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 353
No. 63153
DR(M)-646

Decision No. 30805-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 December 26, 2003, the Association of Mental Health Specialists 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 Association has a duty to bargain with Rock County over proposals that limit certain benefits to spouses and thereby exclude same-sex domestic partners. The Association asserts in its petition that such proposals are illegal, relying in part upon federal constitutional law.

On January 12, 2004, the County filed a motion to dismiss the petition because: (1) resolution of the issue raised by the Association will inappropriately require the Commission to interpret and apply federal constitutional law; and (2) the Association's legal position is unclear. On February 20, 2004, we denied the motion to dismiss. The parties subsequently waived hearing and filed written argument. The record was closed on August 25, 2004 when the Association provided additional information at the Commission's request.

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.

3. The two expired collective bargaining agreements between the County and the Association provided funeral leave and family health and dental insurance to spouses and certain other "dependents," but not to same-sex domestic partners. The County proposes to include these same contractual provisions in the successor bargaining agreements.

4. The contractual provisions/proposals described 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. It would not violate the Association's statutory duty of fair representation to agree to the contractual proposals referenced in Finding of Fact 3.

2. It would not violate the Due Process and Equal Protection clauses of the United States Constitution for Rock County or a State-appointed interest arbitrator to include in a collective bargaining agreement the contractual proposals referenced in Finding of Fact 3.

3. 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

Jurisdiction

As reflected in our prior Order Denying Motion to Dismiss, Sec. 111.70(4)(b), Stats., gives us jurisdiction to resolve duty to bargain disputes even where to do so requires us to resolve constitutional issues. SEE MILW. BOARD OF SCHOOL DIRECTORS V. WERC, 163 WIS.2D 739 (1991). In its post-Order brief, the County argues that there is no duty to bargain dispute for us to resolve because the Association has not made a proposal which would extend contractual benefits to same-sex domestic partners nor has the County refused to bargain over any such a proposal. The County misapprehends the Association's argument. The dispute the Association seeks to have resolved is whether it must bargain with the County over the County's proposal to include in a successor agreement the existing benefits language (which excludes same-sex domestic partners), or whether instead that existing language is an illegal subject of bargaining. 1/ Thus, there is a dispute over the duty to bargain which is properly resolved through a Sec. 111.70(4)(b), Stats., declaratory ruling.

1/ The Association argues that to be lawful, contractual benefit language must parallel that contained in a Memorandum of Understanding providing health insurance to domestic partners in collective bargaining agreements covering certain units of State employees. The Association referred to this language as "Appendix I" to its petition, but inadvertently failed to include a copy of same. A copy was supplied to the Commission and the County on August 25, 2004.

Merits

Where, as here, it is alleged that a contract provision is an illegal subject of bargaining, the question is whether the proposal irreconcilably conflicts with a statutory provision or obligation or infringes on a constitutional right or power. See, e.g., EAU CLAIRE COUNTY V. TEAMSTERS UNION L. 662, 235 WIS.2D 385 (2000) (a contractual provision permitting the union to arbitrate a deputy sheriff's dismissal is lawful because it does not irreconcilably conflict with Sec. 59.52(8)(c), Stats.); CITY OF JANESVILLE V. WERC, 193 WIS.2D 492 (CT.APP. 1995) (a contractual provision allowing the union to arbitrate a police officer's suspension is an illegal subject of bargaining because it irreconcilably conflicts with Sec. 62.13(5), Stats.); FORTNEY V. SCHOOL DISTRICT OF WEST SALEM, 108 WIS.2D 169 (1982) (a provision permitting a union to submit a teacher's discharge to de novo review by an arbitrator is lawful because it does not irreconcilably conflict with Sec. 118.22(2), Stats.); MILW. BOARD OF SCHOOL DIRECTORS V. WERC, 163 WIS.2D 739 (1991) (an explicitly race-based criterion for layoff would violate the Equal Protection clause of the U. S. Constitution and hence is an unlawful subject of bargaining).

