STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

CEDARBURG EDUCATION ASSOCIATION, Complainant

vs.

CEDARBURG SCHOOL DISTRICT, Respondent

Case 21
No. 66222
MP-4287

Decision No. 31906-A

Appearances:

Melissa A. Cherney, Wisconsin Education Association Council, 33 Nob Hill Drive, Post Office Box 8003, Madison, Wisconsin, 53713, appearing on behalf of the Cedarburg Education Association.

Steven B. Rynecki, von Briesen & Roper, S.C., 411 East Wisconsin Avenue, Suite 700, Post Office Box 3262, Milwaukee, Wisconsin, 53201-3262, appearing on behalf of the Cedarburg School District.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

On August 17, 2006, Cedarburg Education Association (hereafter "Association") filed a complaint with the Wisconsin Employment Relations Commission, alleging that Cedarburg School District (hereafter "District") had violated the provisions of Chapter 111.70 of the Wisconsin Statutes, by failing to bargain in good faith, with respect to proposed health insurance changes, in conjunction with the parties' negotiations for a 2005-2007 collective bargaining agreement.

On November 7, 2006, the Commission appointed Daniel Nielsen, a member of its staff, to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and Order as provided in Sec. 111.07(5), Wis. Stats. Thereafter, the parties entered into a stipulation with regard to the facts relevant to the dispute. The parties submitted initial briefs and reply briefs. In conjunction with the filing of its reply brief, the District also filed a Motion to Strike or Ignore Association's Allegation of Bad-Faith Bargaining Related to School

Calendar Implementation or Alternatively to Conduct Further Litigation and Briefing Regarding the Calendar. The Association filed a response to said motion. On March 26, 2007, Examiner Nielsen issued a ruling denying the District's motion and declaring the record in the present matter to be closed.

On the basis of the record evidence, the arguments of the parties, and the record as a whole, the Examiner makes and issues the following Findings of Fact.

FINDINGS OF FACT

1. The Cedarburg School District ("District") is a municipal employer within the meaning of Sec. 111.70(1)(j), Wis. Stats.

2. The Cedarburg Education Association ("Association") is a labor organization within the meaning of Sec. 111.70(1)(h), Wis. Stats., and is the exclusive collective bargaining representative for all certified personnel of the Cedarburg School District, excluding confidential, managerial and supervisory employees of the District.

3. The term of a 2003-2005 collective bargaining agreement between the District and Association expired on June 30, 2005.

4. From approximately July, 2005 through May, 2006, the parties engaged in bargaining for a collective bargaining agreement to cover the period of July 1, 2005, through June 30, 2007. In the course of bargaining, the parties met several times and exchanged several written proposals.

5. Among other things, the proposals exchanged by the parties addressed possible changes, as outlined below, to the health insurance benefit provided for in the parties' previous agreement.

6. On July 18, 2005, the Association proposed a change from the WEA Trust plan to the WEA Trust Select II plan.

7. On November 22, 2005, the District made the following three, mutually exclusive written proposals relating to a change in the health insurance benefit: replacing WEA Trust with a self-funded insurance program, putting the existing insurance program put out for competitive bidding, or changing benefit plans under WEA Trust.

8. On January 23, 2006, and February 23, 2006, Wisconsin Employment Relations Commission Investigator Karen J. Mawhinney conducted an informal investigation and engaged in mediation with the parties. Ms. Mawhinney also had subsequent conversations with the parties regarding their negotiations.

9. On April 10, 2006, the District made a revised health insurance proposal. Proposal. The parties would temporarily change to the WEA Trust Select II health insurance plan, until July 1, 2007. On July 1, 2007, the lowest cost plan available through WEA or its equivalent would become the health insurance benefit plan. Further, a Health Insurance Committee would be formed, consisting of three members selected by the Association, two District administrators, and two District school board members. The Health Insurance Committee would develop a new plan design, elicit bids for said plan, and recommend the lowest-cost plan to the District and Association.

