STATE OF WISCONSIN CIRCUIT COURT BARRON COUNTY

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COOPERATIVE EDUCATIONAL SERVICE AGENCY NO. 4 and THE BOARD OF CONTROL OF COOPERATIVE EDUCATION SERVICE AGENCY No. 4,

Petitioners, Case No. 79CV316

vs.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION,

Respondents.

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NORTHWEST UNITED EDUCATORS and NORRIS RAWHOUSER, Decision No. 13100-G

Petitioners,

vs.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION, et al.,

Respondents. Case No. 79CV337

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These are ch. 227 stats. actions to review an order of the Wisconsin Employment Relations Commission dated May 8, 1979. The Commission in turn has counterpetitioned for enforcement of the order under sec. 111.07(7) stats.

Facts

The facts are comprehensively set out in the briefs filed. For the purpose of this review they may be more briefly stated. Norris Rawhouser was under contract with CESA #4 to furnish social work services for Cumberland Community Joint School District #2 (40%), Turtle Lake Consolidated Joint District #3 (20%), and Rice Lake Joint District #1 (40%), for the 1973-1974 school year. He was non-renewed by CESA #4 for the 1974-1975 school year. The Commission, adopting all of the findings and conclusions of the examiner, determined that the nonrenewal was in part because of CESA #4's animus toward Rawhouser's involvement in lawful protected activities and its belief that he was unacceptable to the participating districts because of those activities, and because of the union animus and beliefs it failed to make a good faith effort to provide him with a position after non-renewal, both constituting prohibited practices contrary to Sec. 111.07(3)(a) 1 and 3 stats., and in doing so adopted the interpretation of the examiner of the CESA #4 - NUE agreement and his conclusion that CESA #4 violated Article VIII Sec. E of the agreement. Both the examiner and Commission determined that no liability attached to any of the school districts because they were not brought in as parties defendant until more than one year after Rawhouser's nonrenewal and the statute of limitations had run, and further, that there was no evidence that the districts committed any prohibited practices towards Rawhouser. With respect to Cumberland, Turtle Lake, and Rice Lake, those districts where Rawhouser worked, it was determined that although they may have been joint employers with CESA #4 at the time of nonrenewal, the statute of limitations cut off any joint liability to Rawhouser and, thus, the order providing for remedy had to be and was tailored to effect CESA #4 and its Board only. The order primarily provided that CESA #4 and its Board make Rawhouser whole for lost pay; provided a liability determination date; ordered no reinstatement.

General Principles
On Chapter 227 Review

All parties agree on the legal parameters of review in these matters but they do not all agree that there was a correct application of them by the Commission in these cases. In any event, it is appropriate to reiterate some of the guidelines as announced by the Supreme Court and used by this Court in making its decision.

1. Agency's findings are conclusive if supported by substantial evidence in view of the entire record. Chicago M. St. P & PRR Co. v ILHR, 62 Wis 2d 392, 215 NW 2d 443; Sec. 227.20(6) stats.

2. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Stacy v. Ashland County Department of Public Welfare, 39 Wis 2d 595, 159 NW 2d 630.

3. If two conflicting views may be each sustained by substantial evidence, the agency determines which view it wishes to accept. Hillboldt v. Wis RE Brokers' Board, 28 Wis 2d 474, 137 NW 2d 482.

4. When it is reasonable to draw more than one inference the agency's finding is conclusive. Pabst v. Department of Taxation, 19 Wis 2d 313, 120 NW 2d 77.

5. Weight and credibility of evidence are for the agency to determine. St. Francis Hospital v. Wisconsin ER Board, 8 Wis 2d 308, 98 NW 2d 909; Sec. 227.20(6) stats.

6. A reviewing court may not make an independent determination of the facts. Hixon v. Pub. Serv. Comm., 32 Wis 2d 608, 146 NW 2d 577.

7. A reviewing court may not substitute its judgment for that of the Commission. St. Joseph's Hospital v. Wisconsin ER Board, 264 Wis 396, 59 NW 2d 488; Sec. 227.20(6) stats.

Finding of Union Animus

CESA #4 says that record does not support this finding by substantial evidence. NUE says it does, as does the Commission. The school districts in view of the findings and determination that they have no liability to Rawhouser, do not much care and keep their hands off the issue. CESA #4's main thrust is that since the districts within CESA #4's geographical area opted in most part to hire psychologists for the 1974-1975 school year because of a change wrought in the law by the passage of Ch. 89 Laws of 1973 and dissatisfaction with Rawhouser's services by some districts, that the non-renewal was motivated by this new law and reasons unrelated to union animus. The examiner found that union animus partially motivated the nonrenewal while the new law and other legitimate reasons provided the balance of the motivation. CESA #4's complaint is with this inference of union animus that was drawn. This is a fact issue. Kenosha Teachers Union v. Wisconsin ER Comm., 39 Wis 2d 196, 158 NW 2d 914.

The record in this case is exceptionally large since the matter was tried before the examiner on 12 separate days. Suffice to say that the inferences drawn by the examiner from the evidence of union animus and his finding of animus are supported by substantial evidence in the record. The court has carefully read the findings of the examiner in connection with the record page references called to the

Court's attention by counsel in arriving at its conclusion. These references to the record are set out at pp. 5 through 16 inclusive of the Attorney General's Brief. A contrary finding of lack of animus is also supported by substantial evidence, however, the Commission has the first choice and it has chosen to find union animus. This Court is powerless under the principles of review to draw a contrary inference and to make a contrary finding.

