STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL NO. 152, AFL-CIO, Complainant,

vs.

RACINE UNIFIED SCHOOL DISTRICT, Respondent.

Case 191
No. 58280
MP-3583

Decision No. 29846-B

Appearances:

Shneidman, Myers, Dowling, Blumenfield, Ehlke, Hawks & Domer, by **Attorneys Timothy Hawks** and **Mark Sweet,** 700 West Michigan Street, Suite 500, P.O. Box 442, Milwaukee, Wisconsin 53201-0442, appearing on behalf of Service Employees International Union, Local No. 152, AFL-CIO.

Melli, Walker, Pease & Ruhly, S.C., by **Attorney Douglas Witte,** 10 East Doty Street, Suite 900, P.O. Box 1664, Madison, Wisconsin 53701-1664, appearing on behalf of Racine Unified School District.

ORDER AFFIRMING AND MODIFYING EXAMINER'S FINDINGS OF FACT, AND AFFIRMING EXAMINER'S CONCLUSIONS OF LAW AND ORDER

On September 1, 2000, Examiner Raleigh Jones issued Findings of Fact, Conclusions of Law and Order with Accompanying Memorandum in the above matter wherein he concluded that the Respondent District did not commit prohibited practices within the meaning of Secs. 111.70(3)(a)4 or 1, Stats., by installing and utilizing hidden video cameras in the workplace to investigate allegations of employee misconduct.

To maximize the ability of the parties we serve to utilize the Internet and computer software to research decisions and arbitration awards issued by the Commission and its staff, footnote text is found in the body of this decision.

Complainant timely filed a petition with the Wisconsin Employment Relations Commission seeking review of the Examiner's decision pursuant to Secs. 111.07(5) and 111.70(4)(a), Stats. The parties thereafter filed written argument in support of and in opposition to the petition, the last of which was received November 16, 2000.

Having reviewed the record and being fully advised in the premises, the Commission makes and issues the following

ORDER

A. The Examiner's Findings of Fact 1-13 are affirmed.

B. The Examiner's Finding of Fact 14 is affirmed as modified to read:

> 14. The District's decision to install and utilize hidden video cameras on the loading dock and in a break room to investigate allegations of employee misconduct primarily relates to the management and direction of the District and the formulation or management of public policy.

C. The Examiner's Conclusions of Law and Order are affirmed.

Given under our hands and seal at the City of Madison, Wisconsin this 2nd day of February, 2001.

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

Racine Unified School District

MEMORANDUM ACCOMPANYING ORDER AFFIRMING AND MODIFYING EXAMINER'S FINDINGS OF FACT, AND AFFIRMING EXAMINER'S CONCLUSIONS OF LAW AND ORDER

The Examiner's Decision

The Examiner concluded that Respondent District did not commit prohibited practices within the meaning of Secs. 111.70(3)(a)4 or derivatively 1, Stats., by installing and using hidden video cameras in a loading dock and break room to investigate allegations of employee misconduct. His conclusion was based on his determination that the decision to install and use the cameras in the factual circumstances presented primarily related to the management and direction of the District's workforce and thus was a permissive subject of bargaining.

When analyzing the mandatory or permissive nature of the District's decision, the Examiner considered but rejected Complainant's argument that the decision was a mandatory subject of bargaining under the reasoning of the Commission and ultimately the Wisconsin Supreme Court in CITY OF BELOIT SCHOOLS, DEC. NO. 11831-C (WERC, 9/74); AFF'D IN PERTINENT PART, BELOIT EDUCATION ASSOCIATION V. WERC, 73 WIS.2D 43 (1976). He also rejected National Labor Relations Board precedent cited by Complainant because he found this private sector precedent factually distinguishable and grounded in a different duty to bargain analysis than is applicable under the Municipal Employment Relations Act.

Under the Municipal Employment Relations Act, the Examiner concluded that he was obligated to balance the relationship of the decision to wages, hours and conditions of employment and to the management and operation of the schools and the health, safety and welfare of the District's property, students and employees. He determined that the latter relationship predominated. The Examiner found that the District's interest in protecting and safeguarding its property and employees from theft and employee misconduct predominated over employee privacy concerns. Thus, he concluded that the decision was a permissive subject of bargaining which the District could unilaterally implement.

