

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of

EAU CLAIRE SCHOOL DISTRICT

Requesting a Declaratory Ruling Pursuant to Section 111.70(4)(b),
Wis. Stats., Involving a Dispute Between Said Petitioner and

LOCAL 560, DISTRICT COUNCIL 40, AFSCME, AFL-CIO

Case 53
No. 56823
DR(M)-596

Decision No. 29626

Appearances:

Mr. Steve Day, Staff Representative, and **Mr. Greg Spring**, Research Analyst, Wisconsin Council 40, AFSCME, AFL-CIO, 318 Hampton Court, Altoona, Wisconsin 54720, appearing on behalf of Local 560, District Council 40, AFSCME, AFL-CIO.

Weld, Riley, Prenn & Ricci, S.C., by **Attorney Stephen L. Weld**, 4330 Golf Terrace, Suite 205, P.O. Box 1030, Eau Claire, Wisconsin 54702-1030, appearing on behalf of Eau Claire Area School District.

FINDINGS OF FACT, CONCLUSION OF LAW AND DECLARATORY RULING

On September 18, 1998, the Eau Claire Area School District filed a petition with the Wisconsin Employment Relations Commission pursuant to Sec. 111.70(4)(b), Stats., seeking a declaratory ruling as to the District's duty to bargain with Local 560, District Council 40, AFSCME, AFL-CIO over certain matters.

The parties waived hearing and filed stipulations of fact and briefs. The record was closed May 13, 1999.

Having considered the matter and being fully advised in the premises, the Commission makes and issues the following

No. 29626

FINDINGS OF FACT

1. The Eau Claire Area School District, herein the District, is a municipal employer having its principal offices at 510 Main Street, Eau Claire, Wisconsin 54701.

2. Local 560, District Council 40, AFSCME, AFL-CIO, herein the Union, is a labor organization functioning as the exclusive collective bargaining representative of certain blue collar employees of the District and having its principal offices at 318 Hampton Court, Altoona, Wisconsin 54720.

The Union's blue collar unit presently includes only full-time employees. The parties stipulated that:

There is no history of problems with the availability of bargaining unit employees to work scheduled or unscheduled hours on straight time or overtime.

3. The 1996-1998 collective bargaining agreement between the District and the Union contained the following provisions:

ARTICLE I – RECOGNITION

SECTION 1. . . .

The Board of Education agrees with Local No. 560 that said Local shall be regarded as the sole bargaining agent for employees covered by this Agreement.

. . .

SECTION 5. The provisions of this Agreement shall be applicable to maintenance workers, school lunch drivers, garbage hauler, custodians, warehouse employees, grounds keeper/hauling coordinator, and custodial helpers.

. . .

ARTICLE V – HOURS

SECTION 1. The hours of work for employees covered by this Agreement shall be forty (40) hours per week, consisting of five (5) consecutive eight (8) hour days.

. . .

ARTICLE XII – GENERAL

. . .

SECTION 4. Services performed by employees of the bargaining unit shall not be performed by other employees or groups.

During bargaining over a successor to the 1996-1998 contract, the District advised the Union that it believed Article V, Section 1 and Article XII, Section 4 were permissive subjects of bargaining to the extent that said provisions do not allow the District to hire part-time employees to perform bargaining unit work.

4. A proposal which prohibits the performance of bargaining unit work by anyone other than full-time bargaining unit employees primarily relates to wages, hours and conditions of employment.

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

CONCLUSION OF LAW

The proposal referenced in Finding of Fact 4 is a mandatory subject of bargaining.

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

DECLARATORY RULING

The Eau Claire School District has a duty to bargain with Local 560, District Council 40, AFSCME, AFL-CIO as to the proposal referenced in Finding of Fact 4.

Given under our hands and seal at the City of Madison, Wisconsin this 18th day of May, 1999.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Meier /s/

James R. Meier, Chairperson

A. Henry Hempe /s/

A. Henry Hempe, Commissioner

Paul A. Hahn /s/

Paul A. Hahn, Commissioner

**MEMORANDUM ACCOMPANYING FINDINGS OF FACT,
CONCLUSION OF LAW AND DECLARATORY RULING**

POSITIONS OF THE PARTIES

The District

The District contends that the existing disputed contract language is a permissive subject of bargaining to the extent it prohibits use of part-time unit employees or non-unit employees to perform bargaining unit work. The District asserts that such a prohibition primarily relates to managerial and policy prerogatives related to organizational structure and improperly limits the District's flexibility when meeting service needs.

The District argues that in CITY OF EAU CLAIRE, DEC. NO. 29546 (WERC, 2/99), the Commission held that a contractual restriction on the number of part-time employees was a permissive subject of bargaining. Applying EAU CLAIRE to the instant case, the District asserts that a prohibition on hiring part-time employees must also be permissive. The District notes that in the CITY OF RIVER FALLS, DEC. NO. 28384 (WERC, 5/95) and WAUSAU AREA TRANSIT SYSTEM, DEC. NO. 25563 (WERC, 7/88), cases relied on by the Union, there were no prohibitions against the employment of part-time workers.

The District urges rejection of the Union's arguments that the existing contract language primarily relates to hours and the protection of bargaining unit work. It alleges that the public policy decision of how a municipal entity is organized predominates over these interests.

Given the foregoing, the District asks that the disputed contract provisions be found to be permissive subjects of bargaining.

