

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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NORBERT MCHUGH, LOUIS HUTZLER,  
DARREL MOLZAHN, ANN MCHUGH, AND  
GREEN BAY EMPLOYEES, LOCAL 1672-B,  
AFSCME, AFL-CIO,

Complainants,

vs.

BOARD OF EDUCATION, JOINT SCHOOL  
DISTRICT NO. 1, CITY OF GREEN BAY,  
ET AL., GREEN BAY, WISCONSIN, AND  
EDWIN OLDS, SUPERINTENDENT,

Respondents.  
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Case VI  
No. 12944 MP-63  
Decision No. 9095-G

RECOMMENDATION TO HONORABLE DONALD W. GLEASON, JUDGE,  
BROWN COUNTY CIRCUIT COURT, WITH RESPECT TO  
COMPLIANCE WITH COMMISSION'S MAKE WHOLE ORDER

Pursuant to an Order issued by Honorable Donald W. Gleason, Judge, Brown County Circuit Court, on October 10, 1974, that the Wisconsin Employment Relations Commission adduce evidence to determine the extent of the liability of the above-named Respondents with respect to compliance by the above-named Respondent, with the Order of the Commission issued on September 16, 1971, and the Court's Judgment affirming same, issued on January 24, 1973, respecting Complainant's Norbert McHugh and Louis Hutzler, the Commission, on November 26, 1974, conducted a hearing at Green Bay, Wisconsin, before Commissioner Zel S. Rice II, where the parties were present and given the opportunity to present evidence germane to the matter; and the Commission having considered the evidence and briefs filed by the parties, makes and issues the following Supplemental Findings of Fact and Supplemental Order.

SUPPLEMENTAL FINDINGS OF FACT

1. That pursuant to the original Order issued by the Wisconsin Employment Relations Commission, the School Board, on August 15, 1973, offered reinstatement to Norbert McHugh; and that McHugh accepted the offer of the School Board with respect to his being made whole as a result of his prohibited discharge; and that, therefore, the School Board has no further monetary obligation with respect to McHugh.
2. That on August 15, 1973, the School Board offered Louis Hutzler reinstatement; and that, however, the School Board and Hutzler, as well as AFSCME, have not been able to reach an agreement with respect to the sums of money due and owing Hutzler to make him whole in accordance with the Commission's Order.
3. That since Hutzler's termination from employment by the School Board on May 12, 1969 to March 31, 1973, Hutzler would have earned \$33,025.20 in wages from his employment with the School Board had he not been terminated by the School Board; and that Hutzler earned during the above-mentioned period, \$39,619.43 in wages from other employment.

4. That for the year 1969, Hutzler would have earned \$7,500.00 in wages from his employment with the School Board had he not been terminated by the School Board; that in 1969, Hutzler earned, during employment with the School Board from January 1, 1969 until May 12, 1969, and from other employment through December 31, 1969 the sum of \$5,749.13 in wages; that had Hutzler not been terminated by the School Board, he would have earned an additional sum of \$1,750.87 in the year 1969; that the School Board, therefore, owes Hutzler the sum of \$1,750.87, plus the legal rate of interest from May 12, 1969; and that, however, inasmuch as Hutzler's earnings for the year 1970 and each year thereafter to the date of his offer of reinstatement from other employment were greater than those sums he would have earned had he been employed by the School Board, the School Board is not indebted to Hutzler for any wages for the year 1970 and thereafter.

5. That had Hutzler not been terminated by the School Board, he would have been entitled to the following number of days of vacation: 15 days for 1969, 15 days for 1970, 16 days for 1971, 20 days for 1972, and 21 days for 1973; that if said vacation days were paid for on a daily basis they would be worth the following: \$418.80 for 1969, \$448.68 for 1970, \$515.88 for 1971, \$571.20 for 1972, and \$630.72 for 1973; that Hutzler was paid \$418.80 for the 15 vacation days in 1969; that Hutzler received 30 accumulated vacation days to his credit upon his return to work in 1973; and that Hutzler received \$500.00 from the School Board to be applied towards settlement of the vacation days issue.

6. That had Hutzler not been terminated by the School Board, he would have been entitled to the following number of paid holidays: 6 in 1969, 7 in 1970, 7 in 1971, 7 in 1972 and 4 in 1973 until the date of his reinstatement; and that Hutzler received one or two holidays in 1972 and three or four holidays in 1973 from his other employment.

