
RACINE COUNTY,	:	
	:	
Petitioner,	:	<u>DECISION</u>
	:	
vs	:	File No. 72-493-CI
	:	File No. 72-630-CI
WISCONSIN EMPLOYMENT RELATION	:	
COMMISSION,	:	
	:	
Respondent.	:	Decision No. 10917-B
	:	

The above entitled matters are separate and distinct but they may be considered as dealing with the same general subject matter. In Case No. 72-493-CI the petitioner is seeking review of an order entered by the respondent in a matter before the respondent entitled "Racine County Deputy Sheriffs' Association, Complainant, vs. Racine County. Case XII No. 15347 MP-123 Decision No. 10917-B," pursuant to Section 227.16 Wis. Stats. In Case No. 72-630-CI the respondent, based upon the certified record of the proceedings before it above referred to, has petitioned the Court to dismiss the petition for review and enter a judgment and decree confirming and enforcing the provisions of the respondents' order entered on July 14, 1972.

Racine County and Racine County Deputy Sheriffs' Association had heretofore entered into a contract which terminated on December 31, 1971. The county and the association attempted to negotiate a new labor contract for the period after December 31, 1971. The matter was not resolved. The deputy sheriffs continued working and continued negotiating a new contract with the county. The matter of retroactive pay came into the discussion between the parties but the county representatives took the position that they wouldn't negotiate respecting retroactive payment of wages from the period after the termination of the 1971 labor contract on December 31, 1971 and until the new contract would become effective.

The county board of supervisors had prior to the period of negotiation adopted the following ordinance.

"4.21. RETROACTIVE SALARY INCREASE PROHIBITED

The Racine County Board of Supervisors shall not grant or approve any retroactive salary and/or compensation increases to any public officer, agent, employee or group of employees after the services shall have been rendered."

The association filed a complaint with the Wisconsin Employment Relations Commission alleging that Racine County had engaged in and was engaging in unfair labor practices contrary to the provisions of Chapter lll Wis. Stats. Specific reference was made to the allegation that representatives of the county would not consider or recommend a retroactive pay increase to December 31, 1971. The commission appointed Marvin L. Schurke, examiner, to conduct a hearing and make findings of fact, conclusions of law and order in the matter. Hearing was waived by the parties and briefs were requested. The Racine County Corporation Counsel advised the examiner that the only issue involved in the dispute concerns the legality of the ordinance above referred to. The county filed a brief but the complainants did not.

The examiner thereafter filed his findings of fact and conclusions of law. In brief the examiner found that the association was a labor organization; that the county was a municipal employer; that the above quoted ordinance was in existence; that the county had recognized the association as the exclusive collective bargaining representative of uniformed and plainclothes deputies employed in the county's Sheriff's Department; that the county and the association were parties to a collective bargaining agreement which expired December 31, 1971; that said parties had entered into negotiations for a new collective bargaining agreement to succeed said agreement; that no new agreement was reached prior to December 31, 1971; that negotiations continued subsequent to December 31, 1971; that in such negotiations the association asserted a demand that any wage increase agreed upon be made retroactive to December 31, 1971; that the county, through its Personnel Committee, took the position that it would bargain about wages, hours and conditions of employment but not respecting retroactive payment of wages from the period after the termination of the 1971 labor contract on December 31, 1971 and until the new contract would hopefully become effective.

The examiner made conclusions of law predicated upon said findings that the Association is the representative of a majority of the employes in an appropriate collective bargaining unit; that the question of retroactive payment of negotiated wage increases directly affects the wages of municipal employes and is a subject for bargaining within the meaning of Section 111.70 (1)(d) Wis. Stats.; and that Racine County by its refusal to negotiate with the association concerning the payment of wage increases for 1972 retroactive to the termination date of the 1971 collective bargaining agreement, has refused to bargain collectively with the representative of a majority of its employes in an appropriate collective bargaining unit and has committed and is committing prohibited practices within the meaning of Sections 111.70 (3)(a) 1 and 4 Wis. Stats.

The examiner then ordered Racine County to cease and desist from refusing to bargain collectively with the association concerning the payment of wage increases retroactive to the termination date of the 1971 collective bargaining agreement between the county and the association. The county was directed to bargain collectively with respect to payment of wage increases for 1972 retroactive to the termination of the 1971 agreement.

Racine County appealed from the examiner's decision and on July 14, 1972 the respondent herein entered an order affirming the examiner's findings of fact, conclusions of law and order and memorandum. It is from this order that the petitioner herein has appealed.

