STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

RACINE EDUCATION ASSOCIATION,

Complainant,

vs.

RACINE UNIFIED SCHOOL DISTRICT,

Respondent.

Case 110
No. 40056 MP-2064
Decision No. 25283-B

Appearances:
Schwartz, Weber, Tofte & Nielsen, Attorneys at Law, by Mr. Robert K. Weber, 704 Park Avenue, Racine, Wisconsin 53403, appearing on behalf of Complainant.
Melli, Walker, Pease & Ruhly, S.C., Attorneys at Law, by Mr. Jack Walker and Ms. Carol Gapen, Suite 600, 119 Martin Luther King Jr. Boulevard, P.O. Box 1664, Madison, Wisconsin 53701, appearing on behalf of Respondent.

ORDER AFFIRMING AND MODIFYING EXAMINER'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Examiner Raleigh Jones having on October 12, 1988, issued Findings of Fact, Conclusions of Law and Order with Accompanying Memorandum in the above-entitled matter wherein he dismissed the complaint filed by the Racine Education Association alleging that the Racine Unified School District had committed certain prohibited practices by conduct related to the elimination of the position of Area Coordinator; and the Association having timely filed a petition with the Commission seeking review of the Examiner's decision; and the parties having filed written argument in support of and in opposition to the petition for review, the last of which was received on February 22, 1989; and the Commission having reviewed the matter and being fully advised in the premises, makes and issues the following

ORDER 1/

That the Examiner's Findings of Fact, Conclusions of Law and Order are hereby affirmed with the exception of Finding of Fact 10 which is set aside and Finding of Fact 12 which is modified to read:

1/ Pursuant to Sec. 227.48(2), Stats., the Commission hereby notifies the parties that a petition for rehearing may be filed with the Commission by following the procedures set forth in Sec. 227.49 and that a petition for judicial review naming the Commission as Respondent, may be filed by following the procedures set forth in Sec. 227.53, Stats.

227.49 Petitions for rehearing in contested cases. (1) A petition for rehearing shall not be prerequisite for appeal or review. Any person aggrieved by a final order may, within 20 days after service of the order, file a written petition for rehearing which shall specify in detail the grounds for the relief sought and supporting authorities. An agency may order a rehearing on its own motion within 20 days after service of a final order. This subsection does not apply to s. 17.025(3)(e). No agency is required to conduct more than one rehearing based on a petition for rehearing filed under this subsection in any contested case.

(Footnote 1/ continued on page 2)

That the District's decision to eliminate the Area Coordinator position was primarily related to educational policy and the management and direction of the school system; that the District's actions did not have a reasonable tendency to interfere with, restrain or coerce employes in the exercise of their Sec. 111.70(2), Stats. rights; and that the District's actions were not motivated in whole or in part by animus toward the Union or the Sec. 111.70(2), Stats., activity of employes.

Given under our hands and seal at the City of Madison, Wisconsin this 24th day of May, 1989.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By ______________________________
S. H. Schoenfeld, Chairman

____
Herman Torosian, Commissioner

____
A. Henry Hempe, Commissioner

1/ continued

227.53 Parties and proceedings for review. (1) Except as otherwise specifically provided by law, any person aggrieved by a decision specified in s. 227.52 shall be entitled to judicial review thereof as provided in this chapter.

(a) Proceedings for review shall be instituted by serving a petition therefore personally or by certified mail upon the agency or one of its officials, and filing the petition in the office of the clerk of the circuit court for the county where the judicial review proceedings are to be held. Unless a rehearing is requested under s. 227.49, petitions for review under this paragraph shall be served and filed within 30 days after the service of the decision of the agency upon all parties under s. 227.48. If a rehearing is requested under s. 227.49, any party desiring judicial review shall serve and file a petition for review within 30 days after service of the order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. The 30-day period for serving and filing a petition under this paragraph commences on the day after personal service or mailing of the decision by the agency. If the petitioner is a resident, the proceedings shall be held in the circuit court for the county where the petitioner resides, except that if the petitioner is an agency, the proceedings shall be in the circuit court for the county where the respondent resides and except as provided in ss. 77.59(6)(b), 182.70(6) and 182.71(5)(g). The proceedings shall be in the circuit court for Dane county if the petitioner is a nonresident. If all parties stipulate and the court to which the parties desire to transfer the proceedings agrees, the proceedings may be held in the county designated by the parties. If 2 or more petitions for review of the same decision are filed in different counties, the circuit judge for the county in which a petition for review of the decision was first filed shall determine the venue for judicial review of the decision, and shall order transfer or consolidation where appropriate.

