

February

STATE OF WISCONSIN

CIRCUIT COURT
BRANCH 2

MANITOWOC COUNTY

LOCAL 913, AFSCME, AFL-CIO
PLAINTIFF,

MEMORANDUM DECISION
AFFIRMING THE WISCONSIN
EMPLOYMENT RELATIONS
COMMISSION

VS.

CASE NO. 88 CV 132

WISCONSIN EMPLOYMENT
RELATIONS COMMISSION
DEFENDANT.

Decision No. 23591-B

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WISCONSIN EMPLOYMENT RELATIONS COMMISSION

On March 18, 1986, the County Board approved a leasing arrangement with the "Marlis S. Griffiths Group." On April 29, 1986, the County sent notices to all Park Lawn employees represented by the Union, except for some maintenance employees, that the County was permanently laying them off on June 30, 1986. Evidence in the record supports the position that the decision to lease Park Lawn was for the purpose of removing a major source of liability from the County's budget.

LAW

Section 111.70(1)(d) of the Wisconsin Statutes requires municipal employers to bargain "with respect to wages, hours and conditions of employment". The same section provides employees are not 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."

When subjects relate both to "wages, hours and conditions of employment" and the "management and direction of the governmental unit" the Wisconsin Supreme Court has adopted a "primarily related" standard. West Bend Education Association v. WERC 121 Wis 2d, 1, 8, 357 NW2d 534 (1984). Collective bargaining is mandatory on subjects primarily related to wages, hours or conditions of employment. Bargaining is not mandatory on subjects primarily related to management and direction of the governmental unit.

Both parties cite Unified S.D. #1 of Racine County v. WERC 82 Wis 2d 89, 259 NW2d 724 (1977) and City of Brookfield v. WERC 87 Wis 2d 819, 275 NW2d 723 (1979) as applications of the "primarily related" test. In the Racine case, the Court determined that a school district's decision to sub-contract a school lunch program was a mandatory subject of bargaining because a decision related primarily to the wages, hours and conditions of employment. The Court further noted that the school district's decision did not represent a choice between alternative political goals or values. The school district had simply substituted private employees for public employees with the sub-contracted lunch program.

The Brookfield case involved a layoff of five firefighters due to budget reductions. The Commission decided that this was a mandatory subject of bargaining, but the Wisconsin Supreme Court reversed that decision. The Court noted, as it had

in both the Racine case and in Beloit Education Association v. WERC, 73 Wis 2d 43, 242 NW2d 231 (1976) that the principal limit on the scope of collective bargaining in the public sector is concern for the integrity of the political process. The Court in Brookfield further indicated that a balance must be struck between the public employees bargaining rights and protecting the health and safety of citizens within the framework of the political and legislative process. The Court found that economically motivated lay-offs of public employees as a result of budget restraints are matters primarily related to the exercise of municipal powers and responsibility and to the integrity of the political process of government. Therefore, they were not mandatory subjects of bargaining.

It is the Petitioner's position that in the Brookfield case the Court specifically relies on Chapter 62 of the Wisconsin Statutes in recognizing that the City of Brookfield had the power to lay off 5 firemen. However, the express language in the Court's decision is equally applicable to the County's decision in this case.

We hold that economically motivated layoffs of public employees resulting from budgetary restraints is a matter primarily related to the exercise of municipal powers and responsibilities and the integrity of the political processes of municipal government. The citizens of a community have a vital interest in the continued fiscally responsible operation of its municipal services. Thus, it is imperative that we strike a balance between public employees' bargaining rights and protecting the public health and safety of our citizens within the framework of the political and legislative process.

The determination by the Commission of whether a particular subject is a mandatory subject of bargaining under the Municipal Employees Relation Act is entitled to "great weight" and any "rational basis" will sustain it. School District of Drummon v. WERC 121 Wis 2d, 133, 358 NW 2d 285 (1984) - this deference to the Commission recognizes its "special competence in the area of collective bargaining and... (its) significant experience in deciding cases involving the issue of mandatory bargaining."

