

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of

WAUPACA COUNTY

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

**WAUPACA COUNTY HIGHWAY DEPARTMENT
EMPLOYEES UNION LOCAL 1756, AFSCME, AFL-CIO**

Case 130
No. 61241
DR(M)-645

Decision No. 30733

Appearances:

James R. Macy, Attorney at Law, Davis & Kuelthau, S.C., 219 Washington Avenue, P.O. Box 1278, Oshkosh, Wisconsin 54903-1278, appearing on behalf of Waupaca County.

Michael J. Wilson, Representative at Large, Wisconsin Council 40, AFSCME, AFL-CIO, 8033 Excelsior Drive, Suite B, Madison, Wisconsin 53717-1903, appearing on behalf of Waupaca County Highway Department Employees Union Local 1756, AFSCME, AFL-CIO.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECLARATORY RULING

On May 20, 2002, Waupaca County filed a petition with the Wisconsin Employment Relations Commission seeking a declaratory ruling pursuant to Sec. 111.70(4)(b), Stats., as to whether the County was obligated to bargain with Waupaca County Highway Department Employees Union, Local 1756, AFSCME, AFL-CIO over the wages, hours and conditions of employment of temporary and seasonal employees.

The parties thereafter engaged in a lengthy and ultimately unsuccessful effort to stipulate to a factual record. Hearing was then held in Waupaca, Wisconsin on March 12, 2003 by Commission Examiner Peter Davis.

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The parties filed post-hearing written argument, the last of which was received by June 20, 2003.

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

FINDINGS OF FACT

1. Waupaca County, herein the County, is a municipal employer having its principal offices in Waupaca, Wisconsin.

2. Waupaca County Highway Department Employees Union, Local 1756, AFSCME, AFL-CIO, herein AFSCME, is a labor organization that serves as the collective bargaining representative of certain employees of the County Highway Department.

4. Since June 1990, the County and AFSCME have had an unresolved dispute as to whether "seasonal" and "temporary" employees are included in the AFSCME Highway Department collective bargaining unit.

4. The 1999-2001 contract between the County and AFSCME states the following (lined-through added):

Article I – Recognition & Unit of Representation

1.01 The Employer recognizes the Union as the exclusive bargaining representative of all employees of the Employer employed in the Highway Department, except the Highway Commissioner, supervisory personnel and confidential clerical personnel, for the purposes of conferences and negotiations with the above named municipal employer, or its lawfully authorized representative, on questions of wages, hours and conditions of employment.

...

Article VII – Probationary & Employment Status

...

~~7.04 A seasonal employee is one who is a regular employee, but who is on the active payroll only during the season in which his/her services are required according to the Table of Organization referred to elsewhere in this Agreement.~~

Article VIII - Job Posting & Seniority

...

- 8.11 ~~There shall be two seniority groups; full-time employees and seasonal employees. Seasonal employee's seniority group shall be below that of the full-time employees and~~ All seasonal employees shall be laid off prior to any reduction in the full-time employee working force.

~~When laying off seasonal employees, the oldest point of service shall be retained if qualified to perform the available work.~~ When laying off full-time employees, the oldest in point of service shall be retained if the remaining personnel are qualified to perform the work available. The rehiring of employees that have been laid off shall be in reverse order to that of laying off.

...

Article XIII - Job Classification & Wage Schedule

...

- 13.04 Probationary employees, ~~temporary employees, and seasonal employees~~ shall be paid at the rates as now listed in the attached schedule. The employee's weekly pay shall be the product of his/her job classification rate, multiplied by the number of hours worked.

Schedule "A" Job Classification and Wage Schedule

~~Class 1~~

~~Temporary Help~~

(Wage Rate)

During bargaining between the County and AFSCME over a successor to the 1999-2001 contract, a dispute arose as to whether the lined-through portions of Articles VII, VIII and XIII and Schedule A are mandatory subjects of bargaining.

5. The description of the Highway Department bargaining unit contained in Article 1.01 of the 1999-2001 contract is the same unit description contained in the parties' first contract which covered the period of January 1 - December 31, 1964. Like the 1999-2001 contract, the 1964 contract also contained provisions which defined "seasonal employee", "part-time employee", "temporary employee", specified the layoff and seniority rights of "seasonal employees", required that "temporary employees and seasonal employees" be paid wage rates specified in a wage schedule, and specified a wage rate for "Temporary Help."

