STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

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

Petitioner,

vs.

WISCONSIN EMPLOYMENT RELATIONS
COMMISSION,

Respondent.

MEMORANDUM DECISION

Case No. 80CV1470

Decision No. 15759-B

Petitioner, American Federation of State, County and Municipal Employees, Council 24, Wisconsin State Employees Union, AFL-CIO (all locals), seeks review of an order of the respondent Wisconsin Employment Relations Commission which found that the Union had committed, and was committing, an unfair labor practice within the meaning of sec. 111.84(2)(d), Stats., by violating the provisions of two collective bargaining agreements which had existed between the Union and the State. The Commission has counterpetitioned for enforcement of its order pursuant to sec. 111.07(7), Stats.

The State and the Union were parties to collective bargaining agreements covering two different bargaining units from September 14, 1975 through June 30, 1977. The provision at issue in these proceedings is contained in each agreement, and provides as follows:

> "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."

Several employees were involved in the negotiations of the two collective bargaining agreements. The Commission's hearing examiner stated in his Findings of Fact (which were affirmed by the Commission) that the evidence submitted at the hearing established that the intent of the parties in agreeing to this provision was to assuage the Union's concerns that employee participation in protected activities might adversely affect pension rights and fringe benefits such as sick leave and vacation. The Commission found that the agreement was to achieve a "wash" for both sides; that is, the employees were to be secured against loss of these benefits as a result of their participation in covered activities, and the State was to be reimbursed for the cost of providing the benefits. The Commission also found that sometime prior to the execution of the 1975-1977 contracts, James Wood (then Deputy Secretary of the Department of Administration) and Tom King (Executive Director of the Union) agreed that employees who participated in the negotiations for the contracts would be entitled to protection of the above-quoted language even though these activities took place before the contracts were executed. The Commission determined that the parties also agreed that the State's reimbursement would be in the form of payment by the Union of 18% of the gross salaries paid to the employees for covered activities.

By December 31, 1975, the State had paid all the employees who had participated in the negotiations for all time spent in those activities up to December 1st. Beginning December 18, 1975, numerous letters were exchanged between King and representatives of the State regarding reimbursement of approximately $92,000 claimed by the State pursuant to the contract provisions. Finally, in April, 1976, the Union sent the State a check for $10,000; another $10,000 followed in July of that year, and still another $8,100 in February, 1977. Additional payments totalling approximately $6,000 were received by the State from several local unions in the spring of 1977. It is the Union's failure to tender the remaining $38,348.76 that the Commission found constituted an unfair labor practice under sec. 111.84(2)(d), Stats.

The issue before the court is whether the Commission's construction and application of the collective bargaining agreements, specifically Art. II, sec. 13 (as quoted above), and its finding that the Union committed an unfair labor practice under sec. 111.84(2)(d), Stats., is reasonable and supported by substantial evidence. Tecumseh Products Co. v. Wisconsin E.R. Board, 23 Wis.2d 118, 126 N.W.2d 520 (1964). The applicable standard was set forth as follows in Board of Ed., Brown Deer Schools v. WERC, 86 Wis.2d 201, 210, 271 N.W.2d 662 (1978):

> ". . .this court has viewed as a question of law the application of a collective bargaining agreement to certain facts. The question on review is whether the Commission's construction was reasonable in light of the language of the instrument and its industrial context."

It also is clear that the court must accord due weight to the "expertise, technical competence and specialized knowledge of the agency involved as well as discretionary authority conferred upon it." Sec. 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). And, the findings of fact made by an administrative agency are conclusive if supported by substantial evidence in view of the entire record. Chicago M., St. P. & P. R.R. Co. v. ILHR Dept., 62 Wis.2d 392, 215 N.W.2d 443 (1974). The court's review is limited to the question of whether the evidence was such that the department might reasonably make the determination it did, State ex rel. Beierle v. Civil Service Comm., 41 Wis.2d 213, 217-218, 163 N.W.2d 606 (1969), and 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).

It is the Union's position that the Commission erred in concluding that it was still liable to the State, and several alternative arguments have been proffered in support of this position.

