STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MILWAUKEE DISTRICT COUNCIL 48, AFSCME, AFL-CIO and NICK BALLAS, STAFF REPRESENTATIVE, Complainants, vs. PENFIELD CHILDREN'S CENTER, Respondent.	Case IV No. 19026 Ce-1608 Decision No. 13534-A

Appearances:
Goldberg, Previant & Uelmen, Attorneys at Law, by Mr. John S. Williamson Jr., for the Complainant.
Foley and Lardner, Attorneys at Law, by Mr. Stanley S. Jaspan, for the Respondent.

ORDER GRANTING IN PART AND DENYING IN PART MOTION FOR SUMMARY DISMISSAL OF COMPLAINT

A Complaint of unfair labor practices having been filed on April 7,1975 by Milwaukee District Council #48, AFSCME, AFL-CIO and Nick Ballas, staff representative, alleging that Penfield Children's Center had committed and is committing certain unfair labor practices within the meaning of Sec. 111.06 of the Wisconsin Employment Peace Act (WEPA); and the Commission having appointed Marshall L. Cratz to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and Order in the matter; and on May 21, 1975, Respondent having filed with the Examiner a Motion to Dismiss with accompanying affidavit in which Motion Respondent requested, inter alia, (1) that the Examiner dismiss the Complaint with respect to unfair labor practices alleged therein to have occurred prior to November 26, 1974 on the ground that Complainant has waived any right to file or pursue any such claims of unfair labor practices against Respondent, and (2) that the Examiner dismiss the Complaint with respect to unfair labor practices alleged therein to have occurred prior to April 7, 1974 on the ground that consideration of such alleged violations is barred by the applicable statute of limitations; and counsel for the parties having met with the Examiner in an informal pre-hearing conference on June 11, 1975; and

said counsel having agreed at said conference that the aforesaid portions of Respondent's Motion to Dismiss would be determined in the manner of a resolution of a motion for summary judgement following submission of Complainant's conteraffidavit and brief and of Respondent's reply brief; and the Examiner having considered the Complaint, the Answer, the portions of Respondent's Motion to Dismiss referred to above as (1) and (2), the parties' affidavits and the briefs of counsel, and being satisfied that Respondent's request for summary determination should be granted with respect to (2) above but denied with respect to (1) above;

NOW, THEREFORE, it is

ORDERED

That the Respondent's request for summary dismissal of the portion of its Motion to Dismiss referred to as (2) above shall be and hereby is granted; and consequently,

IT IS FURTHER ORDERED that the portions of the Complaint in the above-noted case alleging that Respondent committed unfair labor practices with respect to specific acts of Respondent which occurred prior to April 7, 1974 shall be, and hereby are, dismissed.

IT IS FURTHER ORDERED that Respondent's request for a summary determination of the portion of its Motion to Dismiss referred to as (1) above shall be and hereby is denied; but that determination of said portion of said Motion shall be deferred until after an evidentiary hearing is conducted with respect to said portion of said Motion; and that until said portion of said Motion is ruled upon by the Examiner, the Examiner will continue to limit hearing in this matter to consideration of allegations in the Complaint and Answer concerning conduct of Respondent on or after November 26, 1974.

Dated this 31st day of October, 1975 at Milwaukee, Wisconsin.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Marshall L. Gratz
Marshall L. Gratz, Examiner

PENFIELD CHILDREN'S CENTER, IV, Decision No. 13534-A

MEMORANDUM ACCOMPANYING ORDER GRANTING IN PART AND DENYING IN PART MOTION FOR SUMMARY DISMISSAL OF COMPLAINT

On April 7, 1975, Complainant filed with the WERC a complaint alleging that Respondent engaged in a variety of conduct from April 5, 1974 until certain times after November 26, 1974 which conduct allegedly violated Secs. 111.06(1)(a), (c), (d) and (f) of WEPA. On May 31, 1975, Respondent filed an answer denying that it committed any unfair labor practices and raising several affirmative defenses. In addition, Respondent also filed on May 21 a Motion to Dismiss with accompanying affidavit.

At an informal pre-hearing conference between the parties' Counsel and the Examiner, it was agreed that following submission of a counter-affidavit and brief by Complainant and a reply brief by Respondent, the Examiner would issue a formal determination in the manner of a resolution of a motion for summary judgement with respect to those portions of Respondent's Motion to Dismiss referred to as (1) and (2) in the foregoing Order. The foregoing Order and this Memorandum accompanying same constitutes said determination.

