**COURT OF APPEALS DECISION DATED AND FILED**

**October 12, 2006**

**Cornelia G. Clark**
**Clerk of Court of Appeals**

**NOTICE**

**This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.**

**A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.**

**Appeal No. 2006AP238**

**Cir. Ct. No. 2005CV217**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS**
**DISTRICT IV**

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**COOPERATIVE EDUCATIONAL SERVICE AGENCY #3,**

**PETITIONER-RESPONDENT,**

**V.**

**WISCONSIN EMPLOYMENT RELATIONS COMMISSION,**

**RESPONDENT-APPELLANT,**

**CESA #3 EDUCATION SUPPORT PERSONNEL ASSOCIATION,**

**RESPONDENT-CO-APPELLANT.**

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APPEALS from an order of the circuit court for Grant County: ROBERT P. VAN DE HEY, Judge. *Reversed*.

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

¶1 PER CURIAM. This Chapter 227 administrative appeal arises from a dispute between Cooperative Educational Service Agency #3 (CESA or the municipal employer) and CESA #3 Education Support Personnel Association (the association or the employees). The issue is whether a proposal that CESA provide remedial assistance to a poorly performing employee prior to initiating disciplinary procedures is a subject for mandatory bargaining under WIS. STAT. § 111.70 (2003-04).[1] The Wisconsin Employment Relations Commission (WERC or the commission) held that the proposal was subject to mandatory bargaining because it was primarily related to conditions of employment. The circuit court reversed the commission's determination on the grounds that the proposal was primarily related to managerial prerogatives. We now reverse the circuit court's order and reinstate the commission's decision for the reasons discussed below.

*The Proposal*

¶2 This case began when CESA sought a declaratory ruling from WERC on whether CESA had a duty to bargain with respect to a proposal which the association had made. The only portion of the proposal which is at issue on this appeal is as follows:

> If the employer finds that an employee is not performing his or her job satisfactorily, the employer must attempt to provide appropriate remedial assistance prior to instituting disciplinary procedures unless circumstances make such assistance impossible.

The proposal does not specify what measures would constitute appropriate remedial assistance.

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[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

*Relevant Authority*

¶3 WISCONSIN STAT. § 111.70 establishes a duty for a municipal employer to engage in collective bargaining with public employees on certain topics. The statute also provides, however, that a 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 functions affects the wages, hours and conditions of employment of the municipal employee in a collective bargaining unit.

WIS. STAT. § 111.70(1)(a). Since there are a number of subjects which may relate both to "the management and direction of the governmental unit" and "the wages hours and conditions of employment," it must be determined on a case by case basis whether a particular proposal is "primarily related" to the conditions of employment so as to trigger mandatory bargaining. ***City of Beloit v. WERC***, 73 Wis. 2d 43, 52-55, 242 N.W.2d 231 (1976).

¶4 In ***City of Beloit***, the Wisconsin Supreme Court upheld WERC's determination that a proposal involving "assistance to teachers having professional difficulties, and the techniques to be employed in dealing with teachers found to be suffering professional difficulties" was primarily related to the management of the school system rather than the employment conditions of the teachers. ***Id.*** at 66-67.

*Standard of Review*

¶5 The "primarily related" balancing test presents a question of law intertwined with factual and policy determinations. ***West Bend Educ. Ass'n***, 121 Wis. 2d 1, 13, 357 N.W.2d 534 (1984). Because WERC has special competence and experience in applying the balancing test to determine when collective

bargaining is mandatory, its legal conclusion on this issue is entitled to great deference. ***Id.*** "Under the great weight standard, we will uphold an agency's interpretation as long as it is reasonable and not contrary to the statute's clear meaning, even if we find a different interpretation more reasonable." ***Stoughton Trailers, Inc. v. LIRC***, 2006 WI App 157, ¶16, ___ Wis. 2d ___, 721 N.W.2d 102.

*Discussion*

¶6 Given our deferential standard of review, the question presented on this appeal is simply whether there was a reasonable basis for WERC to conclude that the association's remedial assistance proposal related primarily to the employee's conditions of employment. We are satisfied that there was.

¶7 CESA argues that WERC's determination was unreasonable because it was inconsistent with the holding of ***City of Beloit***. *See generally* ***Brown v. LIRC***, 2003 WI 142, ¶48, 267 Wis. 2d 31, 671 N.W.2d 279 (noting that an agency's interpretation and application of a statute must be "'consistent with the judicial analysis of the statute'" to be reasonable). We disagree.

¶8 First of all, the commission explained why it deemed the remedial assistance proposal in this case to be distinguishable from that at issue in ***City of Beloit***, stating:

> the proposal that the Commission and Court held permissive in BELOIT was not a simple requirement that the employer provide remedial assistance, but confined the employer to specific and detailed methods for providing assistance. Such detailed methodology encroached significantly more upon managerial prerogatives and discretion than does an assistance requirement that leaves the employer in charge of deciding how and what assistance is appropriate.

Given that the court in ***City of Beloit*** explicitly noted that the remedial assistance plan under examination there was related to both conditions of the teacher's employment and management of the school system, it was entirely appropriate for the commission to focus on the specific terms of the proposal at issue here, to see whether any differences altered the outcome of the balancing test. That is the essence of a "case by case" determination.

¶9 In considering the effect of the association's proposal on conditions of employment, the commission noted that assisting an employee overcome an identified performance deficiency was directly related to job security since it would provide an opportunity for the employee "to improve and thereby remain employed." It analogized the remedial assistance proposal in this respect to "just cause" requirements such as notice of deficiencies, the number, length and type of work observations, and consistency or uniformity of work standards, which have all been found to be subject to mandatory bargaining.

¶10 With respect to the effect of the association's proposal on management interests, the commission observed that the requirement would influence the expenditure of employer resources and infringe on the employer's discretion to decide when and how assistance should be provided or that assistance might not be worthwhile in a given situation. The commission then engaged in a balancing analysis to determine that the remedial assistance proposal would have a greater impact on the conditions of employment than on managerial interests. The commission reasoned that the proposal did not dictate an extraordinary, excessive or burdensome expenditure of resources and allowed the employer to retain considerable discretion "to determine what and when performance difficulties need to be addressed and what type and amount of assistance is appropriate under

the circumstances." It again contrasted the employer's flexibility in this regard with the more structured proposal in ***City of Beloit***.

¶11 In sum, the commission's discussion evinces the considerable experience and expertise in this area which the commission has acquired in the thirty years since ***City of Beloit*** was decided, and represents a reasonable case by case application of the balancing factors to the facts of record. We therefore reinstate the commission's decision.

*By the Court.*—Order reversed.

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