CIRCUIT COURT BRANCH 6
JUDGE: Richard J. Callaway

MADISON TEACHERS, INC., Petitioner,
vs.
WISCONSIN EMPLOYMENT RELATIONS COMMISSION, Respondent.

DECISION No. 28671-C
Case 96-CV-2202

This is a Chapter 227 judicial review of a decision by the Wisconsin Employment Relations Commission that a high school principal's directive had no impact on the wages, hours or conditions of employment of teachers which mandated collective bargaining. Because the Commission's decision is supported by substantial evidence and free from material legal errors, it is affirmed.

REVIEW OF RECORD

The historical facts (what happened) are not disputed: For the 1992-93 school year, Madison Memorial High School, a school administered by the Madison Metropolitan School District (MMSD), the respondent below, established a pilot Core program for entering students with a goal of increasing the percentage of them who could be promoted after one year. A "Core" consisted of about 80 students with common English, Social Studies and Science teachers. In 1993-94, the Core program was expanded to cover the entire ninth grade in five Cores. Each Core teacher was given 2-1/2 periods a week for planning and discussing strategies to meet the students' needs.

For the beginning of the 1994-95 school year, school administrators proposed that Core teachers each contact a certain number of their students' parents or guardians. The building representative of Madison Teachers, Inc. (MTI), the teacher's union, objected on the grounds that the resulting telephone calls would take much time and effort and was an additional burden which could not be unilaterally imposed by the administration. The proposal remained in dispute and was not implemented at that time. On September 6, 1995, Carolyn Taylor, Memorial's principal, issued the memo which is the crux of this dispute to all Core teachers. The memo stressed the importance of contact with parents to the academic success of students. Ex. 1.

> Using some of the time provided by our Core arrangements (or any other time you deem appropriate to substitute), please make telephone contact with one parent of each student in your Core. Start with those you believe to be the shakiest. My assumption is that you will want to divide the students in a Core among the three Core teachers and the counselor supporting your Core in order to have fewer than 20 contacts each in most cases, but feel free to devise other splits that might make more sense to the four of you . . . . In the event that the family has no phone, an individual note mailed home is acceptable. I would
> appreciate your completing the project by the end of Wednesday, September 20, and reporting your results to me in terms of parents reached and any comments you wish to add.

The memo suggested that certain topics be covered in the conversations, such as how well the student was adjusting to high school and how adjustment could be facilitated, how well the work load was being managed, and the student's interests, talents and work habits. No guidance or direction was given as to how long the telephone calls were expected to take but Principal Taylor testified to the effect that she expected the calls to take about five minutes each. Tr. at 123.

On October 25, 1995, MTI filed a complaint against MMSD with the Wisconsin Employment Relation Commission (WERC) asserting, among other things, that Principal Taylor could not assign additional duties to teachers which had an impact on their working conditions without bargaining over that impact. Apparently, implementation of the directive has been postponed pending resolution of this dispute. The matter was heard by a hearing examiner on April 24, 1996. On August 8, 1996, the Examiner dismissed MTI's complaint, concluding that:

> The District's Memorial High School Principal's directive dated September 6, 1995, to make telephone contact with Core parents had no impact on wages, hours or conditions of employment so the District had no duty to bargain over said directive and the District did not commit any violation of Sec. 111.70(3)(a)l or 4, Stats.

On September 6, 1996, WERC adopted the Examiner's decision as its own.

CONCLUSIONS OF LAW

MTI petitions for judicial review and reversal of WERC's decision. Under sec. 111.07(8), Stats., the Court's authority to review is governed by ch. 227, Stats. The Court's authority on review is strictly limited by sec. 227.57, Stats. Review is limited to the record. Sec. 227.57(1), Stats. The Court shall set aside the agency's action if it determines that the agency has made a material error in interpreting the law. Sec. 227.57(5), Stats. The Court shall also set aside an agency's action based on any material findings of fact not supported by substantial evidence. Sec. 227.57(6), Stats. Substantial evidence is such evidence that reasonable minds might accept as adequate to support a conclusion. *Gilbert v. Medical Examining Bd.*, 119 Wis.2d 168, 195 (1984). The question is whether substantial evidence supports the findings the Commission did make, not whether evidence supports findings it did not make. *Eastex Packaging Co. v. DILHR*, 89 Wis.2d 739, 745 (1979). "Even if the findings . . . are contrary to the great weight and clear preponderance of the evidence, reversal is not commanded. . . ." *Id*. The Court may not reweigh the evidence nor reevaluate the credibility of the witnesses, *Id*.

