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WISCONSIN EMPLOYMENT
RELATIONS COMMISSION

COURT OF APPEALS
DECISION
DATED AND RELEASED

JUL 12 1982

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals pursuant to s. 808.10 within 30 days hereof, pursuant to Rule 809.62 (1).

NOTICE

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FILED

JUL 12 1982

CLERK OF COURT OF APPEALS
OF WISCONSIN

No. 81-1877

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT IV

AMERICAN FEDERATION OF STATE, COUNTY
AND MUNICIPAL EMPLOYEES, COUNCIL 24,
WISCONSIN STATE EMPLOYEES UNION,
AFL-CIO (all locals),

Petitioner-Appellant,

v.

WISCONSIN EMPLOYMENT RELATIONS
COMMISSION,

Respondent.

Decision No.
15759-B

APPEAL from an order and a judgment of the circuit
court for Dane county: WILLIAM F. EICH, Judge. Affirmed.

Before Gartzke, P.J., Bablitch and Dykman, JJ.

PER CURIAM. The union appeals from an order and judgment of the circuit court affirming an order of the Wisconsin Employment Relations Commission on the state's complaint that the union committed an unfair labor practice by violating the terms of two collective bargaining agreements.¹ The alleged violation was the union's failure to reimburse the state for wages paid to union employees for

time spent in negotiating the agreements. The commission found that the union had committed an unfair labor practice under sec. 111.84(2)(d), Stats., and ordered the union to pay the State of Wisconsin \$38,348.76. The circuit court affirmed the order. We affirm the judgment and order of the circuit court.

The state and the union were parties to two agreements covering different bargaining units from September 14, 1975, to June 30, 1977. Article II, sec. 13 of each 1975-77 agreement, entitled "Loss of Benefits," provided:

Employees shall receive their regular rate of pay for the first 174 hours of time spent per calendar year in authorized Union activities contained in Article II, Section 5 (Union Conventions, Educational Classes and Bargaining Unit Conferences) and Section 8 (Attendance at Local Union Meetings).

Employees shall receive their regular rate of pay for time spent in authorized Union activities contained in Article II, Section 12 (Executive Board of Council 24) and for contract negotiation meetings with the Employer (24-designated members of the Union's bargaining team).

The Union shall reimburse the Employer for the total costs involved provided the Employee does not charge such time to vacation, holiday credits, or compensatory time credits.

Under other provisions of the agreements, employees were not entitled to state wages for time spent on union activities covered by art. II, sec. 13. Employees were normally paid by the union for those activities. Article II, sec. 13 was inserted in both agreements because of the union's concern that union members who spent time in negotiating the 1975-77 contracts would lose credit for state pension rights and fringe benefits, such as sick leave and vacation. Although the parties disagree as to the manner of payment, both agree (and the commission found) that the agreement was to achieve a "wash" by being paid their wages. The employees would not lose pension and fringe benefits through participation in negotiations, and the union would reimburse the state for wages paid to those employees.

The state paid approximately \$92,000 in wages to employees pursuant to art. II, sec. 13. The payments were made directly to employees by payroll checks. In his letter to the secretary of the Department of Administration dated December 18, 1975, Tom King, the executive director of the union, conceded that the amounts paid to the employees must be repaid by the union, and assured the state that the amount would be "repaid at the earliest possible time --

desirably within a two-week period or less, depending on mail service." In his letter of March 3, 1976, King said the union would not pay \$80,000 to the state at that time because of a dispute regarding the amount and manner of payment. The union requested and received additional information from the state. The union and local bargaining units made various payments to the state in 1976 and 1977.