POSITIONS OF THE PARTIES ON REVIEW

Complainant

Complainant asserts the Examiner erred when he concluded that the decision to install and use hidden video cameras was a permissive subject of bargaining. Complainant argues that such theft detection measures have no relationship to public policy while having obvious

and important impacts on employee privacy, job security and the right to engage in private activities, including union activities, during breaks. Thus, the Complainant asserts the decision to install and use hidden video cameras was a mandatory subject of bargaining.

Citing BELOIT, SUPRA, and private sector precedent, Complainant alleges that decisions which alter the "mode of investigation and the character of proof on which an employees' job security might depend" are mandatory subjects of bargaining.

Should the Commission correctly conclude that the decision to install cameras was a mandatory subject of bargaining, Complainant then argues that it did not waive its right to so bargain. Complainant Union's knowledge of prior use of hidden cameras in other factual circumstances is not sufficient to establish the requisite "clear and unmistakable" waiver standard.

Respondent

Respondent urges affirmance of the Examiner.

Respondent argues that the Examiner properly found the use of hidden video cameras primarily related to the operation and management of the schools and to the health, safety and welfare of the students and employees of the District. Respondent further contends that the use of hidden video cameras is a legitimate investigatory tool to assist the District in carrying out its statutorily mandated responsibilities to run the schools.

Respondent alleges that the use of hidden video cameras did not constitute a change in conditions of employment and argues that the concerns of employees/Complainant Union can best be addressed through impact bargaining.

Respondent argues that the private sector precedent cited by Complainant is not relevant to the instant dispute.

Should the Commission conclude that the use of hidden video cameras is a mandatory subject of bargaining, Respondent contends the Complainant waived its right to bargain over this subject.

DISCUSSION

Under the specific facts of this case, we affirm the Examiner's determination that the decision to install and use video cameras was a permissive subject of bargaining. However, as set forth below, our analysis differs somewhat from the Examiner's.

Before considering the specific matter at issue herein, it is useful to set out the general framework within which we determine whether a matter is a mandatory or permissive subject of bargaining.

Section 111.70(1)(a), Stats., provides:

> "Collective bargaining" means the performance of the mutual obligation of a municipal employer, through its officers and agents, and the representative of its municipal employees in a collective bargaining unit, to meet and confer at reasonable times, in good faith, with the intention of reaching an agreement, or to resolve questions arising under such an agreement, with respect to wages, hours and conditions of employment, and with respect to a requirement of the municipal employer for a municipal employee to perform law enforcement and fire fighting services under s. 61.66, except as provided in sub. (4)(m) and s. 40.81(3) and except that a municipal employer shall not meet and confer with respect to any proposal to diminish or abridge the rights guaranteed to municipal employees under ch. 164. The duty to bargain, however, does not compel either party to agree to a proposal or require the making of a concession. Collective bargaining includes the reduction of any agreement reached to a written and signed document. The municipal employer shall not be required to bargain 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 municipal employees in a collective bargaining unit. In creating this subchapter the legislature recognizes that the municipal employer must exercise its powers and responsibilities to act for the government and good order of the jurisdiction which it serves, its commercial benefit and the health, safety and welfare of the public to assure orderly operations and functions within its jurisdiction, subject to those rights secured to municipal employees by the constitutions of this state and of the United States and by this subchapter.

In WEST BEND EDUCATION ASS'N V. WERC, 121 WIS.2D 1, 7-9 (1984), the Wisconsin Supreme Court concluded the following as to how Sec. 111.70(1)(a), Stats., (then Sec. 111.70(1)(d), Stats.), should be interpreted when determining whether a subject of bargaining is mandatory or permissive.

