STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of

THE ASSOCIATION OF MENTAL HEALTH SPECIALISTS

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

ROCK COUNTY

Case 351
No. 62889
DR(M)-643

Decision No. 30787-A

Appearances:

John S. Williamson, Jr., Attorney at Law, 103 West College Avenue, Suite 1203, Appleton, Wisconsin 54911, appearing on behalf of the Association of Mental Health Specialists.

Eugene R. Dumas, Deputy Corporation Counsel, Rock County, Courthouse, 51 South Main Street, Janesville, Wisconsin 53545, appearing on behalf of Rock County.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECLARATORY RULING

On January 30, 2004, the Wisconsin Employment Relations Commission issued an Order Denying Motion to Dismiss in the above matter concluding that there was a duty to bargain dispute between the Association of Mental Health Specialists and Rock County that would appropriately be resolved by a ruling on the merits of the Association's Sec. 111.70(4)(b), Stats., petition for declaratory ruling. The parties thereafter waived hearing and filed written argument, the last of which was received June 22, 2004.

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

FINDINGS OF FACT

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

2. The Association of Mental Health Specialists, herein the Association, is a labor organization that serves as the collective bargaining representative of two bargaining units of professional employees of the County. On occasion, an employee in one unit serves as an Association representative in the other unit when investigating/processing grievances and bargaining with the County.

3. The two expired collective bargaining agreements between the County and the Association provide that unit employees who are Association representatives will be paid for work time spent investigating/processing grievances and bargaining with the County so long as the grievances or bargaining in question involves the unit in which said employees are employed. Employees serving as Association representatives in the unit in which they are not employed can use available leave time to remain in pay status if they wish to do so. The County proposes to include these same contractual provisions in the successor bargaining agreements.

4. The contractual provisions/proposals referenced in Finding of Fact 3 primarily relate to wages, hours and conditions of employment.

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

CONCLUSIONS OF LAW

1. The contractual proposals referenced in Finding of Fact 3 do not interfere in a legally significant way with the Sec. 111.70(2), Stats., right of municipal employees to bargain and investigate/process grievances through representatives of their own choosing.

2. The contractual proposals referenced in Finding of Fact 3 are mandatory subjects of bargaining within the meaning of Sec. 111.70(1)(a), Stats.

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

DECLARATORY RULING

The Association has a duty to bargain with the County over the inclusion of the contractual proposals referenced in Finding of Fact 3 in successor collective bargaining agreements.

Given under our hands and seal at the City of Madison, Wisconsin, this 1st day of September, 2004.

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

Rock County

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECLARATORY RULING

It is undisputed that Sec. 111.70(2), Stats., gives employees and the union they select as their collective bargaining representative the right to bargain collectively and process grievances ". . . through representatives of their own choosing. . . ." The Association cites private sector precedent interpreting the National Labor Relations Act (NLRA) to the same general effect.

It is well established that employees have no statutory right to pay for time spent in such activities, although a municipal employer may lawfully agree to do so. See Sec. 111.70(3)(a) 2, Stats. It is also undisputed that the issue of pay for work time spent by employee union representatives on these activities is a mandatory subject of bargaining. CITY OF MADISON, DEC. NO. 16590 (WERC, 10/78); SCHOOL DISTRICT OF JANESVILLE, DEC. NO. 21466 (WERC, 3/84); SCHOOL DISTRICT OF SHULLSBURG, DEC. NO. 20120-A (WERC, 4/84).

Thus, the issue in this proceeding is a narrow one: does a contract proposal that restricts paid union leave to services provided within that employee's own bargaining unit intrude upon employees' statutory right to be represented by "representatives of their own choosing" such that the proposal is a non-mandatory subject of bargaining? While the question is not without some difficulty, we conclude that the proposal is a mandatory subject of bargaining.

As noted above, the statutory right to select one's representatives does not include the right to have those representatives paid for work time spent in providing such representation. As a general matter, unions and employers have a duty to bargain over contract proposals governing such paid leave. Thus, a proposal to pay for all such leave, as well as a proposal to pay for no such leave, would both be mandatory subjects of bargaining. That said, we recognize, as the court did in AXELSON, INC. V. NLRB, 599 F.2D 91, 101 LRRM 3007, 2010, (5TH CIR. 1979), that:

> . . . many highly skilled negotiators will be reluctant to continue to serve on the committee if they are required to negotiate only during off-time or lose their production pay. These arguments do not fall on deaf ears. We are not unaware of the reluctance a person might have to make such sacrifices.