August 17, 1977, the state filed a complaint with the commission, alleging the union unfairly failed fully to reimburse the state pursuant to art. II, sec. 13. A hearing was held. The examiner issued findings, conclusions and an order concluding that the union had committed an unfair labor practice under sec. 111.84(2)(d), Stats. Among other things, the examiner found:

4. The State agreed to said language in part in order to alleviate Council 24's concern that senior employees near retirement would have their pension adversely affected if said employees were not paid by the State for the time they spent on negotiations. In addition, Council 24 sought said provision so that its members who spent time on negotiations would continue to receive fringe benefits such as sick leave, retirement and vacation; and that the parties' intent in agreeing to Article

II, Section 13 was to hold employes harmless from loss of such benefits for participating in covered Union activities and to hold the State harmless for the costs of providing such benefits. Because the accrual of employee retirement benefits could only be preserved by keeping employes on the State payroll when they were engaged in covered activities, the reimbursement arrangement was orally agreed upon in lieu of a bookkeeping transaction which the parties originally contemplated.

5. At some undetermined date prior to the execution of the 1975-77 contracts, King and James Wood, then Deputy Secretary, Department of Administration, orally agreed that State employes who participated in the negotiations leading up to the 1975-77 contracts were to be granted the same rights as those later agreed to under Article II, Section 13, even though their negotiating activity occurred prior to the execution of the 1975-77 contracts. However, the parties did not agree during negotiations on a time frame under which the Union would reimburse the state for its payment for these covered activities.

6. That the parties agreed that the Union would also pay the State eighteen percent of the gross salary paid to employes for covered activities in order to cover the State's costs for social security and other fringe benefits and the employee's contributions into their retirement account.

7. That the Union supplied the State with information on the number of hours spent by its bargaining committee members in negotiations and there appears to be no dispute as to the accuracy of this information.

8. That the parties agreed that Council 24 would reimburse the State for its payments to employes who participated

in the negotiations which led up to the 1975-77 contracts; and that with respect to other covered activities, although it was understood that local unions affiliated with Council 24 could (and in fact did) directly reimburse the State for their membership's covered activities; the Union, i.e. Council 24, assumed the ultimate responsibility, pursuant to the terms of Article II, Section 13 to reimburse the State for the payment to employees for such covered activities in the event its affiliated local unions did not reimburse the State in the proper amount.

The commission affirmed the examiner's findings and issued enlarged conclusions of law and an amended order. The commission disagreed with the examiner's suggestion that the parties entered a separate enforceable oral agreement for repayment. The commission found that the state's payments to employees for time spent in negotiations leading up to the 1975-77 agreements were made after the written agreements became effective and pursuant to those agreements. The commission amended the examiner's conclusions to reflect the exact amount owed by the union, \$38,348.76. The circuit court confirmed the commission's order.

The union having sought relief under ch. 227, Stats., the scope of this court's review is identical to that of the circuit court. Boynton Cab Co. v. ILHR Department,

96 Wis.2d 396, 405, 291 N.W.2d 850, 855 (1980). We paraphrase the Boynton court's elaboration on the scope of review as follows: Findings of fact by the commission shall be set aside if not supported by substantial evidence in the record. Sec. 227.20(6). Questions of law, including construction, interpretation, or application of a statute, are reviewable ab initio. Sec. 227.20(5). Although due weight must be accorded the experience, technical competence and specialized knowledge of the agency, no special deference is required when this court is as competent as the agency to decide the legal question involved.

The commission's decision turns largely on its construction of the labor agreements. We employ a restricted review of the commission's construction of a labor agreement. If that construction is reasonable, it will be sustained on review, "even though an alternative view may be equally reasonable." Board of Ed., Brown Deer Schools v. WERC, 86 Wis.2d 201, 210, 271 N.W.2d 662, 666 (1978), quoting from Tecumseh Products Co. v. Wisconsin Employment Relations Board, 23 Wis.2d 118, 129, 126 N.W.2d 520, 525 (1964).

The union contends a separate oral agreement was entered for repayment of costs incurred before the agreements

became effective, September 14, 1975, and that art. II, sec. 13 is not applicable to those costs. A large portion of the benefits paid to employees was for time spent negotiating contracts before September 14, 1975. According to the union, the agreements cannot be construed to apply to a time period before the effective date of the contract. In the same vein, the union argues that, because the separate agreement was oral, it is unenforceable in an unfair labor practice action.

