STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

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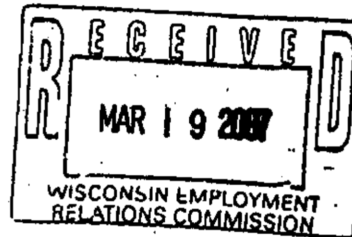
March 19, 2007



John W. Barrett
Clerk of Circuit Court
Milwaukee County Courthouse
901 N. Ninth St.
Milwaukee, WI 53233-1425

Re: *Milw. Bd. of School Directors v. WERC*
Case No. 06-CV-008395

[Dec. No. 31732]

Dear Mr. Barrett:

Enclosed for filing is the Notice of Entry of Decision in the above-captioned case. Copies have been mailed today to counsel of record Thank you.

Sincerely,

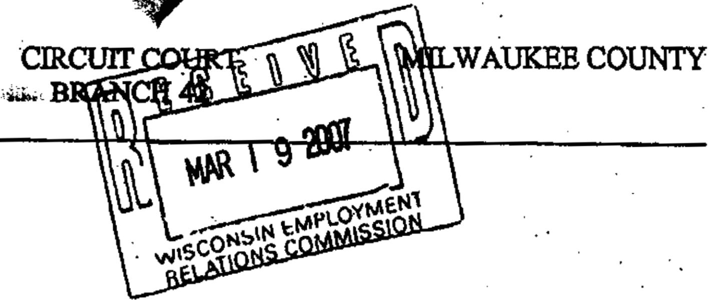
David C. Rice
Assistant Attorney General
State Bar No. 1014323

DCR:lkf

Enclosure

c w/enc.: Donald L. Schriefer, Assistant City Attorney
Richard Saks, Attorney for Milw. Teachers' Ed. Ass'n
Peter Davis, WERC

STATE OF WISCONSIN | CIRCUIT COURT BRANCH 48 | MILWAUKEE COUNTY



MILWAUKEE BOARD
OF SCHOOL DIRECTORS,

Petitioner,

v.

Case No. 06-CV-008395
[Dec. No. 31732]

WISCONSIN EMPLOYMENT
RELATIONS COMMISSION and
MILWAUKEE TEACHERS'
EDUCATION ASSOCIATION,

Respondents.

NOTICE OF ENTRY OF DECISION

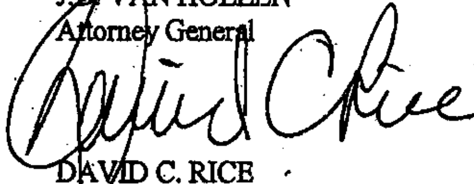
To: Donald L. Schriefer
Assistant City Attorney
800 City Hall
200 E. Wells St.
Milwaukee, WI 53202

PLEASE TAKE NOTICE that a Decision affirming the decision of the Wisconsin Employment Relations Commission, of which a true and correct copy is hereto attached, was signed by the court on the 13th day of March, 2007, and duly entered in the Circuit Court for Milwaukee County, Wisconsin, on the 13th day of March, 2007.

Notice of entry of this Decision is being given pursuant to Wis. Stat. §§ 806.06(5) and 808.04(1).

Dated this 19th day of March, 2007.

J.B. VAN HOLLEN
Attorney General



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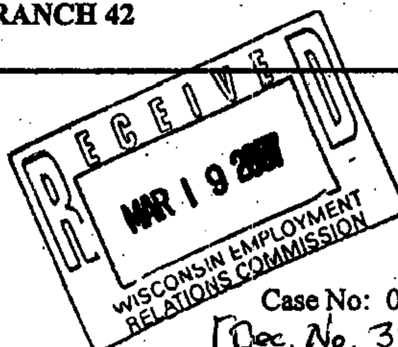
STATE OF WISCONSIN | **CIRCUIT COURT BRANCH 42** | **MILWAUKEE COUNTY**

MILWAUKEE BOARD
OF SCHOOL DIRECTORS,

Petitioner,

vs.

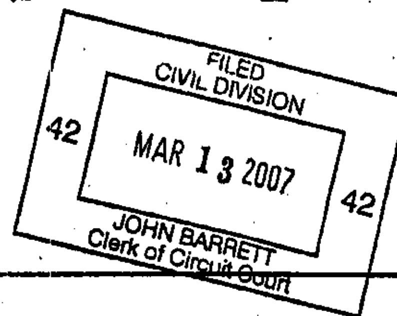


Case No: 06-CV-008395
[Dec. No. 31732]

WISCONSIN EMPLOYMENT
RELATIONS COMMISSION, and

MILWAUKEE TEACHERS'
EDUCATION ASSOCIATION

Respondents.



