than a lease and sale, and the new operation required the same staff skills as did the old. Id. at 263, 405 N.W.2d at 756. On balance, WERC concluded that the county's subcontracting decision related primarily to wages, hours and conditions of employment.