In its discussion of the union's petition for review of the examiner's findings, conclusions and order, the commission made the following mixed finding of law and fact:

It is perfectly clear from the record evidence that all payments made by the State and reimbursements made by Council 24 to the State were made pursuant to Article II, Section 13 of the collective bargaining agreements, which section was clearly understood, by agreement of the parties, to apply to negotiations leading up to the 1975-1977 collective bargaining agreements.

In spite of testimony regarding the separate oral agreement, the state's letters to the union refer to the

amounts due under the written contracts. No letter by either party refers to a separate oral agreement. Paragraph three of art. II sec. 13, refers to "total costs involved." The commission's finding quoted above, to the extent it is factual, is supported by substantial evidence in the record. It therefore must be sustained. Sec. 227.20(6), Stats. The commission's construction of the agreement based upon these facts is reasonable and therefore must be sustained. Brown Deer Schools, supra. Because of our holding on this issue, we need not review the union's arguments regarding a separate oral agreement, and the contention that the agreements are not retroactive.

The union contends that the provisions of art. II, sec. 13 are void for vagueness. It maintains that all ambiguities should be construed against the state because the provision was drafted by the state. Some evidence indicates that the provision was drafted by the state. Other evidence indicates it is the product of a joint effort by the parties. Which party drew the agreement is not critical. As an original matter, the action of the parties shows that the contract provisions were intended by them to apply to the entire negotiation period. King's letter of

December 18, 1975 and the Union's payments to the state support that construction. 'A court should not substitute its judgment for the parties' practical interpretation of contractual language. Cutler-Hammer, Inc. v. Industrial Commission, 13 Wis.2d 618, 634, 109 N.W.2d 468, 475-76 (1961). The commission appears to have employed the same principle. We have already concluded that the commission's construction of the agreement in this respect was reasonable. We therefore must sustain it. Brown Deer Schools, supra.

The union argues that the state breached the agreement first and thus the union was not obligated to perform. This argument is based upon the union's contention that the state was to pay the monies to the bargaining committees. According to the union, payment directly to the employees was a breach of the agreement. Article II, sec. 13, however, does not specify how the payments were to be made. The commission concluded that all payments made by the state were made pursuant to the agreements, impliedly rejecting the union's contention that the state violated the agreements. Because we have sustained that conclusion, the union's contention on this point fails.

The union claims that it fulfilled its obligations, its remaining obligation was forgiven by the express terms of the agreements, and its obligation to reimburse was excused in the bargaining process for subsequent agreements. The first part of this argument relies on the union's position that it was required to act only as a conduit, i.e., it was not directly liable and was only required to reimburse monies which it received. Because we have held that the commission's contrary construction of the agreements is reasonable, the argument fails.

To support the second part of its argument, the union relies upon the "Termination of Agreement" clause in the 1973-75 and 1975-77 agreements which provides that on termination of the contract, all obligations are automatically cancelled, except grievances being processed. The contention has no merit. The 1975-77 agreements were extended. The state's complaint was filed before the 1975-77 agreements expired.²

The union's argument that its obligation was excused is based on the state's demand for payment of about \$40,000 as a condition to bargaining in the spring of 1977.

The union contends that the state waived the obligation when it nevertheless executed new agreements in 1977 without payment of the \$40,000. The commission adopted the examiner's rationale in his memorandum. The examiner characterized King's testimony as an admission that the state in its negotiations never said that the union's debt was to be forgiven. The state's bargaining representative, Phillips, testified that removal of the condition did not remove the union's liability, and that he never proposed or agreed to compromise or forgive that liability. King testified that Phillips did not say that the \$40,000 was forgiven. The state continually asserted its claim before and after the execution of the 1977 agreements. The examiner's finding, adopted by the commission, that the obligation was not excused through collective bargaining is supported by substantial evidence in the record.