10. On April 26, 2006, the Association counter-proposed to change the health insurance to the WEA Trust Select II plan effective June 1, 2006. Further, the Association proposed a Health Insurance Committee consisting of three members selected by the Association and three members selected by the District school board. The Health Insurance Committee would elicit bids on the current plan design and on a plan design revised to reflect changes requested by the Association and the District. If the District and Association were not able to agree on a plan design, the parties would file a joint petition for arbitration with the WERC.

11. On May 5, 2006, the District reiterated its proposal of April 10, adding an offer to fund the hiring of an independent insurance consultant to assist the Health Insurance Committee in the development of a new health plan design.

12. On May 17, 2006, the Association renewed its offer of April 26, 2006.

13. On May 22, 2006, the District renewed its May 5, 2006 proposal. In doing so, the District characterized this proposal as its "last and final offer".

14. On May 25, 2006, Pamela Harrison, chief negotiator for the Association, sent an e-mail message to John Pendergast, President of the District school board, indicating that the Association would not agree to the offer proposed by the District. Ms. Harrison's e-mail message further stated, "[i]f this is your final proposal, then it appears we are at a deadlock".

15. During this period of negotiations from July, 2005, through May, 2006, the District also informally presented a qualified economic offer as a possible alternative to the health insurance changes being discussed by the parties.

16. On May 30, 2006, Attorney for the District James Korom sent correspondence to Karen Mawhinney, requesting a declaration of deadlock between the parties. Attorney Korom's correspondence enclosed a Qualified Economic Offer by the District, as well as a Notice of the Exact Manner of QEO Implementation.

17. On June 1, 2006, Investigator Mawhinney issued to the parties a Notice to Parties of Investigator's Determination of Deadlock.

18. On June 30, 2006, Mr. Pendergast sent an e-mail message to Ms. Harrison, not addressing the health insurance debate, but suggesting a change to the salary schedule through a side-bar agreement.

19. On July 9, 2006, Ms. Harrison sent an e-mail message to Mr. Pendergast, indicating that the proposed change to the salary schedule already had been agreed to by the parties and asserting that the only point on which the parties had not been able to agree was the manner for investigating and choosing a health insurance plan. Ms. Harrison's message further proposed an "advisory" Health Insurance Committee that would not be binding, but would put selected insurance plans out for competitive bids and work in good faith to ensure that the parties' negotiating teams had accurate, up to date information regarding health plans.

20. On July 10, 2006, Mr. Pendergast sent an e-mail message to Ms. Harrison, reiterating the salary proposal and asserting that a Health Insurance Committee could be implemented without a side-bar agreement.

21. On July 13, 2006, Ms. Harrison sent an e-mail message to Mr. Pendergast, stating that the Association would only be willing to resolve the salary schedule issue in conjunction with the other issues outstanding for the 2005-2007 collective bargaining agreement. Ms. Harrison expressed hope that the Association's willingness to work with the District on a health insurance committee, in the context of a settled contract, would persuade the Board "to drop its demand that the teachers waive their right to bargain health insurance for the next round of negotiations".

22. On July 17, 2006, Mr. Pendergast sent an e-mail message to Ms. Harrison, indicating that any previous salary increase made by the District had been contingent upon the Association accepting the District's proposal with regard to forming an insurance committee and selecting an insurance plan.

23. After July 17, 2006, there were no further negotiations or communications between the parties.

24. The continued negotiations after the presentation of the District's purported "last and final offer" on May 22, belie the existence of an impasse as a result of that offer

25. The final offer of the District in these negotiations was the Qualified Economic Offer proffered on May 30, which did not include the proposed health insurance changes.

On the basis of the above Findings of Fact, the Examiner makes and issues the following Conclusions of Law.

CONCLUSIONS OF LAW

1. The Complainant did not waive or otherwise compromise its ability to challenge the permissive nature of the District's health insurance proposals by making its own similar proposals in the course of bargaining.

2. The Complainant did not fail to exhaust its administrative remedies by not seeking a declaratory ruling with regard to whether the health insurance proposal at issue in this case is a permissive or mandatory subject of bargaining.