Allegations of Unfair Labor Practices with Respect to Respondent's Conduct Prior to April 7, 1974

The instant complaint was filed with the Commission on April 7, 1975. Section 111.07(14) of WEPA provides that "[t]he right of any person to proceed under this section shall not extend beyond one year from the date of the specific act or unfair labor practice alleged." Respondent has requested that all unfair labor practices alleged to have occurred prior to April 7,1974 should be dismissed. The Complainant has presented no arguments or other basis for reaching any other conclusion. Therefore, that portion of Respondent's Motion to Dismiss referred to in the Order as (2) has been granted by the Examiner.

Allegations of Unfair Labor Practices with Respect to Respondent's Conduct Prior to November 26, 1974

thereto on November 20, 1975; that following ratification said agreement and supplements were executed on November 26, 1975; and that one of the Supplemental Agreements reads in pertinent part as follows:

> "4. The Union shall immediately withdraw the unfair labor practice charges currently pending before the Wisconsin Employment Relations Commission [1/] and agrees not to file (or assist, aid or encourage any individual to file) any further unfair labor practice charges with respect to any conduct of the Employer which occurred prior to the effective date of the collective bargaining agreement." 2/

On the basis of those facts, Respondent argues that Complainant 3/ has contractually waived its right to file or pursue any claims within the purview of Paragraph 4. While the Commission has required that, in order to be given effect, waivers of statutory rights must be "clear and unmistakable" and "based upon specific language in the agreement or history of bargaining," 4/ Paragraph 4, on its face, meets those requirements.

Complainant argues, however, that Paragraph 4 ought not be held to preclude Complainant from filing unfair labor practice claims with respect to pre-November 26, 1974 Respondent conduct. In support of that position, the Union offered one affidavit, that of Nick Ballas attached

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1/ On October 29, 1974, Complainant filed a Complaint with the WERC against Respondent (in what became Case II) alleging essentially the same allegations as are contained in the first twelve of the nineteen factual allegations in the instant Complaint as initially filed. On November 22, 1974, Complainant advised the WERC Examiner in Case II by letter that it was withdrawing its Complaint ". . . as a result of a negotiated contract settlement which includes withdrawal of the complaint . . .". Pursuant to Complainant's above-noted letter, the WERC issued an Order dated November 25, 1975 dismissing said Complaint (Dec. No. 13135-A).

2/ The quoted provision shall be referred to herein as "Paragraph 4."

3/ It has not been argued herein that Nick Ballas is a complainant in any capacity other than his role as staff representative (and therefore agent) of Complainant Union. Therefore, the term "Complainant" is used herein in the singular with reference to the Union and to Mr. Ballas acting in his capacity of staff representative thereof.

4/ E.g., City of Brookfield, Dec. No. 11406-A (7/73) aff'd by WERC Dec. No. 11406-B (9/73); Nicolet Joint Union High School District No. 1 School Board, Dec. No. 12073-B (10/74) aff'd by WERC Dec. No. 12073-C (10/75).

hereto as Appendix A. In particular, Complainant states the following reasons in support of its position:

1. That the Ballas affidavit contains facts sufficient to establish that Respondent induced Complainant to agree to Paragraph 4 by fraud; and that, on general contract law principles, Complainant is therefore entitled to rescind that provision and free itself to refile the complaint it withdrew. 5/

2. That Paragraph 4 constitutes "an agreement intended to settle unfair labor practice charges"; that under federal labor law deserving of application in cases under WEPA, such settlement agreements are not enforced so as to preclude litigation of the previously settled disputes where subsequent conduct of the party seeking enforcement amounts either to independent unfair labor practices that frustrate the purpose of the settlement agreement or to a breach of the settlement agreement itself; that in the instant case, the Ballas affidavit and the Complaint contain assertions that Respondent has committed independent post-settlement unfair labor practices that frustrated the purpose of the settlement agreement herein; that, moreover, the implied covenant of good faith and fair dealing deemed to be in the instant settlement agreement as in all other contracts and agreements was breached by Respondent in that Respondent committed post-November 26, 1974 unfair labor practices thereby depriving Complainant of the full benefit and of the fruits of the settlement agreement, to wit, "the right. . . to be free from unfair labor practices"; and that, therefore, the settlement agreement, i.e. Paragraph 4, should be set aside.

