COURT OF APPEALS
DECISION
DATED AND FILED

August 16, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2006AP862 **Cir. Ct. No. 2005CV348**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

EDGERTON FIRE PROTECTION DISTRICT,

PETITIONER-APPELLANT,

V.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION AND INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, LOCAL #580, AFL-CIO,

RESPONDENTS-RESPONDENTS.

APPEAL from an order of the circuit court for Rock County: JAMES E. WELKER, Judge. *Affirmed.*

Before Higginbotham, P.J., Dykman and Lundsten, JJ.

¶1 PER CURIAM. Edgerton Fire Protection District appeals an order affirming a decision of the Wisconsin Employment Relations Commission.[1] The issues are: (1) whether the Wisconsin Employment Relations Commission (WERC) reasonably determined that the Edgerton Fire Protection District's decision to eliminate three full-time positions was subject to mandatory bargaining; (2) whether WERC properly determined that the District was motivated in part by hostility to the employees' union activities; and (3) whether a statement made by the human resources manager for the District constituted a prohibited practice under the Municipal Employment Relations Act. We affirm.

¶2 The District first argues that WERC acted unreasonably in concluding that the District's decision to eliminate three full-time positions was subject to mandatory bargaining under the Municipal Employment Relations Act, WIS. STAT. §§ 111.70-111.77 (2005-06).[2] We give great weight to WERC decisions regarding the bargaining nature of proposals under the Municipal Employment Relations Act because WERC "has special competence in the area of collective bargaining and has developed significant experience in deciding cases involving the issue of mandatory bargaining." ***West Bend Educ. Ass'n v. WERC***, 121 Wis. 2d 1, 13, 357 N.W.2d 534 (1984) (footnotes omitted).

¶3 Disputes primarily related to wages, hours, or conditions of employment are subject to mandatory bargaining. ***Beloit Educ. Ass'n v. WERC***, 73 Wis. 2d 43, 50, 242 N.W.2d 231 (1976). A municipal employer is not required

[1] We review the decision of the Wisconsin Employment Relations Commission, not the decision of the circuit court. ***Motola v. LIRC***, 219 Wis. 2d 588, 597, 580 N.W.2d 297 (1998).

[2] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

to bargain on "subjects reserved to management and direction of the governmental unit except insofar as the manner of exercise of such functions affects the wages, hours and conditions of employment" of the employees. WIS. STAT. § 111.70(1)(a); *see also* ***Beloit Educ. Ass'n***, 73 Wis. 2d at 50. "The difficulty encountered in interpreting and applying [the statute] is that many subject areas relate to 'wages, hours and conditions of employment,' but not only to such area of concern." ***Beloit Educ. Ass'n***, 73 Wis. 2d at 52. Application of the statute thus requires "a balancing test which recognizes that the municipal employer, the employees, and the public have significant interests at stake and that their competing interests should be weighed to determine whether a proposed subject for bargaining should be characterized as mandatory." ***West Bend Educ. Ass'n***, 121 Wis. 2d at 9. "If the employees' legitimate interest in wages, hours, and conditions of employment outweighs the employer's concerns about the restriction on managerial prerogatives or public policy, the proposal is a mandatory subject of bargaining." ***Id.*** "In contrast, where the management and direction of the [governmental unit] or the formulation of public policy predominates, the matter is not a mandatory subject of bargaining." ***Id.***

¶4 The District contends that it eliminated the three employees and returned to a volunteer fire department because it had a projected budget shortfall caused primarily by the need to purchase a new truck. The District contends that its decision to eliminate the employees based on budgetary constraints is not a mandatory subject of bargaining under ***City of Brookfield v. WERC***, 87 Wis. 2d 819, 830-33, 275 N.W.2d 723 (1979) (holding that a decision to lay off five fire fighters based on budget reductions was not a mandatory subject of bargaining).

¶5 WERC distinguishes ***Brookfield*** because the decision to lay off the fire fighters in that case resulted in a reduction of fire-fighting services to the

community, thus implicating policy and political processes. WERC contends that this case is more similar to ***Unified School District No. 1 of Racine County v. WERC***, 81 Wis. 2d 89, 259 N.W.2d 724 (1977). In ***Unified School District No. 1***, the court held that a school district's decision to lay off its employees and to subcontract its food service program to a private contractor to save money was a mandatory subject of bargaining. ***Id.*** at 102-03. The court explained that the decision did not involve policy concerns because "[t]he decision merely substituted private employees for public employees," who would do "[t]he same work … in the same places and in the same manner." ***Id.*** at 102. WERC contends that this case is closely analogous because the volunteer fire fighters will do the same work the paid fire fighters were doing. WERC aptly explained:

> [T]he District heavily emphasizes the alleged public policy choice involved in its decision, i.e., whether to purchase a new truck, on the one hand, or maintain a full-time work force, on the other. Certainly every expenditure and budgetary decision carries some policy implications. Had the District faced a choice between reducing its fire protection services and purchasing a truck, its decision might more closely approach the public policy choices that animated the court's decision in ***Brookfield***. However, if [a] public employer's choice to spend money on equipment rather than wages were ipso facto nonbargainable, even if services were unaffected, then virtually any economic issue affecting employees could be cast in nonbargainable terms, at least in an environment of limited revenues. An employer could simply assert, "We cannot give you a raise, because we want to fix the plumbing" in order to remove wages from the scope of bargaining. This is why ***Beloit*** requires a balancing of the relative weight of the asserted policy interests against the effect on wages, hours, and working conditions of employment. In ***Brookfield***, the court decided that a political body's decision to endure reduced services was sufficiently imbued with policy to outweigh the effect of a layoff on wages, hours, and conditions of employment. As the Examiner noted, the ***Brookfield*** court's concern about a union preempting public debate over policy choices would have little resonance in a situation where the choice did not involve a potential loss of services. Asking the public, "Would you

> like to have the same service you have now and a new truck, too, but spend less money?" is like asking whether they want to have their cake and eat it, too—that is to say, not a serious policy choice at all.