(b) The petition shall state the nature of the petitioner's interest, the facts showing that petitioner is a person aggrieved by the decision, and the grounds specified in s. 227.57 upon which petitioner contends that the decision should be reversed or modified.

(Footnote 1/ continued on page 3)

1/ continued

. . .

(c) Copies of the petition shall be served, personally or by certified mail, or, when service is timely admitted in writing, by first class mail, not later than 30 days after the institution of the proceeding, upon all parties who appeared before the agency in the proceeding in which the order sought to be reviewed was made.

Note: For purposes of the above-noted statutory time-limits, the date of Commission service of this decision is the date it is placed in the mail (in this case the date appearing immediately above the signatures); the date of

filing of a rehearing petition is the date of actual receipt by the Commission; and the service date of a judicial review petition is the date of actual receipt by the Court and placement in the mail to the Commission.

MEMORANDUM ACCOMPANYING ORDER AFFIRMING AND MODIFYING EXAMINER'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The Examiner's Decision

Citing Oak Creek Franklin Joint School District, Dec. No. 11827-D, E (WERC, 9/74) aff'd (CirCt Dane, 11/75) and Milwaukee Board of School Directors, Dec. No. 20093-A (WERC, 2/83), the Examiner concluded that the District's decision to eliminate the position of Area Coordinator was primarily related to the educational policy and to the organizational structure which the District believed to be most appropriate. Thus, the Examiner concluded the decision was a permissive subject of bargaining. He therefore found that the District had no duty to bargain with the Union as to said decision and that the District therefore did not commit any prohibited practices by unilaterally eliminating the Area Coordinator position. As to the issue of whether the District had refused to bargain over the impact of the decision to eliminate the Area Coordinator position, the Examiner found that the Union had waived its right to so bargain because it never submitted any proposals to the District with respect to impact issues despite the District's professed willingness to bargain over such matters.

As to the Union's contention that the District engaged in bad faith bargaining when it refused to reinstate the Area Coordinator position following ratification of a new labor agreement, the Examiner concluded that the Union knew or should have known that the new contract did not reestablish the position in dispute and that there was no evidence in the record of any intent by the District to lead the Union to believe to the contrary. Given the foregoing, the Examiner concluded that the new contract did not require reinstatement of the Area Coordinator position and that the District did not act in bad faith when it failed to reinstate said position.

As to the Union contention that the District committed prohibited practices by requiring unit employes to assume certain responsibilities previously performed by the Area Coordinators, the Examiner concluded that the District had the right to unilaterally assign such duties to teachers because they were fairly within the scope of a teacher's employment.

Given the foregoing, the Examiner dismissed the Union's prohibited practice complaint.

POSITIONS OF THE PARTIES

The Union

The Union initially argues that the Examiner erred when he concluded that the District did not breach its duty to bargain obligation to maintain the status quo during a contractual hiatus by unilaterally eliminating 50 middle school Coordinator positions in July, 1987. The Union asserts that the Oak Creek and Milwaukee cases relied upon by the Examiner held only that the decision to create positions is a permissive policy decision and thus are not necessarily applicable to position elimination. Assuming arguendo that the elimination of a position is generally found to be permissive, the Union contends that the distinctive facts of this case nonetheless compel a finding herein that the District should have bargained with the Union.

In this regard, the Union asserts that because the elimination of the positions resulted in a reduction in the wages received by 50 unit employes, the elimination decision primarily relates to wages and thus is a mandatory subject of bargaining. The Union contends that unilateral wage reductions are generally prohibited; that the positions in question had been included in successive bargaining agreements for 18 years; that the elimination saved the District $40,000; that the timing of the elimination just prior to the 1987-1988 school year prevented the employes who held Area Coordinator positions from bidding on other extra-duty jobs; and that the District reassigned the Coordinator duties to other unit members who had not previously performed same. The Union also alleges that at the time the positions were eliminated, both parties' interest arbitration offers listed the Area Coordinator position under the heading of "Compensable Extra Duty Responsibilities." The Union argues that pursuant to ERB 32.10, said proposals were deemed mandatory subjects of bargaining because neither party challenged them as being permissive during the declaratory ruling proceeding which followed submission of final offers. The Union contends that the District should not be permitted to, in essence, modify its Area Coordinator proposal by eliminating the position when the District would not have been allowed to unilaterally modify its proposal in the interest arbitration process.

Under the foregoing circumstances, the Union argues that the decision to eliminate the Area Coordinator positions was a mandatory subject of bargaining. The Union notes that it cannot reasonably be argued that it waived any rights to bargain over the decision. In this regard, the Union notes that its bargaining demand clearly referenced the District's decision while the District's response only indicated a willingness to bargain over the impact of the decision.

