STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MADISON TEACHERS, INC., Complainant,

vs.

MADISON METROPOLITAN SCHOOL DISTRICT and THE BOARD OF EDUCATION OF THE MADISON METROPOLITAN SCHOOL DISTRICT, Respondents.

Case 295
No. 64514
MP-4132

Decision No. 31345-D

Appearances:

Richard Thal, Lawton & Cates, S. C., Attorney at Law, 10 East Doty Street, Suite 400, Madison, Wisconsin, appearing on behalf of Madison Teachers, Inc.

Kirk Strang, Davis & Kuelthau, S.C., Attorney at Law, 10 East Doty Street, Suite 600, Madison, Wisconsin, appearing on behalf of Madison Metropolitan School District.

DECISION REGARDING COMMISSION'S POSITION IN LITIGATION

On March 24, 2006, Examiner John Emery issued Findings of Fact, Conclusions of Law, and Order in the above-captioned case, holding that the Madison Metropolitan School District (District) had bargained directly with individual employees represented by Madison Teachers, Inc. (MTI), in violation of Secs. 111.70(3)(a)1 and 4, Stats., by creating a Support Services Week Work Group to review and make recommendations regarding the future of Support Services Week, and by soliciting the opinions of the District's Speech and Language Clinicians regarding the continuation of Support Services Week. To remedy this violation, the Examiner ordered the District to cease and desist from such conduct and to post a notice to employees.

Neither party sought Commission review of the Examiner's decision, as provided in Secs. 111.07(5) and 111.70(4)(a), Stats. In Dec. No. 31345-C (WERC, 4/06), the Examiner's decision was thus "affirmed by operation of law" pursuant to those statutory sections.

On May 19, 2006, the District filed an appeal with the Dane County Circuit Court, pursuant to Secs. 227.52 and 227.53, asking the court to overturn the Commission's decision. Thereafter the Commission reviewed the record, the Examiner's decision, and the arguments of the parties. For purposes of taking a position in the pending Circuit Court litigation, and for the reasons set forth in the Memorandum below, the Commission decides as follows:

1. The Commission perceives no error in the Examiner's Findings of Fact 1 through 19 and reaffirms its adoption of those Findings in its prior Decision No. 31345-C.

2. The Commission disavows its prior Decision No. 31345-C regarding the Examiner's Findings of Fact 20-21, which are inextricably linked with the Examiner's Conclusions of Law 3 and 4.

3. The Commission reaffirms its adoption of the Examiner's Conclusions of Law 1 and 2 in its prior Decision No. 31345-C.

4. The Commission disavows its prior Decision No. 31345-C regarding the Examiner's Conclusions of Law 3 and 4, to the extent those conclusions were premised upon the Examiner's incorrect reasoning that, "even though the District may act unilaterally with respect to a permissive subject [of bargaining] it cannot circumvent the Union and deal directly with employees in addressing the subject." (Examiner's Decision at 19).

5. Because the Examiner did not decide the question of whether Support Services Week involves a mandatory or permissive subject of bargaining and because the parties have not argued that matter before the Commission following the District's appeal to circuit court, the Commission does not determine that issue.

Given under our hands and seal at the City of Madison, Wisconsin, this 19th day of March, 2007.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/
Judith Neumann, Chair

Paul Gordon /s/
Paul Gordon, Commissioner

Commissioner Susan J.M. Bauman did not participate.

Madison Metropolitan School District

MEMORANDUM ACCOMPANYING DECISION REGARDING COMMISSION'S POSITION IN LITIGATION

Summary of the Facts

The salient facts, in a nutshell, are as follows.

The District has maintained for many years a practice such that every fourth week of the school year is designated "Support Services Week" and may be utilized by the Speech and Language Clinicians (SLC's) to perform a wide variety of necessary functions, such as conferences, reports, and recordkeeping, apart from direct services to students. This practice has been discussed at the bargaining table but is not incorporated into the contract. In December 2004, the District sent a memo to various staff members, including the SLC's, informing them that, "during these fiscal times," the District felt it necessary to reexamine the value of Support Services Week "as part of speech and language service delivery." As part of that reexamination, the District surveyed the SLC's in detail about the tasks they performed during Support Services Week and also formed a committee, comprising administrators and some SLC's, that analyzed the surveys, reviewed related literature, and formulated a recommendation to the District about whether or not the Support Services Week should continue.

