STATE OF WISCONSIN CIRCUIT COURT MILWAUKEE COUNTY

BOARD OF EDUCATION,
BROWN DEER SCHOOLS,
DIVISION NO. 1,

Plaintiff,

v. Case No. 434-634

WISCONSIN EMPLOYMENT
RELATIONS COMMISSION, Decision No. 12045-C

Defendant.

MEMORANDUM DECISION

July 25, 1975, The WERC affirmed the finding of fact and conclusions of law, and the order of the Examiner dated July 3, 1974. From the July 25, 1975 order, the Petitioner seeks review in the Circuit Court pursuant to section 111.07(8) Stats. in the manner provided in chapter 227 of the statutes and more specifically pursuant to 227.20. The respondent counterpetitions pursuant to section 111.07(7) to have the order affirmed.

The quantum of proof for the petitioner to upset the findings of fact pursuant to 111.07(8) is found in 227.20(1)(d), which in pertinent parts states:

> "(1). . . The court may affirm the decision of the agency, or may reverse or modify it if the substantial rights of the appellant have been prejudiced as a result of the administrative findings.....being:
>
> (d) Unsupported by substantial evidence in view of the entire record as submitted."

On pages 558 and 559 of Muskego-Norway C.S.J.S.D. No. 9 v. W.E.R.B., (1966), 35 Wis. (2d) 540, the Supreme Court cites the substantial evidence formula of Copland v. Department of Taxation, (1962) 16 Wis. (2d) 543, by stating:

> "'The term "substantial evidence" should be construed to confer finality upon an administrative decision on the facts when, upon an examination of the entire record, the evidence, including the inferences therefrom, is found to be such that a reasonable man, acting reasonably, might have reached the decision; but, on the other hand, if a reasonable man, acting reasonably, could not have reached the decision from the evidence and its inferences then the decision is not supported by substantial evidence and it should be set aside.'"
>
> Moreover, in Copland we reiterated that "'substantial evidence' is 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' In Copland we declared that the test of reasonableness 'is implicit in the statutory words 'substantial evidence.'" and that the "use of the statutory words 'in view of the entire record as submitted' strongly suggests that the test of reasonableness is to be applied to the evidence as a whole, not merely to that part which tends to support the agency's findings."

The quantum of proof for the respondent to sustain the order is found in 111.07(7):

". . .The findings of fact made by the commission, if supported by credible and competent evidence in the record, shall be conclusive."

The Supreme Court in St. Francis Hospital v. Wisconsin E. R. Board, (1959) 8 Wis. (2d) 308 (311), stated as follows:

"The findings of fact made by the board, if supported by credible and competent evidence, are conclusive. Sec. 111.07(7) Stats. The extent of the review by the courts is the same as that under the Workmen's Compensation Act, that is, there must be some evidence tending to support the finding of the board, and, if this is discovered, the court may not weigh the evidence to ascertain...
whether it preponderates in favor of the finding. . . The drawing of inferences from the facts is a function of the board and not of the courts."

WERC v. Evansville, (1974) 69 Wis. 2d 140, p. 149, points out the different quantum nuances between "Substantial evidence" standard (227.20)(1)(d)) where a petitioner attempts to obtain review to reverse the WERC finding of fact and the "credible and competent" standard (111.07(7)) where a petitioner or counterpetitioner, as herein, seeks affirmance of the findings of fact of the WERC.

The Examiner's finding of fact No. 18 reads as follows:

"The complainant complied with the notice requirements in Sec. 500.03 in that he notified the superintendent in writing before February 1, 1973 and specifically on August 17, 1972, of his intent to return to teach for respondent in school year 1973-74."

The Examiner's findings of fact in paragraphs 7 and 8 clearly state that the school board rejected the August 17, 1972 Diekroeger request on September 8, 1972, and denied the request again on October 2, 1972, but suggested that Diekroeger and Attorney Perry meet later that evening with the Board's attorney and Board's members, Rogers and Gloor, which culminated in exhibit 7, signed by Diekroeger and unanimously adopted by the School Board October 9, 1972.

That agreement in gist stated Diekroeger would get one year's leave of absence for the 1972-73 school year pursuant to Sec. 500.03 of the Collective Bargaining Agreement and that he provide the superintendent with medical progress reports on or about January 1, 1973, and on or about August 1, 1973. The tardiness of Diekroeger's medical progress report poses no problem to this court, since the terms of the October 1972 agreement provided that medical progress reports be submitted on or about January 1, 1973. Such language does not mitigate interpretation of that agreement to require that time be of the essence. This court turns to Appleton State Bank v. Lee, (1967) 33 Wis. (2d) 690, wherein the Supreme Court states on page 693:

"Time is not of the essence of a contract unless it is clear that the parties intended to make it so."