3. That in the instant circumstances the underlying purposes of WEPA would best be served by prohibiting Respondent from relying on the waiver language in Paragraph 4 since to do otherwise would:

   a. destroy confidence in the settlement process (by allowing an employer to rely on a settlement agreement which it has, itself, frustrated by "violation of its promise to end unfair labor practices"),

   b. frustrate the statutory purpose of protecting employes from employer unfair labor practices (by permitting an employer to induce a waiver of complaint filing by promising not to engage in future anti-union conduct only to treat such promise as a nullity shortly thereafter),

   c. encourage bad faith bargaining (by allowing Respondent to blithely disregard its promise to cease anti-union harrassment), and

   d. defeat the public interest in prevention of unfair labor practices (by precluding Complainant from proceeding with a complaint that would, in part, protect that public interest).

5/ Brief of Complainant, n.3, pp. 3-4.

Respondent, in its reply brief, contends that neither the Complaint nor the Ballas affidavit set forth facts sufficient to satisfy the elements of fraud; that paragraph 4 does not constitute a "settlement agreement" as that term is used in the cases cited by Complainant; and that the underlying purposes of WEPA would be best served by giving effect to the parties'clear and unambiguous written agreement set forth in part, in Paragraph 4. Respondent therefore requests summary dismissal of the allegations in the Complaint with respect to Respondent's conduct prior to November 26, 1975.

Where, as here, a party moving for summary determination presents facts by way of affidavit that establish prima facie support of its position, the affidavits of the party opposing the motion must be examined to determine whether they present facts which create an issue as to any material point. If they do, then the motion for summary determination must be denied. 6/

The Examiner finds that the Complainant's affidavit by Nick Ballas creates, at a minimum, the following factual issues:

1. Did Jon Osterkorn state to Nick Ballas at some time during the period November 20-26, 1974 that if reports received by Ballas from employes to the effect that agents of Respondent were engaging in actions hostile to Complainant were accurate then Respondent would take steps to stop such actions?
2. Were any such reports received by Ballas?
3. Were any such received reports accurate?
4. Did Respondent fail to take steps to stop actions hostile to Complainant that were accurately reported by employes to Ballas?
5. Is it to be inferred from any failure by Respondent to take such steps in such circumstances that Osterkorn had a present intent contrary to that represented to Nick Ballas when any statement(s) referred to in 1 above was made?
6. Is it to be inferred that Osterkorn intentionally misrepresented his intentions to Ballas with respect to whether Respondent would take steps to stop actions by Respondent's agents that were hostile to the Complainant if reports of such actions received by Ballas were accurate?
7. Did Complainant agree in writing on November 26, 1974 not to file subsequent WERC complaints concerning Respondent's pre-November 26, 1974 conduct in reliance upon statement(s) referred to in 1 above?

6/ FRCP Rule 56(e); McWhorter v. Employers Mutual Casualty Co., 28 Wis. 2d 275 (1965); Sec. 270.635 (2) WIS. STATS. (1973).

The question of whether the foregoing factual issues are material to a determination of the portions of Respondent's Motion to Dismiss at issue herein calls for an analysis of the legal theories upon which Complainant relies, in the light of existing authorities.

The Ballas affidavit creates factual issues which, if resolved in favor of Complainant, would establish the elements of common law fraud in the inducement. 7/ This forum has, in at least one prior case, relieved a party of his obligations under what was, on its face, a clear and unambiguous obligation in a written collective bargaining agreement setting forth overall terms and conditions of employment where it was found that said party's execution of said agreement was induced by fraud. 8/ Moreover, there are cases in which the National Labor Relations Board has refused to give effect to clear and unambiguous contractual waivers of statutory bargaining rights in circumstances where

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7/ In general, the elements of fraud consist of a false statement of material fact made to be acted on and actually believed and acted on with consequential injury to the person acting thereon. 12 Williston on Contracts, Sec. 1487A (3rd Ed., 1970); See also, Wulfers v. E.W. Clark Motor Co., 177 Wis. 497, 499 (1922). While fraud cannot ordinarily be predicated on unfulfilled promises or statements made as to future events, one of the exceptions to that rule is that when promises are made upon which the promisee has a right to rely, and at the time of making them the promisor has a present intent not to perform them, the promises may amount to fraudulent representations. Alropa Corp. v. Flatley, 226 Wis. 561, 566 (1938); Suskey v. Davidoff, 2 Wis. 2d 503, 507 (1958). Respondent did not explain in detail its basis for asserting in its brief that ". . . neither the Complaint nor the affidavit contain facts sufficient to satisfy the elements of fraud." Respondent's Brief at n.3 p.5. If by emphasizing the word "facts", Respondent is arguing that the statements in the Ballas affidavit from which the factual issues number 1-8 above have been drawn are too conclusory or insufficiently particular to constitute statements of evidentiary facts, that argument is rejected by the Examiner.

