

SUPERIOR BOARD OF EDUCATION
JOINT SCHOOL DISTRICT NO. 1,
CITY OF SUPERIOR, ET AL,

Petitioner,

-vs-

MEMORANDUM OPINION

WISCONSIN EMPLOYMENT RELATIONS
COMMISSION

AND ORDER

Decision No. 12174-E

and

SUPERIOR BOARD OF EDUCATION
EMPLOYEES LOCAL UNION NO. 1397,
AFSCME, AFL CIO,

Respondents.

This is an appeal by the Board of Education from a determination by the Wisconsin Employment Relations Commission of an award against the Board and in favor of the Union. The Board of Education is represented on this appeal by William Hammann, Superior City Attorney, and Douglas Moodie of counsel. The Union is represented by Bruce Ehke of the Madison law firm of Lawton and Cates, and the commission is represented by the Wisconsin Attorney General's office by David C. Rice, assistant attorney general.

The Union represents the non-instructional employees of the Board, the City and County bus drivers, engineer 1, engineer 2, custodians, janitresses, cooks, kitchen helpers, store room clerks, secretaries.

The trouble started in January 1973 when the teachers went on strike and the Board then laid off some of the employees of this Union. The members of this Union then went on strike and a mediator from Madison conducted mediations starting on January 21, 1973 to settle said strike. It is a disagreement between the Board and the Union as to what was agreed in settlement of said strike at these mediation sessions that is the source of the problem in this case.

It is claimed by the Union that the Board agreed to file with the unemployment compensation people a document bringing all the members of this Union under unemployment compensation insurance. The Union claims that it was agreed that this document should specifically include the seasonal employees, that is, the bus drivers, and the Class V secretaries, so that they could be paid unemployment insurance during the summer months they are not employed because school is not in session.

Section 108.02 (5) (f) provides in part as follows:

"(f) The term 'employment', as applied to work for a government unit, except as such unit duly elects otherwise with the department's approval, shall not include:

9. Past service in a regular annual school-year position except in a hospital or institution of higher education (other than teaching) by an individual who still (when claiming benefits) has status therein as a school-year employee;"

Everyone is aware that the unemployment compensation department has never approved such a coverage of seasonal employees during the time that the school is closed, but it apparently was the Union hope the department would approve and it would obtain coverage for their seasonal employees. The Board claims that it never agreed to file any document calling for coverage of the seasonal employees, although it does admit that it did agree to bring all of the Union employees under unemployment compensation coverage except for the summer coverage for the seasonal employees.

Before the summer of 1973 arrived, the Board and the Union had managed to come up with some disagreements as to the interpretation of their employment contract, this disagreement in regard to unemployment insurance coverage as well as a number of others. As a result of such disagreements it was agreed by the Board and the Union that they would arbitrate all of their differences and an arbitrator from the Labor Department, Joseph B. Kerkman, arrived in Superior on May 21, 1973 to do such arbitration. After a session which lasted about three hours according to Mr. Louis Thompson, Mr. Kerkman gave his decision from the bench and he thereafter by letter of May 31, 1973 transmitted in writing what he says he decided. As the School Board and the Union had previously agreed "that the award of the arbitrator would be final and binding upon them," if we can find that the arbitrator did decide this issue, and how he decided it, this should settle the matter regardless of whether the arbitrator actually decided the issue correctly or not as to what was actually agreed to at the mediation sessions in January of 1973.

The arbitration agreement insofar as it deals with this issue is as follows:

ISSUE NO. 1;

"Did the agreement between the parties, which was reached on January 21, 1973, with respect to covering certain employees of the bargaining unit represented by the Union for unemployment compensation purposes, except any employees of the unit from such coverage?

DISCUSSION:

It is clear to the Arbitrator that the Settlement Agreement reached by the parties on January 21, 1973, provided for no strings on unemployment compensation coverage for any employees of the unit employed by the School District. It is also clear that there was considerable discussion in caucus as to whether certain ten-month employees of the School District employed in this bargaining unit would be eligible for unemployment compensation benefits. Since the Settlement Agreement signed by the parties provided for coverage with no strings, the Arbitrator can form no other opinion than that all employees should be covered under the resolution submitted to the Department of Industry, Labor and Human Relations for the purposes of making available unemployment compensation benefits to the employees of the unit.

The Arbitrator in no way is determining whether or not the ten-month employees, e.g. bus drivers and ten-month secretaries, are entitled to unemployment compensation benefits under the unemployment compensation statute. That determination will be appropriately left for the Unemployment Compensation Division of the Department of Industry, Labor and Human Relations.

