STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

EUGENE KELM, CHAIRMAN OF THE BOARD OF TRUSTEES OF THE WISCONSIN BRICKLAYERS WELFARE FUND ON BEHALF OF THE BOARD OF TRUSTEES OF THE WISCONSIN BRICKLAYERS WELFARE FUND AND ON BEHALF OF THE WISCONSIN BRICKLAYERS WELFARE FUND,	:	Case I No. 15394 Ce-1405 Decision No. 10832-A
Complainant,	:	
vs.	:	
DEAN GOTZION, d/b/a GOTZION CERAMIC TILE COMPANY,	:	
Respondent.	:	

Appearances:
Lawton & Cates, Attorneys at Law, by Mr. Richard V. Graylow, appearing on behalf of the Complainant.
Mr. Dean Gotzion, the Respondent, appearing on behalf of himself.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDERS

Complaint of unfair labor practices having been filed with the Wisconsin Employment Relations Commission in the above entitled matter, and the Commission having appointed Howard S. Bellman, a member of the Commission's staff to make and issue Findings of Fact, Conclusions of Law and Orders in the matter, as provided in Section 111.07(5), Wisconsin Statutes, and the hearing on such complaint having been held at Madison, Wisconsin, on April 11, 1972, before the Examiner, and the Examiner having considered the evidence and arguments and being fully advised in the premises, makes and files the following Findings of Fact, Conclusions of Law and Orders.

FINDINGS OF FACT

1. That Eugene Kelm, referred to herein as the Complainant, is an individual residing at 409 Concord Avenue, Watertown, Wisconsin; that the Complainant is the Chairman of the Board of Trustees of the Wisconsin Bricklayers Welfare Fund, hereinafter referred to as the Fund; and in such capacity has authority to act on behalf of the Board of Trustees of said Fund and on behalf of said Fund.

2. That Bricklayers, Masons and Plasterers International Union, Local 13, hereinafter referred to as the Union, is a labor organization having offices at Madison, Wisconsin.

3. That Dean Gotzion, d/b/a Gotzion Ceramic Tile Company, referred to herein as the Respondent, is a sole proprietorship, engaged in tile contracting, and an employer having offices at Route 1, Deerfield, Wisconsin.

4. That at all times material herein, the Union and the Respondent have been parties to a collective bargaining agreement which contains among its provisions the following that are material herein:

"ARTICLE II

For the period April 1, 1970 to April 1, 1971, the Employer agrees to pay $6.00 per hour for tilesetters, with 15¢ going toward the union welfare plan if in effect.

For the period April 1, 1971 to March 31, 1972, the Employer agrees to pay $6.95 per hour for tilesetters.

For the period April 1, 1972 to March 31, 1973, terrazzo workers will be paid 25¢ over the tilesetters scale.

These minimum rates of pay shall apply five days a week, Monday through Friday. The working hours are to be between 8:00 A.M. and 5:00 P.M. of any working day. Noon hours may be curtailed on the job but are not to be less than thirty minutes.

. . ."

5. That during the period of March, April and May, 1971, the Respondent failed to make contributions to the Fund required by the above-quoted Article II, in the amount of $48.61.

6. That on approximately October 4, 1971 and November 9, 1971, the Fund notified the Respondent in writing of his failure to make said required payments.

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

CONCLUSIONS OF LAW

1. That the Respondent, by violating the collective bargaining agreement existing between him and the Union, by failing to make payments required by said agreement to the Fund for March, April and May, 1971, has committed, and is committing, an unfair labor practice, within the meaning of Section 111.06(1)(f) of the Wisconsin Employment Peace Act.

2. That the Respondent, by failing to make said required payments to the Fund within six weeks after such payments became due and payable and after receiving notice in writing of his failure to do so, violated Section 103.86 of the Wisconsin Statutes; and that by so violating said Statute, the Respondent committed a misdemeanor in connection with a controversy as to employment relations thereby committing an unfair labor practice within the meaning of Section 111.06(1)(1) of the Wisconsin Employment Peace Act.

