DANE COUNTY CIRCUIT COURT BRANCH 5
JUDGE: Robert R. Pekowsky

LOCAL 60, AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO, Petitioner,

vs

WISCONSIN EMPLOYMENT RELATIONS COMMISSION, Respondent.

DECISION NO. 28676-A
Case No. 96 CV 730
Admin. Review: 30607

DECISION AND ORDER

This is a petition for administrative review pursuant to Chapter 227, Stats., of a March 22, 1996, decision by the Wisconsin Employment Relations Commission.

Petitioner is Local 60 of the American Federation of State, County and Municipal Employees, AFL-CIO. Local 60 and the Sun Prairie School District were parties to a collective bargaining agreement which ran from July 1, 1993, through June 30, 1996. In February of 1995, the District created a new job classification and designated it a "Cleaner position." The subsequent negotiations between Local 60 and the District regarding the wage to be paid to persons filling the Cleaner position ended in impasse.

Local 60 then petitioned the Wisconsin Employment Relations Commission ("WERC") for interest arbitration pursuant to sec. 111.70(4)(cm)(6), Stats. On July 18, 1995, a hearing on that motion was held before Mr. Peter Davis, general Counsel for WERC. In its Findings of Fact, Conclusions of Law and Order issued on March 22, 1996, WERC granted Sun Prairie's motion to dismiss, holding that interest arbitration was not available to Local 60 under the statute. In doing so WERC followed its decision in *Oak Creek Professional Policemen's Association v. City of Oak Creek*, Comm. Dec. No. 27074-C (May 25, 1993), and concluded that

> Because the 1993-1996 collective bargaining agreement automatically applies to the Cleaner position and the employes who hold same, the dispute between Local 60 and the Employer as to the cleaner wage rate is not [a] dispute over the terms of a "new collective bargaining agreement" within the meaning of sec. 111.70(4)(cm)6, Stats.

Dec. No. 28676 (March 22, 1996) at 2. 1/

This petition for review followed.

DISCUSSION

A. Standard of Review

Before reaching the precise issue presented for review the Court must determine the appropriate level of deference to be accorded WERC's interpretation of the statute. An agency decision may be granted one of three distinct levels of deference: great weight, due weight or *de novo* review. *Jicha v. DILHR*, 169 Wis. 2d 284, 290 (1992).

De novo review is appropriate in cases of first impression. *UFE Inc. v. LIRC*, 201 Wis. 2d 274, 285, [citing *Kelley Co. Inc. v. Marquardt*, 172 Wis. 2d 234, 244-45 (1992)]. This is not such a case. WERC has had direct experience interpreting the statute at issue. As noted, WERC previously interpreted sec. 111.70(4)(cm)6, Stats., in *Oak Creek Professional Policeman's Association v. City of Oak Creek*, Comm. Dec. No. 27074-C (May 25, 1993).

However, *de novo* review is also appropriate if "an agency's position on an issue has been so inconsistent so as to provide no real guidance." *UFE*, 201 Wis. 2d at 285, [citing *Marten Transp., Ltd. v. DILHR*, 176 Wis. 2d 1012, 1018-19 (1993)]. Under this criteria, the court of appeals in *Wausau Sch. Dist. Maintenance Union v. WERC*, 157 Wis. 2d 315 (Ct. App. 1990), held that WERC's interpretation of sec. 111.70(4)(cm)6, Stats., was not "substantially uniform." *Id*. at 319. In fact, the *Wausau* court noted that WERC's interpretations changed as the composition of the Commission changed, and commented that "[i]t would require an enormous stretch of logic to label WERC's contortions on this issue as 'substantially uniform,' and we therefore decline to accord deference to its most recent interpretation." Id. at 321. 2/

Thus the question becomes whether WERC has established a consistent and long standing interpretation of sec. 111.70(4)(cm)6, Stats., since *Wausau* was issued. If so, WERC's interpretation would qualify for great weight deference. In support of its request for great weight, WERC again points to its decision in *Oak Creek*, a decision which addressed an issue virtually identical to that in the case at bar. The Court, however, is not persuaded that one post1990 decision on this issue is sufficient to document a consistent and long standing interpretation. 3/

For these reasons the Court finds that the appropriate level of deference to accord WERC's decision is due weight. Under this standard, "an equally reasonable interpretation of a statute should not be chosen over the agency's interpretation." Id. at 63, n.3. Due weight deference is based more upon the fact that the legislature has charged an administrative agency with the enforcement of the statute than the agency's knowledge or skill. *Id*. WERC has been charged by the legislature with the enforcement of the Municipal Employment Relations Act. When an agency "has had at least one opportunity to analyze the issue and formulate a position, a court will not overturn a reasonable agency decision that comports with the purpose of the statute unless the court determines that there is a more reasonable interpretation available." *Id*. Thus, when applying due weight deference, "a court need not defer to an agency's interpretation which, while reasonable, is not the interpretation which the court considers best and most reasonable." *UFE*, 201 Wis. 2d at 286 [quoting *Hamischfeger Corp. v. LIRC*, 196 Wis. 2d 650, 660 n.4 (1995)].

B. WERC's Interpretation of Sec. 111.70(4)(cm)6, Stats.

Having determined the appropriate standard of review the Court now turns to the central dispute in

this case: whether it is reasonable for WERC to conclude that, when impasse is reached in negotiations regarding the wage for a newly created position within a bargaining unit, the arbitration procedures specified in sec. 111.70(4)(cm)6, Stats., do not apply.

The statute provides in pertinent part as follows:

> If a dispute has not been settled after a reasonable period of negotiation and after mediation by the commission under subd. 3 and other settlement procedures, if any, established by the parties have been exhausted, and the parties are deadlocked with respect to any dispute between them over wages, hours and conditions of employment to be included in a new collective bargaining agreement either party, or the parties jointly, may petition the commission, in writing, to initiate compulsory, final and binding arbitration, as provided in this paragraph.