3. The Respondent did not insist to impasse on a permissive subject of bargaining and, therefore, did not engage in bad faith bargaining or commit any prohibited practice within the meaning of Sections 111.70(3)(a)1 and 4, Wis. Stats.

4. The District did not engage in bad faith bargaining by informing the Association and the WERC investigator of its intention to implement a Qualified Economic Offer and, therefore, did not commit any prohibited practice within the meaning of Sections 111.70(3)(a)1 and 4, Wis. Stats.

On the basis of the above and foregoing Findings of Fact and Conclusions of Law, the Examiner makes and issues the following Order.

ORDER

It is ORDERED that

The instant complaint is dismissed in its entirety.

Dated at Racine, Wisconsin, this 10th day of August, 2007.

Daniel Nielsen /s/
Daniel Nielsen, Examiner

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER DISMISSING COMPLAINT

This case concerns the Association's belief that the Cedarburg Schools engaged in bad faith bargaining by proposing a committee, a majority of the members to be drawn from management, to study and make changes in the health insurance coverage during the term of the contract, and making that proposal a final offer for settlement. The Association rejected the proposal, and the District then presented a QEO and sought and received a deadlock letter from the Commission's investigator. The Association asserts that the committee structure would have effectively stripped it of its right to bargain health insurance benefits, and was therefore permissive. The alleged violations of the duty to bargain are two: First, that the District insisted to the point of impasse on a non-mandatory proposal; and second, that the District evinced bad faith by threatening to implement a QEO if its non-mandatory demand was not met.

A. The District's Waiver Claim.

As a threshold matter, the Respondent argues that the Association has waived its right to assert the permissive nature of the heath insurance proposal. First, the District contends that the Association cannot object to the health care proposal as a permissive subject of bargaining, because the Association made proposals on the same subject and, therefore, brings its prohibited practice claim with "unclean hands". Further, the District asserts that the Association was procedurally obligated to raise such a challenge through the declaratory ruling procedures set forth in ERC Chapters 30 and 33. Neither of these contentions is persuasive.

With respect to the "unclean hands" argument, I would observe that a topic is termed "permissive" because parties are permitted to bargain over it, but are not required to do so. If a party waived its right to complain about a permissive topic as an impasse item simply by negotiating over the topic prior to impasse, the effect would be to transform all proposals into mandatory topics once they had been discussed without objection. That is not and never has been the law, and if it were to become the law, the bargaining process would be so littered with potential traps for the unwary that all but the plainest vanilla topics would be off limits.

The logic of the District's second argument is that a party, in order to protect its right to complain about illegal conduct by the other party, must first engage in the declaratory ruling process to determine that the conduct is illegal. While in interest arbitration proceedings a party who fails to object to the content of the other party's final offer may be held to have waived objections and be compelled to arbitrate over that offer once it is certified, there are no such waiver provisions in the portions of Ch. 111 addressing complaint proceedings. The District proposes to add a new and unusual step to the prohibited practice procedures and in some respects turns them on their head. The duty to refrain from illegal conduct does not generally depend on the other party first proving to you that your conduct is illegal.

The District's argument relating to the alleged need to utilize the declaratory ruling process is further without support in case law. Indeed, it conflicts with the many instances in which the Commission has explored the mandatory/permissive question in a non-declaratory-ruling context. *See, e.g.*, MILWAUKEE COUNTY, DEC. NO. 15420-A (WERC, 6/82), WEST ALLIS-WEST MILWAUKEE SCHOOL DISTRICT, DEC. NO. 23805-C (WERC, 11/87), RACINE UNIFIED SCHOOL DISTRICT, DEC. NO. 27972-C (WERC, 3/96), RANDOM LAKE SCHOOL DISTRICT, DEC. NO. 29998-C (WERC, 8/02). For these reasons, I conclude that the Association neither has waived nor has been estopped from bringing this complaint.