6. Between 1964 and 2002, the County paid “seasonal” and “temporary” employees the wage rate specified in the applicable bargaining agreements on some occasions and not on others. AFSCME did not grieve the failure of the County to pay the contractually identified wage rate until May 2002.

7. In 1989, AFSCME filed a unit clarification petition with the Commission seeking inclusion of two Highway Department clerical employees in the AFSCME Highway Department unit. In response to the petition, the County voluntarily agreed to inclusion of the two clerical employees in the AFSCME Highway Department unit.

8. The Highway Department employs an Engineering Assistant. There is no reference to the Engineering Assistant in any of the parties’ collective bargaining agreements and AFSCME has never asserted that the Assistant is in the Highway Department bargaining unit.

9. The Highway Department employs an Engineer. The Engineer supervises the Engineering Assistant and is not included in the Highway Department bargaining unit.

10. The Highway Department employs a Parts and Receiving Manager. The Manager supervises the bargaining unit position of Stock Clerk and is not included in the Highway Department bargaining unit.

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

CONCLUSIONS OF LAW

1. Because there is a dispute between AFSCME and the County concerning their duty to bargain over the lined-through contractual provisions set forth in Finding of Fact 4, it is appropriate for the Wisconsin Employment Relations Commission to resolve that dispute in the context of a Sec. 111.70(4)(b), Stats., declaratory ruling proceeding.

2. Seasonal and temporary employees are included in the County Highway Department collective bargaining unit represented by AFSCME.

3. The disputed portions of Articles VII, VIII and XIII and Schedule A primarily relate to wages, hours and conditions of employment of employees in the Highway Department unit represented by AFSCME.

4. The disputed portions of Articles VII, VIII and XIII and Schedule A are mandatory subjects of bargaining.

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

DECLARATORY RULING

The County has a duty to bargain with AFSCME within the meaning of Secs. 111.70(1)(a) and (3)(a) 4, Stats., as to the disputed portions of Articles VII, VIII and XIII and Schedule A.

Given under our hands and seal at the City of Madison, Wisconsin, this 4th day of November, 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 FINDINGS OF FACT,
CONCLUSIONS OF LAW AND DECLARATORY RULING**

Our disposition of this duty to bargain dispute turns on resolution of the parties' more than decade old dispute over whether "seasonal" and "temporary" employees are included in the Highway Department bargaining unit.

If they are so included, the disputed provisions defining who these employees are 1/ and establishing their wage rates, seniority and layoff rights are primarily related to wages, hours and conditions of employment and thus are mandatory subjects of bargaining.

1/ As to the portion of Article VII (7.04) that defines a seasonal employee, the County secondarily argues that this language impermissibly intrudes into management policy judgments as to whether a particular position is seasonal/temporary or regular. We disagree. Article VII (7.04) simply defines what a seasonal employee is for the purposes of identifying who is covered by the substantive seasonal employee rights found elsewhere. This contract language does not dictate whether there will or will not be any seasonal employees. Given the link of this definitional language to substantive benefits, it primarily relates to wages, hours and condition of employment if the seasonal employees are found to be part of the bargaining unit. FRANKLIN SCHOOLS, DEC. NO. 21846 (WERC, 7/84).

If they are not so included, AFSCME correctly concedes that it has no right to bargain on behalf of these employees.

As a preliminary matter, AFSCME argues that we should dismiss the County's petition for declaratory ruling because a ruling will serve as a de facto unit clarification and will usurp the role a grievance arbitrator should play when interpreting the parties' collective bargaining agreement. We do not find this AFSCME argument to be persuasive.

AFSCME and the County have a dispute as to their duty to bargain over proposals that affect seasonal and temporary employees. Section 111.70(4)(b), Stats., provides that:

Whenever a dispute arises between a municipal employer and a union representing its employees concerning the duty to bargain on any subject, the dispute shall be resolved by the commission on petition for declaratory ruling.

Thus, while it is true in the context of this duty to bargain dispute that a unit clarification decision would likely also be dispositive as to the duty to bargain issue, that reality does not make a declaratory ruling proceeding inappropriate given the clear language of

Sec. 111.70(4)(b), Stats. To the extent we need to interpret the parties' agreement to resolve the duty to bargain dispute, we do so with some caution so as to avoid usurping the parties' contractual grievance arbitration process. 2/

2/ We note in this regard that the WINNEBAGO COUNTY decision cited by AFSCME (DEC. No. 27669 WERC, 5/93) in support of its dismissal request did not involve a Sec. 111.70(4)(b), Stats., declaratory ruling petition but rather a declaratory ruling petition filed pursuant to Sec. 227.41, Stats., over which an administrative agency "may" choose to exercise jurisdiction.