Under sec. 111.70(4)(a) and secs. 111.07(l) and (4), Stats., WERC may provide relief from prohibited labor practices involving municipal employers. A school district is a municipal employer. Sec. 111.70(l)(j), Stats. Municipal employees have the right to bargain collectively with their employers through representatives of their own choosing. Sec. 111.70(2), Stats. The topics for collective bargaining include "wages, hours and conditions of employment" but do not include:

> 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 municipal employes in a collective bargaining unit.

Sec. 111.70(l)(a), Stats. Subjects reserved to the School District include determinations of public

policy such as ". . . educational policy and school management and operation"
Beloit Education Assoc. v. WERC, 73 Wis.2d 43, 52 (1976).

The briefs of both parties are not entirely accurate in describing the analysis in determining what must be bargained when the subject has public policy implications. As interpreted by WERC and the courts, the statutory definition of municipal collective bargaining, now sec. 111.70(l)(a), Stats., requires "mandatory bargaining as to (1) matters which are **primarily** related to 'wages, hours and conditions of employment,' and (2) the impact of the 'establishment of educational policy' affecting the 'wages, hours and conditions of employment.'" *Beloit Education Asso.*, 73 Wis.2d at 54 (emphasis in original). "In bargaining the former, the parties confer about whether the proposal should be adopted and what it should say. In bargaining the latter, they discuss the manner of applying the policy adopted or exercising the function involved." *School Dist. of Drummond v. WERC*, 121 Wis.2d 126, 140 (1984). These are two separate requirements although they involve many of the same considerations, hence the confusion of the briefs. See *Blackhawk Teachers' Federation v. WERC*, 109 Wis.2d 415. 24, 429-30 (Ct. App. 1982). See also, *West Bend Education Asso. v. WERC*, 121 Wis.2d 1, 14-15 n. 17 (1984).

Under the first *Beloit Education Asso.* requirement, a matter which is primarily related to wages, hours or conditions of employment must be bargained collectively **regardless** of the incidental impact of the matter on public policy. See, e.g., *School Dist. of Drummond*, 121 Wis.2d at 135 (quoting *West Bend Education Asso.*, 121 Wis.2d at 5). Whether a matter is primarily related to working conditions or education policy involves a balancing of the competing interests. *School Dist. of Drummond*, 121 Wis.2d at 135.

Under the second *Beloit Education Asso*. requirement, matters primarily related to questions of policy are not entirely insulated from collective bargaining but must be bargained "insofar as the manner of exercise of such functions" has an impact on wages, hours or conditions of employment. Sec. 111.70(l)(a), Stats. See *Blackhawk Teachers' Federation*, 109 Wis.2d at 424; *West Bend Education Asso.*, 121 Wis.2d at 14-15 n. 17. Whether such a matter has an impact on working conditions under the second *Beloit Education Asso.* requirement does not involve a balancing of competing interests but simply the binary question of whether or not there is an impact on working conditions. If there is an impact, only that impact is subject to mandatory bargaining. An example of this is classroom size, which may be set by the administration as a matter of policy but the impact of which on teachers' work loads, must be bargained collectively. *Beloit Education Asso*., 73 Wis.2d at 63-64 and n. 37.

Matters of public policy themselves, whether or not they affect working conditions, may be subject to collective bargaining if the employer so chooses and the law does not otherwise forbid it. *City of Brookfield v. WERC,* 87 Wis.2d 819, 829 (1979).