The Union also argues that the District engaged in bad faith bargaining when it failed to reestablish the Area Coordinator positions upon ratification of a successor agreement in October, 1987. The Union contends that the Examiner erroneously concluded that reference to the Area Coordinator position did not mandate existence of the position. The Union argues that in light of the Union's reaction to the position's elimination, the District knew or should have known that ratification of an agreement would obligate the District to reinstate the positions. Thus, the Union argues that the District's conduct was an intentional frustration of the bargaining process violative of Sec. 111.70(3)(a)4, Stats.

In conclusion, the Union asserts that the Commission must reverse the Examiner whose decision will permit an employer to unilaterally reduce wages in a manner inconsistent with both its pending, certified final offer and ratification of a contract whose provisions reference the eliminated positions.

The District

The District asserts the Examiner correctly concluded that the decision to eliminate the Area Coordinator position was a permissive subject of bargaining. It argues that the Examiner properly relied upon Oak Creek and Milwaukee inasmuch as decisions regarding elimination of positions, like decisions involving position creation, are primarily related to management determinations regarding the most appropriate organizational structure and the best allocation of teacher time and energy. The District contends that it eliminated the Area Coordinator position to provide the best organizational structure within which to use more limited resources. By reallocating teacher time and effort, the District asserts it could spend the $40,000 saving on other programs deemed more necessary. Thus, the District, citing City of Brookfield, 87 Wis.2d 819 (1979) argues that position elimination decisions, like economically motivated layoff decisions, are permissive even though employes may be economically harmed.

The District contends that inclusion in the parties' final offers of extra curricular compensation for the Area Coordinator is irrelevant to the case at hand. Citing City of Eau Claire, Dec. No. 22795-A (WERC, 1/86), the District argues that as the duty to maintain the status quo only applies to disputes subject to interest arbitration and as the parties did not have a dispute over Area Coordinator compensation because their offers were identical, the District had no obligation to maintain the status quo as to the Area Coordinator position.

The District alleges that the elimination of the Area Coordinator position did not result in the assignment of additional duties to teachers because teachers were only asked to perform functions which they had performed in the past. However, the District nonetheless advised the Union that it was willing to bargain over the impact of the elimination of the Area Coordinator position. The District asserts the Examiner properly found that the Union's failure to respond to the District's offer to bargain constituted waiver by inaction of any impact bargaining rights. The District, citing Racine Unified School District, Dec. No. 18810-A (WERC, 7/82) also argues that the Union's failure to act also should act as a waiver of any right to claim that the District should have bargained over the decision itself. In the alternative, the District contends that the Union did bargain over the impact of the decision when it bargained a raise for all teachers, including former Area Coordinators, knowing that the District had eliminated the position.

The District urges affirmance of the Examiner's conclusion that ratification of a successor agreement did not obligate the District to reinstate the Area Coordinator position and that the District was thus not guilty of bad faith bargaining. When viewed in the context of the Union's knowledge of the position's elimination, the District's offer to bargain over the impact of same, and silence from the Union, the District asserts that the contractual inclusion of a pay rate for Area Coordinators does not show intent to reinstate the position.

Given the foregoing, the District requests that the Commission affirm the Examiner's decision.

DISCUSSION

The record establishes that in July, 1987, during a hiatus between bargaining agreements, the District unilaterally eliminated the Area Coordinator position. Whether the District's action constituted a modification of the status quo the District was obligated to maintain during the contractual hiatus, and thus was a breach of the duty to bargain with the Union, is determined by whether the decision primarily related to wages, hours and conditions of employment or to educational policy and/or school management and operation.

As the Examiner and the parties have noted, in Oak Creek and Milwaukee we concluded that the decision by a school district to establish a position was a permissive subject of bargaining primarily related to educational policy and the organizational structure deemed most appropriate to meet educational policy goals. If we were to conclude that a school district could not unilaterally decide to eliminate positions 2/ it had unilaterally decided to create, we would be concluding that a school district, once having unilaterally made a policy decision, could not unilaterally alter that policy decision in the future. While we are cognizant of the economic impact which elimination of the position had upon those unit employes holding the area coordinator positions, we conclude, on balance, that the decision primarily relates to educational policy and organizational structure determinations.

The Union argues that even if we determine that the foregoing is a generally applicable statement of the law, the specific interest arbitration context within which the elimination of positions occurred mandates a different result in this case. Specifically, the Union asserts that where, as here, both parties' final offers are pending before the interest arbitrator and are deemed by operation of Sec. 111.70(4)(cm)6.a. Stats., and ERB 31 to be mandatory subjects of bargaining not subject to unilateral alteration, and where, as here, both parties' final offers establish compensation levels for an Area Coordinator position, the District must not be allowed to unilaterally eliminate the Area Coordinator position because such action is inconsistent with the interest arbitration law and the overall purposes of the Municipal Employment Relations Act.

