STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

BLOYCE JOHNSON and HORICON EDUCATION ASSOCIATION,

Petitioners,

vs.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION and JOINT SCHOOL DISTRICT NO. 10, CITY OF HORICON, et al; and BOARD OF EDUCATION OF JOINT SCHOOL DISTRICT NO. 10 CITY OF HORICON, et al.,

Respondents.

MEMORANDUM DECISION

Case No. 161-363

Decision No. 13765-B

BEFORE: HON. GEORGE R. CURRIE, Reserve Circuit Judge

This is a proceeding by petitioners Johnson and Horicon Education Association (hereafter the Association) under ch. 227, Stats., to review the decision and order of the Wisconsin Employment Relations Commission (hereafter the Commission) dated January 23, 1978. The Commission's decision reversed the examiner's decision and held inter alia that the respondent school district's non-renewal of petitioner Johnson for the school year 1975-76 did not violate the "just cause" provision or any other provision of the 1974-75 collective bargaining agreement between the Association and respondent school district, and therefore the respondent school district did not commit any prohibited practice in violation of sec. 111.70(3)(a)1 and 5, Stats., of the Municipal Employment Relations Act (MERA).

STATEMENT OF FACTS

Petitioner Johnson was employed as a band director and music teacher by the defendant from 1971 to 1975. By letter dated February 19, 1975 the school district informed Johnson that it was considering nonrenewing his individual teaching contract for the 1975-76 school year and that if he filed a request within 5 days he hada right to a private conference with defendant, Board of Education. Johnson timely requested a private conference and such conference was held on March 4, 1975, regarding Johnson's proposed nonrenewal. On March 8, 1975, Johnson was informed that his contract would be nonrenewed for the ensuing 1975-76 school year. No reasons were given for the Board's action.

Petitioner Association is the exclusive bargaining representative for Johnson and other teachers employed by defendant. Petitioner Association and defendant entered into a formally executed bargaining agreement beginning with the 1968-69 school year and executed successive agreements in years following. Each bargaining agreement contained a "Management Rights" clause, the language of which is hereinafter set forth. The interpretation of this clause forms the basis of the dispute in the instant proceeding.

Pursuant to a prohibited practice complaint filed by petitioners, a hearing was held on September 25 and 26, 1975, before Examiner Greco. On June 23, 1976, the examiner issued his findings of fact, conclusions of law and order. The examiner concluded that defendant's nonrenewal of Johnson violated the contractual just cause requirement and, therefore the school district had violated Section 111.70(3)(a)1 and 5 of MERA.

Timely petitions for commission review were filed and on January 23, 1978 Amended Findings of Fact, Revised Conclusions of Law and Order were issued. A majority of the three member commission (with one dissent) reversed the examiner and found that no violation of the Act had been committed by the school district relative to the nonrenewal of Johnson.

In order to ascertain themeaning of the disputed provision of the contract and aid in the interpretation of its language, both the examiner and commission found the admission of parole evidence proper. The disagreement in interpretation of the disputed "just cause" provision between that made by the examiner and the commission was whether it embraced non-renewals of teacher employment contracts.

THE DISPUTED CONTRACT PROVISION

Article III, Management Rights Clause:

> "Nothing in this Article shall interfere with the right of the employer, in accordance with applicable law, rules and regulations to:
>
> (1) Carry out the statutory mandate and goals assigned to the school district utilizing personnel, methods and means in the most appropriate and efficient manner possible.
>
> (2) Manage the employees of the school district; to hire, promote, transfer, assign or retain employees in positions within the school district and in that regard to establish reasonable work rules.
>
> (3) Suspend, demote, discharge or take other appropriate disciplinary action against the employee for just cause; or to lay off employees in the event of lack of work or funds or under conditions where continuation of such work would be inefficient and non-productive.
>
> (4) Subject to provisions and conditions of this agreement." (Emphasis supplied)

THE ISSUE

While each of the three briefs submitted phrase the issue to be resolved differently, the court deems it to be:

> Should this court set aside the Commission's determination that the non-renewal of petitioner Johnson's contract for the school year 1975-1976 did not violate the "just cause" provision of the collective bargaining contract which is contained in Article III, paragraph (3), thereof?