At the hearing, MTI stipulated that the District had the right to implement the responsibility to make the phone calls and that the question before WERC was whether it had a duty to bargain the impact, if any, on wages, hours and conditions of employment. Tr. at 90-91. This stipulation meant that MTI was agreeing that Principal Taylor's directive to make the telephone calls to parents was not "primarily related" to wages, hours and working conditions and so that the first *Beloit Education Asso.* requirement was eliminated. The question before WERC was limited to the second requirement, involving a determination as to whether the implementation of the directive had an impact on teachers' wages, hours and conditions of employment. WERC expressly found that there was no impact, thus nothing to bargain about. Decision at 3. This Court must determine whether that ruling was supported by the record.

MTI appears to argue that the determination of the existence of an impact is a question of law. The "bargaining nature" of a proposal--whether it is mandatorily or permissively bargainable--involves a question of law within WERC's expertise and reviewed under a rational basis standard. *West Bend Education Asso.*, 121 Wis.2d at 13. Here, the conclusion that the impact of Principal Taylor's directive was not bargainable was based on the underlying determination that it would have no impact, which strikes the Court as being a question of fact. Regardless of whether the question of impact is one of law, reviewable on a rational basis standard, or one of fact, reviewable on a substantial evidence standard, the Court concludes that WERC's determination was correct as it was both reasonable and supported by the evidence.

It is undisputed that Principal Taylor's directive had no impact on wages. It also does not appear that the directive had an impact on hours. The memo expected teachers to use time previously allotted by Core arrangements and did not expect teachers to make phone calls after hours, during breaks or any other time not previously assigned for work duties. Ex. 1. The phone calls were expected to have top priority, replacing, if necessary, rather than supplementing activities previously done in the allotted time. See Tr., at 117.

It is undisputed that telephone calls and other contacts with parents are an ordinary and sometimes necessary part of a teacher's duties. The question here is whether this particular assignment had an impact on conditions of employment. Conditions of employment fairly include matters such as the quality and safety of the work environment, the work load for the time allotted, the stressfulness of assignments and the potential for disciplinary problems with students. See *Beloit Education Asso.*, 73 Wis.2d at 64 n. 37.

A key to whether the directive had an impact on work load is the amount of time required for the phone calls. James Skaggs, Memorial's union representative, testified consistently with other MTI witnesses that phone calls to parents varied enormously in length from one to twenty minutes. Tr. at 32-33. Principal Taylor testified that parent-teacher conferences were scheduled for five minutes. Tr. at 115. She testified that the phone conversations should be less involved. Tr. at 116. She expected the phone calls to average about five minutes each. Tr. at 123.

The Examiner implicitly found that Principal Taylor's expectation was reasonable. Decision, Finding #5. The Court has no reason to disturb this finding. From the scope of suggested questions contained in the directive, Ex. 1, the telephone calls were intended to provide basic information to help students to adjust to their new school early in the school year. There does not appear to have been an expectation that the calls would involve in-depth discussions or counselling which would substantially increase their duration.

If the teachers and guidance counselors involved divided the task equally, each would make about twenty phone calls. At five minutes a call, this would mean the entire task would take a total of about 100 minutes of telephone time per person. The calls were expected to be completed within two weeks. Ex. 1. The Examiner noted that Core teachers were given two-and-a-half hours a week for Core planning, which consisted primarily of discussions among the teachers and counselors. Decision at 8. See Tr. at 23 (Skaggs). One of the purposes of those meetings early in the school year was to gather information about the students. Tr. at 24. Thus, as the Examiner saw it, the directive "simply substituted phone contacts for discussion about Core students. The discussion on students could occur at a later time." Decision at 9. It was his clear belief that the two or more hours each teacher would devote to the phone calls would come out of the five hours allotted for teachers' planning meetings during the two week time frame.

Although the Court itself is not entirely convinced that two hours of previously assigned work time would be adequate to complete the entire task--parents may be hard to reach during the day, the Examiner's determination was not unreasonable or unsupported by the evidence. Given the basic introductory and informational nature of the phone calls, the record does support a conclusion that the five hours allotted for planning discussions during the two weeks in which the calls were to be made would be adequate for both the calls and the most serious student problems which might require immediate discussion among the teachers.

