STATE OF WISCONSIN | CIRCUIT COURT BRANCH II | RACINE COUNTY

MEMORIAL HOSPITAL ASSOCIATION,
Burlington, Wisconsin,

Petitioner,

vs

WISCONSIN EMPLOYMENT RELATIONS COMMISSION,
Room 906, 30 West Mifflin Street,
Madison, Wisconsin 53703,

Respondent.

DECISION

Decision No. 10010-B and 10011-B

The matter before the Court is a petition for judicial review pursuant to Section 227.15 et seq., Wis. Stats., of the Wisconsin Employment Relations Commission. Conclusions of Law and Order in the following matters:

> Local No. 150, Service and Hospital Employees International Union, AFL-CIO, et al, v. Memorial Hospital Association, Case VII, No. 14196, Ce-1326, Decision No. 10010-B, and
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> Local No. 150, Service and Hospital Employees International Union, AFL-CIO, et al, v. Memorial Hospital Association, Case VIII, No. 14197, Ce-1327, Decision No. 10011-B.

The Commission affirmed after review the order of the examiner who directed the petitioner to the extent it had not already done so, offer employment to 13 complainants in its Nurses' Aide Division in the positions that were given to 14 Nurses' Aide Trainees on June 8 and 9, 1970, or substantially equivalent positions in accordance with paragraphs numbered (1) and (2) of the strike settlement agreement, without prejudice to their seniority or other rights and privileges; and to pay said complainants back wages and fringe benefits lost as a result of its failure to recall them to the positions of employment in its Nurses' Aide Division which were given to the Nurses' Aide Trainees on June 8 and 9, 1970, less certain earnings they may have received as spelled out in said order.

The petitioner seeks reversal or modification of said Order on the following grounds:

(a) The said Order is contrary to the Constitutional rights and privileges of the Petitioner pursuant to Article I, Section 10(1) of the United State Constitution, in that it impairs the obligation of contracts which had existed between the Petitioner and the Trainees; and the Order is contrary to Petitioner's right to equal protection of the law.

(b) The said Order is erroneous as a matter of law since the Petitioner had contracted with the 14 Trainees prior to the settlement of the strike and the signing of the strike settlement agreement, and therefore Petitioner had fully complied with the terms of said agreement.

(c) The said Order is unsupported by substantial evidence in view of the entire record as submitted, in that the record shows that the Trainees had entered into enforceable contracts prior to the settlement of the strike and were not, therefore, new hires as of June 8 and 9, 1970.

There doesn't appear to be any disagreement concerning the facts of the case. Local 150 had been negotiating collective bargaining agreements with the petitioner from December 19, 1969; an impasse was reached and a strike was called by the Union in support of its demands in bargaining; the strike began on April 28, 1970, and ended on or before May 29, 1970; that the Union and the petitioner entered into a strike settlement agreement on May 29, 1970, which provided that all strikers who unconditionally offer to return to work not later than 5 o'clock P.M. of May 29, 1970, will thereafter be re-employed by the petitioner initially and to the extent that there are job openings, certain shift preferences were recognized and it was specifically provided that the petitioner need not lay off or discharge any employee who worked during the strike.

It is equally undisputed that the applications of 14 girls were accepted for the position of Nurses' Aide Trainee on or about April 17, 1970. The application read as follows:

> "I understand and agree to the following contract if I am accepted:
>
> I am to become a Senior starting with the school year in Sept. 1970.
>
> I have my own transportation and do not have to depend on being scheduled with another person in or outside of the hospital.
>
> I will work part-time, as necessary, during the school year, as well as full-time during the summer of 1970 and 1971."

The 14 trainees began the Nurses' Aide Training Program on May 1, 1970, and completed the same on or about June 1, 1970. During the period between the aforesaid dates the trainees received 2 hours of instruction 4 days a week. On May 11, 1970, the trainees were told that they would be working at the hospital and were given a copy of a work schedule which indicated that they were to begin working as Nurses' Aides in the Nurses' Aide Division on June 8, 1970. On June 8, 1970, 13 of the trainees began working and the remaining girl commenced working on June 9, 1970. No work was performed by any trainee for the petitioner prior to June 8, 1970, nor was any compensation paid to her during the training period.

Thirteen Nurses' Aide complainants who had been on strike were not recalled to work following the execution of the strike settlement agreement and prior to June 8, 1970.

The examiner studied the strike settlement agreement to ascertain the intention of the parties to the agreement. The agreement very obviously set forth a method of returning striking employees who were willing to work to positions at the hospital. The agreement refers to returning employees on an overall seniority basis to the extent there are job openings; it speaks of filling vacancies; it protects those who worked during the strike regardless of seniority; and it obligated the petitioner not to hire any new employees until all the eligible strikers who were not called back initially had been first offered re-employment.

Strikers for whom no job openings existed immediately were placed on a preferential hiring list. The examiner noted absence of any indication of the petitioner's intentions as far as the trainees were concerned when it entered into the May 29, 1970 agreement which gave certain rights to striking employees. It is apparent from the record that the union representatives did not consider the trainees as employees on May 29, 1970, who were protected as having worked during the strike. When the union received complaints it asked for a list of employees as of June, 1970. The list it received from the petitioner did not contain the names of the trainees, and in fact it was not until the actual hearing before the examiner that the names of the trainees together with their beginning dates of employment were obtained by subpoena.

The examiner concluded that as of May 29, 1970, the trainees were not employed by the petitioner. They were still in their training period and had not done any work normally performed by nurses aides nor had they performed any bargaining unit work. He also concluded that the hiring of said trainees was a violation of the strike settlement agreement and was an unfair labor practice within the meaning of Section 111.06 (1) (b) of the Wisconsin Statutes.