THE COURT'S DECISION

The issue in the instant case is whether the Commission was correct in its construction and application of a provision of the collective bargaining agreement. The construction of a collective bargaining agreement is a conclusion of law. Tecumseh Products Co. v. Wisconsin E.R. Board, 23 Wis. 2d 118, 129, 126 N.W. 2d 520 (1964). In Tecumseh, the court stated at 129 that:

> ". . . If the board's construction of the agreement is reasonable, this court will sustain the board's view, even though an alternative view may be equally reasonable . . . . The reasonableness of the board's determination will be assessed not only from the point of view of the express criteria for judgment set forth in the agreement, but, because the express standards of the agreement are often purposefully general and indeterminate, the board's determination must also be evaluated in terms of the 'common law of the shop'--general practices and principles of industrial relations which are a part of the context in which every collective agreement is negotiated, although not expressed in the contract as criteria for judgment."

Although this court is not bound by the Commission's conclusions of law, Milwaukee v. WERC, 71 Wis. 2d 709, 714, 239 N.W. 2d 63 (1976), where:

". . . The WERC's determination is neither without reason nor inconsistent with the purposes of the statute, [and] since that is the ultimate test . . . the determination of the WERC will be affirmed." Milwaukee v. Wisconsin Employment Relations Comm., 43 Wis. 2d 596, 602, 168 N.W. 2d 809 (1969).

Moreover, the court must accord due weight to the "experience, technical competence, and specialized knowledge of the agency involved, as well as discretionary authority conferred upon it." Section 227.20(10), Stats.; Muskego-Norway C.S.J.S.D. No. 9 v. W.E.R.B., 35 Wis. 2d 540, 562, 151 N.W. 2d 617 (1967).

The construction of a collective bargaining agreement is to be distinguished from cases of first impression involving either the interpretation of a statute or the application of that statute to a particular set of facts. In such cases the court is not bound by the Commission's interpretation of the statute where the Commission has limited experience with the issues involved even though such interpretation would have "great bearing" and would be accorded "due weight" in the court's determination as to what the appropriate interpretation should be. Beloit Education Assoc. v. WERC, 73 Wis. 2d 43, 67-68, 242 N.W. 2d 731 (1976); Unified S.D. No. 1 of Racine County v. WERC, 81 Wis. 2d 89, 93, 259 N.W. 2d 724 (1977).

Thus, in the instant case, since the issues are not of first impression, the petitioners must show that the Commission's construction of the contract in view of applicable law is either without reason or inconsistent with the purposes of law.

On judicial review under sec. 111.07(8) and ch. 227, Stats., the Commission's findings of fact are conclusive if supported by substantial evidence in view of the entire record. Chicago, M. St. P. & P. RR. Co. v. ILHR Dept., 62 Wis. 2d 392, 396, 215 N.W. 2d 443 (1974). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Copland v. Department of Taxation, 16 Wis. 2d 543, 554, 114 N.W. 2d 858 (1962); see also Stacy v. Ashland County Dept. of Public Welfare, 39 Wis. 2d 595, 603, 159 N.W. 2d 630 (1968); Robertson Transport Co. v. Public Serv. Comm., 39 Wis. 2d 653, 658, 159 N.W. 2d 636 (1968).

The weight and credibility of the evidence, and the inferences which may be drawn from it, are matters for the Commission to determine. St. Francis Hospital v. Wisconsin E.R. Board, 8 Wis. 2d 308, 318, 98 N.W. 2d 909 (1949). When more than one inference reasonably can be drawn, the finding of the Commission is conclusive. Pabst v. Department of Taxation, 19 Wis. 2d 313, 322, 120 N.W. 2d 77 (1963).

A reviewing court may not make an independent determination of the facts, Hixon v. Public Service Comm., 32 Wis. 2d 608, 629 146 N.W. 2d 577 (1966), nor may it substitute its judgment for that of the Commission. St. Joseph's Hospital v. Wisconsin E.R. Board, 264 Wis. 396, 402, 59 N.W. 2d 488 (1953). Moreover, due weight must be accorded the experience, specialized knowledge and discretionary authority of the Commission. Section 227.20(10), Stats.; Muskego-Norway C.S.J.S.D. No. 9 v. W.E.R.B., supra.

Petitioners contend that in reversing the hearing examiner's determination, the Commission misapplied its own rule that examiner findings are to be affirmed if "established by the clear and satisfactory preponderance of the evidence." Wis. Adm. Code ERB 12.09(2)(a). They contend that the examiner had an opportunity to observe the demeanor of the witnesses, that the evidence supporting the examiner's decision was "sufficient to warrant affirmation," and that the examiner's decision should not have been set aside by the Commission.

The Commission clearly has authority to "either affirm, reverse, set aside or modify . . . [examiner] findings or order, in whole or in part." Secs. 111.07(5) and 11.70(4)(a), Stats. As the court pointed out in Indianhead Truck Lines v. Industrial Comm., 17 Wis. 2d 562, 567, 117 N.W. 2d 679 (1962):

". . . The ultimate responsibility for findings is upon the commission itself . . . .