In January 2005, MTI sent a letter to the District protesting the formation of the committee that included bargaining unit members to discuss the elimination of a past practice (Support Services Week) that MTI asserted was a condition of employment. In February 2005, MTI wrote again to the District protesting the District's intention to survey individual bargaining unit members regarding a subject MTI asserted was reserved to the Union. The District refused to disband the committee or discontinue the surveys, contending that the issue was not a working condition but a "decision to provide services to students in a certain manner." MTI was not invited to participate in the committee, despite the expressed concerns of some bargaining unit members on the committee.

The committee met several times throughout the remainder of the 2004-05 school year and prepared a draft report that the District ultimately issued, which recommended continuation of Support Services Week. Support Services Week thereafter continued.

Discussion

The Examiner held that, whether or not the continuation of Support Services Week was a mandatory subject of bargaining, the District refused to bargain in good faith with MTI by circumventing MTI and dealing directly with bargaining unit employees on the subject. Both convening a committee that included bargaining unit members, but not the Union, and surveying individual bargaining unit members on the subject were unlawful "individual

bargaining" according to the Examiner. Because the Examiner viewed the issue as irrelevant, he did not consider or rule upon the question of whether continuation of Support Services Week was a mandatory subject of bargaining.[1]

In the Commission's view, contrary to the Examiner, it seems clear that a union's exclusive bargaining rights can be neither greater nor lesser than the municipal employer's corresponding duty to bargain with the exclusive bargaining representative. In addition to its internal logic, this principle is supported by the language of the law itself, which states the union's bargaining authority in terms that echo the employer's bargaining responsibility:

> **111.70 Municipal employment. (1)** DEFINITIONS. As used in this subchapter:
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> (a) "Collective bargaining" means the performance of the mutual obligation of a municipal employer, through its offices 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 agreement, or to resolve questions arising under such an agreement, with respect to wages, hours and conditions of employment … 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 function affects the wages, hours and conditions of employment of the municipal employees in a collective bargaining unit. …
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> **(4)** POWERS OF THE COMMISSION
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> . . .
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> (d) *Selection of representatives and determination of appropriate units for collective bargaining*. 1. A representative chosen for the purposes of collective bargaining by a majority of the municipal employees voting in a collective bargaining unit shall be the exclusive representative of all employees in the unit <u>for the purpose of collective bargaining</u>. (Emphasis added).
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> . . .

[1] The Examiner also held that, contrary to the District's argument, the language in Section I-A-3 of the collective bargaining agreement did not "authorize the District to deal directly with the represented staff members on matters bearing on their working conditions to the exclusion of the Union." We agree with the Examiner that that contract language does not waive MTI's right to be the exclusive representative of bargaining unit members regarding mandatory subjects of bargaining. However, that conclusion begs the question, which the Examiner did not decide, about whether the continuation of Support Services Week falls within that mandatory scope of bargaining.

It is clear from the foregoing statutory language that MTI's authority as exclusive representative is "for the purpose of collective bargaining," and that "collective bargaining" is limited by definition to subjects on which the employer has a legal duty to bargain ("wages, hours, and conditions of employment"). An employer may agree to deal with the union about subjects that are not mandatory subjects of bargaining, but are instead "permissive" subjects of bargaining, and any agreements reached on such subjects are enforceable for the term of any such agreement. GREENFIELD SCHOOLS, DEC. NO. 14026-B (WERC, 11/77).[2] However, absent such a written contractual provision, an employer is free at any time to refuse to deal with the union and/or discontinue dealing with the union about non-mandatory subjects of bargaining. Moreover, it is well settled that, unlike provisions governing mandatory subjects of bargaining, which must be maintained even after a contract expires and until a successor agreement is reached, contractual provisions regarding non-mandatory bargaining subjects "evaporate" at the conclusion of an agreement and either party is free to abandon such commitments at that time. GREENFIELD, SUPRA.

