RACINE COUNTY CIRCUIT COURT BRANCH II
JUDGE: Stephen A. Simanek

RACINE EDUCATION ASSOCIATION, Petitioner,
v.
WISCONSIN EMPLOYMENT RELATIONS COMMISSION, Respondent.

Decision No. 27972-D
Case 96-CV-0924

NOTICE OF ENTRY OF FINAL ORDER

TO:Mr. Robert K. Weber, Hanson, Gasiorkiewicz & Weber, S.C., 514 Wisconsin Avenue, Racine, WI 53403.

Mr. Jack D. Walker, Melli, Walker, Pease & Ruhly, S.C., Suite 600 Insurance Building, 119 Martin Luther King, Jr. Blvd., P.O. Box 1664, Madison, WI 53701-1664

PLEASE TAKE NOTICE that a memorandum decision and final order affirming the decision of the Wisconsin Employment Relations Commission, of which a true and correct copy is hereto attached, was signed by the Court on the 12th day of December, 1996, and duly entered in the Circuit Court for Racine County, Wisconsin, on the 12th day of December, 1996.

Dated this 30th day of December, 1996.

JAMES E. DOYLE, Attorney General

JOHN D. NIEMISTO, Assistant Attorney General, State Bay No. 1012658, Attorneys for Defendant, Wisconsin Personnel Commission

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Memorandum Decision and ORDER

INTRODUCTION

This matter comes before the Court on a Petition for Review brought by the Racine Education Association (REA) pursuant to Wisconsin Statutes, Section 227.53 to review the March 18, 1996, decision of the Wisconsin Employment Relations Commission (WERC) dismissing REA's complaint regarding Racine Unified School District's (Unified) implementation of a year-round school program. REA alleged that Unified violated its duty to bargain a year-round program before implementation. WERC concluded:

> 1. The modification of employe work schedules set forth in Finding of Fact 13 is a permissive subject of bargaining and the Racine Unified School District therefore did not violate its duty to bargain with the Racine Education Association when it unilaterally implemented the work schedule set forth in Finding of Fact 13. Thus, the District did not thereby commit a prohibited practice within the meaning of Sec. 111.70(3)(a)4 or 1, Stats.
>
> 2. The Racine Unified School District has not refused to bargain with the Racine Education Association over the impacts of the work schedule change which primarily relate to wages, hours and conditions of employment and thus has not thereby committed a prohibited practice within the meaning of Sec. 111.70(3)(a)4 or 1. Stats.

ISSUE

Is there a rational basis for the WERC conclusions that implementation of a year-round school program is a permissive subject of bargaining and that Unified has not refused to bargain with REA over the impacts of such implementation which relate primarily to wages, hours and conditions of employment?

DISCUSSION

The appropriate standard of review is set forth by the Wisconsin Supreme Court in WEST BEND EDUCATION ASSOCIATION VS. WERC, 121 Wis.2d 1, 357 N.W.2d 534 (1984) at pages 12-14.

> The statutes, as well as the cases, caution that under certain circumstances a court should defer to the agency's conclusions of law. Sec. 227.20(10), Stats.

> 1979-1980, provides that upon review of an agency's determination, 'due weight shall be accorded the experience, technical competence, and specialized knowledge of the agency involved ....' Our cases similarly recognize that if the administrative agency's experience, technical competence, and specialized knowledge aid the agency in its interpretation and application of the statute, the agency's conclusions are entitled to deference by the court. Where a legal question is intertwined with factual determinations or with value or policy determinations or where the agency's interpretation and application of the law is of long standing, a court should defer to the agency which has primary responsibility for determination of fact and policy. NOTTELSON V. ILHR DEPT., 94 Wis.2d 106, 115-118, 287 N.W.2d 763 (1980). Thus, our cases describe various degrees of authoritative weight which may be given to an agency's interpretation and application of a law, depending on the circumstances.
>
> In this case the question of law, which is the bargaining nature of the proposals, is intertwined with facts, values and policy. WERC, in contrast to the courts, has special competence in the area of collective bargaining and has developed significant experience in deciding cases involving the issues of mandatory bargaining. Under our cases, these factors argue in favor of giving 'great weight' to WERC's rulings on the bargaining nature of the proposals. Consequently we should affirm WERC's conclusions regarding the bargaining nature of proposals if a rational basis exists for them or, to state the rule in another way, if the agency's view of the law is reasonable even though an alternative view is also reasonable. This court should not apply the balancing test ab initio to determine the mandatory bargaining nature of the proposals in issue. (Footnotes omitted.)