Article VIII Sec. E
of Contract

The examiner and Commission interpreted the labor contract so as to make Article VIII Sec. E applicable to Rawhouser. Again it's not a question of whether a different interpretation could be made, but rather whether the interpretation that was made was without reason or inconsistent with the purposes of MERA. Tecumseh Products Co. v. Wisconsin ER Board, 23 Wis 2d 118, 126 NW 2d 520. While the construction of the agreement is a conclusion of law and a court is not bound by the Commission's conclusions, there is no reason in this Court's view to interpret the contract in a different manner from that of the Commission.

Secs. A through H of Article VIII are set forth in the examiner's finding #39. CESA #4 urges that since Sec. H makes only recall provisions retroactive to January 1, 1974, that Sec. E has no application as it has no relationship to recall. Hence, it says the Commission could not base a finding of prohibited practices upon a contract violation. Sec. F gives recall rights to a teacher "acceptable to the school districts involved." Sec. E requires the board and the teacher who is laid off to prepare mutually agreeable recommendations, etc., and furnishes a laid off teacher an early means to advertise his competence and availability accompanied by the blessing and recommendation of CESA #4. If an opening presents itself, recall rights are more likely to be effectuated if the provisions of Sec. E are utilized. Therefore, Sec. E is in a sense a recall provision.

I see no ambiguity in Sec. E. If it is ambiguous, the construction given by the Commission is entirely reasonable in view of the evidence presented, and further, the factual basis for the Commission's determination that this section of the contract was breached constituting a prohibited practice under Sec. 111.70(3)(a)1 and 3 stats. is well supported by substantial evidence of record.

Sole Liability of
CESA #4

Rawhouser and the union make no claim of responsibility on the part of any district other than Rice Lake, Cumberland and Turtle Lake, those districts using Rawhouser's services for the 1973-1974 school year. These districts were not joined as parties until more than one year after the nonrenewal that occurred on March 11, 1974. The examiner and Commission therefore correctly concluded that the statute of limitations, Sec. 111.07(14) stats. had run prior to their joinder so there could be no liability for the unlawful renewal. Arguably these districts and CESA #4 may have been joint employers at the time of nonrenewal so as to be jointly liable to Rawhouser, but failing to sue them until after the statute had run destroys any joint liability the relationship may have created. Following nonrenewal any joint employer status ceased. While these three districts were joined within a year of the time that some of CESA #4's conduct following nonrenewal occurred, there is no evidence in the record that any of the three was aware of, or participated in CESA #4's activities, animus or beliefs constituting a breach of the collective bargaining agreement, and the Commission determined that in the absence of any such evidence they were not liable on any theory for CESA #4's conduct following nonrenewal. This Court agrees with the Commission in its determination that the districts have no responsibility for any of the conduct of CESA #4 that equates a prohibited practice.

The real gut question in these cases in this Court's view deals with remedy. Rawhouser and the union realize that because of the nature of the statutory child (CESA's) Rawhouser may have extreme difficulty collecting back pay ordered, and that reinstatement becomes impossible unless these three districts are found responsible on some vicarious liability theory whether the conduct of CESA #4

creating the responsibility occurred before, at or following nonrenewal. The examiner in his decision (p.55) discussing the finding of CESA #4's sole responsibility as it relates to economic loss in part said:

> "the examiner is persuaded that CESA #4 has the legal ability to raise funds to comply with such an order by borrowing and/or by assessing a prorated share of said cost, which will become a cost of Cooperative Educational Programs within the meaning of Sec. 116.03(4) stats., against units which enter into contracts for future CESA services."

This Court is aware that this conclusion of the examiner concurred in by the Commission, and worried about by the union and Rawhouser, is difficult to reconcile with the monetary restraints of Sec. 116.03(4) and 116.08(1)(2) stats., nonetheless, to conclude that although CESA #4 committed a prohibited practice there could be no remedy, certainly would not effectuate the purpose of MERA.

The Commission's determination that none of the districts, and particularly these three districts, are responsible for CESA #4's conduct in this case **must** be affirmed. Cases finding joint employer status and joint liability or agency responsibility in prohibited labor practice cases are distinguishable. The briefs cite many and the Court will not analyze each nor attempt any distinguishing on a case basis. Furthermore, assuming a joint employer relationship between CESA #4 and the three districts at the time of nonrenewal, the relationship ended upon nonrenewal and the statute had run before any district was brought in and claimed against.

This Court appreciates that unless some theory of liability exists or is fashioned to hold the three districts responsible an effective remedy may not be available. On the one hand an order ought be devised and entered to effectuate the purposes of MERA, yet on the other so should the monetary limitations of Ch. 116 be recognized. A clash between them, as exists in this case, could be ironed out by making a policy decision, not based upon existing principles of responsibility, but creating a new one dependent upon the peculiar relationship of statutory CESA's to school districts determining that any liability of CESA #4 to Rawhouser shall be borne by the three districts whether sued or not because they contracted with CESA #4 for social services which were provided them by Rawhouser who was under contract with CESA #4 to provide the services at the time nonrenewal for the following school year occurred. This Court feels that it cannot make any such policy decision, and that if one is to be made, it ought be made legislatively or by an appropriate appellate court. Nor can this Court interpret and fit the facts presented in such a way so as to determine liability on the part of the three districts based upon an agency or joint employer theory.

Because of the foregoing the Commission's findings, conclusion and order is affirmed. Counterpetition for enforcement of the Commission order is granted. The Attorney General to prepare any and all papers it deems necessary to carry out the Commission's order.

Dated this 27th day of January, 1981.

BY THE COURT:

Robert F. Pfiffner /s/
Circuit Judge