

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of
MARKESAN DISTRICT EDUCATION ASSOCIATION
Requesting a Declaratory Ruling Pursuant to Section 111.70(4)(b), Wis. Stats.,
Involving a Dispute Between Said Petitioner and

MARKESAN SCHOOL DISTRICT

Case 10
No. 62350
DR(M)-638

Decision No. 30723

Appearances:

Melissa A. Cherney, Staff Counsel, Wisconsin Education Association Council, P.O. Box 8003, Madison, Wisconsin 53708-8003, appearing on behalf of Markesan District Education Association.

Douglas E. Witte, Attorney at Law, Melli, Walker, Pease & Ruhly, S.C., P.O. Box 1664, Madison, Wisconsin 53701-1664, appearing on behalf of Markesan School District.

ORDER DENYING MOTION TO DISMISS

On May 2, 2003, the Markesan District Education Association filed a petition with the Wisconsin Employment Relations Commission pursuant to Sec. 111.70(4)(b), Stats., seeking a declaratory ruling as to whether the Association is obligated to bargain with the Markesan School District over inclusion in a 2001-2003 agreement of certain contract language from the parties' 1999-2001 contract.

On May 9, 2003, the District filed a statement in response to the petition. In the response, the District asserted that the petition should be dismissed because the contract language in question had become part of the parties' 2001-2003 contract on April 2, 2003 by operation of Sec. 111.70(4)(cm) 5s, Stats., and thus there is no present duty to bargain dispute for the Commission to resolve.

On June 18, 2003, the District formalized its position by filing a motion to dismiss.

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The parties thereafter filed argument in support of and in opposition to the motion -- the last of which was received August 5, 2003.

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.

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

ORDER

The motion to dismiss is denied.

Given under our hands and seal at the City of Madison, Wisconsin, this 14th day of October, 2003.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/

Judith Neumann, Chair

Paul Gordon /s/

Paul Gordon, Commissioner

Susan J. M. Bauman /s/

Susan J. M. Bauman, Commissioner

MEMORANDUM ACCOMPANYING ORDER DENYING MOTION TO DISMISS

The Association asserts in its May 2, 2003 petition that there is a dispute between the parties as to whether there is an obligation to bargain over inclusion of the following provision in their 2001-2003 contract:

Section 10.3. This Agreement reached as a result of collective bargaining represents the full and complete agreement between the parties and supersedes all previous agreements between the parties. It is agreed that any matters relating to the current contract term, whether or not referred to in this Agreement, shall not be open for negotiations except as the parties may specifically agree thereto. All terms and conditions of employment not covered by this Agreement shall continue to be subject to the Board's direction and control provided, however, that the MDEA shall be notified in advance of any changes having a substantial impact on the bargaining unit, given the reason for such change, and provided an opportunity to discuss the matter.

Citing existing Commission precedent 1/, the Association argues that Section 10.3 is a permissive subject of bargaining to the extent it waives the Association's statutory right to bargain over mandatory subjects of bargaining during the term of the contract.

1/ The Commission has concluded that provisions such as Section 10.3 (commonly known as "zipper clauses") are permissive subjects of bargaining to the extent they apply to matters that arise during the term of the contract which were not known to the parties when the contract was bargained and which are not otherwise covered by the contract. DEERFIELD COMMUNITY SCHOOL DISTRICT, DEC. NO. 17503 (WERC, 12/79); RACINE UNIFIED SCHOOL DISTRICT, DEC. NO. 19981-B (WERC, 1/83); MILWAUKEE PUBLIC SCHOOLS, DEC. NO. 29134 (WERC, 7/97).

The District asserts that there cannot be such a duty to bargain dispute because on April 2, 2003, Section 10.3 became part of the 2001-2003 contract by operation of Sec. 111.70(4)(cm) 5s, Stats.