The dispute at bar centers around the interpretation of "new collective bargaining agreement." WERC contends that, as it held in *Oak Creek*, the creation of new positions does not trigger the right to interest arbitration under sec. 111.70(4)(cm)6, Stats., because individuals filling the newly created Cleaner position (which is within the existing bargaining unit), are automatically covered by the collective bargaining agreement. In short, no "new" collective bargaining agreement is created; the new positions simply become part of the existing bargaining agreement.

Local 60, on the other hand, argues that its petition for interest arbitration is properly characterized as relating to a new collective bargaining agreement for the employees occupying the Cleaner position. This is because neither the position nor the employees filling it existed under the bargaining agreement until it was created by the District.

It was previously held in *Wausau* that the phrase "new collective bargaining agreement" is ambiguous. *Wausau*, 157 Wis. 2d at 322. That case concerned a printer's position that had not before been part of the union. Under the applicable precedent, when unrepresented positions were accreted to an existing bargaining unit, the bargaining agreement did not cover those positions. After deadlock was reached in negotiations for the printer's wages, hours and conditions of employment, the union petitioned for interest arbitration. WERC denied the petition, finding that the union was not seeking a "new collective bargaining agreement." *Id*. at 318. The court of appeals reversed, reasoning that WERC's interpretation of sec. 111.70(4)(cm)6, Stats., was unduly narrow and did not comport with MERA's legislative purpose, especially its anti-fragmentation policy. 4/ *Id*. at 322.

WERC argues that *Wausau* is distinguishable from the instant case because, unlike the accreted printer's position at issue there, the Cleaner position created by the District is covered by the collective bargaining agreement. WERC further asserts that because this interpretation is reasonable it must be affirmed. In response, Local 60 points out that *Wausau* court disfavored unduly narrow readings of MERA and stressed the public policy behind the statute.

While both readings of sec. 111.70(4)(cm)6, Stats., are reasonable, the Court's inquiry does not end here. When examining an agency decision pursuant to the due weight standard of review, deference is not required for "an interpretation which, while reasonable, is not the interpretation

which [the Court] consider[s] best and most reasonable." *Morris v. Employe Trust Funds Bd. of Wisconsin*, 203 Wis. 2d 172, 183 (Ct. App. 1996). Thus while WERC's reading of sec. 111.70(4)(cm)6, Stats., is reasonable in a technical sense, it appears, as it did in *Wausau*, to be an unduly narrow interpretation. First, on a practical level it cannot be ignored that the Cleaner position did not exist before it was created by the District. Thus the collective bargaining agreement is certainly "new" as far as those employees are concerned. 5/

Second, *Wausau* stressed the importance of arbitration as part of dispute resolution when it noted "the strong legislative policy in Wisconsin favoring arbitration in the municipal collective bargaining context as a means of settling disputes and preventing individual problems from growing into major labor disputes." *Wausau*, 157 Wis. 2d at 323, [quoting *Joint School dist. No. 10 v. Jefferson Educ. Ass'n*, 78 Wis. 2d 94, 112 (1977)]. Finding that the Cleaner position is subject to interest arbitration actively serves this policy in a way that WERC's narrow interpretation does not.

Finally, this decision reflects concern that WERC's application of sec. 111.70(4)(cm)6, Stats., encourages employers to seek out short term gains by creating new positions which encompass many of the duties of established job descriptions but pay substantially less. Even if the wage and conditions of employment are arbitrated in the subsequent collective bargaining agreement, there is the potential for substantial savings when the employer is able to unilaterally implement its last offer and the existing agreement will not expire for a year or more. Thus the unavailability of arbitration leaves the employee without a remedy while conferring a benefit upon the employer.

ACCORDINGLY,

For the above stated reasons the decision by the Wisconsin Employment Relations Commission is hereby REVERSED.

Dated this 5th day of May, 1997.

BY THE COURT:

Hon. Robert R. Pekowsky
Circuit Judge, Branch 5

ENDNOTES

1/ Local 60 also contended in the proceedings before WERC that the Cleaner position was little different than the existing custodian positions and merely an attempt by the District to establish a substandard wage rate. In Paragraph 3 of its Findings of Fact WERC found that "The position of Cleaner differs from existing bargaining unit custodian positions to the extent Cleaners will not perform any minor repairs or routine maintenance; will not perform seasonal jobs such as grass cutting or snow removal; will not perform any program support activities such as preparing for special events, meetings, etc.; will not have any building security responsibilities; and will not report to faculty or other school staff in a supervisory context.

2/ Indeed, in light of the holding on this issue in Wausau, the Court finds WERC's assertions that its

interpretation "is long continued, substantially uniform, and without challenge by government agencies and courts," to be rather disingenuous.

3/ As stated by the Wisconsin supreme court under similar circumstances, "one holding hardly constitutes the type of expertise and experience needed by an agency for it to be afforded great weight deference by a court." *UFE*, 201 Wis. 2d at 61.

4/ The purpose and spirit of MERA is set forth in the statute:

> Declaration of policy. The public policy of the state as to labor disputes arising in municipal employment is to encourage voluntary settlement through the procedures of collective bargaining. Accordingly, it is in the public interest that municipal employees so desiring be given an opportunity to bargain collectively with the municipal employer through a labor organization or other representative of the employes' own choice. If such procedures fail, the parties should have available to them a fair, speedy, effective and, above all, peaceful procedure for settlement as provided in this subchapter.

Sec. 111.70(6), Stats.

5/ For example, the Cleaner position is not present in the Wage Matrix appended to the July 1, 1993, through June 30, 1996 Labor Agreement between Local 60 and the District.