Section 111.70(1)(d) sets forth the legislative delineation between mandatory and nonmandatory subjects of bargaining. It requires municipal employers, a term defined as including school districts, sec. 111.70(1)(a), to bargain "with respect to wages, hours and conditions of employment." At the same time it provides that a municipal employer "shall not be required to bargain 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 employees." Furthermore, sec. 111.70(a)(d) recognizes the municipal employer's duty to act for the government, good order and commercial benefit of the municipality and for the health, safety and welfare of the public, subject to the constitutional statutory rights of the public employees.

Section 111.70(1)(d) thus recognizes that the municipal employer has a dual role. It is both an employer in charge of personnel and operations and a governmental unit, which is a political entity responsible for determining public policy and implementing the will of the people. Since the integrity of managerial decision making and of the political process requires that certain issues not be mandatory subjects of collective bargaining, UNIFIED SCHOOL DISTRICT NO. 1 OF RACINE COUNTY V. WERC, 81 WIS.2D 89.259; N.W.2D 724 (1977), sec. 111.70(1)(d) provides an accommodation between the bargaining rights of public employees and the rights of the public through its elected representatives.

In recognizing the interests of the employees and the interests of the municipal employer as manager and political entity, the statute necessarily presents certain tensions and difficulties in its application. Such tensions arise principally when a proposal touches simultaneously upon wages, hours, and conditions of employment and upon managerial decision making or public policy. To resolve these conflict situations, this court has interpreted sec. 111.70(1)(d) as setting forth a "primarily related" standard. Applied to the case at bar, the standard requires WERC in the first instance (and a court on review thereafter) to determine whether the proposals are "primarily related" to "wages, hours and conditions of employment," to "educational policy and school management and operation," to "management and direction of the school system" or to "formulation or management of public policy." UNIFIED SCHOOL DISTRICT NO. 1 OF RACINE COUNTY V. WERC, 81 WIS.2D 89 95-96, 102, 259 N.W.2D 724 (1977). This court has construed "primarily" to mean "fundamentally," "basically," or "essentially," BELOIT EDUCATION ASSO. V. WERC, 73 WIS.2D 43, 54, 242 N.W.2D 231 (1976).

> 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 weighted to determine whether a proposed subject for bargaining should be characterized as mandatory. If the employees' legitimate interests 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. In such cases, the professional association may be heard at the bargaining table if the parties agree to bargain or may be heard along with other concerned groups and individuals in the public forum. UNIFIED SCHOOL DISTRICT NO. 1 OF RACINE CO. V. WERC, SUPRA, 81 WIS.2D AT 102; BELOIT EDUCATION ASSO., SUPRA, 73 WIS.2D AT 50-51. Stating the balancing test, as we have just done, is easier than isolating the applicable competing interests in a specific situation and evaluating them. (footnotes omitted)

The Examiner cited "employee privacy concerns" as the primary relationship of the video camera decision to employee wages, hours and conditions of employment. We disagree. As Complainant correctly argues, job security is implicated as an employee interest. We find this job security interest to be the most significant employee wage, hour and conditions of employment interest presented by this case.

The primacy of job security in our duty to bargain analysis is largely due to the very limited impact which this video camera use had on employee privacy interests. Neither camera recorded sound. Thus, any intrusion into privacy was limited to conduct which occurred within the cameras' view. One of the cameras was trained on the loading dock – an open area where there is little if any privacy interest. The second camera was trained on a table in a room which had many uses – including serving as the head engineer's office – and whose doors were generally unlocked. Although employee lockers are present in the room, the six days of tape presented as exhibits never revealed any employee changing clothes or engaging in other behavior which an employee might reasonably expect to be private. Given the foregoing, employee privacy interests play no significant role in our mandatory/permissive analysis.

Turning to the identification of the employer interests at stake, Complainant limits the scope of potential employer interest to "public policy choices" and then argues that there are no public policy choices present in this case. We disagree for several reasons. First, under Wisconsin law, the scope of potential employer interests is broader than Complainant suggests. Second, there are public policy implications present here.