The Union's argument recited above assumes that the parties' final offers obligated the District to maintain the Area Coordinator position. We need not 3/ determine whether the Union is correct in its assumption. Absent

---

2/ Of course, as noted by the Examiner in his footnote 11, if an employer chooses to bargain over retention of positions and contractually obligates itself to maintain a position, it cannot eliminate same without violating the contract. Here, no contract was in existence when the District acted and we have found that the District's action did not violate its duty to bargain status quo obligations.

3/ The parties ultimately reached a voluntary agreement on a new contract which, like both parties' final offers, contained a provision listing the Area Coordinator position on a schedule of "Compensable Extra Duty Responsibilities." As the Union has filed a grievance seeking reinstatement of the Coordinator position and as we run the risk of usurping the arbitral function if we interpret the final offers/contract, it is not only unnecessary but also undesirable for us to determine the validity of the Union's assertion. Thus, we, unlike the Examiner, make no determination as to whether the District's decision was a "change" from its final offer and have set aside Examiner's Finding of Fact 10 wherein he interprets the final offer/contract.

contractual limitations, an employer can act unilaterally as to permissive subjects of bargaining. We have earlier concluded that the decision to eliminate the Area Coordinator position was permissive. Parallel final offers or even tentative agreements do not constitute a binding contract between the parties unless the parties have a specific agreement to the contrary. 4/ No such agreement is found in the record. Thus, even assuming arguendo that the parties' final offers both obligated the District to maintain the Area Coordinator position, the District was free to act during the contractual hiatus in a manner contrary to its offer because its decision was a permissive subject of bargaining. Given the foregoing, we reject this Union argument.

We now turn to the Union argument that the District engaged in bad faith bargaining when it failed to reinstate teachers to Area Coordinator positions upon ratification of the contract despite the District's knowledge that the Union expected reinstatement and that the contract required such action. Even assuming arguendo that the Union is correct that the contract does mandate reinstatement of the teachers to the Area Coordinator positions, 5/ the Union's allegation of bad faith bargaining must be rejected.

For the Union to prevail, it must, among other matters, establish through competent evidence of record that the District gave direct or implied reinstatement assurances to the Association during bargaining.

But the record reveals only one communication from the District to the Association following the District's elimination of the positions (and the Association's protest). This communication consisted of Johnson's August 19 letter to Weber indicating the District's willingness to bargain the impact of its elimination action, but contained nothing which could be reasonably construed as reinstatement reassurances, direct or implied.

Thereafter, it appears that both parties chose merely to rely on what was later overtly revealed to be their respective differing views of the disputed contract language. Although each party may well have suspected the other had a different interpretation of the language in issue, neither chose to share or explore such suspicion with the other when they ultimately settled the contract.

On this state of the record, we are constrained to find only that the parties herein now have a good faith disagreement as to the meaning of ratified contract language.

As to the Union's assertion that the District violated its duty to bargain when, during the term of the 1987-89 contract, it unilaterally assigned certain teachers certain responsibilities previously performed by the Area Coordinator, the Examiner found no violation because any duties so assigned were fairly within the scope of a teacher's employment. In light of his conclusion, he deemed it unnecessary to resolve the parties' disagreement over whether any such reassignment had actually occurred. We concur with the Examiner's analysis and affirm same.

Lastly, as to the Examiner's determination that the Union by inaction waived its right to bargain over the impact of the District's decision to eliminate the Area Coordinator position, we affirm same. The focal point of the parties' dispute was the duty to bargain over the decision to eliminate the Area

---

4/ See Sauk County, Dec. No. 22552-B (WERC, 6/87); aff'd (CtApp IV) 148 Wis.2d 392 (1988).

5/ As noted earlier in Footnote 3, we have set aside the Examiner's Finding of Fact 10 in which he interprets the contract. We have also modified Examiner's Finding of Fact 12 to include the appropriate ultimate Findings.

Coordinator position. Through Weber's August 1987 letter, the Union, contrary to Examiner's Footnote 13, asked the District to bargain both the decision and the impact. The District's response to Weber's letter reflected a willingness to bargain over the impact of the decision but not the decision itself. The Union thereafter made no proposals to the District. Under said circumstances, a finding of waiver by inaction is appropriate.

Dated at Madison, Wisconsin this 24th day of May, 1989.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By ______________________________
S. H. Schoenfeld, Chairman

____
Herman Torosian, Commissioner

____
A. Henry Hempe, Commissioner

sh
H1210H.01