

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Respondent.

Case IV
No. 15757 Ce-1433
Decision No. 11643

Goldberg, Previant & Uelmen, Attorneys at Law, by Mr. Alan M. Levy, for the Complainant.
Mr. Erich Grassin, for the Respondent.

Complaint of unfair labor practices having been filed with the Wisconsin Employment Relations Commission in the above entitled matter, and the Commission having appointed Stanley H. Michelstetter II, a member of the Commission's staff, to act as Hearing Officer, and hearing on such complaint having been held at Milwaukee, Wisconsin, on August 1, 1972 before the Hearing Officer, and the Commission having considered the evidence and arguments of the parties, and being fully advised in the premises, makes and files the following Findings of Fact, Conclusions of Law and Orders.

1. That Upholsterers' International Union, Local 29, AFL-CIO, hereinafter referred to as the Complainant, is a labor organization with offices at 1203 East Oklahoma Avenue, Milwaukee, Wisconsin.

2. That Erik's Studio, hereinafter referred to as the Respondent, is engaged in the furniture repair and refurbishing business, with its place of business at 8426 West Lisbon Avenue, Milwaukee, Wisconsin; and that Erich Grassin is the authorized agent of the Employer for the purposes of collective bargaining.

3. That since at least 1967, and at all time material thereafter, the Respondent has recognized the Complainant as the collective bargaining representative of Respondent's employees in an appropriate collective bargaining unit; and that at least prior to November 15, 1971 the Complainant and Respondent were parties to collective bargaining agreements covering the wages, hours and working conditions of said employees.

4. That prior to November 15, 1971 representatives of the Complainant and Respondent met in negotiations in an effort to reach an accord on a collective bargaining agreement to succeed the agreement which was to expire on November 15, 1971; that, during the course

of such negotiations, Grassin, on behalf of the Respondent, proposed, among other things, that the new collective bargaining agreement contain a proposal which would permit the Respondent to require employees to retire upon reaching the age of sixty-five.

5. That on November 15, 1971 representatives of the Complainant and Respondent met in negotiations and reached an oral accord on the provisions of a collective bargaining agreement, which would expire on October 31, 1974; that such agreement did not include any provision with respect to retirement of employees upon reaching the age of sixty-five; that thereafter the Complainant reduced said oral agreement to writing, and, by letter dated December 17, 1971, enclosed said written document to the Respondent for Grassin's signature; that, however, Grassin, by a letter, dated February 24, 1972, addressed to the Complainant, refused to execute said written agreement, unless the Complainant agreed to modify same by including, among other things, the Respondent's proposals with respect to the retirement of employees upon reaching the age of sixty-five.

6. That, although Grassin did not sign the aforesaid agreement, he observed and applied its provisions relating to wages, hours and working conditions of the employees covered thereby; and that, although despite the fact that Grassin refused, and continues to refuse, to affix his signature to the written agreement, a collective bargaining agreement exists between the Complainant and the Respondent, effective at least from November 15, 1971 to at least October 31, 1974; and that said agreement included provisions providing for the discharge of employees for "just cause", for the right of employees to grieve discharges, and for final and binding arbitration of such discharges, as well as other grievances arising under said agreement.

7. That on June 9, 1972 Grassin terminated the employment of Martha Pabelick, an employee included in the collective bargaining unit covered by the aforementioned agreement, because she had attained the age of sixty-five; and that said motivation for such termination did not constitute just cause for such action under the collective bargaining agreement existing between the Complainant and the Respondent.

8. That on June 14, 1972 the Complainant, by letter to the Respondent, grieved Pabelick's termination and therein requested that Respondent reinstate Pabelick with full back pay; that the Respondent failed to respond to the Complainant with respect to said grievance and on June 16, 1972 the Complainant filed a complaint with the Wisconsin Employment Relations Commission initiating the instant proceeding; that approximately four weeks following her termination Pabelick was rehired and has worked regularly, at least up to the date of the hearing herein; that Pabelick has not been made whole for work lost from the date of her termination to the date of her re-employment; and that the grievance with regard thereto has not been resolved.

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

CONCLUSIONS OF LAW

1. That Erik's Studio, by failing and refusing to execute the written collective bargaining agreement covering its employees for the period from at least November 15, 1971 through October 31, 1974, which written agreement reflected terms orally agreed upon by representatives of Erik's Studio and Upholsterers' International Union,

Local 29, AFL-CIO on November 15, 1971, has refused, and continues to refuse, to bargain in good faith with Upholsterers' International Union, Local 29, AFL-CIO, and in that regard Erik's Studio has committed, and continues to commit, an unfair labor practice within the meaning of Sec. 111.06(1)(d), and (a) of the Wisconsin Employment Peace Act.