The Union

The Union asserts that the disputed contract language is a mandatory subject of bargaining primarily related to hours and the protection of bargaining unit work. The Union asserts that the Commission has consistently held that proposals which establish hours of work but do not preclude the employer from providing services are mandatory subjects of bargaining. The Union alleges that the mandatory status of no subcontracting proposals is also firmly established in Commission precedent.

The Union argues the District has not identified any substantial managerial or public policy interests that are impacted by the existing contract language. The Union notes that the existing language has never prevented the District from determining what services need to be performed or when those services will be provided. It points out that the District has the right to determine the size of the workforce.

The Union alleges that the District's true interest in this proceeding is to have existing work performed more cheaply by part-time workers. The Union argues that although the District is free to pursue that interest at the bargaining table or through interest arbitration, the Commission has always held that "cost" is irrelevant to the mandatory or permissive status of a proposal.

The Union contends the Commission's RIVER FALLS decision is directly on point and clearly states that use of part-time as opposed to full-time employees does not present any significant impact on the management of public policy.

Given the foregoing, the Union asks that the contract provisions be found to be mandatory subjects of bargaining.

DISCUSSION

It is useful to set forth the general legal framework within which the issues herein must be resolved. In *BELOIT EDUCATION ASSOCIATION V. WERC*, 73 Wis.2d 43 (1976); *UNITED SCHOOL DISTRICT NO. 1 OF RACINE COUNTY V. WERC*, 81 Wis.2d 89 (1977); and *CITY OF BROOKFIELD V. WERC*, 87 Wis.2d 819 (1979), the Court set forth the definition of mandatory and permissive subjects of bargaining under Sec. 111.70(1)(d), Stats., as matters which primarily relate to "wages, hours, and conditions of employment" or to the "formulation or management of public policy," respectively.

As the Court noted in *WEST BEND EDUCATION ASSOCIATION V. WERC*, 121 Wis.2d 1, 9 (1984):

As applied on a case-by-case basis, this primarily related standard is a balancing test which recognizes that the municipal employer, the employees, and the public have significant interests at stake and that their competing interests should be weighed to determine whether a proposed subject for bargaining should be characterized as mandatory. 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.

We begin by noting that the parties may have a disagreement on the meaning of the existing contract. As was true in the RIVER FALLS case cited by both parties, we need not and do not resolve any such disagreement. For the purposes of this declaratory ruling proceeding, the parties ask us to decide whether a proposal which prohibits the use of anyone other than full-time District employees to perform bargaining unit work is a mandatory subject of bargaining. We proceed to that task.

Both parties correctly cite WAUSAU AREA TRANSIT SYSTEM, CITY OF RIVER FALLS and CITY OF EAU CLAIRE as Commission decisions directly relevant to the disposition of this dispute.

In each of those decisions, we concluded that so long as the employer was able to determine what services to provide and when to provide them, the questions of whether the services were performed by full-time or part-time employees or by bargaining unit or non-bargaining unit employees were not public policy choices.

In each of these decisions, we acknowledged that restrictions on the use of part-time employees or non-bargaining unit employees do impact on managerial prerogatives and flexibility as to how services will be performed.

In each of these decisions, we concluded that employees had a direct and substantial interest in bargaining over their hours. In RIVER FALLS and EAU CLAIRE, we reaffirmed the direct and substantial interest employees have in bargaining contract provisions that protect bargaining unit work.

Applying these common threads in WAUSAU, RIVER FALLS and EAU CLAIRE as to proposals which restricted employer use of part-time and/or non-bargaining unit employees, we found the impact on employee wages, hours and conditions of employment outweighed the restriction on managerial prerogatives. However, in EAU CLAIRE, we concluded that to the extent the proposal went beyond a limitation on the number of part-time employee hours and also dictated the number of part-time employees who could be hired to work those hours, the impact on managerial prerogatives predominated as to the hiring issue. To that limited extent, a portion of the disputed EAU CLAIRE proposal was found to be a permissive subject of bargaining.

Here, the District cites EAU CLAIRE and argues that if a limitation on the number of part-time employees is permissive, then a prohibition against hiring part-time employees must also be a permissive subject of bargaining. The District reads too much into EAU CLAIRE. In EAU CLAIRE, we concluded that it was a mandatory subject of bargaining for the union to propose a limitation on the number of hours part-time employees could work. Only as to that part of the proposal which dictated how the employer would exercise whatever flexibility it had (i.e. how many part-time employees it would hire to work the allowable number of hours) did the balance of interests shift to the employer side of the scale.

In this case, the Union is proposing the strongest possible limitation on the use of part-time employees – a prohibition against their use to perform unit work. The proposal does not prevent the District from deciding what services will be provided and when said services will be provided. Consistent with WAUSAU, RIVER FALLS and EAU CLAIRE, we conclude that the core employee interests in hours and protection of unit work outweigh the limitation on managerial interests which such a prohibition creates. Thus, we find the prohibition proposed by the Union to be a mandatory subject of bargaining.

In closing, it is worth noting that because the use of part-time/non-bargaining unit employees is a mandatory subject of bargaining, the District has a right to seek contract language at the bargaining table and/or through interest arbitration which allows it to use part-time/non-bargaining unit employees to perform bargaining unit work.

Dated at Madison, Wisconsin this 18th day of May, 1999.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Meier /s/

James R. Meier, Chairperson

A. Henry Hempe /s/

A. Henry Hempe, Commissioner

Paul A. Hahn /s/

Paul A. Hahn, Commissioner