STATE OF WISCONSIN CIRCUIT COURT BARRON COUNTY

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COOPERATIVE EDUCATIONAL SERVICE AGENCY #4, and THE BOARD OF CONTROL OF COOPERATIVE EDUCATIONAL SERVICE AGENCY #4,

Petitioners,

vs.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION,

Respondent. Case No. 79CV316

AND DECISION

NORTHWEST UNITED EDUCATORS, and NORRIS RAWHOUSER,

Petitioners, Decision No. 13100-G

vs.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION, ET AL.,

Respondent. Case No. 79CV337

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This Court previously affirmed the order of the Wisconsin Employment Relations Commission which had affirmed the Examiner's Findings, Conclusions and Order with certain modifications, ordering that CESA #4 make Rawhouser whole for any loss in pay and value of fringe benefits he suffered as a result of the prohibited practices found, and provided for ways that CESA could terminate its liability for back pay. The parties could not agree upon the amount due under the Commission's order and this Court ordered that a hearing be held to determine the amount of loss Rawhouser has suffered to date. Such hearing was held June 25, 1982, and briefs were later filed.

Thus, we start with a proposition that Rawhouser is to be made whole. The disputes are:

(1) Salary Placement of Rawhouser for year 1974-75, and following for purposes of determining what he would have earned had he been renewed.

(2) Method of accounting for increase in Rawhouser's work year, that is, whether it is to be in days or months.

(3) Should his projected salary be adjusted to a calendar basis for computation?

(4) How to treat summer employment.

(5) Retirement Computation.

(6) Social Security Payments.

(7) Job hunting and moving expense.

(8) Health Insurance Benefits.

(9) Interest.

SALARY PLACEMENT

Each side puts forth his best foot in urging the Court to adopt its salary placement base. This problem arises because prior to 1974 Rawhouser was paid without regard to any schedule, and thereafter beginning with the 1974-75 school year the collective bargaining contract required that he be placed on a salary schedule. See Ex. 5, Article XIII. From that point he would have advanced one step each year. The agreement does not provide for the method of placement of Rawhouser-type employees on the salary schedule. Rawhouser had eight years of experience with CESA. His contract for the 1973-74 school year provided for a salary of $14,025. Using the salary schedule for Rice Lake for the year 1974-75, a person's salary with his years of experience and educational background would be $12,144; Cumberland, $12,650; and Turtle Lake $12,672, (Ex. 7) all below the salary Rawhouser was making. A 2 percent increase for the school year 1973-74 was negotiated by the union for Rawhouser, (Ex. 4). Obviously, had he remained with CESA, he could not be expected to

take a cut in pay for the next contract year. The employer urges the proper place to put him for 1974-75 in the schedule is in step 11 adjusted to 200 days from 190 days which would allow him a 3.8 percent increase over his previous salary. Rawhouser says he should be placed in step 12 Cumberland and Turtle Lake, and step 13 Rice Lake adjusted to 10 months which would give him a 13.5 percent increase. The Court agrees with the employer's placement in step 11 for the base year for computing back pay as being the most reasonable, as it would recognize his educational status and years of experience and give him a reasonable increase in pay. While the pay schedule for 1974-75 for MA plus 30 increased by $1,000 over 1973-74 regardless of experience, it would seem that the union in view of the discrepancy in salary between Rawhouser and the regular teaching people would not have been as successful in increasing Rawhouser by a like amount. If he were to receive $1,000 more for the 1974-75 year adjusted to 200 days or 10 months plus the $300 multidistrict add, he would not fit into any of the pay schedules for the year. While it is speculative where he might be placed, the Court feels step 11 is an equitable placement all things considered.

PRORATION - MONTHS OR DAYS

As noted above, Rawhouser says his salary should be computed on a monthly basis, while the employer insists it is to be based upon days. Rawhouser's contract for 1970-71, (Ex. 3) provides for 200 days of work beginning August 15, 1970 and ending on or about June 15, 1971. His contract for 1973-74, (Ex. 1) provides for 10 months work, with the beginning on August 15, 1973 and ending on or about June 14, 1974. While the contract period is specified in months for the year 1973-74, there was no increase in his duties, and it's significant that the dates covered amount to the identical time,

that is, 200 days as the previous year's contract. The 1974-76 bargaining agreement between CESA #4 and the union specifies the basic contract to be 190 days. Extended contract days are to be paid on a prorata basis. (Article X, School Calendar, Ex. 5). It therefore is reasonable to compute back pay based upon a 200-day work agreement and allowing Rawhouser 10 additional days in computing pay using step 11 in the salary schedules for the 1974-75 year.

PROPOSED SALARY - ADJUSTED CALENDAR YEAR?

The employer urges adjustment of salary for computation to a calendar year for ease of computation with Rawhouser insisting the school year should be the base. In view of reporting for income tax, social security, STRS, and interest computations the Court feels that it's more appropriate and less complex to indeed convert or adjust to a calendar year. (See Jaffe, Examiner finding p. 63, "back pay liability to Rawhouser should be computed on the basis of separate calendar years or portions thereof....."; and Commission order p. 93, "back pay due Rawhouser shall be computed on an annual basis....."