2. That, since Erik's Studio has refused to acknowledge the existence of either an oral or written collective bargaining agreement between it and Upholsterers' International Union, Local 29, AFL-CIO, the Wisconsin Employment Relations Commission will, and does hereby, exercise its jurisdiction to determine whether Erik's Studio has violated the terms of said collective bargaining agreement with respect to the termination of Martha Pabelick, regardless of the fact that said collective bargaining agreement contains a provision for final and binding arbitration of grievances arising thereunder.

3. That Erik's Studio, by terminating the employment of Martha Pabelick on June 9, 1972, without just cause, violated the provisions of the collective bargaining agreement existing between Erik's Studio and Upholsterers' International Union, Local 29, AFL-CIO; and that in said regard Erik's Studio has committed an unfair labor practice within the meaning of Sec. 111.06(1)(f) of the Wisconsin Employment Peace Act.

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

ORDER

IT IS ORDERED that Erik's Studio, its officers and agents, shall:

1. Immediately cease and desist from:

- (a) Refusing to execute the collective bargaining agreement agreed to by it and Upholsterers' International Union, Local 29, AFL-CIO, on November 15, 1971.
- (b) Violating any provisions of said collective bargaining agreement, and specifically those provisions relating to just cause for termination of employees.

2. Immediately take the following affirmative action which will effectuate the policies of the Wisconsin Employment Peace Act:

- (a) Execute the collective bargaining agreement agreed to by it and Upholsterers' International Union, Local 29, AFL-CIO, on November 15, 1971.
- (b) Make Martha Pabelick whole for the loss of wages suffered by her as a result of her termination from employment on June 9, 1972 to the date of her re-employment, less any earnings she may have received elsewhere during the period of her unemployment, less the amount of unemployment compensation, if any,

received by her during said period, and in the event she received unemployment compensation benefits, reimburse the Wisconsin Department of Industry, Labor and Human Relations in such amount.

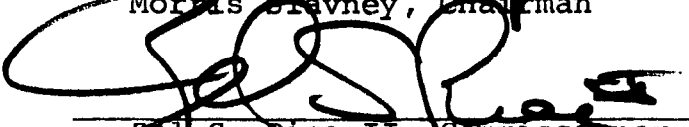
- (c) Notify the Wisconsin Employment Relations Commission in writing, within ten (10) days of the receipt of a copy of this Order, what steps it has taken to comply herewith.

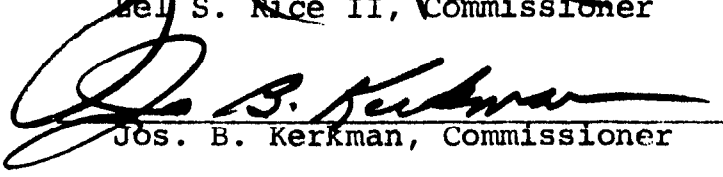
Given under our hands and seal at the City of Madison, Wisconsin, this 8th day of March, 1973.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By


Morris Brayney, Chairman


Mel S. Rice II, Commissioner


Jos. B. Kerkman, Commissioner

MEMORANDUM ACCOMPANYING FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

The Existence of an Agreement

The Complainant's position may be summarized as follows: During the negotiations for a new collective bargaining agreement, Grassin, on behalf of the Respondent, withdrew and/or abandoned proposals previously made. After mediation, Grassin, in the presence of and in agreement with the Complainant's representative, agreed that certain changes would be made in the collective bargaining agreement previously in effect between the parties and that all the unchanged portions, and no other provisions, would be included in the new collective bargaining agreement. After an oral agreement had been reached, Grassin refused to execute said agreement, unless the previously abandoned issues, plus one other issue was agreed to by the Complainant.

Grassin maintains that he did not agree to such terms, or, in the alternative, manifested no assent to said agreement under either the mistaken impression (1) that he was agreeing only to the changes, not the entire contract or, in the alternative (2) that while he, in fact, agreed to the entire contract, he did so on the mistaken understanding of law that he was entitled to continue to make proposals to be included in the collective bargaining agreement, and refused to agree to sign same until those proposals were accepted by the Complainant.

Discussion

The issue involved herein is whether on November 15, 1971 Respondent, in fact, agreed to the terms of a collective bargaining agreement with the Complainant.

