STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of GREENFIELD SCHOOL DISTRICT Requesting a Declaratory Ruling Pursuant to Section 111.70(4)(b), Wis. Stats., Involving a Dispute Between Said Petitioner and LOCAL NO. 2, MILWAUKEE DISTRICT COUNCIL 48, AFSCME, AFL-CIO	Case 99 No. 42984 DR(M)-466 Decision No. 26427

Appearances:
von Briesen and Purtell, S.C., Attorneys at Law, by Mr. James R. Korom, 411 East Wisconsin Avenue, Suite 700, Milwaukee, Wisconsin 53202-4470, for the District.
Podell, Ugent & Cross, S.C., Attorneys at Law, by Ms. Nola J. Hitchcock Cross, 207 East Michigan Street, Milwaukee, Wisconsin 53202, for the Union.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECLARATORY RULING

The Greenfield School District having on October 19, 1989, filed a petition with the Wisconsin Employment Relations Commission seeking a declaratory ruling pursuant to Sec. 111.70(4)(b), Stats., as to the District's duty to bargain with Local No. 2, Milwaukee District Council 48, AFSCME, AFL-CIO, over certain bargaining proposals; and the parties thereafter having engaged in a partially successfully effort to narrow the scope of their dispute; and the parties having waived hearing and filed written argument as to the proposals which remain in dispute, the last of which was received by the Commission on February 5, 1990; and the Commission having considered the matter and being fully advised in the premises, makes and issues the following

FINDINGS OF FACT

1. That the Greenfield School District, herein the District, is a municipal employer having its principal offices at 3200 West Barnard Avenue, Greenfield, Wisconsin 53221.

2. That Local No. 2, Milwaukee District Council 48, AFSCME, AFL-CIO, herein the Union, is a labor organization which functions as the collective bargaining representative of certain maintenance and custodial employes of the District and has its principal offices at 3427 West Saint Paul Avenue, Milwaukee, Wisconsin 53208.

3. That during collective bargaining between the parties, a dispute arose as to whether the District was obligated to bargain over certain Union proposals; and that a dispute continues to

exist between the parties as to the District's duty to bargain over the following proposals:

1. New article - Jurisdiction. No work historically performed or hereafter assigned to members of the bargaining unit shall be subcontracted, transferred or conveyed in whole or in part to outside firms where the resultant effect is a reduction in pay or layoff of existing employees or weakening the union.

2. Article IV (C) (3). When vacant positions are determined to be filled by the school district and prior to new hiring, laid off employees shall be recalled in reverse order of layoff provided the laid off employee

is capable of performing the responsibilities of the available position.

4. That the subcontracting proposal set forth in Finding of Fact 3 primarily relates to the management and direction of the District.

5. That the recall proposal set forth in Finding of Fact 3 primarily relate to wages, hours and conditions of employment.

Based upon the above and foregoing Findings of Fact, the Commission makes and issues the following

CONCLUSIONS OF LAW

1. That the subcontracting proposal set forth in Finding of Fact 3 is a permissive subject of bargaining within the meaning of Sec. 111.70(1)(a), Stats.

2. That the recall proposal set forth in Finding of Fact 3 is a mandatory subject of bargaining within the meaning of Sec. 111.70(1)(a), Stats.

Based upon the above and foregoing Findings of Fact and Conclusion of Law, the Commission makes and issues the following

DECLARATORY RULING 1/

1. That the District and the Union have no duty to bargain within the meaning of Sec. 111.70(3)(a)4, Stats. as to the subcontracting proposal set forth in Finding of Fact 3.

2. That the District and the Union have a duty to bargain within the meaning of Sec. 111.70(3)(a)4, Stats. as to the recall proposal set forth in Finding of Fact 3.

Given under our hands and seal at the City of Madison, Wisconsin this 17th day of April, 1990.

WISCONSIN EMPLOYMENT RELATIONS

COMMISSION

By A. Henry Hempe /s/
A. Henry Hempe, Chair

Herman Torosian /s/
Herman Torosian, Commissioner

William K. Strycker /s/
William K. Strycker, Commissioner

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,

(Footnote 1/ continued on page 3)

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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.

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.

. . .

(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 FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECLARATORY RULING

The parties remain at odds over two proposals as to which the District asserts it has no duty to bargain. We proceed to a resolution of that dispute.

THE SUBCONTRACTING PROPOSAL

The clause in question states:

> 1. New article - Jurisdiction. No work historically performed or hereafter assigned to members of the bargaining unit shall be subcontracted, transferred or conveyed in whole or in part to outside firms where the resultant effect is a reduction in pay or layoff of existing employees or weakening the union.