The Association argues that the disputed benefits provisions are illegal subjects of bargaining because, in light of recent United States Supreme Court precedent, there is no rational basis for excluding same-sex domestic partners. According to the Association, placing such an irrational exclusion in the contract would violate the Association's duty of fair representation and the County's and State-appointed arbitrator's obligations under the Due Process and Equal Protection clauses of the United States Constitution. Boiled down to its essence, the Association's argument proceeds as follows:

a. Certain recent United States Supreme Court decisions have established that classifications that penalize individuals solely because of their homosexuality bear no "rational relationship to an independent and legitimate legislative end . . ." and are therefore unconstitutional. ROMER V. EVANS, 517 U. S. 620, 633 (1996) (invalidating a state constitutional amendment that would have prevented the state or its municipalities from passing laws against sexual orientation discrimination); LAWRENCE V. TEXAS, 123 S. CT. 2472 (2003) (invalidating the state's criminal laws against sodomy).

b. Limiting benefits to "spouses" prevents same-sex domestic partners from receiving benefits because of their homosexuality.

c. Therefore limiting benefits to "spouses" is arbitrary, discriminatory, and unconstitutional within the principles of ROMER and LAWRENCE – and also violates the Association's duty of fair representation.

The first problem with the Association's analysis is that the second premise stated above is inaccurate. It is not homosexuality that excludes same-sex partners from benefits, but the fact that such partners are unmarried and hence not "spouses." It is not just same-sex partners, but unmarried heterosexual partners and domestic partners who are not in any kind of sexual relationship with each other who are excluded from benefits. Hence it is marriage and not homosexuality that triggers the exclusion. This is essentially the court's perspective in PHILLIPS V. WISCONSIN PERSONNEL COMMISSION, 167 Wis.2d 205 (1992), when the Wisconsin Supreme Court held that a spousal limitation on benefits does not discriminate on the basis of sexual orientation, marital status, or gender. 2/

2/ Consistent with the State's Fair Employment Act (WFEA), bargaining unit employees, their spouses, and their dependents cannot be denied contractual benefits based on their sexual orientation.

The Association recognizes this problem with its argument, but points out that same-sex domestic couples are prevented from marrying by virtue of their homosexuality and that subsequent United States Supreme Court decisions (ROMER and LAWRENCE) have eroded the validity of distinctions that stigmatize homosexuality. We do not see these decisions as undermining the basic analysis in PHILLIPS. To be sure, homosexuality will frequently coincide with the benefit exclusion, but from this it does not follow that the exclusion is based upon homosexuality or "drawn for the purpose of disadvantaging" homosexuals in the words of the ROMER Court, 517 U. S. AT 633. If the underlying marriage laws are unconstitutional because they single out homosexuals with no legitimate state interest, as the Massachusetts Supreme Judicial Court has recently held, GOODRIDGE V. DEPT. OF PUBLIC HEALTH, 440 MASS. 309 (2003), then one might plausibly attack the spousal benefit limitation as derivatively unconstitutional. For example, if Wisconsin had a law against miscegenation, we might well conclude that the spousal limitation was unlawful to the extent it effectuates discrimination that has clearly been held to be unconstitutional. Thus, in MILWAUKEE BOARD OF SCHOOL DIRECTORS, SUPRA, the Commission applied clearly established United States Supreme Court precedent in ruling that a contract proposal explicitly based upon race was an unlawful subject of bargaining. 163 WIS. 2D 739 AT 743. The Association does not take this tack, as discussed below. Nor, unlike the situation in MILWAUKEE BOARD OF SCHOOL DIRECTORS, does any controlling State or federal law direct us to invalidate these contractual provisions based upon the unconstitutionality of the underlying marriage laws. 3/

3/ The Wisconsin appellate courts have thus far declined to rule upon the constitutionality of the State's laws precluding same-sex marriage. SEE, IN THE INTEREST OF ANGEL LACE, 184 WIS.2D 492, 518 (1994) (limiting adoptive rights to "spouses" of birthparents is not discrimination based upon sexual orientation, noting that the parties had not directly attacked the constitutionality of Wisconsin's prohibition of same-sex marriages); PHILLIPS V. WISCONSIN PERSONNEL COMMISSION, 167 WIS.2D 205, 213 n.1 (1992) ("Whether to allow disallow same-sex marriages – or even whether to allow extension of state employee health insurance benefits to companions of unmarried state employees of whatever gender or sexual orientation – is a legislative decision, not one for the courts.") Moreover the United States Supreme Court expressly distanced its decision in LAWRENCE, holding that a state may not criminalize sodomy, from the separate issue of "whether the government must give formal recognition to any relationship that homosexual persons seek to enter." 539 U. S. at 525.

Rather than attack the constitutionality of the marriage laws, the Association assumes (at least for purpose of argument) that the State has a legitimate interest in promoting heterosexual marriage, i.e., procreation within a legally-defined family unit. However, the Association then argues that this asserted State interest cannot justify a spousal limitation on benefits because there is no reason to believe that limiting benefits will encourage marriage.