B. The Complainant's Claim That the District Bargained to Impasse on a Permissive Subject of Bargaining.

The Association has alleged that the District engaged in a prohibited practice by insisting to impasse on a health insurance proposal that constituted a permissive subject of bargaining. As the parties have recognized in the present case, it is well-settled law that a party cannot insist on a permissive subject of bargaining, as a condition to reaching a voluntary agreement, to the point of impasse. Having acknowledged that general rule, however, I do not find that it comes into play in this case.

Whether the health insurance proposal constituted a mandatory or permissive subject of bargaining does not matter here because the District's final offer was its qualified economic offer, which did not contain the disputed health insurance proposals. I have found that the parties were not at a point of deadlock or impasse[1] until they were declared to be so by Investigator Mawhinney, on June 1, 2006. On May 30, 2006, the District formally made its qualified economic offer. It had informally presented the QEO as a possible alternative to its health insurance proposals during the preceding period of the parties' negotiations. Regardless of the nature of the permissive or mandatory proposals made by the District prior to the time when it made its QEO, the District's final offer necessarily maintained the fringe benefits of the previous contract and, therefore, did not contain the disputed health insurance proposal.

In reaching this conclusion, I recognize that, prior to the time when Investigator Mawhinney declared deadlock, each of the parties made some assertion that their negotiations had reached a stand-still. The District indicated to the Association that its offer of May 22 was its "last and final offer". Subsequently, the Association stated, on May 25, "it appears we are at a deadlock". I do not view either of these statements to be a formal or reliable indication of impasse. Rather, I view them as nothing more than competing overtures made in the course of bargaining, with the purpose of compelling acceptance of an offer. Indeed, even in the weeks after Investigator Mawhinney declared deadlock, the parties continued to negotiate over the

[1] I am assuming, for the sake of this analysis, that a deadlock and an impasse are functionally the same event in the QEO context. *See*, Campbellsport School District, Dec. No. 30585 (WERC, 3/03) at 14.

health insurance proposal, as well as possible changes to the salary structure. These continued negotiations indicate that, rather than embracing the concept of deadlock before the point in time when one was declared by Investigator Mawhinney, each party continued to believe, before and after the declaration, that a voluntary settlement was possible through the normal process of collective bargaining.[2]

C. The Complainant's Claim that the District Engaged in Bad Faith Bargaining by Threatening Implementation of a QEO.

The Association also alleged that the District engaged in bad faith bargaining by threatening to implement a qualified economic offer, for the purpose of coercing the Association to accept the District's health insurance proposal. In denying this claim, I rely on CITY OF BELOIT, DEC. NO. 27779-B (WERC, 9/94) and SCHOOL DISTRICT OF THORP, DEC. NO. 29146-A (CROWLEY, 4/98). As explained therein, it is generally appropriate for one party to advise the other during the collective bargaining process of the potential negative consequences of a position that is being adopted at the bargaining table. Such behavior is permissible because it is presumed that an employer, in setting forth anticipated alternatives to a proposal, is not seeking to deter employees from exercising rights. Rather, it is seeking merely to persuade employees to change the position they are taking at the collective bargaining table. Id. It is a bargaining tool rather than an attempt at unlawful coercion.

Likewise, in the present case I view the District's tactic of presenting a qualified economic offer as a possible alternative to the offer being proposed as a legitimate, good faith attempt to persuade the Association to accept its health insurance proposal. It was apparently an honest statement of the District's intentions, not to mention a generally accurate statement of the law regarding deadlocks in teacher bargaining. That being the case, I do not find that the District's behavior constituted a prohibited practice.

Dated at Racine, Wisconsin, this 10th day of August, 2007.

Daniel Nielsen /s/
Daniel Nielsen, Examiner

[2] In concluding as a factual matter that the May 22 offer was not the final offer of the District, and that instead the QEO was the final offer, I do not suggest that there can never be an illegal insistence to the point of impasse on a permissive proposal when the Employer eventually presents a QEO not containing the permissive topic. The existence of impasse and the reasons for impasse are fact driven conclusions, and those determinations will vary depending upon the circumstances of each case.

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