SUMMER EMPLOYMENT

The employee feels that any earnings following his non-renewal from other sources earned in the months between the end of a school year and the beginning of the next should not be considered in computing back pay. While it is true that he had an opportunity to seek and obtain work during these months, nonetheless, to exclude them because he now has employment for 12 months in a capacity utilizing the very same skills he utilized in the employ of CESA at an annual wage rather than a teaching position for 10 months or 200 days would seem to make him more than whole in this Court's judgment. In Louis Hutzler, et al. v. Board of Education Joint District One,

the following appears:
City of Green Bay, et al.,/Case No. VI No. 12944 MP-63 Decision No. 9095-G Supp Findings and Order WERC.

> "3. That since Hutzler's termination from employment by the School Board on May 12, 1969 to March 31, 1973, Hutzler would have earned $33,025.20 in wages from his employment with the School Board had he not been terminated by the School Board; and that Hutzler earned during the above-mentioned period $39,619.43 in wages from other employment."

No mention was made of any credit being allowed for Hutzler, a teacher, during summer nonschool months. Making a wrongfully terminated employee whole does not include penalizing the employer, and in this instance to exclude two months of his 12-month earnings from the computation would in effect be tantamount to determining that had he not been terminated he would have earned two-twelfths of his present salary of summer employment which is entirely speculative. Consequently, the Court feels that that CESA eligible salary should be computed on an annual basis, as should his outside earnings when determining back pay liability.

RETIREMENT COMPUTATION

Here again both sides are poles apart in their positions. Rawhouser is now a federal employee and the government pays 7 percent of his basic pay into its pension plan, and Rawhouser pays a like percentage. He became a member of the United States Civil Service Retirement System in April, 1977, and CESA obviously has no obligation thereafter to make contributions to the STRS. Crediting earnings in other employment against CESA eligible pay prior to this time for STRS would not make Rawhouser whole. The Court determines that STRS contribution liability of CESA exists until April 1, 1977, regardless of earnings from outside employment that he may have had.

SOCIAL SECURITY PAYMENTS

The employer is liable for its share of social security contributions and must pay them into the fund.. These amounts are to be determined on the difference between his actual earnings and his CESA eligible salary. Since these contributions are not the responsibility of Rawhouser, no determination of amount due need be made. The final determination of back pay will govern.

JOB HUNTING AND MOVING EXPENSE

It's clear to the Court that the employer owes Rawhouser all job hunting and moving expense, (Ex. 16), except that incurred in 1980 amounting to $545 which occurred after he had been in the employ of the Veterans Administration.

HEALTH INSURANCE BENEFITS

There seems to be no dispute in the amount due, and the Court finds the employer's liability for this expense to be $1,830.66.

INTEREST

The parties stipulated at the hearing that NLRB interest rates are to be applied, (Ex. 15). CESA now says that since the amount due for back pay was not liquidated nor reasonably ascertainable with exactness until fixing by the Court, interest can only run after the Court determines the amount, citing among other authorities Dahl v. Housing Authority of City of Madison, 54 Wis 2d 22. Examiner in his order provided for interest at the legal rate on the amount of back pay due recognizing that the Commission ordinarily did not order interest on back pay, but that it has so ordered under unusual circumstances citing Joint School District One, City of Green Bay, et al., 9095-G. The Brown County Circuit Judge in that case after receiving the supplemental findings and recommendation of

the WERC determined that interest was not allowable because not liquidated nor reasonably ascertainable until the decision was made. See Decision 9095-G.

This Court does not agree that interest in this situation should not be ordered because the amount due has not been ascertained up to this point. Certainly Rawhouser had no idea what he might earn in outside employment upon termination, but this is not his fault. His CESA eligible salary while not definitely set should not work to his detriment. We know what he earned the previous year. We know that had he continued he would have been put in the salary schedule. It seems to this Court that there are unusual circumstances present here that should permit the award of interest on the amount of back pay due. Not to allow it because of contingencies beyond his control and created by the unfair practices of the employer would be a far cry from making him whole. I determine that his CESA eligible salary was reasonably ascertainable even though credits against it from other employment were not, but that interest at NLRB rates as stipulated should be concluded and applied retrospectively. To find otherwise would ignore equity in this instance, and as the examiner determined, there are unusual circumstances present where fairness requires payment of interest.

CONCLUSION

It follows that CESA 4's liability for back pay ends with 1978 because in 1978 he earned more than he would have if not terminated based upon the Court's determination herein. Counsel for the employer will compute the back pay liability together with interest at NLRB rates, moving and job hunting expense, FICA, and STRS, Health Insurance Premiums, in accordance with this determination, and submit

the computation to counsel for Rawhouser for approval insofar as compliance with the Court's determination herein, and submit an order based thereon for signature.

Dated this 3rd day of September, 1982.

BY THE COURT:

Circuit Judge