STATE OF WISCONSIN : CIRCUIT COURT BRANCH I : OUTAGAMIE COUNTY

Case No. 87 CV 00871

OUTAGAMIE COUNTY,

Petitioner,

-vs-

DECISION

WISCONSIN EMPLOYMENT RELATIONS COMMISSION,

Respondent.

Decision No. 25484-A

On September 4, 1986, Outagamie County, pursuant to Sec. 111.70(4)(b), Stats., requested a declaratory ruling from the Wisconsin Employment Relations Commission as to whether a proposal submitted by Local 980, AFSCME, AFL-CIO was a mandatory subject of colletive bargaining. Local 980, in its capacity as Union representative of certain County employees employed at the Outagamie County Health Center, had submitted the following proposal:

> "The Employer agrees that it will not sell or otherwise transfer the operation of the Health Care Center to another employer unless the new employer agrees to assume the existing collective bargaining agreement as a part of the transfer agreement".

The County asserted that the proposal was a permissive subject of bargaining rather than mandatory and as such the County was not obligated to bargain over the proposal.

On April 21, 1988, the Commission dismissed the County's petition because there was no longer a dispute within the meaning

of Sec. 111.70(4)(b). AFSCME filed a petition on April 26, 1988 under 227.41 and on May 31, 1988 the WERC issued a declaratory ruling that the proposal was a mandatory subject of bargaining.

On June 29, 1988 petitioner filed a Petition for Review pursuant to Sec. 227.53 for judicial review by this Court of the WERC decision.

When the legislature charges an administrative agency to apply and enforce a particular statute, as it has with the Wisconsin Employment Relations Commission and Sec. 111.70, Wis. Stats., the agency's construction and interpretation of the statute is entitled to great weight and must be affirmed if there is any rational basis to support it. School District of Drummond v. WERC, 121 Wis. 2d 126, 132-133, 358 N.W.2d 285 (1984).

Wis.Stats. 111.70(1)(a) provides:

> "Collective bargaining" means the performance of the mutual obligation of a municipal employer, through its officers and agents, and the representatives of its employes, to meet and confer at reasonable times, in good faith, with respect to wages, hours and conditions of employment, except as provided in s. 40.81(3), 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 employes. In creating this subchapter the legislature recognizes that the public employer must exercise its powers and responsibilities to act for the government and good order of the municipality, its commercial benefit and

basis standard to WERC's "primarily-related" decision and balancing of competing interests.

If WERC fails to apply the balancing test, the Court need not defer to WERC's ruling. West Bend Education Ass'n v. WERC, 121 Wis. 2d 1, 15, 357 N.W.2d 534 (1984). It is clear from this record that WERC applied the required balancing test. WERC's Findings of Fact, Conclusions of Law and Declaratory Ruling on pages 7 and 8 of its decision states:

> [W}e turn to the balancing of the relationship of the proposal to management and public policy interests against the relationship of the proposal to wages, hours and conditions of employment. As the County correctly notes, we have concluded that in at least some circumstances a municipal employer need not bargain with the union over a decision to sell a health care facility to a private employer because the sale represents a policy choice by the municipal employer to cease providing health care services. However, contrary to the County's assertion, we do not find that this proposal prevents the County from making such a decision. The proposal only requires that if the County elects to sell or transfer the facility to a party who will continue to operate the facility to provide health care, the new employer will assume any existing contract. The County exhibit consisting of a letter from a potential purchaser indicating a disinterest in assuming the labor agreement reflects only the predictable views of a buyer in a potential transaction who seek to maximize their own flexibility upon purchase. On the other hand, the proposal has a strong relationship to employe wages, hour and conditions of employment in that it seeks to protect wages, hours, job security provisions, etc., which exist at the time of the sale or transfer. Given the foregoing, we conclude that the proposal primarily relates to wages, hours and conditions of employment and is not "so intertwined" with any management or public policy interests that it should nonetheless be held permissive under Milwaukee Sewerage.
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> Our conclusion herein is analygous to our rejection in Racine Unified School District, Dec. No. 20653-A (WERC, 1/84) aff'd CTApp II (3/86) unpublished, and School District of Janesville, Dec. No. 21466 (WERC, 3/84) unpublished, and School District of Janesville,

> the health, safety and welfare of the public to assure orderly operations and functions within its jurisdiction, subject to those rights secured to public employes by the constitutions of this state and of the United States and by this subchapter. [Emphasis added]