7. That subsequent to Hutzler's termination by the School Board, AFSCME, paid \$301.92 to cover the health insurance premiums for Hutzler for the period of July 1969 to June 1970; that there was an understanding between Hutzler and AFSCME that Hutzler would repay such sum to AFSCME; that said insurance premiums would have been paid by the School Board had the School Board not terminated Hutzler; and that Hutzler received health insurance from his other employment subsequent to June, 1970.

8. That had Hutzler not been terminated by the School Board, the School Board would have paid \$3,073.62 to the Wisconsin Retirement Fund, on behalf of Hutzler as the School Board's contribution to the Fund for the period of May 12, 1969 to August 15, 1973; that also the School Board would have paid \$1,119.30 to the Wisconsin Retirement Fund on behalf of Hutzler, as a share of Hutzler's contribution to the Fund for the period of May 12, 1969, to August 15, 1973, as required under the existing collective bargaining agreements between the School Board and AFSCME in effect during said period of time.

Upon the basis of the above and foregoing Supplemental Findings of Fact, the Commission makes the following

SUPPLEMENTAL ORDER

IT IS ORDERED that the Board of Education, Joint School District No. 1, City of Green Bay, et al., its officers and agents, including Superintendent Edwin Olds, in order that Louis Hutzler be made whole for any loss of wages and other benefits he suffered as a result of his discriminatory discharge, shall immediately:

1. Pay the following sums of money to Louis Hutzler:

- (a) The sum of \$1,750.87 as the difference between what Hutzler would have earned and what he actually earned for the calendar year of 1969, as well as the legal rate of interest thereon from September 16, 1971 through the date of compliance herewith.
- (b) The sum of \$301.92 as the amount to liability Hutzler incurred in order to have his health insurance continued, as well as the legal rate of interest thereon from September 16, 1971 to the date of compliance herewith.

2. Pay the following sums of money to the Wisconsin Retirement Fund on behalf of Louis Hutzler's account:

- (a) \$3,073.62 as the Employer's contribution to said Fund for the period of May 12, 1969 to August 15, 1973; and
- (b) \$1,119.30 as the School Board's contractual share of the employe's contribution to said Fund for the period of May 12, 1969 to August 15, 1973.

Given under our hands and seal at the City of Madison, Wisconsin this 21<sup>st</sup> day of August, 1975.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Morris Slavney  
Morris Slavney, Chairman

Howard S. Bellman  
Howard S. Bellman, Commissioner

Herman Torosian  
Herman Torosian, Commissioner

MEMORANDUM ACCOMPANYING RECOMMENDATION FOR HONORABLE DONALD W. GLEASON, JUDGE, BROWN COUNTY CIRCUIT COURT, WITH RESPECT TO COMPLIANCE WITH COMMISSION'S MAKE WHOLE ORDER

This case is on remand from the Circuit Court of Brown County, by order of Honorable Circuit Court Judge Donald W. Gleason, dated October 10, 1974. The sole issue on remand was to determine the meaning of make-whole remedy as it affects employes Norbert McHugh and Louis Hutzler.

Norbert McHugh accepted an offer by the School Board with respect to the make-whole remedy as it applied to him. Thus, there exists no dispute concerning the meaning of the make-whole remedy as it affects McHugh.

From the evidence adduced at the hearing held on November 26, 1974 before Commissioner Zel S. Rice II, there were four issues in dispute concerning the make-whole remedy as it applied to Louis Hutzler: (1) the amount of back wages due to Louis Hutzler, if any; (2) the amount of compensation due to Louis Hutzler for lost vacation days and holidays, if any; (3) whether the School Board was liable for health insurance premiums paid by AFSCME for the benefit of Louis Hutzler, upon the condition that Louis Hutzler repay said payments to AFSCME; and (4) whether the School Board was liable for its contractual share of the Employee's contribution to the Wisconsin Retirement Fund on behalf of Louis Hutzler's account. The School Board admitted liability with respect to the Employer's contribution to the Wisconsin Retirement Fund on behalf of Louis Hutzler's account.

COMPUTATION OF BACK WAGES:

Evidence was adduced for the period of May 12, 1969 to March 31, 1973, for which Hutzler's earning records were available. Hutzler made a total of \$39,619.43 in wages, and for the same period, Hutzler would have made \$33,025.20 in wages had he been employed by the School Board. The School Board argues that since Hutzler earned more than he would have if he had not been terminated, Hutzler is not entitled to any back wages.

Evidence was adduced that during the year 1969, Hutzler made \$5,749.13 while he would have made \$7,500.00 if employed by the School Board. Thus, he "lost" \$1,750.87 for that year. No evidence was adduced by the Complainants with respect to the wage breakdown for any of the other years in contention (1970, 1971, 1972 and 1973), so it is presumed that Hutzler earned more from other employment during each of said years than he would have if he had been employed by the School Board.