"'The Commission in reviewing findings and order of an examiner does not act as an appellate body but under its powers in an original proceeding. The commission is to make its own determination.'"

It is true, however, that when the Commission reverses an examiner and substitutes its own determination, the Commission must consult with the examiner concerning his or her impressions ofwitness credibility, and must set forth in a memorandum opinion its reasons for reversing the examiner. Appleton v. ILHR Department, 67 Wis. 2d 162, 172, 226 N.W. 2d 497 (1975). There is no dispute in the instant action that the Commission both consulted with the examiner and fully explained its reasons for reversing the examiner.

In reviewing an examiner's decision for purposes of reaching its own decision, the Commission applies the preponderance of the evidence and not the substantial evidence test. Unlike this court sitting in judicial review, the Commission is required to determine the weight and credibility of the evidence, to choose between competing reasonable inferences, and to reach an independent determination of the facts. In short, the Commission need not afford the same degree of latitude to examiner decisions which this court must afford to Commission decisions under the substantial evidence test.

With these principles in mind the court will now examine the relevant evidence to determine whether the Commission violated the preponderance of the evidence test in reversing the examiner; and whether there is substantial evidence in the record to support the pertinent finding of fact made by the Commission. This finding of fact reads:

> ". . . thatduring the negotiations leading to the 1969-1971 collective bargaining agreement, representatives of the Association and the representatives of the District did not reach an understanding that the "just cause" provision covered the non-renewal of teachers."

The chief spokesman of the Association's representatives who negotiated the 1969-1971 collective bargaining contract was Earl Ritter, a teacher employed by the school district. The negotiating representatives of the school district were four school board members: Paul Gysbers, Elmer Rehse, Lloyd Wagener and Mary Sullivan. of whom Gybers was the chief spokesman. It is undisputed that the language of Article III, paragraph 3, was contained in an Association proposal.

The examiner reviewed the testimony of various witnesses and concluded that the school district, in the negotiations leading to the collective bargaining agreement involved in the instant case, agreed that non-renewal would be subject to the "just cause" provision. In reviewing the entire record, the majority of the Commission concluded that such an intent was not agreed upon by the parties. It was the Commission's determination that the examiner's conclusion was not supported by a preponderance of the evidence.

The Commission agreed with the examiner that there was some evidence or some discussion concerning non-renewal but that the testimony of Paul Gysbers and Earl Ritter, were directed more toward the provision as written, specifically referring to "suspend, demote, discharge" rather than being directed toward the questions of whether agreement had been reached that all non-renewals would fall within the scope and meaning of the provision. The language, of course, does not specifically refer to non-renewals.

Gysbers testified as follows when questioned in response to why the word "non-renewal" was not specifically included in the provision: "I would say because we had decided and so on it would cover the same thing. I think probably in my argument it means the same thing." (Tr. 40). Gysbers also testified that "I cannot say that they said the word 'nonrenewal' to include this as a statement, but I believe we inferred it when we turned around and talked about it between the two of us." (Tr. 39)

Ritter testified that the word "nonrenewal" was used in their conversation, but when questioned as to specifics, he testified as follows: "That nonrenewal--you see, can I just make a few things straight? Nonrenewal was just taken for granted, that if you didn't receive a contract it was a nonrenewal and we talked about that as part of the--what if the teacher doesn't get a contract, you know, and the reasons are not given? He's just laid off. What kind of security do we have? We talked back and forth that way. I don't think I can be any more specific than that." (Tr. 51)

When questioned with regard to the Board's consideration of non-renewal, Ritter testified as follows: "There was no question on their part. They understood the same--at least the impression was that they had the same meaning for the term as we did. As I said before, Mrs. Sullivan probably was the only one that wanted to know why the Administration didn't have the right to fire or discharge or whatever term you want to use." (Tr. 51)

The Commission found significatn the fact that the testimony of neither Gysbers nor Ritter, nor of any other witness, established that the parties reached the understanding that non-renewals would be considered discharges within the meaning of the Association's proposed just cause language. The Commission noted that in regard to whether such an agreement was reached, Gysbers testified that "I think probably in my argument it means the same thing . . . ." (Emphasis added) and that "I believe we inferred it . . . ." Emphasis added). Ritter's testimony was similarly vague as far as establishing an agreement concerning non-renewal in that he stated "nonrenewal was just taken for granted . . ." (Emphasis added), and that "they [the Board's team] understood the same--at least the impression was that they had the same meaning . . . " (Emphasis added).