¶6 The District counters that WERC's decision does great damage to the ability of local municipalities and local governing agencies to control their own affairs and "cede[s] total control of lay-off decisions to the WERC, [leaving] the public unrepresented." To the contrary, governing bodies like the District may act on economic motivations without being subject to mandatory bargaining as long as actual policy choices are being made and, as we address below, anti-union bias is not also a motivating factor. The problem is not that WERC has misinterpreted the law, grasping power for itself as the District implies, but that, under the facts here, the District's actions were primarily related to wages, hours, and conditions of employment.

¶7 The District also argues throughout its brief that WERC was not authorized to examine what, on its face, would appear to be an economic decision under ***Brookfield***. Stated differently, the District argues that WERC exceeded the scope of its authority by examining the circumstances underlying what appeared to be an economic decision. ***Brookfield*** lends no support to the District's position. We believe that WERC properly examined the underlying circumstances in order to determine whether the economic rationale for the decision was pretext. In sum, WERC thoroughly and persuasively explained why it believed that ***Unified School District No. 1*** was more similar to this case than ***Brookfield.*** According great weight to WERC's decision, as we are required to do, we affirm its legal conclusion that the decision to lay off the employees was a subject of mandatory bargaining.

¶8 The District next argues that WERC improperly concluded that the District was motivated to eliminate the three full-time positions in part because of hostility to the employees' union activities. "'[A]n employee may not be fired when one of the *motivating factors* is his union activities, no matter how many other valid reasons exist for firing him.'" ***DER v. WERC***, 122 Wis. 2d 132, 139, 361 N.W.2d 660 (1985) (emphasis added) (quoting ***Muskego-Norway Consol. Schs. Joint Sch. Dist. No. 9 v. Wisconsin Employment Relations Bd.***, 35 Wis. 2d 540, 562, 151 N.W.2d 617 (1967)). Whether an employer is motivated in part by hostility is a question of fact. *See* ***Pullman-Standard v. Swint***, 456 U.S. 273, 287-90 (1982). We will uphold WERC's factual findings if they are supported by substantial evidence. ***Kitten v. DWD***, 2001 WI App 218, ¶19, 247 Wis. 2d 661, 634 N.W.2d 583, *aff'd on other grounds*, 2002 WI 54, 252 Wis. 2d 561, 644 N.W.2d 649. "Substantial evidence is the quantity and quality of evidence which a reasonable person could accept as adequate to support a conclusion." ***Id.***

¶9 WERC's decision that the District was motivated in part by anti-union animus when it eliminated the three full-time positions is supported by substantial evidence. The District's decision to cut the positions from the budget outside the normal budget cycle was not in keeping with its prior practice. The District took this unusual action even though it already had funds set aside to pay the three full-time employees for another six months. The reason given for the lay offs—that the District needed to purchase a new fire truck—had been under discussion for at least two years and nothing happened between the April board meeting and when the men were laid off in June that made the need to replace the truck more urgent. At the meeting, there was little discussion about alternative ways to handle the purported fiscal crisis other than laying off the employees. Aside from the questionable nature of the District's budgetary decision, the record

is replete with facts that show the District's personnel manager did not want a union and actively tried to persuade the men not to form one. Under these circumstances, WERC properly concluded that the District's activities were motivated in part by hostility to union activities.

¶10 The next issue is whether WERC properly concluded that a written statement made by Robert Hellendrung, who was the District's Director of Human Relations, to the employees constituted a prohibited practice under the Municipal Employment Relations Act (MERA) because it tended to interfere with, restrain, or coerce the employees in their rights under MERA to engage in lawful concerted activity. *See* WIS. STAT. § 111.70(2) and (3)(a).

¶11 Whether the undisputed facts—here, Hellengdrung's written statement—constitute a prohibited practice under MERA is a question of law. *See* ***Kitten***, 247 Wis. 2d 661, ¶22 ("Once the facts are established, however, the determination of whether those facts fulfill the statutory standard is a legal conclusion."). Because we give great weight deference to WERC's legal conclusion that the letter constituted a prohibited practice, we will affirm the conclusion "if a rational basis exists for [it]" or, stated differently, "if [WERC's] view of the law is reasonable even though an alternative view is also reasonable." *See* ***West Bend Educ. Ass'n***, 121 Wis. 2d at 13-14.

¶12 WERC's decision that the letter constituted a prohibited practice was reasonable. WERC concluded that Hellendrung's letter overstated the inflexibility that the union contract would bring and the consequent detriment to the employees. WERC also concluded that the letter contained threatening language because it listed the economic benefits it was willing to offer the employees, but implied that it would have a different attitude if those improvements were sought

by the union. The letter also implied that unionization might cost one of the employees his job because that employee would be unable to meet a putative physical examination requirement, and implied that unionization might force the district to eliminate the jobs altogether. As pointed out by WERC, Hellendrung's letter was more threatening in tone than a letter found to constitute a prohibited practice in ***WERC v. City of Evansville***, 69 Wis. 2d 140, 154, 230 N.W.2d 688 (1975). Based on the facts presented in this case and the applicable precedent, we thus conclude that WERC's view of the law was reasonable.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.