During the year 1969, Hutzler suffered a loss of wages. While this loss was made up in future years, in the year 1969, Hutzler had to rely on less income and alter his financial situation accordingly to meet that loss of income, which constituted a deprivation which Hutzler suffered and which could not be made up in future years. Hutzler suffered this deprivation as a direct result of the School Board's misconduct in terminating him discriminatorily, and the School Board should be liable for such deprivation.

Further, to allow the School Board to offset the earnings for the entire period under consideration would benefit the School Board for its failure to reinstate Hutzler at an earlier date. This would also encourage other employers to refuse to reinstate employes who

were fortunate to obtain employment which paid a higher rate than their old job, since then the employers would wait to reinstate employes until the backpay owed to them had been made up through wages paid by other employers. Such encouragement of a delay in the rightful reinstatement of an employe would be contrary to the purpose of the remedy of reinstatement.

Therefore, the Commission, for the purposes of this case, adopts AFSCME's position and will require a yearly accounting, based upon the calendar year. The Commission is aware of the quarterly accounting period used by the National Labor Relations Board, as set forth in F. W. Woolworth Co. (1950) 26 LRRM 1185, but does not adopt such a formula at this time.

#### VACATION DAYS AND HOLIDAYS:

AFSCME argues that Hutzler should be compensated for the paid vacation days and paid holidays which he did not receive, yet would have if Hutzler had not been terminated by the School Board. The Commission recognizes that days off with pay are of significant benefit for an employe, but we shall not order compensation over what the School Board is hereby ordered to pay for those days. The pay for those days is not lost, since such pay is computed within the salary of the employe under the various relevant collective bargaining agreements. The only loss to the employe is the time off from work, and this loss is impossible to compute. The School Board has already granted Hutzler some monetary payments and vacation day credits, and the Commission is not willing to conclude that such compensation is inadequate to cover the "loss" that Hutzler incurred.

#### HEALTH INSURANCE PREMIUMS:

Upon the School Board's termination of Hutzler's employment, Hutzler's health insurance premiums were no longer paid by the School Board, thus constituting a loss of benefits. Any loss to Hutzler for the continuation of this insurance, until such coverage was granted by his subsequent employer, is a cost which Hutzler incurred as a result of his termination, and for which the School Board is liable. While AFSCME paid the insurance premiums in question, it did so with an understanding that Hutzler would repay same, thus creating a liability on the part of Hutzler to AFSCME which is no different than if Hutzler had paid such premiums outright.

The Commission will not accept the argument that the School Board is only accountable for actual medical costs paid, whether outright or by insurance. Such a position would force an employe to choose between paying for health insurance with the knowledge that such payment would not be recouped unless the employe used the insurance, or not having any health insurance and risking a serious accident which could result in a significant debt if his case were either decided against him or, as in the present case, delayed for such a length of time that a judgement could be obtained against him. The Commission will not sanction the placing of an employe in this situation, and thus has required the School Board's payment of the insurance premiums for which Hutzler is liable.

#### WISCONSIN RETIREMENT FUND:

The problem involved here is placing Hutzler in the same position he would have been had he not been terminated with respect to his future retirement benefits. The School Board admits its liability for the Employer's contribution to the Wisconsin Retirement Fund, so there is no issue in that regard.

With respect to the School Board's contractual obligation to pay the employe's contribution to the Fund, the School Board's argument that such payments should be offset against the extra earnings of Hutzler is unsound. Such payments are not part of the wages of an employe, but rather is an additional benefit provided to an employe. Such benefit cannot be offset by wages, since the two are categorically different. In order to place Hutzler in the position that he would have been had he not been terminated in the respect to his future retirement security, the School Board must make the payments to the Fund it would have made had it not terminated Hutzler. To require Hutzler to make such payments out of his pocket would prevent Hutzler from obtaining his due retirement benefits which are over and above any wages paid or due to him. Therefore, the Commission has ordered the School Board to pay its contractual share of the employe's contribution to the Wisconsin Retirement Fund on behalf of Hutzler's account, plus any interest if required by the Fund.

INTEREST:

In granting the legal rate of interest from September 16, 1971, the Commission is following the mandate of the Circuit Court of Brown County in its Judgment of January 24, 1973.

Dated at Madison, Wisconsin this 21<sup>st</sup> day of August, 1975.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Morris Slavney  
Morris Slavney, Chairman

Howard S. Bellman  
Howard S. Bellman, Commissioner

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Herman Torosian, Commissioner