The Union's first argument is that the contract language is not applicable to the instant litigation, and it maintains (alternatively) that the language can only be applied to costs incurred during the contract period (September 14, 1975 to June 30, 1977); that any agreement as to expenses during the negotiating period was a separate oral agreement; that if the contract language is applicable, it is nonetheless overly vague and thus void; and, finally, that the State breached whatever contract provision may be applicable, thereby relieving the Union of any obligation to perform. The record does not support these contentions. The Commission had before it evidence giving rise to conflicting inferences. On one hand, King testified that he understood that all costs involving employee participation in contract negotiations prior to the contract's execution were covered by a separate oral agreement and not the language of the contract itself. On the other hand, written communications between the Union and the State repeatedly refer to the payments due under the contract; no mention is made of any "side" agreement. The Commission concluded that any oral agreement referred to was simply an agreement that the contract would apply to pre-contract negotiations; and, when more than one inference may be drawn from the evidence, the Commission's finding is conclusive. Pabst v. Department of Taxation, supra.

As indicated, the Union next argues that even if the contract language is applicable, it is unreasonably vague. The language in question, while hardly a model of clarity, does set forth the essential commitments and obligations of the parties. In addition, I note the many letters exchanged between the Union and State concerning repayment under the clause in question (including additional clarification and itemization) and also that between April, 1976, and February, 1977, the Union made three payments to the State totalling over $28,000. Given some ambiguity in the contract, the practical construction given to it by the parties is of great force and entitled to great weight, and under these circumstances the

court is bound to place the interpretation upon the terms of the contract which the parties have adopted. Cutler-Hammer, Inc. v. Industrial Comm., 13 Wis.2d 618, 109 N.W.2d 468 (1961). The parties' actions here make it clear that the contract provisions at issue were intended to apply to the negotiation period.

The Union next argues that the State itself breached the agreement, thereby rendering it unenforceable against the Union. The argument is that during negotiations the parties had agreed that the reimbursement procedure was to be only a "paper" transaction, and that the State's unilateral decision to issue payment to the employees through payroll checks, and then bill the Union for the costs, was a breach of the agreement. The Commission correctly dismissed this contention. First, although the parties had discussed the "paper transaction" reimbursement procedure, the contract language itself, as the Union concedes, was unclear as to the actual method of reimbursement. Second, the contract language specifically states that "[t]he Union shall reimburse the Employer" for the total costs involved. Third, and most important, the State's decision to use a different procedure to implement the plan did not change the effect of the contract; it was rather a means of ensuring that the purposes of the agreement would be effectuated. Indeed, the State adopted the procedure because it believed that ch. 41, Wis. Stats., required the issuance of paychecks in order for the employees to earn retirement credit. Moreover, when King was informed of this factor, he agreed to the procedure. The Union's contention that the contract language is not applicable to the instant litigation is without merit.

The Union argues next that even if the language is applicable to the instant dispute, all of its obligations under the contract have been met in that: (1) it has complied with the language; (2) any remaining obligations were foregiven by the express terms of the agreement; and (3) any obligation to reimburse the State was excused by the bargaining for subsequent collective bargaining agreements. As for the first contention, the Union claims that it has complied with the contract because under its terms it was to serve merely as a conduit, reimbursing the State for all monies turned over to it by employees. This argument finds no support in the contract language itself or in the testimony at hearing. As stated above, the contract clearly provides that the Union will reimburse the State "for the total costs involved," not just the amounts turned over to it. Moreover, as already discussed, the clear intent of the parties was to effectuate a "wash"--both the State and the employees were to be held harmless. The argument that any remaining obligations were forgiven by the express terms of the agreement is also groundless. The union cites language in the "Termination of Agreement" clauses of both the 1973-75 and 1975-77 contracts which provide in substance that upon termination of the contract all obligations (except grievances then being processed) are automatically cancelled. The State had performed its obligation under the provision at issue by the end of December, 1975, and during that month commenced its attempts to collect the sum owed it by the Union. The letters exchanged between State and Union officials from December, 1975 through March, 1976 clearly demonstrate the State's efforts to collect the sum. The Union's argument, if accepted, would lead to the absurd result that a party could flagrantly violate the clear terms of a contract during its life, and nonetheless have all of its obligations extinguished at the close of the contract period. The Commission properly found that this was not the intended effect of the "Termination of Agreement" clauses. The Union's argument that any obligation it might have had to reimburse the State was excused through bargaining for subsequent contracts is an inaccurate interpretation of the parties' subsequent negotiations. During the negotiations for the 1977-79 contract, the State offered the Union a particular provision in exchange for the Union's payment of the outstanding debt. Ultimately the provision the State had offered was included, but no reference was made in the contract to the Union's continued obligation to pay off its debt. The Union thus argues that the "waiver clause" of the contract precludes the State from asserting any right to that debt. The Commission again correctly concluded that the State's actions did not amount to a waiver, or evidence that it was dropping its claim (even King admitted that the State never admitted in negotiations that the Union's debt was to be forgiven).