8/ J.E. Herro, Dec. No. 516 (10/43) (Illiterate employer held by WERB not to have violated written agreement clearly requiring wage rate of $30.00 when he paid $22.50, the rate which union representatives assured him was provided for in the agreement, which assurance was known by one union representative present to be false and which assurance induced the employer to execute the collective bargaining agreement; decision, unfortunately, is not accompanied by memorandum explaining precise WERB rationale for result.)

such waivers are found to have been fraudulently induced. [9] On the other hand, there are general contract law principles that a party seeking recission of a transaction must rescind same in its entirety and may not rescind part and affirm the balance, [10] and that the power of recission for fraud is lost if the injured party, after acquiring knowledge of the fraud, manifests to the other party to the transaction an intention to affirm it. [11] Thus, whether fraud in the inducement relieves the injured party of its obligations under one clause of a collective bargaining agreement otherwise remaining in effect is, at best, an open and novel question in this forum.

Moreover, a WERC examiner issued the following dictum in a Memorandum Accompanying his Order dismissing a complaint of unfair labor practices:

> "In a complaint case, where the complaint is dismissed on the basis of a settlement agreement, the Commission will not ordinarily entertain a refiling of a complaint alleging the same matter previously complained of unless it is determined that the settlement agreement reached between the parties has not been complied with or that the settlement agreement reached is repugnant to the policies expressed in the Wisconsin Employment Peace Act. If in this case the Respondent does not comply with the terms of the settlement agreement, the complaint may be refiled along with an allegation that the settlement agreement previously reached has not been complied with." [12]

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[9] Southern Materials Co., 198 NLRB No. 80 LRRM 1606 (1972) (1970) (NLRB refuses to recognize clear and unambiguous general waiver of bargaining rights clause as defense to complaint of unlawful unilateral elimination of Christmas bonus not specifically referred to in the agreement where employer found to have deliberately concealed existence of Christmas bonus so as to mislead Union into believing that employes could not be losing any such benefit by reason of Union's agreement to drop maintenance of standards clause proposal and to include waiver of bargaining clause in agreement; NLRB reasons that to do otherwise would "do violence to the principles of good faith collective bargaining" id. at 80 LRRM at 1607) on remand from NLRB v. Southern Materials Co., 447 F, 2d 15, 77 LRRM 2814 (1971); 74 LRRM 2814 (CA 4, 1971); Conval-Ohio, Inc., 202 NLRB 85, 94, 82 LRRM 1701 (1972); cf. Padioear Corp., 214 NLRB No. 33, 87 LRRM 1330 (1974).

[10] E.g., Grant v. Law, 29 Wis. 99 (1871).

[11] Restatement, Contracts, Sec. 484; accord, Benz v. Zobel, 255 Wis. 252 (1949); Alberts v. Alberts, 78 Wis. 72 (1890).

[12] Ellis Stone Construction Co., Dec. No. 11474-A (12/72).

Whether the foregoing dictum properly reflects the state of the law, and, if so, whether the parties' collective bargaining agreement including supplements and Paragraph 4 constitutes a "settlement agreement" within the purview of the foregoing dictum, and, if so, whether Paragraph 4 of the instant settlement agreement is, in the context of its alleged inducement and execution, repugnant to the policies expressed in WEPA are also open and novel questions in this forum.

The presence of such novel issues makes a summary determination appear inappropriate herein [13] since the Examiner in making such initial determination and the Commission in reviewing such determination (if favorable to Respondent) would be without benefit of a full factual record upon which to most effectively evaluate the merits of and formulate rules of law with respect to said novel issues (if any of them are raised by proven facts). Therefore, the Examiner has deferred ruling in the portion of Respondent's Motion to Dismiss referred to in the foregoing Order as (1) until after an evidentiary hearing is conducted with respect to same.