Before considering the specific proposals 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.2D724 (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 0-51. 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)

We begin our analysis by acknowledging the testimony presented by each side to the effect that they have always understood that temporary and seasonal employees have either always been included or never been included in the Highway Department unit. While we do not doubt the good faith beliefs reflected by this testimony, this evidence does not provide a persuasive basis for adopting the position of either party in this litigation. Thus, we move on to a consideration of the other evidence the parties have presented.

Looking first at the language of the contractual recognition clause, AFSCME correctly points out that this language is broad enough to cover “seasonal” and “temporary” employees because AFSCME represents “all employees” of the Highway Department “except the Highway Commissioner, supervisory personnel and confidential clerical personnel.” 3/ While the County is correct that we generally would not include seasonal and temporary employees who lack a reasonable expectation of continued employment in the same bargaining unit as regular full-time and regular part-time employees, Sec. 111.70(4)(d)2.a., Stats., specifically authorizes department-wide units 4/ and thus the inclusion of these employees in this Highway Department unit would not create an illegally composed bargaining unit. Therefore, if the

contractual recognition clause were the only evidence before us, we could conclude that the seasonal and temporary employees are part of the bargaining unit.

3/ The parties agree that this contractual language parallels in pertinent parts the unit description language used by the Commission in 1963 when it certified AFSCME as the collective bargaining representative of the Highway Department unit.

4/ Section 111.70(4)(d)2.a., Stats., provides in pertinent part:

. . . the commission may decide whether, in a particular case, the municipal employees in the same or several departments . . . constitute a bargaining unit.

However, the evidence before us also includes conduct by AFSCME that is inconsistent with its assertion that “all” means “all.” Two clerical employees were not added to the unit until after AFSCME filed its 1989 unit clarification petition. 5/ AFSCME has never sought to include the Engineering Assistant in the unit. 6/ This evidence supports the County’s position in this litigation as does evidence of AFSCME’s failure to seek enforcement of the contractually established wage rate for “Temporary Help” during the years that the County was not paying said rate. While AFSCME correctly argues that this evidence could be viewed as merely demonstrating AFSCME’s lax enforcement of contractual rights, the evidence is more reasonably supportive of an inference that there was no enforcement because AFSCME did not in fact believe that “all” means “all.”

5/ Although AFSCME correctly points out that “confidential clerical employees” are excluded from the unit and argues that it may have believed that the clerical employees added in 1989 were “confidential” before it sought their inclusion, there is no direct evidence to support this argument. AFSCME does persuasively argue that the strength of the negative inference to be drawn from this evidence is lessened by the fact that it is unclear how long the clerical employees existed before AFSCME sought their inclusion.

6/ While the County also points to the exclusion of the Parts and Receiving Manager and Stock Clerk, the record establishes that the Manager is excluded as “supervisory personnel” and that the Stock Clerk is included in the unit.

The last piece of significant evidence we have before us is the longstanding existence of the contractual language itself regarding seasonal and temporary employees. We find the existence of this language to be the dispositive. The contracts between the parties have

historically and consistently established a wage rate for “Temporary Help” as well as seniority and layoff rights for seasonal employees. The existence of this language is strongly supportive of a conclusion that the employees covered thereby are included within the bargaining unit. While it can be argued that these parties simply bargained over these matters for almost 40 years as a matter of mutual convenience, the far more persuasive inference to be drawn from the existence of these contractual provisions is that it reflects objective evidence of an understanding that “temporary” and “seasonal” employees are included within the bargaining unit that AFSCME represents.

Contrary to the County, the limited extent of the parties’ bargain as to these employees (i.e. no fringe benefits, no posting rights, etc.) does not support a conclusion that the employees are not in the unit but rather reflects the parties’ judgments as to what rights these employees should have as a result of the bargaining process.

As noted earlier herein, resolution of this dispute turns on our disposition of the unit inclusion issue. Given our disposition of that issue, it is our conclusion that the disputed provisions are mandatory subjects of bargaining because they primarily relate to the wages, hours and conditions of employment of bargaining unit employees.

Dated at Madison, Wisconsin, this 4th day of November, 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