This standard was reaffirmed in SCHOOL DIST. OF DRUMMOND V. WERC, 121 Wis.2d 126, 358 N.W.2d 285 (1984), where the court stated at pages 133 and 135:

> In any case where the commission is asked to determine whether a subject matter is mandatorily or permissibly bargainable, this court will apply the great weight--any rational basis standard to its primary relation,

> conclusion. . . .
>
> The commission's interpretation of Section 111.70 Stats. must be affirmed if there is any rational basis to support it. ARROWHEAD, 116 Wis.2d at 593; BELOIT EDUCATION ASSO., 73 Wis.2d at 67.

The Municipal Employment Relations Act (MERA), Secs. 111.70-111.77, Stats., requires municipal employers and municipal labor organizations to bargain "with respect to wages, hours and conditions of employment." Sec. 111.70(l)(a), Stats. Employers are not required to bargain, however, 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." Id. The difficulty encountered in interpreting and applying MERA is that many subject areas relate both to "wages, hours and conditions of employment" and to "management and direction of the governmental unit." WEST BEND, 121 Wis.2d at 8; BELOIT EDUCATION ASSO. V. WERC, 73 Wis.2d 43, 52-53, 242 N.W.2d 231 (1976); UNIFIED S.D. NO. 1 OF RACINE COUNTY V. WERC, 81 Wis.2d 89, 95, 259 N.W.2d 724 (1977).

In order to determine whether a proposed contract provision is a mandatory or permissive subject of bargaining under MERA, the WERC developed the "primary relationship test." The Wisconsin Supreme Court has approved the construction of MERA requiring the application of the primary relationship test to proposed subjects of bargaining in municipal sector labor relations. WEST BEND, 121 Wis.2d at 8; BELOIT, 73 Wis.2d at 54; BROWN COUNTY V. WERC, 138 Wis.2d 254, 405 N.W.2d 752 (1987); MADISON METROPOLITAN SCHOOL DIST. V. WERC, 133 Wis.2d 462, 395 N.W.2d 825 (1986).

Under the primary relationship test, collective bargaining is required with regard to subjects primarily related to wages, hours or conditions of employment. Bargaining is not required with regard to subjects primarily related to management and direction of a governmental unit. "Primarily" has been construed by the court to mean "fundamentally" or "basically" or "essentially." WEST BEND, 121 Wis.2d at 8-9; BELOIT, 73 Wis.2d at 54; UNIFIED S.D. NO. 1, 81 Wis.2d at 95-96, 102. See also, CITY OF BROOKFIELD V. WERC, 87 Wis.2d 819, 275 N.W.2d 723 (1979).

To determine whether the proposals are mandatory subjects of bargaining, the weight of the managerial interests of the public employer, together with any separate public political interest,

must be balanced against the interests of the employes. WEST BEND, 121 Wis.2d at 15. A review of the March 18, 1996, WERC decision demonstrates such balancing test was applied in this case. At page 5 of the decision, WERC noted:

> In reaching his conclusions, the Examiner determined that the duty to bargain/school calendar decisions in BELOIT EDUCATION ASSOCIATION V. WERC, 73 Wis.2d 743 (1976) and SCHOOL DISTRICT OF JANESVILLE, Dec. No. 21466 (WERC, 3/84) did not control because both decisions involved traditional school calendars, not a year-round education program. Proceeding to balance the relationship of a year-round educational program to education policy against the program's relationship to wages, hours and conditions of employment, the Examiner concluded the educational policy relationship predominated. He found the decision to establish the year-round program was based primarily on: (1) a policy choice that student achievement would improve by eliminating the two and one half-month learning gap in the traditional calendar (i.e., summer vacation) and replacing it with shorter breaks during which remediation or enrichment could occur; and, secondarily, (2) the potential for financial savings resulting from year-round use of school buildings. Balancing the educational policy and the potential for financial savings against the "concededly substantial" impact on employe hours and conditions of employment (particularly the change in vacation schedules), the Examiner concluded the former predominated.