DECISION

The Milwaukee Board of School Directors appeals to the Circuit Court a decision by the Wisconsin Employment Relations Commission in which the Commission held that the Board violated the Municipal Employment Relations Act by prohibiting the placement of "Attract and Retain" signs in locations which students customarily occupied, including classrooms, where teachers otherwise were permitted to display personal, non-instructional items or materials, but only to the extent that the "Attract and Retain" signs did not exceed the limitations in terms of number, size and location that the Board has applied to other personal items or materials. The Board requests that the Court overturn the Commission's decision. For the reasons stated herein, the Court affirms the Commission's decision.

BACKGROUND

The Milwaukee Board of School Directors ("the Board") is a municipal employer that employs teachers. The Milwaukee Teachers' Education Association ("the MTEA") is a labor

organization that serves as the collective bargaining representative for teachers employed by the Board. During bargaining over a 2001-2003 contract between the Board and the MTEA regarding teachers' wages, hours and conditions of employment, the MTEA engaged in an "Attract and Retain" campaign designed to support its collective bargaining goal of retaining and improving existing wages and benefits. In March 2004, the MTEA distributed approximately 9,200 "Attract and Retain" buttons to MTEA building representatives and encouraged teachers to start wearing the buttons. Teachers wore the buttons at work while negotiations continued throughout that school year and the following school year.

Subsequently, the MTEA also distributed two-sided, 11-inch by 14-inch "Attract and Retain" cardboard signs and encouraged teachers to post the signs. On one side, the signs stated "Attract and Retain with a FAIR CONTRACT NOW!" and the other side stated "Attract and Retain It's Time to DO THE RIGHT THING!" Teachers placed the signs inside school buildings in ways that varied from teacher to teacher and building to building. The record contains pictures showing how various signs were placed throughout classrooms and school buildings. In some schools, the buttons and/or the signs prompted questions from students to teachers, and teachers responded to those questions.

After receiving some parental complaints, Flora Odom-Flagg, the head of Administrative Accountability, and Deborah Ford, the Executive Director of Human Resources, distributed a directive to all principals, dated October 27, 2004, which referenced Board Policy 9.08 prohibiting political advertising/advocacy in school buildings or on school premises. The directive stated that this policy "includes, but is not limited to campaign literature, commercial and political advertising, political advocacy (i.e. "Attract and Retain" campaign)." This directive was not applied to prohibit teachers from wearing "Attract and Retain" buttons.

On November 1, 2004, the MTEA filed a prohibited practices complaint with the Commission regarding the Board's alleged unlawful prohibition of "Attract and Retain" buttons and "Attract and Retain" signs in classrooms. The case was later converted to a declaratory ruling pursuant to section 227.46 of the Wisconsin Statutes. A hearing was held before Examiner Peter G. Davis on June 8 and 9, 2005, but no decision was issued. The Commission reviewed the record and post-hearing briefs. On August 3, 2006, a majority of the Commission issued its findings of fact, conclusions of law, and declaratory ruling. Commissioner Paul Gordon dissented from the majority opinion to the extent that it would allow the "Attract and Retain" signs to be displayed in classrooms.

STANDARD OF REVIEW

The Milwaukee Board of School Directors requests that the Court review and reverse the Commission's decision in this matter on grounds that the Commission erroneously interpreted section 111.70 of the Wisconsin Statutes. Wis. Stat. §§ 227.53(1)(b) and 227.57(5) (2005-2006). Whether WERC properly interpreted section 111.70 is a question of law, and the Court is not bound by the agency's interpretation. *See Racine Educ. Ass'n v. WERC*, 2000 WI App 149, ¶ 16, 238 Wis. 2d 33, 616 N.W.2d 504 (Ct. App. 2000). However, where the agency's "'experience, technical competence, and specialized knowledge aid the agency in its interpretation and application of the statute, the agency's conclusions are entitled to deference by the court.'" *Id.* (quoting *West Bend Educ. Ass'n v. WERC*, 121 Wis. 2d 1, 12, 357 N.W.2d 534 (1984)).

