STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

RACINE UNIFIED SCHOOL DISTRICT, Complainant, vs. RACINE EDUCATION ASSOCIATION, Respondent.	Case XLI No. 22021 MP-782 Decision No. 15809-E
RACINE EDUCATION ASSOCIATION, Complainant, vs. RACINE UNIFIED SCHOOL DISTRICT, Respondent.	Case XLII No. 22201 MP-796 Decision No. 15914-E

ORDER DENYING PETITION FOR REHEARING

On the record,

IT IS ORDERED that the petition for rehearing of the Racine Education Association be, and hereby is, denied.

Dated at Madison, Wisconsin, this 29th day of March, 1978.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By: Charles D. Hoornstra
Charles D. Hoornstra, Examiner

No. 15809-E
No. 15914-E

RACINE UNIFIED SCHOOL DISTRICT, XLI, XLII, Decision Nos. 15809-E and 15914-E

MEMORANDUM ACCOMPANYING ORDER
DENYING PETITION FOR REHEARING

On March 13, 1978, the Racine Education Association filed a motion for reconsideration, which the examiner treats as a petition for rehearing under sec. 227.12, Stats., of this examiner's decision of February 23, 1978. The school district filed a written reply on March 20, 1978.

Positions of the parties

The association contends that the examiner/commission's original decision of February 23, 1978, contains a material "mistake of fact" in respect to the lawfulness of the employer's maternity leave policy. The association argues that the criteria for legality under the Ray-O-Vac Case 1/ were not properly subject to litigation before the commission since the Department of Industry, Labor and Human Relations (DILHR) already has decided that the employer's policy is in violation of the Fair Employment Act, secs. 111.31-111.37, Stats., in two cases presently pending review in the Dane County Circuit Court. The failure of the parties to bring these cases to the examiner's attention was due to inadvertence and oversight, the association maintains, and the examiner can take administrative notice of those decisions, uncertified copies of which were attached to the association's moving papers. It would be a violation of the principle of comity between administrative agencies, the association contends, to require relitigation before the commission.

The association's moving papers contain no specified prayer for relief, but it is presumed it desires the examiner to set aside his original decision on the ground that the illegality of the maternity leave policy excuses the association from signing the contract draft offered by the employer.

The employer does not object to the examiner taking administrative notice of the uncertified decisions of the Department of Industry, Labor and Human Relations (DILHR). It argues: (1) it is too late for the association to produce new facts; (2) the association's position is that the contract should require the employer to follow its policy until the matter is resolved by the courts, not an administrative agency; (3) DILHR's orders demonstrate the undesirability of including "provisions about pregnancy" in the collective bargaining agreement; and (4) the legality of the employer's policy has no bearing on what the parties agreed to.

DISCUSSION

In an appropriate case the commission has jurisdiction to determine questions involving the interpretation and application of the Fair Employment Act, secs. 111.31-111.37, Stats. 2/ The commission has held, however, that it should defer to the primary jurisdiction of DILHR under the Act. 3/ Generally, an agency is excluded from exercising its concurrent jurisdiction where another agency with proper jurisdiction already has assumed jurisdiction of the case. 4/ Therefore, since both of the two submitted DILHR decisions were rendered on June 1, 1977, and since the

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1/ Ray-O-Vac v. ILHR Department, 70 Wis. 2d 919, 236 N.W. 2d 209 (1975).

2/ Harold Mahnke v. Louis Allis Company, WERC Dec. No. 11017-E (January 17, 1978), review pending in Milwaukee County Circuit Court.

3/ Id.

4/ 73 C.J.S., Public Administrative Bodies, sec. 53, p. 376.

instant case was commenced September 6, 1977, the commission ordinarily would defer to the decisions of DILHR as establishing the illegality of the employer's maternity leave policy.

This rule is not of easy application here, however, since the association could have, but did not, call the examiner's attention to these decisions during the hearing. Section 227.12(3), Stats., dealing with the power of the commission on the instant petition for rehearing, states:

> "(3) Rehearing will be granted only on the basis of:
>
> "(a) Some material error of law.
>
> "(b) Some material error of fact.
>
> "(c) The discovery of new evidence sufficiently strong to reverse or modify the order, and which could not have been previously discovered by due diligence."

The "due diligence" criterion of sub. (3)(c) is conspicuously absent from sub. (3)(a) and (b). Therefore, under the inclusio-exclusio principle, it does not apply to errors of fact or law urged under (3)(a) or (b). On the other hand, the alleged error of fact must be discernible from the record already made, rather than through the introduction of new evidence. Otherwise, the objective of putting an end to litigation would be defeated, and the "due diligence" requirement of sub. (3)(c) effectively would be repealed through circumvention. The association's belated introduction of evidence of DILHR's rulings is not excusable under sub. (3)(c). Therefore, it is not entitled to a rehearing.

Even if the association were not barred from introducing evidence showing an error of fact, its argument based on the DILHR decisions is without merit. In the first of the two DILHR decisions 5/ that agency found that the employer maintained a plan for the payment of disability income on an accumulated sick leave basis, except for pregnancy disabilities, and that such plan was unlawfully discriminatory. In the second case, 6/ the employer unlawfully denied accumulated sick leave during the time she was absent from work due to a pregnancy-caused disability. Thus, both decisions relate only to the denial of sick leave during pregnancy-caused disabilities. Here, the employer's policy makes the employe's entitlement to paid sick leave contingent on "what happens in various courts."

The instant employer's policy, therefore, evinces an intent to comply with the law as determined by the courts. On that basis, the DILHR decisions are inapposite and there is no basis for setting aside the original decisions herein.

Furthermore, as noted in the original decision, the employer's policy is not a term of the collective bargaining agreement. Signing that contract does not oblige the association to agree with the employer's policy.

Accordingly, the petition for rehearing is denied.

Dated at Madison, Wisconsin, this 24th day of March, 1978.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By: Charles D. Hoornstra
Charles D. Hoornstra, Examiner

5/ Byrd v. School Board, ERD No. 2701310 (June 1, 1977).

6/ Hermann v. School Board, ERD No. 7301001 (June 1, 1977).