The Association may be correct that depriving same-sex partners of benefits cannot rationally be said to promote the State's interest in marriage, since same-sex couples cannot marry in Wisconsin. The flaw in the Association's argument is its premise that "the prohibition against same-sex [marriage] [must have] a rational relationship to the exclusion of same-sex partners from family health insurance." (Assoc. Br. at 6). In other words, the Association assumes that the only legitimate rational basis for requiring partners to be married in order to receive benefits would be the State interest in encouraging marriage.

We do not agree that limiting benefits to "spouses" must be rationally related to the State's interest in encouraging marriage in order to meet constitutional or duty of fair representation standards. The State's ostensible interest in promoting heterosexual marriage and procreation could justify denying same-sex marriage, while a contract could limit its benefits to "spouses" for reasons completely unrelated to sexual preference or procreation. Such legitimate considerations include administrative difficulties in determining and monitoring the contours of "domestic partner" relationships, possible additional costs in providing broader coverage, and the fact that "spouses" have legal and financial obligations to each other, including responsibility for medical bills. PHILLIPS, 167 WIS.2D AT 213 N. 1; IRIZARRY V. CHICAGO BOARD OF EDUCATION, 251 F.2D 604, 610 (7TH CIR. 2001) ("It is easier to determine whether the claimant is married to an employee than to determine whether the claimant satisfies the multiple criteria for domestic partnership. . . . [and] cost is an admissible consideration in evaluating the rationality of a classification."); ROVIRA V. AT & T, 817 F. Supp. 1062, 1072 n.8 (1993) (if "spouses" were construed to include domestic partners, "defining the contours of the 'spousal' relationship would become a complex problem of administration. Such matters are better addressed through legislative means or union-management negotiations rather than on an ad hoc basis"). It can reasonably be argued that these factors are outweighed by the many social policies favoring domestic partner benefits, but that judgment is not within our purview in this case. We need only decide whether these factors are rationally related to the spousal limitation of benefits. We conclude that they are. The competing policies can be addressed at the bargaining table and if necessary before an interest arbitrator. 4/

4/ Consistent with its argument that there is no rational basis for excluding domestic partners from health insurance benefits, the Association argues that a state could not enact legislation that would limit such benefits to "spouses." (Association Br. at 11). In this connection, it is worth noting that the Massachusetts state statutes do contain exactly that limit for public employees, as construed in CONNORS V. CITY OF BOSTON, 430 MASS. 31 (1999), a decision by the same court that a few years later invalidated the Massachusetts laws precluding same-sex marriage. GOODRICH V. DEPT. OF PUBLIC HEALTH, 440 MASS. 309 (2003).

As noted, the Association's primary duty of fair representation argument seems to rest upon the same underlying logic as its constitutional arguments, i.e., that excluding domestic

partners from benefits has no legitimate rational basis and is therefore arbitrary and discriminatory. However, to the extent the Association also suggests that it has a duty to acquire benefits for same-sex partners in order to assuage the "stigmatization" that would otherwise accompany their relationship, we are unpersuaded. It is well established that the duty of fair representation leaves a union wide latitude when it determines what benefits it will pursue at the bargaining table and what compromises it must inevitably make to reach agreement on a contract. FORD MOTOR CO. V. HUFFMAN, 345 U. S. 330 (1953); AIR LINE PILOTS V. O'NEILL, 499 U. S. 65 (1991). So long as a union considers the interests of all the employees it represents when making those determinations, it does not breach its duty of fair representation by failing to acquire benefits for some but not all employees. FORD MOTOR CO., 345 U. S. AT 338. As one commentator aptly stated, "For the union engaged in negotiating, the 'wide range of reasonableness' identified by the Court in HUFFMAN became, in the hands of the O'NEILL Court, a range as wide as reasonableness." HARDIN & HIGGINS, THE DEVELOPING LABOR LAW (4TH ED., BNA 2001) AT 1922.

Applying these established principles, we have no evidence that the Association has failed to consider the interests of any employees it represents who are or may become part of a same-sex domestic partnership. We have no evidence that the Association's failure to acquire benefits for employees who are part of same-sex couples reflects an Association bias against homosexual employees. As discussed earlier, the limitation of benefits to "spouses" satisfies the minimal test of reasonableness and accordingly we reject this component of the Association's duty of fair representation argument.

For the foregoing reasons, we declare that the County's proposals that limit health and dental insurance, as well as funeral leave, to "spouses" and thereby exclude same-sex domestic partners, are mandatory subjects of bargaining within the meaning of Sec. 111.70(1)(a), Stats.

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/
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