There are three levels of deference accorded to agency decisions: great weight deference, due weight deference, and *de novo* review. *UFE Inc. v. LIRC*, 201 Wis. 2d 274, 287, 548 N.W.2d 57, 62 (1996). Great weight deference is appropriate only where "the agency was charged by the legislature with the duty of administering the statute"; the agency's interpretation

"is one of long-standing"; the agency "employed its expertise or specialized knowledge in forming the interpretation"; and the agency's interpretation "will provide uniformity and consistency in the application of the statute." *Id.* at 284, 548 N.W.2d at 61. Under that standard, a court "will uphold an agency's reasonable interpretation that is not contrary to the clear meaning of the statute, even if the court feels that an alternative interpretation is more reasonable." *Id.* at 287, 548 N.W.2d at 62. Due weight deference is accorded when "the agency has some experience in an area, but has not developed the expertise which necessarily places it in a better position to make judgments regarding the interpretation of the statute than a court." *Id.* at 286, 548 N.W.2d at 62. Finally, a court will use *de novo* review when the issue before the agency "is clearly one of first impression, or when an agency's position on an issue has been so inconsistent so as to provide no real guidance." *Id.* at 285, 548 N.W.2d at 62 (citations omitted).

The Commission and the MTEA assert that the Court should accord great weight or heightened deference to the Commission's decision. The Commission points out that (1) it is the agency charged by the legislature with the duty of administering section 111.70; (2) its interpretation of that statute is one of long-standing; (3) it employed its expertise or specialized knowledge in forming this interpretation; (4) its interpretation will provide uniformity and consistency in the application of the statute; (5) its interpretation is intertwined with factual determinations; and (6) its interpretation involves value and policy judgments about the obligations of employers and employees. Similarly, the MTEA argues that the Commission has been charged by the legislature with responsibility for enforcement of the MERA, and that the Commission's standard balancing inquiry for assessing the validity of employer restrictions on concerted activities has been applied for over four decades, in many varied circumstances, and in an even-handed manner.

The Board, however, argues that the Court should apply *de novo* review because this is the first case under the MERA to involve application of the analytical framework first expressed by the Commission in its *University of Wisconsin Hospitals and Clinics Authority*, No. 30202-C (WERC Apr. 12, 2004) decision.[1] The Board contends that the analytical framework from *University of Wisconsin Hospitals* is new and is inconsistent with prior decisions. It asks that the Court apply the traditional analytical framework from *City of Kenosha Board of Education*, No. 6986-C (WERC Feb. 25, 1966), rather than the analytical framework from *University of Wisconsin Hospitals*. Alternatively, the Board argues that if the Court is inclined to defer to and accept the new analytical framework, then only due-weight deference should be applied.

The Commission's decision was based upon its finding that the Board's prohibition extended beyond legitimate parameters and violated the rights of employees represented by the MTEA under section (2) of the MERA, in violation of section 111.70(3)(a)1. The Court finds that the Commission has developed extensive experience applying section 111.70 in a variety of cases, and it employed this specialized knowledge throughout its memorandum, citing and applying a number of prior Commission decisions and the balancing test.[2] The Board draws distinctions amongst prior Commission decisions, but it fails to persuade the Court that the Commission's decisions have been so inconsistent as to provide no real guidance and warrant *de novo* review, the presumption established by *City of Kenosha* notwithstanding.

Therefore, the Court will accord deference to the Commission's decision in this case.

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[1] In this respect, the Board notes that under *City of Kenosha Board of Education*, No. 6986-C (WERC Feb. 25, 1966), an employer's rules were presumed valid and could not be overturned unless employees could show actual invidious intent of one type or another in promulgation or enforcement of the rules. The Board now argues that recently, the Commission rejected this presumption of validity and has shifted the burden from the union to the employer, representing a profound change in the law. As a result, the Board claims that the Commission has effectively overruled the long-standing *City of Kenosha* test, and that this is the first case under the MERA in which the new analytical framework has been applied.

[2] The Court finds that the Commission's memorandum accurately cites to and utilizes the relevant tests found in *City of Kenosha, University of Wisconsin*, and other Commission decisions.

While the Court is persuaded by the arguments of the Commission and the MTEA and is therefore inclined to accord great weight deference to the Commission's reasonable interpretation of section 111.70, the level of deference accorded is not essential to the Court's determination. Even if the Court agreed with the Board that the Commission's interpretation is not one of long-standing, and thus accords only due deference, the Court's decision to affirm the Commission would remain the same. The Commission's decision was not only reasonable, but it is the most reasonable interpretation and application of the MERA to the facts presented.[3] Accordingly, the Court does not find that there is a more reasonable conclusion than that of the Commission.