It is further clear that at the time the agreement was reached by the parties on January 21, 1973, the Union did not represent the teacher aides. Since teacher aides were not represented at the time the agreement was reached, the Arbitrator concludes that they are not intended to be covered for unemployment compensation purposes as a result of the agreement between the parties.

AWARD:

The agreement reached between the parties on January 21, 1973, did contemplate covering all employees in the bargaining unit represented by the Union except for the teacher aides as noted in the discussion above. Questions of eligibility for unemployment compensation payment are reserved for the Unemployment Compensation Division of the Department of Industry, Labor and Human Relations to determine."

It is the position of the Union and the Commission that by this arbitration award the arbitrator did decide that the Board had agreed to complete coverage for all the union employees, including seasonal employees during the period when this school was closed, subject of course to the final determination by the Unemployment Compensation Department. Counsel for the Board asserts that the award does not find the Board agreed to such coverage, and consequently the arbitrator decided that the Board did not agree to such coverage.

After reading and re-reading the award several times in connection with the applicable testimony and exhibits, I have come to the conclusion that the arbitrator did intend to state that the Board agreed to cover all the employees with unemployment compensation coverage to the extent that they could be covered, including the seasonal employees. There is certainly nothing in the award indicating that the arbitrator intended to say that the Board did not agree to such coverage, and to say he did not find an agreement for such coverage is to say he just didn't decide the issue before him. If this issue wasn't submitted at the arbitration hearing and decided, I can not figure out what was submitted in regard to unemployment insurance coverage at the hearing and what was decided in regards thereto.

As stated by Mr. Cermond, pages 67 through 70 of the transcript, it is clear that the Board intended to cover all of the members of the Union with at least some unemployment compensation coverage, so there doesn't seem to have been anything to argue about, other than the coverage for the seasonal employees. Louis Thompson states, pages 75 and 76 of the transcript, that at the arbitration hearing held in May the Union was asking for "summer benefits." Mr. Thompson states in Exhibit 11, his summary of what transpired at the arbitration hearing, "Mr. Kerkman of opinion that seasonal employees to be included in unemployment compensation coverage as parties had agreed 'no strings' on 'Strike Settlement' agreement of January 21, 1973." It is true that another statement attributed to Mr. Kerkman by Mr. Thompson is somewhat inconsistent with this when it says "this would be no cost to the Board providing bus drivers and class V secretaries, when laid off in June, are assured of work when fall term of school begins."

The Court wonders if this might be somewhat erroneous and whether Mr. Kerkman might just have given an opinion that it probably wouldn't cost the Board anything because the unemployment compensation division had never agreed to allow coverage in this situation before and probably wouldn't now. This is consistent with Mr. Kerkman's introductory statement prior to the award paragraph that "The Arbitrator isn't in any way determining whether or not the ten-month employees, e.g., bus drivers and ten-month secretaries, are entitled to compensation benefits under the unemployment compensation statutes. That determination will be appropriately left for the unemployment compensation division of the Department of Industry, Labor and Human Relations." It seems to me that Mr. Kerkman is just protecting himself by emphasizing to the Union that even though the Board goes along with it on the coverage, the Unemployment Compensation Division might very well decide they would not allow coverage anyway.

If the arbitrator wasn't deciding the issue of summer coverage of the bus drivers and class V secretaries in their favor, why did he make special mention of them at all in the above quotation? Except for this "summer coverage," the unemployment insurance issue would affect them the same as everyone else.

It seems to me that the quote part above illustrates that Mr. Kerkman was very much aware of the seasonal coverage issue and we have to decide whether he simply refused to decide such issue or whether he decided it in favor of the Union. There is nothing to indicate he decided it in favor of the Board. It is the Court's belief that, while Mr. Kerkman certainly could have done a more explicit job, he did intend to and did decide that the Board had agreed to give the employees just as broad unemployment compensation insurance as it was possible to give them.

Whether the arbitrator was right in making such decision is now irrelevant. His decision is binding anyway.

Therefore, it is the Court's decision that the decision of the Wisconsin Employment Relations in this action, be, and it hereby is, affirmed.

There is one additional matter to be considered. Counsel for the school board asserts that even if the Board did agree to file with the Unemployment Compensation people the document relating to full coverage for all employees, including the seasonal employees, and wrongfully failed to do so, that the Commission has exceeded its authority in what it has ordered the Board to do now. That is, in case the unemployment compensation people now decide that it is too late to rule on the matter because of the delay

caused by the Board, that the Board pay the employes whatever they would have been entitled to as unemployment compensation if there had been a filing and allowance of coverage by the unemployment compensation division. Counsel cites no authority for this assertion and I do not feel that I can find that the Commission has exceeded its power. Therefore, as indicated above, its order is affirmed.

April 23, 1976

BY THE COURT:

/s/ Allen Kinney

JUDGE