

STATE OF WISCONSIN

CIRCUIT COURT
BRANCH 9

DANE COUNTY

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

Petitioner,

v.

Case No. 06 CV 1661

[re WERC Dec No. 31345-C, -D]

WISCONSIN EMPLOYMENT RELATIONS
COMMISSION and MADISON TEACHERS INC.

Respondents.

DECISION AND ORDER FOR REMAND

Like it or not, in calling for a mulligan (its so-called "Decision No. 31345-D"), the Wisconsin Employment Relations Commission knocks this judicial review into a cocked hat. Beyond pummeling the concept of judicial deference to administrative decisionmaking¹, this "elephant in the room" casts substantial doubt on whether or not the real issue in controversy was tried and decided.

At the heart of the Hearing Examiner's decision, imputed to the Commission by operation of procedural law, is the proposition that the Union had legally enforceable exclusive bargaining rights concerning Support Services Week issues, which foreclosed the District's opportunity to deal directly with Union members about those issues, even if the issues did not involve mandatory subjects of bargaining. This may or may not be true, although I am not convinced that the sparse law cited by the Union actually supports such a proposition.² More to the point, however, is that before this Court enters these largely uncharted waters and takes the perhaps unprecedented step of expanding the

¹ How can this Court accept the Union's invitation to accord great deference, or any deference, to a decision the Commission has since expressly disavowed, albeit in unorthodox fashion?

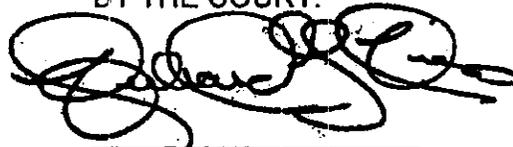
² *Allied-Signal, Inc.*, 307 NLRB 752, 753-754 (1992) involved a mandatory subject of bargaining, and *City of Milwaukee*, Dec. No. 26354-A (McLaughlin, 4/92), another Commission decision only by operation of law, may be materially distinguishable on its facts.

Union's exclusive bargaining rights into the arena of non-mandatory subjects of bargaining, it seems only prudent that the factual record fairly present the issue. That is, if this court is going to rule on whether or not the District may undermine the Union by dealing directly with its members on permissive topics of collective bargaining, we ought to at least know whether or not this is a relevant inquiry *on the facts of this case*, i.e. whether or not the Support Services Week issues are, in fact, merely permissive subjects of bargaining. Otherwise, we may be needlessly deciding issues or, worse, creating mischievous dicta. Nothing sabotages precise analysis and advancement of the law like an incomplete or muddy factual record.

While I am not convinced that the District's survey and advisory committee relating to Support Services Week do not implicate mandatory bargaining subjects, the factual record is insufficiently developed on this point to make an informed decision. While the posture of this case does not fit cleanly within any of the remand provisions in §227.57 (4), (5), (6), (7) or (8), Stats., remand is nonetheless indicated, and the parties agreed at oral argument that the court has the authority to remand this case given its current presentation. I agree and I will leave it to the Court of Appeals to shoehorn the remand rationale here into the appropriate subsection of §227.57, Stats. This case is remanded to the Wisconsin Employment Relations Commission for further action, including evidentiary hearing if necessary, to resolve the issue of whether the Support Services Week topics addressed by the District's survey and advisory committee were mandatory subjects of bargaining or not.

Dated this 13th day of August, 2007.

BY THE COURT:

A handwritten signature in black ink, appearing to read "Richard G. Niess", written over a horizontal line.

Richard G. Niess
Circuit Judge

CC: Attorney Richard Thal
Attorney Kirk D. Strang
Assistant Attorney General David C. Rice