DECISION

In a well-reasoned decision, a majority of the Commission issued a declaratory ruling that the Board violated the MERA by prohibiting the placement of "Attract and Retain" signs in locations which students customarily occupied, including classrooms, where teachers otherwise were permitted to display personal, non-instructional items or materials, but only to the extent that the signs did not exceed the limitations in terms of number, size and location that the Board has applied to other personal, non-instructional items or materials. The dissenting Commissioner concluded that the employee interest in posting signs in classrooms was significantly outweighed by the Board's interest in keeping children free from distractions.[4]

As grounds for setting aside the commission's decision, the Board makes the following three points. First, that the Commission's statement of the Board's position is incorrect because the Board applied its directive only to the "Attract and Retain" signs, not the buttons. Second,

[3] Moreover, it is also the conclusion that the Court would reach without any deference to the Commission's interpretation.

[4] The Court took into consideration the majority's insightful response to the arguments brought out in the dissenting opinion.

that the signs are distinguishable from the buttons, but the Commission majority appears to have genuinely viewed the signs and buttons as merely identical in purpose, content, and effect. Third, that by treating the signs and buttons as identical, the Commission majority rejected prior case law and applied new legal standards never before recognized by the Commission. The Court disagrees with the Board and finds that the Commission's decision accurately took into account the distinguishing characteristics of the buttons and signs, and it reasonably interpreted the MERA in an application consistent with its past Commission decisions.

With respect to the Board's first point, footnote two of the Commission's decision specifically articulates the scope of the decision. In that footnote, the Commission acknowledges that the issue originally posed did not extend to buttons, and that the Board did not attempt to restrict teachers from wearing buttons. While the Commission did discuss the buttons at various points in its decision, the Commission's declaratory ruling aptly focuses on the "Attract and Retain" signs. The Commission merely determined, after considering the parties' arguments, that the buttons and signs warranted a combined discussion.

The Board also argues that the characterization of the signs as "Attract and Retain signs" effectively minimized the impact and purpose of the different messages contained on the signs and buttons, and that the Commission's assertions that the buttons and signs contained the same message, that distinguishing them was meaningless, and that there was no reason to believe there would be any meaningful difference between the two in terms of student reactions are unsupportable. The Court, however, recognizes that the Commission's findings of fact accurately describe the number, size, and content of the buttons, as well as the size, content, and placement of the signs. The Commission reasonably examined both the buttons and the signs throughout its nearly sixteen-page discussion, properly comparing and contrasting them at

various points.[5]

Finally, the Board argues that the Commission's decision departs from past decisions and applies new legal standards never before recognized by the Commission.[6] Based on the record and the sound analysis set forth in the Commission's decision, however, the Court disagrees with the Board and finds that the Commission very reasonably interpreted the MERA and properly employed its standard balancing test in forming this interpretation.

In *City of Kenosha,* the Commission determined that the rights of employees and their representatives "must be balanced with the obligation and duties of the municipal employer." *City of Kenosha Board of Education*, No. 6986-C at 22 (WERC Feb. 25, 1966). The Commission recently explained that this test has ultimately depended upon "balancing the degree of intrusion on employee protected activity against the employer's demonstrated need to regulate the activity." *University of Wisconsin Hospitals,* No. 30302-C at 14, n.2 (WERC April 12, 2004). The Board maintains that the Commission largely ignored the nature of the signs and the limited extent to which the interests served by them were served by posting them in classrooms full of children, and that the Commission failed to consider a number of factors pertinent to the "intrusiveness" analysis. But the Court finds that the Commission did in fact consider pertinent factors to the degree of intrusion, and the Commission did take into consideration the nature of the signs and the interests served by them. In sum, the Commission found that the signs served a

[5] For example, the Commission stated on page 12 that "[t]he signs pose a more difficult issue. While the tone and content of the signs is similar to that of the buttons (if anything, the signs more clearly link the "Attract and Retain" slogan to the contract dispute), the signs were considerably larger than the buttons and perhaps even less likely to escape student notice."