This court would further turn to the case of Kubnick v. Bohne, (1972) 56 Wis. 2d 527, where the Supreme Court on page 535 and 536 states as follows:

"Time will not be regarded as of the essence of the contract merely because a definite time for performance is stated therein, without any further provision as to the effect of nonperformance at the time stated. . . "The importance of time of performance depends upon the terms in the contract and the circumstances appearing from the acts of the parties."

The Examiner's finding of fact that the Diekroeger letter of August 17, 1972 (exhibit No. 30) met the requirements of the October 1972 agreement (exhibit No. 7) approved by the Board October 9, 1972; that, Diekroeger was granted a one-year leave of absence for the 1972-73 school year pursuant to Sec. 500.03 of the contract between

School District No. 1 The Village of Brown Deer in the Brown Deer Education Association just cannot hold evidentiary water in light of his previous findings of fact that the School Board rejected that request on two separate occasions; namely, September 8, 1972 and then again on October 2, 1972.

This court would turn to Rathman v. Schwanz (1921) 170 Wis. 459, where the Supreme Court states on page 465 as follows:

> "It is an elementary principle of the law that the negotiations and conversations between parties leading up to and including the making of a written contract are not admissible evidence to contradict and vary it, where the writing plainly purports to contain the entire contract, in the absence of accident, fraud, or mistake of fact."

This court is of the opinion that the law will not support the Examiner's findings of fact in paragraph 18, in that the agreement reached by Diekroeger and unanimously approved by the School Board October 9, 1972, precluded any employment of any negotiations and conversations leading up to and including the making of a written agreement to vary its terms.

The WERC's affirmance of and the Examiner's 18th finding of fact is therefore unsupported by substantial evidence in view of the entire record pursuant to Sec. 227.20(1)(d), which is incorporated in 111.07(8), nor is it supported by credible and competent evidence in the record as required by 111.07(7).

The October 1972 agreement incorporates 500.03 of the collective bargaining agreement by reference. The pertinent part reads as follows:

> "Teachers who have been granted a one year leave of absence must notify the Superintendent, in writing, of their intention to return to teaching. Such notification shall occur on or before February 1st to qualify a teacher for a contract during the ensuing year."

This court paraphrases Diekroeger's statement in his letter of February 22, 1973 (exhibit 12), that he never received a copy of the 1972-73 collective bargaining agreement ergo, he was unaware of the February 1 requirement of the written notice feature of 500.03. With respect to Diekroeger being aware of the requirements of Sec. 500.03 of the collective bargaining agreement, this court turns to the case of Lefebvre v. Autoist Mutual Insurance Company (1931) 205 Wis. 115, where the Supreme Court on page 119 states:

> "It is well established that as a general rule a person is not permitted to repudiate a written obligation by saying when called upon to respond to it that he did not read it when he signed it or did not know what it contained. . . . The rule in its strictness, however, is applied to contracts."

The cases of Wussow v. Badger State Bank (1931) 204 Wis. 467 at pages 477-78 and Bostwick v. Mutual Life Insurance Company (1903) 116 Wis. 392, at page 417, support the above quoted rule.

The plain and clear terms of the agreement (exhibit 7) signed by Diekroeger and unanimously approved by the School Board required that as of October 9, 1972, Diekroeger, pursuant to Sec. 500.03 of the collective bargaining agreement, give written notice of his intention to return to teaching for the 1973 and 1974 school year to the superintendent by February 1, 1973. He didn't give such written notice by February 1, 1973. Since he didn't comply with the plain and clear terms of exhibit 7, the School Board was under no obligation to hold open a teaching position for him for the 1973 and 1974 school year.

The WERC, in affirming the 18th finding of fact of the Examiner, literally rewrote the agreement (exhibit 7) between Diekroeger and the School Board. They, just as a court of law, have no such prerogative. This court would turn to Amidzich v. Charter Oak Fire Insurance Company (1969) 44 Wis. 2d 45, where on page 52 the Supreme Court states as follows:

"Courts, however, do not have the prerogative to engage in the equitable redrafting of contracts when the terms of those contracts are plain on their face."

The WERC's affirmance of the Examiner's 18th finding of fact is contrary to 227.20(1)(d) as unsupported by substantial evidence in view of the record.

The conclusions of law of the WERC and the Examiner are affected by error of law pursuant to Sec. 227.20(1)(B).

The order of the WERC dated July 25, 1974 is accordingly reversed.

By the Court,

/s/ WILLIAM R. MOSER

WILLIAM R. MOSER
Circuit Judge

Dated at Milwaukee, Wisconsin,

this 14th day of July, 1976.