Thus, even if the District had dealt with MTI about the Support Services Week in the past, the District had no legal obligation and MTI had no legally enforceable exclusive bargaining rights regarding that issue, *unless it involves a mandatory subjects of bargaining*. If MTI's exclusive representative authority does not extend to permissive subjects of bargaining, it follows that MTI's status as exclusive bargaining representative is not undermined simply if the District "bypasses" MTI and/or deals directly with bargaining unit members about those issues. Whatever our personal thoughts may be about the virtues and advantages of dealing with a union about permissive bargaining subjects or matters of school policy, especially where such discussions may have been fruitful in the past, the Commission cannot compel an employer to do so.[3]

In arguing that it is irrelevant whether the Support Services Week was a mandatory subject of bargaining, the Examiner and MTI rely heavily upon an earlier decision by another Commission examiner, CITY OF MILWAUKEE, DEC. NO. 26354-A (MCLAUGHLIN, 4/92). Like

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[2] A related point is that the statutory interest arbitration language permits a final offer as submitted to the arbitrator to include permissive subjects of bargaining "if the other party does not object," in which case the permissive subject "shall then be treated as a mandatory subject" for purposes of inclusion in the interest arbitration award. Sec. 111.70(4)(cm)6.am., Stats.

[3] It is, of course, theoretically possible for a public employer to engage in unlawful undermining of a collective bargaining representative by the manner in which the employer conducts itself when dealing directly with employees over matters of school policy that are permissive subjects of bargaining. For example, an employer is not free to make derogatory comments about the effectiveness of the union or otherwise attempt to drive a wedge between the union and its bargaining unit members. There also may be circumstances in which the employer's conduct regarding permissive subjects is undertaken in a manner that discriminates against the union or otherwise interferes with employees' lawful protected activity. We emphasize, therefore, that neither the facts of this case nor the parties' arguments raise any issue about such independently unlawful conduct, but instead focus upon an alleged inherent undermining of the Union that accompanied the District's surveying of the SLC's and convening of a committee including SLC's.

the instant decision, the CITY OF MILWAUKEE examiner decision was not substantively reviewed by the Commission but rather affirmed by operation of law in DEC. NO. 26354-B (WERC, 5/92). In that case, the City had agreed in a collective bargaining agreement that it would negotiate with the union before changing the existing drug testing policy. Instead of negotiating with the union, however, the City held a public meeting on the issue and expressly encouraged individual bargaining unit members to attend the meeting and voice their opinions. The City then altered the policy without bargaining with the union. The examiner in that case stated that, in such a context, it was irrelevant whether or not the drug testing policy was a mandatory subject of bargaining, because the City had agreed by contract to negotiate any changes. The examiner remarked, "That a subject is permissive does not act as a license for the City to circumvent the [union] as the majority representative of police officers for collective bargaining purposes." Dec. No. 26354-A at 30.

We first note that the issue in the CITY OF MILWAUKEE case was materially different from the issue in the instant case. The question in MILWAUKEE was whether the City could be compelled to adhere to a contractual commitment to negotiate over a subject (drug testing policy), even if the issue was not a mandatory subject of bargaining. The absence of such a contractual commitment in the instant case is an important if not pivotal distinction between the two cases.

Second, it is important to observe that unreviewed examiner decisions, such as the one in CITY OF MILWAUKEE, are not precedentially binding on other examiners or the Commission. See, e.g., CITY OF BROOKFIELD, DEC. NO. 19822-C (WERC, 11/84). This rule is crucial to the effective operation of the Commission and to the parties within its jurisdiction. The Commission's resources would be overwhelmed if the Commission were bound precedentially by every examiner decision, whether or not review was sought. A large portion of examiner decisions are not appealed to the Commission. If the agency nonetheless had to review in depth every record and the rationale of every decision within 20 days after an examiner issued it, it would delay the agency's service to all of its customers. Just as importantly, where even minor disagreements exist between the Commission's views and an examiner's, the agency would have to prepare and issue decisions that would affect all of the agency's constituents, even though the parties to the particular case were satisfied with the outcome. Such a rule would compel parties to continue litigating cases they found satisfactorily resolved and then apply the results of such potentially tepid litigation to all parties within the agency's jurisdiction. This seems unwise and unwarranted.

Accordingly, to the extent the examiner in CITY OF MILWAUKEE and the Examiner in the instant case concluded that, in determining whether an employer had unlawfully bypassed a union, it did not matter whether the issue was mandatory subject of bargaining, the Commission does not agree with that conclusion.

The Commission instead concludes that a determination of whether the District unlawfully refused to bargain with MTI depends upon whether or not Support Services Week involves a mandatory subject of bargaining. However, because this issue was not decided by the Examiner and has not been argued to us, we cannot make a considered decision on that issue at this point in the proceedings.

Dated at Madison, Wisconsin, this 19th day of March, 2006.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/
Judith Neumann, Chair

Paul Gordon /s/
Paul Gordon, Commissioner

Commissioner Susan J. M. Bauman did not participate.

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