3. That any conduct of Respondent regarding payments to the Fund which conduct occurred prior to March 1, 1971, and therefore more than one year preceding the filing of the instant complaint of unfair labor practices, cannot constitute any unfair labor practice within the meaning of the Wisconsin Employment Peace Act.

Upon the basis of the above and foregoing Findings of Fact and Conclusions of Law, the Examiner makes the following

ORDER

That Dean Gotzion, d/b/a Gotzion Ceramic Tile Company shall immediately:

1. Cease and desist from violating Article II of the collective bargaining agreement between him and Bricklayers, Masons and Plasterers International Union, Local 13, by failing, neglecting, and refusing to make payments to the Wisconsin Bricklayers Welfare Fund.

2. Cease and desist from violating Section 103.86 of the Wisconsin Statutes by failing to make payments to the Wisconsin Bricklayers Welfare Fund after timely notice in writing of his failure to do so.

3. Take the following affirmative action which the Examiner finds will effectuate the policies of the Act:

(a) Immediately pay to the Wisconsin Bricklayers Welfare Fund the sum of $48.61 for the months of March, April, and May, 1971.

(b) Notify the Wisconsin Employment Relations Commission in writing within 20 days from the date of this Order as to what steps the Respondent has taken to comply herewith.

Dated at Madison, Wisconsin, this 15th day of January, 1973.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Howard S. Bellman
Howard S. Bellman, Examiner

DEAN GOTZION d/b/a GOTZION CERAMIC TILE COMPANY,
Case I Decision No. 10832-A

MEMORANDUM ACCOMPANYING
FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDERS

The complaint in this matter was filed on March 1, 1972. 1/ It asserts that the Respondent violated collective bargaining agreements with the Union and, thereby, Section 111.06(1)(f) of the Wisconsin Employment Peace Act, by failing to make certain payments to the Fund from April 1969 through May 1971; and, by implication, that said conduct was also a violation of Section 103.86, Wisconsin Statutes 2/ and, thereby, an unfair labor practice within the meaning of Section 111.06 (1)(1) of the Act.

In his answer, filed on March 13, 1972, the Respondent, who was not represented by Counsel, replied that he did not make the payments in question to the Fund because at the time he entered the pertinent collective bargaining agreement, which was his first contract with the Union, and was actually an agreement negotiated earlier by the Union and an employers' association, he agreed with his employes to pay to them directly, rather than to the Fund, the 15¢ per hour referred to in Section II of said contract, quoted in the Findings of Fact attached.

This arrangement, according to Mr. Gotzion, was agreeable to himself and to his employes and did not conflict with any knowledge on his part that the Fund was "in effect". He also claims that, although he was aware, based upon experience when he was an official of the Union, that the Fund was being developed or under consideration, he interpreted the term of Article II "if in effect" to indicate that such was not yet the case. In fact, the Fund had been in effect for some time prior to the labor agreement.

Apparently based upon knowledge gained for the first time at the hearing that the Respondent was not a party to an earlier collective bargaining agreement, the Complainant amended its complaint to

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1/ The instant complaint was filed simultaneously with two others which were substantially idential to it. One of these was dismissed on the basis of settlement and the other (Lake City Tile Co., Decision No. 10831-A) is the subject of a decision also issued on this date by the Examiner. It has been understood from the outset that these cases would be processed together. Final arguments including a motion were received from the Complainant on November 21, 1972.

2/ "103.86 Employe welfare funds: default in payments
(1) Any employe who promises in writing to make payments to an employe welfare fund, either by contract with an individual employe, by a collective bargaining agreement or by agreement with such employe welfare fund, and who fails to make such payments within 6 weeks after they become due and payable, and after have been notified in writing of his failure to make the required payments, shall be fined not more than $200.