Further, the Commission found that the parties did not reach a meeting of the minds regarding the construction of the contract language advocated by petitioners. The Commission's finding is supported in part by the following testimony of Gysbers and Ritter. Gysbers testified as follows:

"Q Well, let me ask you did the Board's team--we're talking about the team--did they ever specifically say on behalf of the Board that the just cause covered nonrenewal?

A As the team I do not think they all decided, no.

Q Is it fair to say that although that was your interpretation, that the Board itself did not communicate that back to the Association? Is that accurate?

A I could not say the Board interpreted that to the Association, but when I was speaking, I do not think they questioned it." (Tr. 41-42) Emphasis added.)

Ritter's testimony was as follows:

"Q . . . Do you specifically recall anyone on behalf of the Board saying yes, just cause covers nonrenewal or failure to give a contract for a subsequent year? Do you remember anyone specifically saying that?

A Most of the time it was done by Paul [Gysbers] and I, and I believe Paul did talk about--that a nonrenewal--I don't recall the term nonrenewal being--coming up as often as you're asking. We did talk about teachers not receiving a contract.

Q What specifically did you say about teachers not receiving a contract?

A That if that happens and they have to be given a reason why they did not receive a contract.

Q And, what specifically did he or anyone else of the Board negotiators say?

A Paul agreed to the same, as I just said, and we did talk about--that it would have to be done in writing. (Tr. 51-52)

* * *

Q Who said it?

A Paul said it.

Q What did he say?

A That if there is a just cause to that the person has been not given a contract, that the reasons for the person not receiving a contract should be written out and the person should be able to see them. (Tr. 53)

* * *

Q . . . What was the context in which he said that?

A In trying to get across the idea--to another member of the Board that teachers had to have some rights that they had--that if a person was to be discharged that they had to have some reasons, the School Board had to have some reasons for doing it and so it wouldn't be anything just up in the air at the will of some member of the Administration to fire a teacher or to discharge a teacher. (Tr. 53-54)

* * *

Q All right. Now, tell me again what he [Gysbers] said to Mrs. Sullivan.

A That the teachers had to have some security and that <u>if a teacher was to be fired or discharged, then the reasons for that discharge should be down in writing</u>." (Tr. 54) (Emphasis supplied.)

Petitioner's brief quotes this portion of the testimony of Gysbers:

"Q You indicated in response to a question that the negotiator for the teachers used the term '<u>nonrenewal</u>'? (Emphasis added)

A Right.

Q And, it was--and, you--at that point I believe the opposing counsel cut you off and you were not allowed to finish. Would you like to finish the conversation that took place at that time?

A All right. I believe at that time that I told him as far as I was concerned any employee was entitled to the full knowledge of why he was <u>not being renewed</u> and I figured just cause was the same in the case of a disciplinary as it was in the <u>renewal</u>, that the person should know. (Emphasis added)

Q So, it was your understanding that the just cause standard you were negotiating into the contract covered nonrenewal situations?

A Yes." (Tr. 37)

However, this only tends to show Gysber's understanding and not the understanding of the school board negotiating team as a whole.

Rehse testified that he could not recall the word "nonrenewal" having been specifically discussed in the negotiations, and, if it had been, he would not have agreed to putting it in the contract.

The testimony of Wagener, as elicited by the examiner, establishes that some members of the school district's bargaining team were opposed to granting a "just cause" standard for any form of discipline. In that regard, Wagener testified as follows:

"Q Now going back to the '68-'69 negotiations, did the parties have any discussion over what the phrase meant, 'or take other appropriate disciplinary action against the employe for just cause?'

A None.

Q No discussion at all?

A Well, there was a little discussion but nothing big or anything.

Q Well, what was the extent of the discussion that was had?

A Well, when the HEA presented it, we took it under advisement. We didn't approve it right away. We took it under advisement and discussed it among ourselves and we came back, and among ourselves the discussion--not with the HEA negotiating team--strictly among the Board members.

Q What was the discussion?

A Well, one or two of the Board members felt it should come out and after considerable discussion it was agreed among the four Board members that we would let it in there.

Q Why did they want it out, the ones that wanted it out?

A Oh, for several reasons. First, they didn't think it was good for the Board and they thought it might be hard to implement and everything. And, after discussion by Mr. Gysbers and myself, the other two--we convinced the other two that it wouldn't hurt to leave it there.

Q Well, what were the other two-why did they not want it in there?