The Union argues finally that the Commission's finding that it committed an unfair labor practice is defective for several reasons. The Union's first contention is that the employer must exhaust his contractual grievance procedure before filing an unfair labor practice complaint with the Commission and that this was not done here.

The argument was correctly disposed of by the Commission's holding that the contractual grievance procedure was unavailable to the State:

> "This conclusion is buttressed by reading the entire grievance-arbitration procedure, which makes absolutely no reference whatsoever to the State's ability to file a grievance. To the contrary, the grievance procedure expressly states that 'the grievance shall be presented to the "designated supervisor"'; that the 'supervisor' shall 'hear the grievance and return a written decision to the Employee(s) and his/her representatives'; that the grievance must be appealed to the 'designated agency representative'; that said representative shall prepare a written answer for 'the Employee(s) and his/her representative(s)'; that said grievance can thereafter be appealed 'to the designee or the appointing authority (i.e., Division Administrator, Bureau Director, or personnel office'; and that 'the written decision of the agency will be placed on the grievance by the appointing authority of the agency and returned to the grievant. . . .' Read together, it is absolutely clear that the underlying grievance procedure only provides for employe or union grievances. Accordingly, it must be concluded that the State does not have the contractual right to file a grievance and that, as a result, it cannot proceed to arbitration on a matter wherein it alleges that the Union has breached the parties' collective bargaining agreement." Decision, p. 15 (footnotes omitted).

The Union next argues that under the language of sec. 111.84(2)(d), Stats., a union cannot commit an unfair labor practice, because the relevant language only prohibits employees from violating collective bargaining agreements. Sec. 111.84(2), Stats., states that "it is an unfair practice for an employee individually or in concert with others" to engage in certain activities. I agree with the Commission that the Union's argument, if accepted, would mean that a Union was free to engage in any of the prohibited activities listed under sec. 111.84(2), and that such a result would be clearly contrary to the intent of the legislature as found in the Wisconsin Employment Peace Act and the Municipal Employment Relations Act (the other major Wisconsin labor laws), both of which contain prohibitions on Union conduct similar to the language in sec. 111.84(2), Stats. In addition, the specific language of the statute itself--"employees. . .in concert with others"--is broad enough to include a labor union, and indeed constitutes a definition thereof. Finally, reference to the language of the statute demonstrates that many of the activities prohibited could ONLY be engaged in by a union. The Union's contention must, therefore, be rejected.

The Union's next argument is that the one year statute of limitations provided in sec. 111.07(14), Stats., bars the State's action because it seeks to recover amounts that were paid or due the Union by July 1, 1976, and the complaint was filed with the Commission on August 17, 1977, more than 13 months later. The weakness in this argument is its assumption that the cause of action arose by July 1, 1976. The Commission properly found that there was no evidence in the record that the amounts were to be paid by that date; nor was any date mentioned in the contract. Moreover, King himself testified that no time limits in which the Union was to reimburse the State were discussed during negotiations, and the record indicates that the Union continued to make partial payments to the State until at least February, 1977. It was after this point that it became clear that the Union was not going to complete its contractual obligation. As a result, the State's complaint, filed within six months of notice of the breach, was timely.

The Union'a final argument, that the only applicable agreement is an unenforceable oral agreement is merely a restatement of arguments already made and disposed of above and need not be discussed further.

From the foregoing it is clear that the Commission's construction of the collective bargaining agreement between the State and the Union is reasonable, and its findings are supported by substantial evidence in the record. The order must be affirmed, and the State's counterpetition for enforcement will be granted.

Counsel for the Commission may prepare the appropriate order for the court's signature.

Dated at Madison, Wisconsin, this 24th day of July, 1981.

BY THE COURT:

William Eich /s/
WILLIAM EICH
CIRCUIT JUDGE

cc: Richard V. Graylow
Gordon Samuelsen
John Niemisto