(2) This section shall not apply where the failure to make payments is prevented by act of God, proceedings in bankruptcy, orders or process of any court of competent jurisdiction, or circumstances over which the employer has no control."

indicate that the alleged delinquency was from April, 1970 through May, 1971. Even this contention requires an inference that the Respondent agreed to retroactive application of the contract and there is no basis in the record for such an inference. Indeed, the record herein is devoid of any evidence as to when the labor agreement was actually entered by the Respondent, except for a statement by Mr. Gotzion that it was "later in the summer" of 1970.

Thus, although it is established that the Respondent did not make payments to the Fund during the months specified by the Complainant, it is not established when the labor agreement became effective regarding the Complainant.

This state of misinformation is consistent with the Union's failure to recognize the Respondent's delinquency until September, 1971 when an auditor for the Fund making a routine check uncovered the situation. On October 4, 1971 the auditor wrote to the Respondent notifying him of the delinquencies and requesting that sufficient remittance or "suitable arrangement for payment" be made within ten days, or the Fund would take "legal action to enforce collection". This was the first advice to the Respondent that his direct payment practice was considered improper. This was followed by a November 9, 1971 letter from the Fund's attorney which made similar assertions and advised the Respondent of Section 103.86(1), Wisconsin Statutes.

Furthermore, the one year statute of limitations provided at Section 111.07(14) of the Act would apparently exclude from the Commission's jurisdiction any delinquencies prior to March 1, 1971. In this regard the Complainant argues that Lorentzen Tile Company (Decision No. 9630, 5/70) pertains. In that case a similar delinquency pattern occurred and the Commission allowed the Complaint to reach back more than one year. However, certain facts present in that matter, and not herein, were relied upon. Thus, in Lorentzen, the Respondent "on several occasions within the one year period preceding the filing of the complaint acknowledged that he owed the money and stated that he intended to pay it." (quite contrary to the Respondent's attitude in the instant case), and "in fact, he attempted to make full payment within the one year period but failed to do so." The Commission did not conclude in Lorentzen that such delinquencies constitute continuing violations which remain actionable despite their inception beyond the one year period. Likewise, the Examiner rejects that theory herein.

The Examiner also rejects the Complainant's contention that the remedy should reflect the money not paid to the Fund prior to the one year period even if substantive violations cannot be found to have occurred at such times. Remedies should reflect culpability. While the Respondent has not convinced the Examiner that he was innocently ignorant of any obligation to pay into the Fund until he received the October 4, 1971 letter - the Respondent should be fairly sophisticated in finding information regarding Union operations - the Examiner believes the Respondent's conduct reflected a decision to attract and maintain certain employes by paying the 15¢ per hour to them directly, rather than a decision to avoid the payments altogether.

Therefore, although the Examiner has concluded that such payments to individual employes clearly fail to fulfill the labor agreement's

requirements, 3/ the Union is found to be at least equally blameworthy. By obtaining an undated agreement without express retroactivity provisions, by failing to delete the terms "if in effect" from Article II, and by failing to police compliance with that Article, the Union allowed for the situation at hand. Therefore, no extraordinary remedy against the Respondent is warranted. This does not mean that the Complainant must, as its brief suggests, institute delinquency actions every month, but that it may not let such delinquencies occur without appropriate action under the Act for more than one year.

Finally, it appears that after May, 1971, the Respondent commenced to contribute to the Fund at the 15¢ per hour rate. This practice indicates a mutual understanding not clearly required by Article II of continuing such contributions beyond April, 1971. It is inferred that such practice is contractually required however, and therefore it is found as alleged that the Respondent improperly failed to make the required contributions for the three months - March, April, and May, 1971 - that fell within the one year period prior to the filing of the complaint. These delinquencies are of $14.25, $22.58 and $11.78, respectively, and total $48.61.

Dated at Madison, Wisconsin, this 15th day of January, 1973.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Howard S. Bellman
Howard S. Bellman, Examiner

3/ Accordingly, these delinquencies also constitute violations of Section 103.86, Wisconsin Statutes, misdemeanors, and violations of Section 111.06(1)(1) of the Act.