The union maintains that the state's claim cannot be enforced in an unfair labor practice action for contractual and statutory procedural reasons.

The union contends that the agreements require that disputes be resolved by grievances and arbitration.

The state did not institute grievance or arbitration proceedings. The commission concluded that the state had no contractual right to file a grievance. This construction is reasonable. The grievance provisions in the agreements describe only how a grievance is presented by an employee or by the union. No provision is made for the state to file a grievance. Because the commission's construction of the agreements is reasonable, it must be accepted. Brown Deer Schools, supra.

The commission found that the agreements do not permit or require the state to utilize arbitration to determine whether the union has violated a provision of the agreements. This construction is reasonable. The grievance procedure includes an appeal to arbitration. If the state has no right to file a grievance, then the state has no right to appeal to arbitration except as to a grievance filed by an employee or the union. Again, the commission's construction of the agreements being reasonable, we must accept it. Brown Deer Schools, supra.

The union points to step four in the grievance procedure by which "[g]rievances which have not been settled

under the foregoing procedure may be appealed to arbitration by either party" The union suggests that step four applies to grievances which have not been submitted under the grievance procedure. Step four is the last enumerated step. It is more reasonable to construe step four as the final step in the grievance procedure. It is unreasonable to suppose that the appeal provisions in step four convert the final step into a method by which either party may initiate a grievance. We cannot overturn the commission's reasonable construction in favor of an unreasonable construction. Brown Deer Schools, supra.

The union contends that an employer cannot file an unfair labor practice against a union under sec. 111.84, Stats. The union relies upon sec. 111.84(2) which prohibits an unfair labor practice by "an employe individually or in concert with others." Because subsec. (2) does not specifically refer to unfair practices by labor organizations, the union argues that unfair practices by labor organizations are not covered by the statute.

The commission concluded that sec. 111.84(2),

Stats., includes a labor organization because, in the commission's words, "labor organizations consist of employees acting in concert." We are not bound by the commission's reading of the statute. Boynton Cab, supra. We agree, however, with the commission's construction.

The union maintains that the action cannot be maintained because sec. 111.07(14), Stats., provides, "The 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." The union contends that because the state does not claim reimbursement for payments made after July 1, 1976, the amounts to be recovered were due on or before that date. The complaint was filed August 17, 1977. The commission concluded that it had jurisdiction because the complaint was filed within some seven months of the alleged unfair labor practices.

We accept the commission's conclusion that it had jurisdiction. King testified there was no time framework for reimbursement. The commission found that as late as October 6, 1976 King told the state that payment of the amount due the state would be made in several weeks after

the union received the final billing. The complaint was filed well within one year after it was clear that the union would not make further payments. The last payment was made in February 1977.

The union raises other arguments regarding the unenforceability of an oral agreement. We reject these contentions because we have accepted the commission's holding that the obligation to reimburse does not depend upon an oral agreement. The union in its statement of issues questions whether all the sums due and owing employees were paid. This issue has not been seriously discussed in the union's brief and thus has been waived.³ Reiman Associates v. R/A Advertising, 102 Wis.2d 305, 306 n. 1, 306 N.W.2d 292, 294 (Ct.App. 1981).

Because the commission's construction of the agreements is reasonable and its factual findings are supported by substantial evidence in the record, we affirm the order and judgment of the circuit court.

By the Court.--Order and judgment affirmed.

Inclusion in the official reports is not recommended.

APPENDIX

¹ The union is the American Federation of State, County and Municipal Employees, Council 24, Wisconsin State Employees Union, AFL-CIO (all locals).

² The 1975-77 agreements were to expire June 30, 1977. July 18, 1977 the parties agreed that the terms and conditions of the 1975-77 agreements would continue until the effective date of new agreements. The new agreements became effective September 11, 1977. The unfair labor practice complaint was filed August 17, 1977.

³ Although there was a dispute as to the amount to be paid, it appears this matter was resolved in the interim between the issuance of the examiner's decision and the commission's order.