The uncontroverted evidence clearly indicates that during negotiations Grassin put forth various proposals, that after the Complainant explained that such proposals were already covered by the language of the previous collective bargaining agreement between the parties, which language the Complainant agreed to incorporate in the new collective bargaining agreement, Respondent no longer put forth those proposals. While there exists a dispute as to whether the Respondent's proposals were asserted on November 15, 1971, in the presence of a mediator the parties agreed that the previous collective bargaining agreement constituted a new agreement, except for the changes thereupon to be discussed. The proposals of Respondent were not discussed during that face-to-face session; other changes were discussed and agreed upon. If the contradictory testimony of Respondent is to be credited, it indicates that he agreed to the above format and the changes that were made. While it appears that Respondent was under certain misunderstandings of law, he made a knowing assent to the entire contract. He is bound by his assent. The failure to execute a written agreement, which was previously orally agreed upon, constitutes a per se refusal to bargain in good faith, and therefore, a violation of Section 111.06(1)(d) and (a) of the Wisconsin Employment Peace Act.

The Termination of Martha Pabelick

The Respondent's position is that if no collective bargaining agreement is found to exist between the parties, Respondent bargained to impasse over the creation of a rule allowing the Respondent to mandatorily retire employees over sixty-five years of age and properly implemented that rule. If a collective bargaining agreement is found to exist between

the parties, the collective bargaining agreement permits the Respondent to establish reasonable work rules of which the above is one. If such rule is found subject to the limitation that discharges be for "just cause", then such discharge was for just cause since Martha Pabelick was in fact less productive than she should be. No contention has been raised that the Commission should defer to arbitration.

The Complainant's position may be summarized as follows: A collective bargaining agreement exists between the parties. Although such collective bargaining agreement has a final and binding arbitration provision, the Commission should not defer to arbitration because the violation of the collective bargaining agreement complained of was an integral part of the Employer's refusal to bargain in violation of Sec. 111.06(1)(d) of the Wisconsin Employment Peace Act. In the alternative, the Commission should decide the issue as a violation of collective bargaining agreement within the meaning of Sec. 111.06(1)(f) of the Wisconsin Employment Peace Act, either because the Respondent has not raised the contention that the Commission should defer to arbitration or because, if the Respondent were to do so, it would be estopped by its refusal to recognize the existence of the collective bargaining agreement (including its arbitration provisions) and refusal to proceed to arbitration.

Discussion

While the collective bargaining agreement does contain a provision for final and binding arbitration in disputes arising under the agreement, at no time prior or during the course of the hearing involved herein did the Respondent contend that the resolution as to whether the collective bargaining agreement was violated with respect to the termination of Martha Pabelick should be made by an arbitrator. The Commission will determine a grievance on its merits unless the party opposing the Commission's jurisdiction timely objects thereto on the basis that the collective bargaining agreement contains a provision for final and binding arbitration of grievances. 1/

Furthermore, since the Respondent has ignored the existence of a collective bargaining agreement, the Commission, in order to effectuate the policies of the Wisconsin Employment Peace Act and to expedite the resolution of the grievance, has determined to exercise its jurisdiction to determine whether Pabelick was terminated for cause under said collective bargaining agreement. The Respondent claimed that Pabelick was terminated because she had reached the age of sixty-five and eligible for Social Security and further that her work production was not up to standard. However, it is significant that approximately within four weeks after Pabelick's termination the Respondent rehired Pabelick, and according to her testimony Pabelick, upon her return to employment, was performing her same duties and worked the same number of hours which she previously had worked. In the absence of a provision in the collective bargaining agreement requiring employees to retire upon reaching the age of sixty-five, the fact that Pabelick attained such age would not constitute just cause for her discharge under the agreement. Therefore,

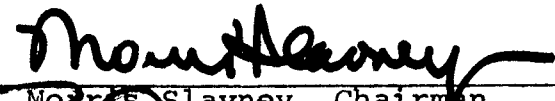
1/ Pet Milk Co., (6209), 1/63.

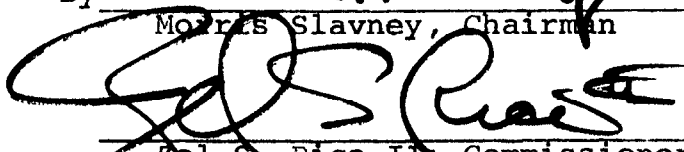
we conclude that the Respondent, in terminating Pabelick violated the terms of the agreement, and therefore has committed, in that regard, a violation of Section 111.06(1)(f) of the Wisconsin Employment Peace Act.

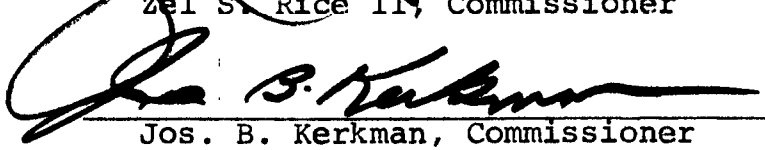
Dated at Madison, Wisconsin, this 8th day of March, 1973.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By


Morris Slavney, Chairman


Zel S. Rice II, Commissioner


Jos. B. Kerkman, Commissioner