Although Skaggs, the union representative, testified that the planning meetings were most intensive early in the school year, their primary focus was informational, such as comparing observations about students. Tr. at 26-27. Skaggs did testify that tasks could not be substituted without damaging the program "one way or another," Tr. at 31, but MTI is not at all clear about what this damage might be. Skaggs' testimony suggested that there would be time to spare in the planning meetings later in the school year, Tr. at 26, and MTI points to no evidence that working conditions would be adversely affected if discussions among the teachers would be reduced or postponed for two weeks when more time would be available for them. Additionally, these discussions would benefit from the additional information obtained directly from the parents. See, e.g., Tr. at 43.

Significantly, Principal Taylor's memo gave the teachers and counselors a great deal of flexibility. The three teachers and the guidance counselor for each Core had complete discretion to divide the task of contacting each parent among themselves in any manner; twenty contacts per teacher was only suggested. Thus, the teachers were allowed to adjust the assignment to accommodate for varying workloads and priorities.

The key weakness in MTI's position is that it never makes clear what the impact on working conditions would be. Although the Court agrees with MTI that the time to be spent on the phone calls is substantial, the record is also clear that Principal Taylor expected this time to be spent in lieu of, rather than in addition to, time previously spent on related matters such as teachers' discussion of students among themselves. The Examiner was not required to accept
MTI's essentially conclusory assertions that this rearrangement would make teachers' jobs more difficult. Contrary to MTI's argument, there was no requirement that MMSD provide affirmative evidence of "no impact." The Examiner could simply infer from the lack of evidence that there would be no impact.

In the absence of more specific evidence of an impact on working conditions, the directive's only potential impact, on working conditions is connected with whether it would have an adverse impact on the success of the acclimatization of new students, a policy question of itself, and thereby make the teachers' jobs more difficult. The record indicates that the requirement of telephoning parents for information about students might result in some delay in tailoring teachers' responses to some students' needs and in somewhat less discussion among teachers devoted to formulating those responses. However, these potentially adverse results would be offset in that the teachers' responses to the students' needs would be made more informed by the additional input provided by the parents early in the school year. It was WERC's task to weigh these competing factors and its conclusion that the net effect of them would result in no significant impact on conditions of employment was reasonable.

MTI's briefs devote much energy to the proposition that WERC could not conclude that the directive had no impact on conditions of employment because the School District conceded that there was a "de minimis" impact. This argument is based on the mistaken notion that there is a significant distinction between "no" impact and a "de minimis" impact.

The concept that insignificant departures from duties imposed by law will be disregarded is well-established. Lawyers, who are fond of employing Latin and Norman French phrases, use the term "de minimis" to denote such insignificances. The term comes from the phrase: "De minimis non curat lex"--"The law does not concern itself about trifles." Black's Law Dictionary at 431 (6th ed. 1990). The doctrine applies even in the field of labor law, as MTI itself recognized in its brief before WERC at 6. See *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 692 (1946). The distinction it now tries to make between "no" impact and a "de minimis" impact is, in a phrase, "de minimis."

The Examiner concluded and WERC concurred that Principal Taylor's memo constituted a reorganization of policy-related priorities which had no impact on teachers' wages, hours and conditions of employment. The record adequately supports WERC's conclusion that this change in priorities would not require teachers to work more hours and would have no more than an insignificant impact on conditions of employment such as work load and increased potential for disciplinary problems. See *Beloit Education Asso.*, 73 Wis.2d at 64 n. 37.

Accordingly,

0 R D E R

IT IS HEREBY ORDERED that the decision of Respondent Wisconsin Employment Relations Commission is AFFIRMED.

Dated at Madison, Wisconsin, this 6th day of June, 1997.

BY THE COURT

Richard J. Callaway, Judge
Circuit Court, Branch

cc: Attorney Stacy M. Rios (MTI)
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