[6] The Board asserts, in part, that the Commission failed to consider whether the Board's rule was narrowly tailored to its interests; that it was required to consider, but did not, the specific extent to which the posting of the signs in classrooms furthered the particular employee interests; that it was required to consider, but did not, the extent to which the employee interests associated with the signs were met or achievable through alternative means; and that it was incorrect in concluding that by limiting the signs to the same number, size and location as allowed for a teacher's other non-instructional items, a "reasonable student" would not be any more distracted by the signs than same message on the buttons.

fundamental purpose in promoting concerted activity, building collective confidence, and communicating a message of solidarity to the employer and the community. It noted that the signs "served weighty statutory interests and were powerful tools in a time of difficult negotiations." The Court likewise agrees that the signs in this case provided an essential means to encouraging and demonstrating confidence and solidarity among the employees, and that given the nature of their employment, all of the identified interests could be served through posting the signs where other non-instructional items were permitted, including in the classroom.

Next, the Commission reasonably balanced those interests against the employer interests of limiting proselytizing or manipulation of students, and limiting distractions in the educational setting. In this regard, the Commission first examined the purpose served by the Board's rule against classroom "political advocacy." Of particular importance to the Commission was the rule's purpose in limiting "any undue influence of teachers on the political viewpoints of their students and the potential manipulation of students to convey political viewpoints to their parents." Under the balancing test, the Commission concluded that such purpose was not sufficient to outweigh the teachers' statutorily protected interests in this case.[7] It noted that the activity in question "did not generate more than minimal discussion with students nor any significant proselytizing in favor of the Union's bargaining position or against the Board's." The Commission very reasonably determined that although the Board has a legitimate interest in limiting proselytizing or manipulation of students, that purpose "does not outweigh the employees' statutory rights to wear union buttons and display signs <u>of the nature</u> and <u>to the extent</u> at issue here." The Court finds that there is not a more reasonable balancing of employer

[7] The Commission also emphasized the Agreement Clarifying Political Activity Rights, stating that it "refers almost exclusively to *electoral* advocacy." The Commission noted that the buttons and signs are not directed toward any specific candidate for office nor reasonably interpreted as indicating Board support of the Union's bargaining positions.

and employee interests—under the facts in the record—than that made by the Commission, especially given the limited scope of the Commission's declaratory ruling.

Additionally, the Commission looked to the Board's interest limiting distraction and disruption in the educational process. The Commission analyzed the disruptive effect of the signs in a separate discussion from the disruptive effect of the buttons. Agreeing with *East Whittier School District*, No. 1727 at 11 (Ca. PERB Dec. 21, 2004), which utilized an objective examination of disruptiveness, the Commission looked to whether the signs and buttons were so disruptive as to outweigh the employee's statutorily protected rights. The Commission stated that it could not conclude "that the content of the signs was likely to cause any significant disruption in the educational program so as to justify a categorical prohibition." The Board now disagrees with the Commission's application of the test from *East Whittier*, and its conclusion that by limiting the signs to the same number, size and location as allowed for a teacher's other non-instructional items, a reasonable student would not be any more distracted by the picket signs than they would be by the same message on the buttons. The Court, however, disagrees with the Board and agrees with the Commission's objective examination regarding the balancing of the disruptiveness of the signs versus the employee rights to display the signs.

Moreover, after recognizing that prohibiting a union poster in locations where other non-instructional items were allowed is inherently discriminatory, the Commission carefully noted that the right to display the MTEA signs in the classroom was limited to "the same level that has been permitted in any particular building for other forms of non-instructional displays." This holding is consistent with the Commission's prior decisions involving discriminatory application of rules towards employee concerted activity. Here, the Board prohibited signs from being displayed in the classroom even within the same parameters that apply to personal, non-

instructional materials. The Court agrees with the Commission's determination that because the Board's prohibition extended beyond those legitimate parameters, it "violated the rights of employees under section (2) of the MERA, in violation of section 111.70(3)(a)1."[8]

In conclusion, the Court does not find that the Commission erroneously interpreted a provision of law, or that the Court should remand the case to the Commission for further action. Accordingly, the Court refuses to set aside the Commission's decision in this matter, affirms the Commission's decision, and finds that there is not a more reasonable interpretation or application of the MERA than that made by the Commission.

CONCLUSION

THEREFORE, based upon a thorough review of the record and the arguments of the parties as set forth in their briefs, it is hereby ORDERED that the decision of the Wisconsin Employment Relations Commission is hereby AFFIRMED.

Dated at Milwaukee, Wisconsin, this 13 day of March, 2007.

BY THE COURT:

DAVID A. HANSHER

Hon. David A. Hansher
Circuit Court Judge, Branch 42

[8] The Commission noted, and the Court agrees, that "some of the photographed displays could well exceed the protected boundaries we have articulated in this decision." As mentioned above, however, the Commission limited its approach to a generic discussion and ruling, rather than examining the specific displays.