Positions of the Parties

The District notes that the Union's proposal covers the subcontracting of work "historically performed or hereafter assigned." The District contends that the "hereafter assigned" language is too broad. It argues that, in the future, it may assign work to bargaining unit employes which primarily relates to the implementation of management policy decisions. For example, the District asserts that participative management programs, quality circles, etc. are viewed by many to be effective management techniques. Development of such a program could result in the participation of bargaining unit employes in the development of management policy. However, the District asserts that once assigned, such responsibilities could not thereafter be withdrawn or subcontracted under the clause proposed by the Union. Citing School District of Franklin, Dec. No. 21846 (WERC, 7/84), the District argues that in this respect the proposal is permissive because it primarily relates to the effectuation of management policy.

In response to the Union's argument that the District has no right to assign such management functions to employes because such duties are not "fairly within the scope" of the employe's job responsibilities, the District acknowledges that the Union may well demand to bargain over the assignment of such responsibilities and that an employe may have the right to refuse to perform such duties. However, the District asserts that an employe may voluntarily agree to perform such responsibilities, that under such circumstances the duties would then be "assigned" within the meaning of the clause, and that subsequent subcontracting would be prohibited. Thus, the District contends that the Union's argument does not provide a basis upon which this aspect of the clause can be found to be a mandatory subject of bargaining.

The District also contends that inclusion of the phrase "weakening the union" renders this proposal a permissive subject of bargaining. The District argues that the "weakening the union" standard seeks to protect the Union as an institution instead of the individual employes. Citing Milwaukee Federation of Teachers

v. WERC, 83 Wis.2d 588 (1978), the District alleges that merely because a proposal seeks to make the Union as an institution stronger does not make the proposal mandatorily bargainable. The District contends that the "weakening the union" standard is more than a contractual expression of the statutory prohibition against taking action with a purpose or intent to weaken the Union and would presumably be the basis for a challenge to any District exercise of its subcontracting rights. Thus, the District argues that even where the unintentional or indirect effect of the District's subcontracting decisions may weaken the Union, the District would be precluded from subcontracting under this proposal.

The District also asserts that the "weakening the union" standard is virtually impossible to apply and would give arbitrators broad latitude to strike down and reverse a variety of management policy decisions.

Given all of the foregoing, the District asserts that this portion of the subcontracting proposal is also a permissive subject of bargaining.

The Union contends that absent evidence that subcontracting represents "a choice among alternatives social or political goals or values," the Commission must hold that a proposal to preclude subcontracting of bargaining unit work is a mandatory subject of bargaining. Unified School District No. 1 of Racine County v. WERC, 81 Wis.2d 89 (1977). The Union acknowledges that where, unlike here, the record shows that "work historically performed" by bargaining unit employes includes the formulation or management of public or educational policy, a proposal prohibiting the subcontracting of such work is a permissive subject of bargaining. Here, the Union asserts that none of the work performed by bargaining unit members includes anything close to the formulation or management of public or educational policy. Thus, the Union contends that the only dispute is over the future assignment of work which would not be "fairly within the scope" of unit employes' jobs and thus cannot be unilaterally assigned by the District. Under such circumstances, the Union contends that its subcontracting proposal is a mandatory subject of bargaining.

As to the District's objection to the "weakening the union" language in the subcontracting proposal, the Union reiterates that the District can only avoid bargaining over subcontracting when the decision to subcontract represents a choice among alternatives social or political goals or values. The Union asserts that it is difficult to imagine situations where a decision to contract out janitorial and maintenance work would represent such a choice. The Union argues that if a subcontracting decision did represent such a choice, such sub-contracting would not result in "weakening the union." On the other hand, the Union argues that if the choice to contract out bargaining unit work did not represent a choice among alternatives social or political goals or values, such a choice would certainly result in "weakening the union." Thus, for instance, the Union contends that where a subcontracting decision represented a choice by the District to seek to have work performed at cheaper rates, such a decision would "weaken the union." Because its proposal leaves the District free to subcontract when the District's decision is based upon a choice between alternatives social or political goals or values, the

Union asserts that this portion of the proposal is not a permissive subject of bargaining.

As to the District argument that the phrase "weakening the union" is unclear, the Union asserts that the District has provided no authority for the proposition that a lack of clarity renders a proposal permissive. Indeed, the Union argues that if this were the state of the law, the vast majority of the contract provisions might well be struck down as permissive, merely because there is room for interpretation as to the meaning of the contract language.