A Well, like I said, Mrs. Sullivan felt that it might jeopardize the Board's position on teachers and Mr. Rehse felt the same way at that time. But, after considerable discussion on Mr. Gysbers' part and my part we convinced them that they should have just cause to show why they're going to be discharged, demoted or other disciplinary action." (Emphasis added.) (Tr. 220-221)

The court determines that from all of the above cited testimony the Commission could reasonably conclude as it did in its memorandum accompanying the decision (at page 8 thereof):

> "It is significant that neither Gysbers nor Ritter, nor [the testimony] of any other witness, establishes that the parties reached the understanding that non-renewals would be considered discharges within the meaning of the Association's proposed just cause language . . .
>
> Based on the above, the Commission concludes that the parties' discussion centered over the words appearing in the Association's proposal, i.e., suspend, demote, and discharge, and non non-renewal, and thatRitter and the Association assumed the Board was interpreting or defining the word "discharge" to include non-renewal. The Commission is further persuaded . . . that a meeting of the minds between the parties was not reached that the provision covered non-renewals."

In upholding the reasonableness of these conclusions the Court has considered not only the testimony which has hereinbefore been rather extensively set forth, but also the fact that "non-renewal" as applied to teacher contracts is a word of art which normally is not to be equated with discharge. The Supreme Court in Richards v.

Board of Education, 58 Wis. 2d 444, 206 N.W. 2d 597 (1973) held that nonrenewal of a teacher's contract did not constitute a "dismissal" within the language of the collective bargaining agreement. In the later case of Hortonville Education Association v. Joint School District No. 1, 66 Wis. 2d 469, 481, 225 N.W. 2d 658 (1975), reversed on other grounds, 426 U.S. 482, 96 S. Ct. 2308, 49 L.Ed. 2d 1, the Supreme Court cited the Richards case as holding "that the term 'dismiss' means to remove from employment and not to merely to refuse to renew a contract." If this is true of the word "dismiss" it is equally true of the word "discharge".

Because a reasonable basis existed for the crucial findings of fact and conclusions of the Commission the court must affirm the Commission's decision.

The court does not deem it is called upon to determine whether the Association and the school district representatives in their negotiations did reach a common understanding that a disciplinary non-renewal of a teacher contract would be covered by Article III, paragraph 3, of the collective bargaining contract. Petitioner Johnson was represented by counsel at the hearing and the issue tried before the examiner was whether this language of the collective bargaining contract covered all non-renewals. No evidence was presented to indicate that the non-renewal of Johnson's teacher's contract was for disciplinary purposes. The record is silent as to why his contract was not renewed. On the record presented before the Commission there would be no basis for the Court to remand the matter to the Commission for the purpose of having it make findings of fact on the issues of whether the non-renewal of JOhnson's contract was for disciplinary purposes, and, if so, whether there had been a meeting of minds of the negotiations for the Association and the school district that Article III, paragraph 3, of the collective bargaining contract covered a disciplinary non-renewal.

Let judgment be entered affirming the decision and order of the Commission which is the subject of this review.

Dated this 20th day of November, 1978.

By the Court:

George R. Currie /s/
Reserve Circuit Judge

STATE OF WISCONSIN | CIRCUIT COURT | DANE COUNTY

BLOYCE JOHNSON and HORICON EDUCATION ASSOCIATION,

Petitioners,

vs.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION and JOINT SCHOOL DISTRICT NO. 10, CITY OF HORICON, et al; and BOARD OF EDUCATION OF JOINT SCHOOL DISTRICT NO. 10 CITY OF HORICON, et al.,

Respondents.

JUDGMENT

Case No. 161-363

Decision No. 13765-B

BEFORE: HON. GEORGE R. CURRIE, Reserve Circuit Judge

The above entitled review proceeding having been heard by the Court on the 6th day of November, 1978, at the City-County Building in the city of Madison; and the petitioners having appeared by Attorney Wayne Schwartzman; and the respondent Commission having appeared by Assistant Attorney General John D. Neimisto; and the respondent School District having appeared by Attorney Frank D. Woodworth; and the Court having had the benefit of the argument and briefs of counsel, and having filed its Memorandum Decision wherein Judgment is directed to be entered as herein provided;

It is Ordered and Adjudged that the Decision and Order of the respondent Wisconsin Employment Relations Commission dated January 23, 1978, entered in the matter of Bloyce Johnson and Horicon Education Association, Complainants, vs. Joint School District No. 10 City of Horicon, et al.; and Board of Education of Joint School District No. 10 City of Horicon, et al., Respondents, be, and the same hereby is, affirmed.

Dated this 20th day of November, 1978.

By the Court:

George R. Currie /s/
Reserve Circuit Judge