COMMISSION DECISION

The Commission in its decision affirmed the Examiner's Findings of Fact 1 - 15 and 17. The Commission reversed the Finding of Fact 16 and substituted the following:

16. The County's decision to discontinue its operation of the Park Lawn Home, effective July 1, 1986, by entering into a lease agreement providing for the sale of the good will and certain intangible personal property and the lease of real estate and tangible personal property, is primarily related to the formulation or management of public policy.

The Examiner in his decision had gone through the balancing of the actually identified substantive interests that are affected by the action in applying the "primarily related" test. The Commission adopted all but one of the Examiner's Findings of Fact. The Commission in essence agreed with the Examiner balancing the interests and applying the "primarily related" test, but simply disagreed with the Examiner's conclusion. The Commission's reasons for disagreeing with the Examiner's conclusion are stated in its decision.

Here the record demonstrates that Section 5.01 of the lease does not limit the use of the leased facility to the operation of a nursing home but rather permits use "for any lawful purpose." The lease does not require that the lessee give any preference to County residents if it continues to operate the premises as a health care facility. Lastly, we are satisfied that the examiner correctly found that the lease effectively removes the County from any role in the operation of the facility. Under these circumstances, where, as here, the term of the lease is of sufficient length.....so as to satisfy us that the transaction does indeed represent a bona fide decision to cease providing the services in question, we conclude that Manitowoc County did indeed get out of the business of being a health care provider through the instant sale/lease transaction. Under Chippewa County and our understanding of the Wisconsin Supreme Court's decision in City of Brookfield, the County need not bargain over such a "level of services" decision despite the substantial impact on employee wages, hours and conditions of employment.

It is clear from the Examiner's decision that while he was applying the "primarily related" test he was weighing exactly the same factors that the Commission weighed in their decision.

"The existence of such a right is not, however, determinative in giving weight to the County's assorted interest because the County did not, in fact, go out in the nursing home business, but rather changed its role in the business from that of owner and operator to that of lessor to lessee/operator.....

"The County accurately points out that Section 5.01 permits MHCS to use the premises for any lawful purpose." The County's relinquishment of some control must be acknowledged, but the significance of the relinquishment must be discounted by the probability that MHCS would exercise the authority granted. As background, it is important to recall that the lease itself contemplates the transfer of an on-going nursing home operation, and thus the right granted in Section 5.01 is speculative and exercisable at some indefinite point in the future.

"At a minimum, then, the County did not give up the operation of a nursing home and Section 5.01, but the possibility that a lessee/operator might at some future point give up that operation. Beyond this, the lease indicates MHCS was dubiously equipped to exercise the choices implicit in Section 5.01.....

"Nothing in the context of the negotiations of the lease offers any persuasive reason to conclude the County offered, or Griffiths, on behalf of MHCS, accepted, anything other than a lease to operate a skilled care nursing facility."

"The County also asserts that it relinquished a day to day control over the home and the ultimate control of the business operation. ... Nevertheless, a series of provisions... establish that the County assured itself of an ongoing nursing facility with the assurance of at least a certain specific level of quality. In addition, while the County asserts MHCS is the owner of a business which, at the expiration of the lease, could be removed from the County owned facility, the fact remains that in leaving the facility the newly formed corporation would take perishable items, employees, patients and intangible items such as the home's name, and would leave behind equipment valued at \$286,165 and a facility with a "depreciated replacement cost" in December of 1985 apparently in excess of \$2,000,000. It is apparent, then, that while the County withdrew its presence as a day to day operator of the business, it retained a substantial presence as a lessor and the provision of nursing home services. Without such a presence, MHCS could not have agreed to capitalize itself as it did yet operate a significant facility.

The Examiner and the Commission used the same analysis and both applied the "primarily related" test. The Examiner and the Commission simply reached different conclusions. The record in this case provides a "rational basis" for the Commission's conclusion.

CONCLUSION

The Court finds based on the record, that the Commission could reasonably conclude that the County's decision to discontinue operation of Park Lawn Home by selling the good will and certain intangible assets, and by leasing its real estate and tangible personal property, was not a mandatory subject of bargaining.

Therefore, this Court affirms the decision of the Commission.

Dated this 4th day of November, 1988

/s/ Darryl W. Deets

Darryl W. Deets
Circuit Judge