Discussion

In School District of Franklin, supra, the Commission concluded that a subcontracting clause was a permissive subject of bargaining to the extent that it covered work which involved employes in the educational policy determinations. The Commission therein reasoned that the interest of employer freedom to determine how it would make policy determinations predominated over the employe interest in protecting unit work. The District here argues that the instant subcontracting clause is permissive under the Franklin decision because the proposal covers work which may be assigned to unit employes which would involve the employes in managerial decisions. The Union correctly argues that such assignments are not "fairly within the scope" of a unit employe's job responsibilities and thus cannot be imposed on employes unless the District meets its bargaining obligations. 2/ However, we are not persuaded that the question of whether or not a duty can be unilaterally imposed upon an employe is relevant to determining the scope of the work which a subcontracting clause can cover and remain a mandatory subject of bargaining. In our view, the instant proposal is a mandatory subject of bargaining under Racine, supra, even to the extent that the work covered is not "fairly within the scope" of employes' job responsibilities so long as the work does not involve employes in management policy decisions. However, to the very limited extent that the Union's proposal covers such policy work as may be assigned to unit employes in the future after bargaining with the Union, we find the proposal permissive under Franklin.

As to the District argument that the proposal is also permissive because it includes the phrase "weakening the union," we find said argument unpersuasive. The disputed phrase functions as a limitation on the District right to subcontract and as such advances the substantial employe interest in preserving unit work recognized by the Supreme Court in Racine. While the standard by which the limitation is to be measured references "the union," it is an employe interest which is being protected. The fact that the contractual creation of such a standard may also advance an institutional union interest does not negate its contemporaneous advancement of employe interests as well. We do not share the apparent perception of the District that these interests are mutually exclusive or incompatible with each other. 3/

2/ City of Wauwatosa, Dec. No. 15917 (WERC, 11/77); Milwaukee Sewerage Commission, Dec. No. 17025 (WERC, 5/79).

3/ The Milwaukee Federation case cited by the District acknowledges the right of a union to bargain union security

Further, the fact that the precise meaning of this disputed phrase will be subject to arbitral interpretation 4/ is not relevant to a mandatory/permissive analysis but rather goes to the merits of whether the proposal should be included in the bargaining agreement. 5/ Thus, this disputed portion of the proposal is a mandatory subject of bargaining.

THE RECALL PROPOSAL

The recall proposal states:

> 2. Article IV (C) (3). When vacant positions are determined to be filled by the school district and prior to new hiring, laid off employees shall be recalled in reverse order of layoff provided the laid off employee is capable of performing the responsibilities of the available position. (emphasis added)

Positions of the Parties

The District contends that the only dispute between the parties as to this proposal is the use of the word "capable." The District asserts that the present contract language uses the word "qualified" as the standard by which an individual will be judged when hired or promoted or laid off. Yet, on recall from layoff, the District notes that the Union proposes use of the word "capable." Through the use of a different word, the District argues that the Union is proposing a standard which means something other than "qualified." If the District were required to recall from layoff an individual who was merely "capable" of meeting job qualifications at some point in the future but could not meet the minimum qualifications for a particular job at the time of recall, the District concludes that the management right to have employes who meet the minimum qualifications for a particular job would be compromised. Citing School District of Janesville, Dec. No. 21466 (WERC, 3/84), the District therefore asserts that this portion of the recall proposal is a permissive subject of bargaining.

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provisions such as dues checkoff even though such provisions advance the union's institutional interests. Milwaukee Federation only held that a union could not bargain an exclusive checkoff provision to the detriment of minority unions.

4/ The District contends by way of example that the clause could be interpreted to prevent it from subcontracting to obtain technical skills lost when a unit employe retires. While this result may be undesirable from the District's point of view, such concerns go to the merits of the proposal and not to its bargainability. Clearly the proposal does not intrude into the District's ability to have employes who are qualified to perform the work. The District presumably could train existing employes and/or fill the unit vacancy with an applicant possessing necessary skills.

5/ Janesville School District, Dec. No. 21466 (WERC, 3/84).

The Union contends that the word "capable" in its proposal does not require the District to recall employes who do not meet the minimum quali-fications for a job. The Union asserts that it uses the word "capable" to cover a situation where an employe has become medically disabled while on layoff and thus, although possessing the minimum qualifications for the job, is not "capable" of performing the job and therefore need not be recalled. Therefore the Union asserts that its recall proposal is clearly a mandatory subject of bargaining.

Discussion

In Beloit Education Association v. WERC, 73 Wis.2d 43 (1976) our Supreme Court held that a layoff/recall proposal is a mandatory subject of bargaining provided that the proposal protects the employer right to have employes who are qualified to perform the work in question.

The Union asserts that the phrase "capable" is not to be interpreted in a manner which would compel the District to recall an employe who did not possess the minimum qualifications for a position. Given this assurance and the Union's explanation that "capable" is being used in the context of an employe's physical capabilities, the proposal does not deny the District its management right to have at least minimally qualified employes filling its various positions. Thus, the proposal is a mandatory subject of bargaining.

Dated at Madison, Wisconsin this 17th day of April, 1990.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By A. Henry Hempe /s/
A. Henry Hempe, Chair

Herman Torosian /s/
Herman Torosian, Commissioner

William K. Strycker /s/
William K. Strycker, Commissioner