The foregoing resolution of the request for summary determination of said (1) does not, however, warrant opening the hearing in the instant matter to consideration of the Complaint allegations concerning Respondent's pre-November 26, 1974 conduct. For to require Respondent to undergo the burdens of full hearing with respect to said allegations prior to a determination of said (1) would be to deny Respondent the precise benefit of the clear and unequivocal written promise it apparently sought and received in consideration of its agreement to the overall terms and conditions of employment of personnel in the bargaining unit represented by Complainant. [14] The Examiner will not deny Respondent said benefit unless and until it is proven that Respondent is not legally entitled to enjoy same.

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[13] See, Gellhorn and Robinson, "Summary Judgment in Administrative Adjudication", 84 Harv. L. Rev. 612, 614 (1971) (". . . courts seldom rely on summary judgment to decide cases involving complicated or voluminous evidence, especially when the legal question is novel or significant [citations omitted]").

[14] Ballas affidavit, Par. 3.

Dated at Milwaukee, Wisconsin, this 31st day of October, 1975.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Marshall L. Gratz

Marshall L. Gratz, Examiner

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MILWAUKEE DISTRICT COUNCIL 48,
AFSCME, AFL-CIO, and NICK BALLAS,
STAFF REPRESENTATIVE,

Complainant,

vs.

CASE IV No. 19026
Ce-1608

PENFIELD CHILDREN'S CENTER,

Respondent.

AFFIDAVIT

STATE OF WISCONSIN)
) SS
MILWAUKEE COUNTY)

NICK BALLAS, being duly sworn, deposes and says:

1. I am Staff Representative for Milwaukee District Council 48, AFSCME, AFL-CIO, and in such capacity negotiates with, and administers the collective agreements of Penfield Children's Center. In carrying out these duties, I became familiar with or was a direct participant in the events related therein.

2. On or about November 20, 1975, at the final bargaining session of the Negotiating Committees for both parties at which meeting tentative agreement was reached, the question of the disposition of unfair labor practices which the Union had filed arose.

3. Stanley Jaspan, attorney for the employer and its chief negotiator, asserted that the agreement was contingent upon the withdrawal of the unfair labor practices.

4. I replied that the charges would be withdrawn with the understanding that the employer's conduct which had lead to them -- its efforts to discourage the employees from supporting the union, its discrimination against the Union supporters, and the like -- would cease and a new relationship between the parties would be established.

5. I further stated that I would accept Mr. Jaspan's assurances that things would be "squared away" with this agreement and that past conduct would not be repeated.

6. Neither Mr. Jaspan nor any other management person at the bargaining table asserted my understanding was incorrect; on the contrary, Mr. Jaspan asserted that the collective agreement would create a new framework; a structured situation so that differences that had occurred would not be repeated.

7. It was solely on the basis of these assurances that I orally agreed to the withdrawal of the charges and not refile them.

8. Despite Mr. Jaspan's belief the employer would cease its anti-union activities, and the assurances he gave on the basis of this belief in the presence of his principals -- I subsequently learned that this was never the employer's intention to cease its anti-union activities.

9. During the period from November 20 to 26, 1974, I received reports from employees that agents of the employer continued to engage in actions hostile to the Union. However, when I told John Osterkorn, the Executive Director of the Employer, of these reports, he told me either that the reports were inaccurate or that he had taken steps to correct them.

10. Neither he nor Mr. Osterkorn asserted the conduct reported was consistent with the employer's commitment which formed the basis for the withdrawal of the unfair labor practice charges and both informed me they would take steps to stop such conduct if the reports from the employees proved accurate.

11. On the basis of these further assurances, the Union signed the agreement on November 26, 1974.

12. Though the reports I received from the employees generally proved accurate, the employer not only did nothing to correct the conduct but intensified its anti-union efforts, thereby making clear that the assurances it authorized its attorney to make were assurances it never intended to comply with but rather were given to mislead the Union in withdrawing its unfair labor charges. In fact, after November 26, 1974, the Employer, apparently now feeling safe, further intensified its anti-union conduct.

13. By these actions and the actions set forth in the complaint, the Employer frustrated the purpose of agreement to create a new relationship between it and the Union and violated its promises to refrain from anti-union conduct.

14. This Affidavit is submitted in opposition to the Employer's Motion for Summary Judgment.

Dated at Milwaukee, Wisconsin this 25th day of June, 1975.

Nick Ballas

Nick Ballas

Subscribed and sworn to before me
this 25th day of June, 1975.

Notary Public, Milwaukee County, Wisconsin

My commission expires: November 21, 1976.