As to the breadth of potential employer interests, the definition of collective bargaining found in Sec. 111.70(1)(a), Stats., identifies those interests as including "management and direction of the governmental unit," "the government and good order of the jurisdiction which it serves, its commercial benefit," and the "health, safety and welfare of the public to assure orderly operations and functions . . ." The Wisconsin Supreme Court in WEST BEND, SUPRA, summarized these various but related municipal employer interests as "restrictions on managerial prerogatives or public policy" and "the management and direction of the school system or the formulation of public policy." Given the foregoing, there is no doubt that the scope of potential municipal employer interests we must consider is far broader than Complainant suggests.

As to the public policy interests present here, it can fairly be said that the District made the public policy decision that employees are expected to behave honestly in the work place and to perform work when not on break/during meal periods. The decision to use video cameras to investigate alleged violations of this public policy serves to implement the public policy choice as part of what the WEST BEND Court would call "the management and direction of the school system" and the exercise of a "managerial prerogative."

In his ultimate Finding of Fact 14, the Examiner summarized the employer's interests in this case as being "the management and direction of the District's workforce." In his Memorandum, he referenced a management interest and obligation to protect and safeguard employees and property and "the formulation and management of public policy."

Given all of the foregoing, we think it clear that there are a variety of employer interests which must be considered when determining whether the decision to use video cameras is a mandatory or permissive subject of bargaining. We have modified Examiner Finding of Fact 14 to reflect the breadth of those interests and to more precisely identify the use of video cameras that is before us for decision.

Summarizing, we have a factual situation in which the District chose to use two hidden video cameras to investigate allegations of employee theft of time and property. While the location and use of the two cameras does not strongly implicate privacy interests, employee job security interests obviously are impacted given the potential for misconduct to be recorded. On the employer's side of the scale, there are a variety of previously discussed District management and policy interests at stake. When we balance these competing interests, we find the management/policy interests predominate. Thus, like the Examiner, we find the District's decision to be a permissive subject of bargaining. 1/

1/ Respondent correctly argues that support for our decision can be found in VILLAGE OF STODDARD, DEC. NO. 27970-B (WERC, 11/94) where we concluded that installation of a time clock was not a mandatory subject of bargaining because employees were already accountable for their hours and because of management's interest in knowing when employees were actually working. Here, employees are also already accountable for their hours and management has an interest in knowing when employees are actually working.

As to the private sector precedent cited by the Complainant, it is apparent that it reflects a duty to bargain analysis different than that we are bound to apply under the Municipal Employment Relations Act. On that basis alone, we reject that precedent. However, it is also noteworthy that much of that precedent is factually distinguishable from the case at hand.

As to the applicability of BELOIT, SUPRA, to the instant matter, we acknowledge that BELOIT holds that

> . . . the matters of length of observation periods, openness of observation, number of evaluations and frequency of observations are mandatory subjects of bargaining. It would indeed be specious to determine, as we do subsequently herein, that the Association's proposal of a "just cause" standard is a mandatory subject of bargaining, but not require bargaining over such techniques as comprise the procedural aspects of said standard.

and that the Wisconsin Supreme Court affirmed the Commission's decision stating that "these matters go to the right of teachers to have notice and input into procedures that affect their job security."

In our view, given the explicit linkage to a "just cause" standard, the BELOIT rationale and holding provide employees/unions the right to bargain for a disciplinary process which will give them notice of the employer's expectations for their job performance, notice when they are failing to meet those expectations, and opportunities to correct any performance deficiencies. Here, where the misconduct in question is theft of property or time, there are no issues of notice or knowledge of expectations. Employees know that they are not allowed to steal property or time. Therefore, in the specific context of the facts of this case, we conclude that the holding of BELOIT does not require that we find the use of hidden video cameras to be a mandatory subject of bargaining.

Given all of the foregoing and based on the specific facts before us, we have affirmed the Examiner's conclusion that Respondent District did not have a duty to bargain with Complainant over the installation and use of hidden video cameras. Our conclusion does not preclude the Complainant from bargaining with Respondent over the impact of cameras' use on employee wages, hours and conditions of employment.

Dated at Madison, Wisconsin this 2nd day of February, 2001.

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

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