WERC cited the Examiner's Finding of Fact 11, which reads as follows:

> 11. On March 7, 1994, the District's Board voted to approve a single-track year-round education program at James Elementary School and no less than two sections of year-round school at Gilmore Middle School, effective July 1, 1994. This calendar consisted of three periods of 60 consecutive weekdays of school followed by 20 consecutive weekdays of no school, to be done on a single track basis and to be voluntary for all students and teachers. The Board's decision was based on its conclusion that the system would substantially improve the quality of education for three reasons. First, it would eliminate the

> substantial loss of learning, particularly for disadvantaged students, which takes place during the traditional two and a half month summer vacation. Second, it would provide three 20-day periods available for remedial work for students needing additional assistance, rather than the single two and a half month summer session available under the traditional system. Third, these same three 20-day periods would be available to provide additional learning opportunities for gifted students.

And then concluded at pages 14 and 15:

> As recited by the Examiner in Finding of Fact 11, 3/ the redistribution of work time/time off was based upon educational policy judgments by the District that learning opportunities would improve. 4/ Thus, the year-round school program had a direct and substantial relationship to educational policy. As also recited by the Examiner, the change to a year-round school calendar had a direct and substantial impact on the timing of employe vacations and thus on employe hours and conditions of employment. When the Examiner balanced these impacts and relationships, he concluded the relationship of the year-round school program to educational policy predominated over the relationship to employe wages, hours and conditions of employment. In the context of this record, we agree with the Examiner. Thus, we affirm his conclusion that the District alteration of the timing of the pre-existing work/vacation schedule for teachers who would staff the newly created year-round schools did not alter the status quo as to a mandatory subject of bargaining and thus did not constitute a violation of the District's duty to bargain with Complainant.
>
> Complainant argues that because all school calendars presumably reflect some educational policy judgments, the result reached by the Examiner (and now affirmed by the Commission) has the effect of making all school calendar issues permissive subjects of bargaining and overturning prior Commission precedent. We disagree. The Commission has not previously had occasion to consider duty to bargain issues surrounding a shift from a traditional school calendar to a year-round calendar. As we are always obligated to do, we decided

> this case based upon the facts and argument presented. Respondent persuasively established that the redistribution of an existing schedule of work/time off created by a year-round school program primarily related to educational policy. Our decision stands for no more than that.
>
> As previously noted, the record does not definitively tell us the extent to which the year-round calendar implemented by the Respondent altered the schedule of in-service days, convention days, holidays, pay days, snow makeup days, etc. Suffice it to say that these aspects of "school calendar" have historically been found to be mandatory subjects of bargaining and that any change by Respondent in these areas would be subject to the same "primarily related" analysis we have applied to the redistribution of work/vacation time. If the "educational policy" dimensions of when paychecks are distributed, when snow days are made up, when in-service is conducted, whether employes can attend union conventions, or whether employes would have to work "holidays" predominated over the impact on employe wages, hours and conditions of employment, then the Respondent would not be obligated to bargain over such matter(s). If the wage, hour and condition of employment relationship predominated, then these matters would be mandatory subjects of bargaining.

With regard to impact bargaining, WERC concurred with the Examiner's finding that Unified had done so. The Examiner wrote in his Memorandum:

> Commencing March 5, 1991, the District informed the Association it was considering a year-round education and sought negotiations. Again on August 4, 1993, the District offered to bargain on the year-round education program. It requested impact items on October 1, 1993, and later indicated it was willing to meet solely on this subject. The Association made one proposal on February 3, 1994, but no agreement was reached. On March 9, 1994, the District again offered to meet and bargain the subject of its year-round school program but nothing further was done. It is concluded from the record that the District satisfied its obligation to bargain impact before implementation.

CONCLUSION

The WERC determined that Unified's year-round school program implementation was a permissive subject of bargaining by properly balancing the managerial interests of the public employer, together with any separate public political interest against the interests of the employes and concluding that the challenged proposal was primarily related to educational policy and therefore to "management and direction of the governmental unit." There exists a rational basis for this conclusion. There is also a rational basis for the conclusion that Unified satisfied its obligation to bargain impact before implementation.

Therefore, it is ORDERED that the March 18, 1996, decision of the WERC is AFFIRMED in all respects. The petition of REA is dismissed on the merits.

Dated at Racine, Wisconsin, this 12th day of December,1996.

BY THE COURT:

Stephen A. Simanek
Circuit Court Judge Branch II