The petitioner has posed the question as to whether a municipal employer must negotiate with its employes on the subject of retroactive payment of wages for work performed prior to the effective date of a new labor contract, but subsequent to the termination of the prior labor contract.

The petitioner has argued that if it bargained the matter of retroactive payment of wages and if a wage increase was granted it would mean that the county would be paying retroactive wages for work already performed and paid for at the wage rate specified in the old contract. The county has cited to the Court case law to the effect that where an employe continues working after his labor contract expires and no new contract is made, it will be presumed that the parties intend that the employe should be paid the same wages he received under the original contract.

The petitioner has taken the position that it has no obligation to discuss the subject of retroactive wages when the employe, by his action of continuing to perform a service when he possesses a unilateral right of termination, is fully paid and the contract fully discharged.

The petitioner has further argued that it has the right to refuse to bargain about the retroactive payment of wages to its employes. It is of special significance that the argument raised here was also raised before the examiner and by reference was also raised before the respondent on appeal.

The examiner in a well reasoned memorandum pointed out that the cases cited by the petitioner in support of its argument that after termination of a labor contract, the relationship between the employer and employe is terminable at will and that services performed by an employe following termination of a labor contract are in accord with the previous labor contract, are cases representing a body of law dealing with individual employment contracts rather than collective bargaining agreements. The examiner carefully detailed distinguishing characteristics of employment situations referred to in the cases cited by the petitioner and disputes involving collective bargaining agreements. He pointed out that an extension of a collective bargaining agreement is not necessarily implied in the absence of affirmative action by the parties. In this case the record is void of anything that would show the county and the association entered into an extension agreement. The contract having expired, and not being extended by affirmative action, there was a hiatus period and during said period no contract is implied.

The record of the case clearly shows that the association, contrary to the contention of the county that its members were working under the terms and conditions of the old contract, asserted before the county representatives in negotiations and continued to assert before the respondent its demand for retroactivity.

Whereas the corporation counsel had advised the examiner on April 5, 1972, that the only issue involved concerned the legality of the Racine County Ordinance under Sections 111.70 (1)(d) Wis. Stats., the learned examiner in his very scholarly memorandum carefully avoided any attempt to determine the status of the ordinance with respect to whether it was or was not a valid ordinance. The respondent commission is not the proper forum for determining validity of a county ordinance. The examiner wisely interpreted the ordinance as a statement of the county's initial bargaining table position. He left the ordinance intact but clearly stated that the enactment of the ordinance cannot relieve a municipal employer of the duty to bargain imposed by state statute.

The examiner found that Article IV, Section 26 of the Wisconsin Constitution, being applicable to the legislature, is not applicable to the county by comparison. The examiner concluded that the refusal to bargain for retroactivity has a direct and intimate effect on the wages of the employes in the collective bargaining unit. Matters effecting wages are subject to collective bargaining within the meaning of Section 111.70 Wis. Stats.

The petitioner has taken the position that its employes in working beyond the termination date of the existing labor contract, by law enter into an implied contract with Racine County, which contract has as its terms those, and only those, which were found in the labor contract which expired on December 31, 1971. It contends that under such an implied contract where the terms have been fully performed, an association party to the said contract cannot demand, at a date subsequent, that the implied contract be reopened on the matter of wages.

The fact that the employes continued working while continuing negotiations in no way extended the terminated labor contract in the absence of some showing of affirmative action on the part of the parties. If mere working would have that effect it would force the employes to strike. This practice would do violence to the purpose of Wisconsin law which is designed to encourage the resolution of labor disputes peacefully through collective bargaining. It would also mean that municipal employes to protect their rights would have to violate the law, i.e., go on strike which is an expressly prohibited practice.

Municipal employes have the right to bargain collectively with respect to wages as a matter of right by statutory declaration. Retroactive pay is directly and intimately related to wages and is a proper subject matter for collective bargaining. Had the examiner and the respondent commission held otherwise they would have, in effect, granted a premium to the municipal employer who would persistently refuse to bargain collectively which is in itself an unfair labor practice. Such an interpretation would have done violence to the Municipal Employment Relations Act and certainly would not promote peaceful settlements of labor disputes through collective bargaining.

It is the decision of this Court that the examiner's findings of fact, conclusions of law and order which have been adopted by the respondent commission as its findings of fact, conclusions of law and order as well as the examiner's memorandum are supported by the entire record, are not contrary to the constitutional rights and privileges of the petitioner and are reasonable and consistent with the purposes of the Municipal Employment Relations Act. The Order of the Wisconsin Employment Relations Commission is confirmed.

Dated this 25th day of July, 1973.

BY THE COURT:

/s/ Thomas P. Corbett
Circuit Judge