Many potential union proposals have aspects that touch on both management and government decisions and affect the wages, hours and conditions of employment for employees. The language of 111.70(1)(a) recognizes the tension between these dual roles of a municipal employer. To resolve these conflict situations, our Supreme Court has set out the "primarily-related" standard:

> The standard requires WERC in the first instance (and a court on review thereafter) to determine whether the proposals are "primarily related" to wages, hours and conditions of employment, to educational policy and school management and operation, to management and and direction of the school system or to formulation or management of public policy. [Citation omitted] This court has construed "primarily" to mean "fundamentally," "basically," or "essentially." West Bend Education Ass'n v. WERC, 121 Wis. 2d 1, 89, 357 N.W. 2d 534 (1984).

This "primarily-related" standard, applied on a case-by-case basis, requires a balancing test, balancing the competing interests of the municipal employer, the employers and the public:

> If the employees' legitimate interest in wages, hours and conditions of employment outweighs the employer's concerns about the restriction on managerial prerogatives or public policy, the proposal is a mandatory subject of bargaining. In contrast, where the management and direction of the school system or the formulation of public policy predominates, the matter is not a mandatory subject of bargaining.
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> Id. at 9.

Therefore, in any review of the WERC's decision whether the subject matter of a proposal is mandatorily or permissibly bargainable, the court must apply the great weight--any rational

> Dec. No. 21466 (WERC, 3/84) of employer arguments that a wage proposal is nonetheless permissive because it may serve to inhibit the employer from making educational policy choices as to class size or employe activities during the workday. As we noted in those decisions, virtually any wage or other mandatory proposal can impact on management and policy choices. Such impact arguments go to the merits and reasonableness of the proposal not its mandatory or permissive status. The statutory scheme leaves judgments as to the merits of a proposal to the bargaining table and, if necessary, to the interest arbitration process where factors such as the comparability and the impact which implementation of the proposal would have upon the welfare of the public come into play.

No one denies that this proposal restricts the County's ability to sell the Health Care Facility. Certainly, the universe of potential buyers is restricted by this provision but that universe still includes buyers, public or private, willing to accept the facility with such a condition. WERC balanced that restriction on the County against the proposal's substantial relationship to wages, hours and conditions of employment and the impact on the employees finding the proposal to primarily relate to wages, hours and conditions of employment.

Both sides discuss the Chippewa County case, Decision No. 25003 (WERC 11/87) which can be distinguished from this case on two grounds. First, the union proposal in that case involved a much more significant restriction on the County's ability to sell its Health Care facility. That proposal, found to be a permissive subject of bargaining, provided:

> The County agrees, that it will not contract, lease, or sell to the Chippewa County Health Care Center or any of its property or physical plant to be used for the same purpose or for a purpose similar to that for which it is being used for the same purpose or for a purpose similar to that for which it is being used presently;

> nor contract, lease, sell, or otherwise assign the responsibilities to care for the patients and residents thereof.

Not only is this proposal a more intrusive restriction on the County's ability to sell its Health Care facility, it may also be distinguished because the WERC decisions on that and a companion case failed to apply the balancing test and were remanded back to WERC for that purpose.

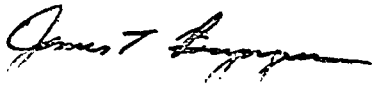
Two other points should be made. First, the determination that a proposal is a mandatory subject of bargaining does not mean that proposal will become part of the collective bargaining agreement, only that the proposal will be a subject of bargaining. Also, as WERC points out on page 7, footnote 17 of its decision:

> We note that the successor's obligation to honor the contract would end when the contract expired by its terms and thus that the length of time a successor would be a party to the contract would depend upon the timing of the purchase/lease. Upon expiration of the contract, the successor's obligation to maintain the status quo would obviously not include any duty to honor any portions of the contract which were permissive subjects of bargaining.

This Court, finding that WERC's decision should be accorded great weight and that its conclusion that the proposal is primarily related to wages, hours and conditions of employment is buttressed by evidence in the record of a balancing of the competing interests of the municipal employer, the employees and the public, AFFIRMS WERC's finding that the proposal is a mandatory subject of bargaining.

Dated at Appleton, Wisconsin this 6th day of January, 1989.

BY THE COURT:



JAMES T. BAYORGEON, CIRCUIT JUDGE BR.I
OUTAGAMIE COUNTY, WISCONSIN