The petitioner argues that it had established with the trainees the relationship of employer-employee prior to May 29, 1970, and therefore it should not be found in violation of paragraph 4 of the Strike Settlement Agreement and therefore should not be found to have committed an unfair labor practice within the meaning of Section 111.06 (1) (b) Wis. Stats. The petitioner seems to place great stress on cases wherein it has been found that an employer-employee relationship existed involving persons in training. It has cited Employers Mutual Liability Insurance Co. v. Industrial Commission, 235 Wis. 270, as supporting its viewpoint. The facts of that case are not similar to the case before the Court. In Employers case, which by the way was a workman's compensation case, the court found that the person injured was an employee within the meaning of the workman's compensation law. The injured person was a student nurse in a nursing school conducted at the hospital. In the course of her training and along with her class work she was assigned "floor duty" which meant doing things in the hospital as giving baths to patients, serving meals, answering bells, cleaning, making beds, taking temperatures and general nursing duties. She was compensating the hospital for the instruction furnished. She also received room and board but did pay fees to the nursing school for entrance, books and uniforms. Had the student nurse not performed the work assigned to her the work would have had to be done by other and probably higher paid help. The finding that she was an employee was not predicated on the fact that she was a student nurse but upon the fact that she performed work for the hospital employer such as is performed in hospitals.

In the case before the Court the trainees received instruction but it is undisputed that they performed no work for the petitioner during the training period.

W. H. Kranze Co., WERC (Dec. No. 4135 1/56) is of no benefit to the petitioner. Ralph Neubauer was employed by Kranze as a salesman and was being tained on the job for sales work. In order to familiarize him with the several thousand items the company handled he worked the major portion of his time in the office and in the warehouse. When trained he would then work exclusively as a salesman. The key to the employer-employee relationship was not that he was a trainee but that he was hired and actually working for the employer.

The petitioner feels aggrieved because the statement of the Commission in its Memorandum stated: "An agreement to hire and become an employee does not establish an employer-employee relationship until the prospective employee actually commences work for which he receives payment for his services rendered as an employee." It would appear to the Court that as a general proposition this would be true where employees are working under a labor contract. It is not inconceivable that payment would not be made directly in some situations. The case entitled Harry Crow & Son, Inc., v. Industrial Commission reported as 18 Wis. 2d 436 is an example where there was no compensation paid by the employer but the employer-employee relationship was found to exist. It is to be noted, however, that our Court once again was dealing with a situation where the employee was actually doing work for the employer to which he had been assigned and in fact had been working six hours a day and six days a week. The employee's status was determined based upon principles related to workman's compensation law.

The petitioner has further argued that because it had the right to control the details relating to the trainees' training and work it had established the employer-employee relationship with the trainees. The cases cited by the petitioner deal with the determination as to whether the relationship between the parties was that of master and servant or employee as against an independent contractor. They do not support the petitioner's contentions here. The situation in this case is different than the problems before the court for determination in said cases. Here the relationship is more akin to the teacher-student relationship which without the addition of a factor such as "work" cannot ripen into an employer-employee relationship.

The petitioner argues that the trainees were receiving on-the-job training as of May 11, 1970, when their names were posted on a work schedule and they were informed that their work for pay would commence on June 8 and 9, 1970. There is such a thing as on-the-job training and such a thing as training for a job. In the instant case as of May 11, 1970, the trainees were not on a job. They were in training for a job and if they successfully passed the course they would begin working on June 8, 1970. The argument that they were being trained on the job is rebutted by the record. Florence Koch, the petitioner's Director of Nursing for 30 years who is in charge of hiring in her particular branch of work, was asked the following question: "And have you also hired people in your nurses aide section who have not been trained and then trained them on the job while paying them?" She replied: "We haven't done it for a long time." Transcript page 71. There is nothing in this record to support the theory of on-the-job training as far as these trainees are concerned. They were not paid. They were not on any job. They did no work. And from the time the schedule were posted they may have had higher hopes of employment but their status was not changed, they were still in training and still not performing any work. Nurse Koch was asked: "Okay, now let me ask you this: You posted a work schedule. Did the hospital in any way promise anything to these people, the nineteen?" After a false start and a rereading of the question she replied: "These people all would like to know if there is a possibility of a job, and we tell them yes." Transcript page 75. Even from the one doing the hiring there is no doubt that reference to a job was something concerning which there was only a possibility as of the time of posting the schedule.

There is nothing in the record to demonstrate any change in the trainees' status from the time the schedule was posted to and including May 29, 1970, when the petitioner executed the Strike Settlement Agreement. The examiner found that the petitioner in hiring the 14 Nurses'

Aide Trainees to work in its Nurses' Aide Division on June 8 and 9, 1970, who were not employees on May 29, 1970, was in violation of the Strike Settlement Agreement and was an unfair labor practice within the meaning of s.111.06 (1) (b). A review of the entire record supports the examiner's findings and conclusions. The examiner's order which was affirmed by the Commission as far as the 14 Nurses' Aide Trainees are concerned is supported by substantial evidence in view of the entire record submitted. The petitioner could hire the 14 trainees if it so desired but it could not do so before returning the 13 complainants to their positions in accordance with the terms of the agreement it made with the union since they were not occupying the positions or performing the work of a nurses' aide on May 29, 1970.

It is the view of this Court that the examiner made a reasonable construction of the terms of the Strike Settlement Agreement. The order of the Wisconsin Employment Relations Commission is affirmed.

Dated this 29th day of June, 1973.

BY THE COURT:

/s/ Thomas P. Corbett
Circuit Judge