Section 111.70(4)(cm) 5s, Stats., provides in pertinent part:

. . . On the 90th day prior to expiration of the period included within the qualified economic offer, if no agreement exists on that day, the parties are deemed to have stipulated to the inclusion in a new or revised collective bargaining agreement of all provisions of any predecessor collective bargaining agreement concerning economic issues, or of all provisions of any existing

collective bargaining agreement concerning economic issues if the parties have reopened negotiations under an existing agreement, as modified by the terms of the qualified economic offer and as otherwise modified by the parties. In such a collective bargaining unit, on and after that 90th day, a municipal employer that refuses to bargain collectively with respect to the terms of that stipulation, applicable to the 90-day period prior to expiration of the period included within the qualified economic offer, does not violate sub. (3)(a)4. Any such unilateral implementation after August 11, 1993, during the 90-day period prior to expiration of the period included within a qualified economic offer, operates as a full, final and complete settlement of all economic issues between the parties for the period included within the qualified economic offer.

Citing the statutory use of the word “concerning” in the above-quoted language, the District argues that Section 10.3 has become part of the 2001-2003 contract because it “concerns economic issues” to the extent the scope of the waiver it creates includes economic issues listed in Sec. 111.70(1)(dm), Stats.

Section 111.70(1)(dm), Stats., defines an “economic issue” as follows:

(dm) “Economic issue” means salaries, overtime pay, sick leave, payments in lieu of sick leave usage, vacations, clothing allowances in excess of the actual cost of clothing, length-of-service credit, continuing education credit, shift premium pay, longevity pay, extra duty pay, performance bonuses, health insurance, life insurance, dental insurance, disability insurance, vision insurance, long-term care insurance, worker’s compensation and unemployment insurance, social security benefits, vacation pay, holiday pay, lead worker pay, temporary assignment pay, retirement contributions, supplemental retirement benefits, severance or other separation pay, hazardous duty pay, certification or license payment, limitations on layoffs that create a new or increased financial liability on the employer and contracting or subcontracting of work that would otherwise be performed by municipal employees in the collective bargaining unit with which there is a labor dispute.

As evidenced by the text of Sec. 111.70(1)(dm), Stats., the list of economic issues does not include contract “zipper clauses” such as Section 10.3 that waive the statutory right to bargain during the term of contract. However, as noted earlier, the District asserts that because the language of Sec. 111.70(4)(cm) 5s, Stats., uses the word “concerning” and because the waiver created by Section 10.3 would extend to the economic issues listed (due to their status as mandatory subjects of bargaining), Section 10.3 has become part of the 2001-2003 contract even though it is not a statutorily listed “economic issue.”

Given all of the foregoing, the question before us is whether the Legislature's use of the word "concerning" reflects an intent to expand the impact of Sec. 111.70(4)(cm) 5s, Stats., beyond the "economic issues" listed in Sec. 111.70(1)(dm), Stats. We conclude it does not.

The District's argument as to the meaning of Sec. 111.70(4)(cm) 5s, Stats., does not account for the absence of the word "concerning" in that portion of Sec. 111.70(4)(cm) 5s, Stats., that provides:

. . . operates as a full, final and complete settlement of all economic issues between the parties. . . .

From the absence of the word "concerning" in this portion of the statute that most directly addresses the issue of whether a "settlement" or agreement exists, we conclude that the scope of Sec. 111.70(4)(cm) 5s, Stats., does not extend beyond the "economic issues" listed in Sec. 111.70(1)(dm), Stats., and that the use of "concerning" elsewhere in the statutory language was not intended to convey a contrary intent.

Indeed, if "concerning" were to be given the substantive meaning advanced by the District, the scope of the stipulation created by a portion of Sec. 111.70(4)(cm) 5s, Stats., would be broader than the "settlement" referenced two sentences later in the same statutory provision. Such an interpretation would run counter to the Court's admonition to avoid interpreting statutes in a manner that produces an "absurd or unreasonable" result. LAKE CITY CORP. V. CITY OF MEQUON, 207 Wis.2d 155 (1997).

Therefore, because Section 10.3 did not become part of the 2001-2003 contract by operation of Sec. 111.70(4)(cm) 5s, Stats., there is a present duty to bargain dispute between the parties over Section 10.3. Thus, we have denied the District's motion to dismiss.

Dated at Madison, Wisconsin, this 14th day of October, 2003.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/

Judith Neumann, Chair

Paul Gordon /s/

Paul Gordon, Commissioner

Susan J. M. Bauman /s/

Susan J. M. Bauman, Commissioner