A contract proposal that no union leave will be paid will likely discourage some employees from undertaking union duties. To this extent, it will inherently affect the employees' selection of representatives and the union's internal structure. As the AXELSON court ultimately concluded, however, and as we concluded in the cases cited above, this effect does not negate the proposal's status as a mandatory subject of bargaining.

The Association does not challenge the foregoing established law, but rather contends that this proposal, which differentiates between union services within the unit and union services outside the unit, discriminatorily burdens the selection of representatives. The Association notes that it represents both units and has historically maintained a unified governance structure where its elected representatives provide services in both units. By paying these individuals only for services within their own respective units, the County's proposal discourages some individuals (those with other significant demands on their paid leave time) from holding Association offices. Since the County's proposal thus burdens the employees' choice of representatives, and since the County has proffered no overriding justification, the Association argues that it should not be required to negotiate over the proposal.

The central problem with the Association's argument is that it wrongly equates the impact of denying an employee the opportunity to serve as a union representative with the impact of denying pay while so serving. While these issues are related, they are not identical in their legal consequences. Denying leave to any particular individual for purposes of carrying out union duties ipso facto precludes that individual from serving as the representative and therefore ipso facto abridges employees' choice of representatives. As the Association recognizes, it was this *preclusion* of chosen representatives that led the courts to hold that the employers' conduct was unlawful in both ANHEUSER-BUSCH, INC. V. NLRB, 172 LRRM 3214 (4TH CIR. 2003) and NLRB V. INDIANA & MICHIGAN ELECTRIC CO., 101 LRRM 2471 (7TH CIR. 1979). While the Association implicitly equates preclusion of choice with interference with choice, that equation is not justified given the other legal principles at stake.

The Association argues that the proposal in question does not affect the relationship between employer and employee, but only the union's internal organization. However, it is axiomatic that issues of paid leave primarily relate to wages, hours, and conditions of employment and are mandatory subjects of bargaining. Put simply, that is why paid union leave is a mandatory subject of bargaining despite its potential effect on employees' choice of representatives. To the extent employees are deterred from serving as representatives if they must take unpaid leave, then providing no paid union leave necessarily would limit the pool of willing representatives (and thus burden employee choice) to a greater degree than providing some paid leave. Since a proposal to pay no union leave is mandatory, despite its broader interference, then a proposal to pay for some but not all union leave must also be mandatory, if interference with employee choice is the crux of the issue. Thus, to the extent the Association's argument is premised upon interference, it cannot be reconciled with the case law establishing that pay for union leave is a mandatory subject of bargaining. In effect, it has long been true that interfering with the choice of representatives by withholding pay for union leave is not legally equivalent to precluding the choice of certain representatives. In this case, as in cases where no paid leave is granted, the Association is free to select any representative, regardless of unit status; the proposal affects only the issue of pay, a mandatory subject of bargaining. 1/

1/ Similarly, the Association's reliance upon NLRB v. TEAMSTERS LOCAL 662, 174 LRRM 3060 (7TH CIR. 2004) is misplaced, because the precedent cited in that case to the effect that it is a permissive subject of bargaining for the union to identify contractually who its representatives will be and thus limit its right to choose, directly concerned selection of, not pay for, union representatives.

The Association's argument may have a more subtle analytical premise than simple interference, in that the Association seems to question the proposal's discriminatory impact on an identifiable group of potential representatives, i.e., those who are members of the other bargaining unit. We would likely have trouble requiring bargaining over proposals that invidiously targeted particular individuals (e.g., "anyone but John Smith is entitled to paid union leave," or "union leave will be paid except for representing Jane Doe"). However, we do not see the instant proposal, which effectuates a distinction in pay based upon bargaining unit membership is similarly invidious so as to warrant an exception to the general rule that pay for union leave is a mandatory subject of bargaining. Indeed, a unit-based distinction is consistent with the general notion that a union cannot require an employer to negotiate over the wages, hours, and conditions of employment of employees outside the bargaining unit. WISCONSIN RAPIDS SCHOOL DIST., DEC. NO. 17877 (WERC, 6/80); CITY OF SHEBOYGAN, DEC. NO. 19421 (WERC, 3/82); MILWAUKEE BOARD OF SCHOOL DIRECTORS, DEC. NO. 29142 (WERC, 7/97). 2/

2/ To the extent the Association's premise is that the County has little actual interest in whether it pays a bargaining unit employee for leave to provide union services, or whether it pays a non-unit employee to provide those services, we see the Association as challenging the merits or wisdom of the County's proposal and hence presenting an argument appropriately addressed to the County and, if necessary, to an interest arbitrator.

Given all of the foregoing, we have found that the contract proposals in question are mandatory subjects of bargaining.

Dated at Madison, Wisconsin, this 1st day of September, 2004.

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

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