

MADISON TEACHERS INCORPORATED and
LAURAMAE ANDERSON,

Petitioners,

v.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION,

Respondent,

and

MADISON METROPOLITAN SCHOOL DISTRICT and
BOARD OF EDUCATION, MADISON METROPOLITAN
SCHOOL DISTRICT,

Intervenor-Respondent.

FEB 3 1982

WISCONSIN EMPLOYMENT
RELATIONS COMMISSION

OPINION

Case No. 81-CV-2945

Decision No. 16471-D

The petitioners' complaint is that the respondent Commission refused to allow them attorney fees and interest on the amounts due for wages and benefits. They also complain that the Commission refused to find that the School District acted in bad faith. There is no dispute that the finding that the School District did commit a prohibited practice by failing to follow the terms of the arbitration was proper. Sec. 111.70(3)(a) 5.

The controversy involves the position of Administrative Clerk. The matter was submitted to arbitration. The position had been occupied by Blaska, who the arbitrator held was not in the bargaining unit. The award provided that the position be vacated and that the employer interview Anderson and Hinze for the vacancy "and select between them pursuant to the agreement." Anderson was interviewed first, Hinze second. The position was offered to Hinze, who refused the position. However, instead of offering the position to Anderson, Blaska was continued in the position, although the arbitrator had determined she was not an "employee" qualified for the position.

On the complaint that such conduct was a violation of the arbitrator's award, after hearing, the Examiner found that the failure to give Anderson the position was a violation of the award and ordered that the position be vacated and awarded to Anderson. The Examiner also found that the employer acted in bad faith and awarded interest on the lost wages and benefits and attorney's fees.

On review, the Commission affirmed the Examiner with the following exceptions: The Commission substituted a finding that the employer did not act in bad faith and deleted the award of interest and attorney's fees.

The only question in this review is whether under the evidence the Commission could find that the employer did not act in bad faith and whether it could deny interest and attorney's fees. We are concerned here only with what the Commission did, not what the Examiner may have done.

The only place in the statutes we have found which provides for an award of interest or attorney's fees is Sec. 111.70(7m)4(e). But this only related to refusal to implement an award under Sec. 111.70(4)(cm). Subd. 4 only applies to police and fire fighting service until October 31, 1981. The Commission's order was made in May, 1981. Sec. 111.70(7m)4(e) does not apply to this case.

The giving of relief for failure to conform to the arbitration, in the absence of statutory direction, must rest in the Commission's discretion. Wisconsin Employment Relations Board v. Algoma P. & V. Co. 252 Wis. 549, 32 NW 2d 417 (1948).

The Examiner made the following observation: "Said award directed the District to interview Hinze (sic) and Anderson and select between them on the basis of their relative abilities. The arbitrator could not have made her point more clear, that both grievants were eligible to fill the position and only the decision as to which of the two was preferred was left to the District." It is also clear that neither the arbitrator nor anyone else anticipated that one of the contestants for the position would decline the appointment. The award was drafted on the assumption that the employer would be given a choice. The employer made the mistake of rejecting Anderson on the belief she was not qualified although the arbitrator had found both "eligible" and directed the choice to be made be determined by comparison of their respective "abilities." In not choosing Anderson, the employer apparently considered, not her qualifications, but her personality, which was a mistake.

The Commission in its review of the Examiner's decision said: "The District's literal reading of the arbitrator's term 'select between them' did not comply with the intent of the award and the arbitrator's reasoning in support thereof." Thus the Commission considered the "interest" of the award as the basis for its decision that the employer had violated the award and not its express terms construed strictly. It said that it did not find that the employer's argument was without possible legal basis. Bad faith infers conduct that is contumacious. The refusal to so find is a matter construing the testimony and does not relate to the credibility of any party or witness. The evidence may be adequate to raise an inference of bad faith but it also supports an inference that the employer was in error or made a mistake in judgment as to the meaning of the awards.

The examiner used a finding of bad faith as a reason for an award of attorney's fees and interest. But there is no rule that attorney's fees and interest must be awarded even if there is bad faith. In the ordinary case there is no award for attorney's fees or interest. Such an award may be given in some cases; that is, the Commission may have the power to give it, but when it is given lies with the discretion of the Commission. No statute establishes any standard for granting of attorney's fees or interest. Nor does any published rule of the Commission establish a standard.

The Commission speaking of the employer's conduct in its memorandum said that it disagreed with the employer's interpretation of the award, "...but do not find that its argument in this regard is without possible legal basis or otherwise frivolous so as to make its conduct willful." See Drake v. Milwaukee Mutual Ins. Co. 70 Wis 2d 977, 236 NW 2d 204 (1975). And it refused the relief in question because "...the Commission has generally refused to order the Respondent to pay claimant's attorney's fees...because it is not generally considered to be an appropriate part of remedial (make whole) orders issued by the Commission. This view is consistent with the general rule of law that attorney's fees may not be recovered as an item of damages in the absence of contractual or statutory liability therefore."

The premise that the question of the extraordinary relief claimed by petitioner begins with is that it is not usual or proper to grant such relief except in extraordinary circumstances. Whether the circumstances of the case at bar are so extraordinary as to call for such relief is a matter of discretion. And that is true

even if the employer acted in bad faith. Petitioner seems to argue that in every case of bad faith the victim is entitled to attorney's fees and interest, but if that is to be true the statute should so provide as does Sec. 111.70(7m)4(e) (which does not apply to this case). While the memorandum seeks to state a policy for the future, which as such may or may not be enforceable, the Commission did exercise its discretion in denying the requested relief in this case. The petitioner points to no statute or published rule which requires the Commission in any case to grant such relief; the petitioner is in no position to claim such relief as a matter of law or that the denial of such relief with or without reason is beyond the power of the Commission or is arbitrary or capricious.

We will affirm the Commission's orders and direct the attorney for respondent to prepare the proper order, submit it to opposing counsel for approval as to form and present it to the court for signature.

Dated January 28, 1982

By the Court:

W. J. ...

Judge

cc: Mr. William Haus
Mr. John D. Niemisto