RECEIVED

MAR 29 1984

WISCONSIN EMPLOYMENT
RELATIONS COMMISSION

STATE OF WISCONSIN CIRCUIT COURT BRANCH III BROWN COUNTY

GREEN BAY EDUCATION ASSOCIATION,

Petitioner,

vs.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION,

Respondent,

and

JOINT SCHOOL DISTRICT NO. 1, CITY OF GREEN BAY AND TOWNS OF ALLOUEZ, BELLEVUE, DE PERE, and SCOTT, and BOARD OF EDUCATION OF JOINT SCHOOL DISTRICT NO. 1, CITY OF GREEN BAY, et al.,

Intervenor-Respondent.

Case No. 81CV1947

DECISION

Decision No. 16753-B

This matter is before the Court on a petition for review under Sec. 227.16, Wis. Stat., of a decision and order of the WERC. The Commission ruled that a unilateral change of dental insurance carriers by the defendant school district did not constitute a prohibited practice pursuant to Sec. 111.70.

FACTS

The Green Bay Education Association (Association) and the District entered into a collective bargaining agreement providing for dental insurance coverage for certain teachers within the system. One agreement covered the 12-month period beginning with April 1, 1977. A later agreement became effective January

1, 1978, to continue through June 30, 1979. The Commission found as an unchallenged fact that there was no discussion during the negotiations for the 1978-1979 contract with respect to the selection of a dental insurance carrier, although there were changes to provide additional coverage.

The agreements of both dates provided that:

> "F. Any policies accepted by the [District] Board shall be from a nationally recognized company."

The contracts contained detailed specifications respecting the levels of dental insurance benefits to be provided.

The Association's representative, Mr. Larry Hathaway, during the latter part of 1977, met with representatives of the insurance company and the School District numerous times with complaints regarding the administration of the program by Blue Cross, which apparently was the first insurance carrier. The Association conducted two surveys which were supplied to the School District, and later Hathaway met with a subcommittee of the City of Green Bay's Common Council, which recommended that the Common Council terminate its relationship with Blue Cross and instead contract with Wisconsin Physician's Service.

The Council took action on the recommendation of the subcommittee and asked the School Board to follow its lead. In June of 1978, the Board of Education debated the issue, and the President of the Board of the School District asked the Association to concur, which it did. The minutes of the Board meeting show this with the notation:

> "GBEA concurs with the change."

As of January 1, 1978, as the result of competitive bidding, the

Connecticut General Life Insurance Company became the dental insurance carrier.

In October of 1978, Mr. Hathaway learned that the School District intended to again submit the dental insurance program on bids; and in November of 1978, the School District insurance consultant recommended that the low bid of Blue Cross be accepted effective January 1, 1979. Mr. Hathaway objected to the change to Blue Cross; and the School Superintendent, Dr. Merrill Grant, in a telephone conversation with Hathaway, indicated that the District would honor the Association's objection. In a later phone conversation with Hathaway, Dr. Grant said that the District would grant the contract to Blue Cross as the low bidder. The Association notified the Board of Education that it was unequivocally opposed to the change; and on December 22, 1978, filed the complaint initiating this proceeding.

DECISION OF EXAMINER AND COMMISSION

The examiner found that the District in January of 1977 sought bids from various insurance carriers and selected Connecticut General Life Insurance Company; that during negotiations for a successor agreement, the matter of a carrier was not discussed but the coverage apparently was increased; that in the period covered by the second agreement, the District resubmitted the coverage on bids and selected Blue Cross as the low bidder. This is the conduct which the Association claims constitutes the prohibited practice.

During the course of the hearing, the Association submitted a substantial amount of evidence to show that the coverage

afforded by Blue Cross materially affected the wages and working conditions of employment of its members as a result of differences in the speed of claim processing, methods by which claims were paid, and amounts allowed for particular types of claims. The Association insisted it did not waive its right to bargain these changes, because the subject had been thoroughly discussed in previous collective bargaining; and the District had no right to change the carrier in the middle of the term of contract.

The examiner found that although the Association expressed displeasure with the decision to switch from Connecticut General to Blue Cross, it never requested to bargain this matter. The examiner concluded that since the Association never demanded to bargain the specific issue, that it had waived any right it may have had under the law to bargain this matter. The examiner also concluded on the basis of earlier findings that the Association had waived any of its rights to binding arbitration in the settlement of this dispute, because it never objected to the Commission asserting its jurisdiction to determine whether the collective bargaining agreement had been breached. Both the examiner and the Commission, in approving the findings and conclusions of the examiner, wrote memoranda explaining their decisions. The memorandum accompanying the order of the Commission as well as the memorandum of the examiner referred to a waiver by the Association of its rights to bargain this issue by the language in the contract.

COMPLAINT OF THE ASSOCIATION

The complaint of the Association brought before the

WERC alleges basically two violations of the statutes which constitute prohibited practices. One is based on an alleged refusal to bargain collectively, and another is based on the violation of the collective bargaining agreement which had been previously agreed upon by the parties.

DECISION BY THE COURT

VIOLATION OF THE AGREEMENT:

I am of the opinion there is no violation of the agreement itself because under its language the District retained the right to select any insurance carrier which was "a nationally recognized company." While there was testimony by Mr. Hathaway to the effect that the selection of Connecticut General was in effect negotiated and agreed upon as a result of bargaining, I am of the opinion that the examiner's findings in this area are factual findings which cannot be disturbed; because the evidence in this area, in my judgment, permits the findings made by the examiner. The rule, which has been stated so many times, is that findings must be supported by substantial evidence--"such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Stacy v. Ashland County Dept. of Public Welfare, 39 Wis. 2d 595. It is not required that the evidence is subject to no other reasonable or plausible interpretation. Hamilton v. ILHR Dept., 94 Wis. 2d 611.

In my opinion, the discussions which took place between Mr. Hathaway and Mr. Grant constituted so-called "industrial governance." In other words, in addition to the written collective bargaining agreement, various understandings are reached by persons

working under the agreement which eventually are respected by each side and are sometimes considered to have the force of contract.[1] It should be noted, however, that in this case any such arrangement would be in direct conflict with the specific written language of the agreement, which provides that the carrier may be any nationally recognized company.

If this matter was before an arbitrator, he might give more weight to so-called practices than the Commission did in this case. That, however, in my judgment, is beside the point. I have concluded that the Commission properly decided that under the terms of the collective bargaining agreement, that the District retained the right to select the insurance carrier.

REFUSAL TO BARGAIN COLLECTIVELY:

The parties in this case have thoroughly briefed this matter and have very carefully listed the evidence from the standpoint of the legal implications. There is general agreement by the writers of all of the briefs that the identity of the insuring company would have been a legitimate item for collective bargaining. At least, the brief of the Assistant Attorney General accepts this for purposes of argument. There are National Labor Relations Board cases involving unfair labor practices which support this view. Keystone Steel & Wire v. N.L.R.B., 606 F.2d 171 (7th Cir. 1979).

It appears to me, however, that during the term of the contract the written language indicates that bargaining this issue is premature and this should await the opening of the agreement. Consequently, it is my view that the decision of the Commission

is correct in deciding that there was no violation of the District's duty to bargain this issue collectively. The Commission found a waiver of the right to bargain because of a failure to ask specifically to do so on learning of the District's action. The Association objects to this finding because immediately on learning of the District's intention to contract with Blue Cross, Hathaway vigorously opposed it. It is asserted that the evidence does not support the finding of a waiver.

As I view the legal question, it would not have made any difference if the union had demanded to bargain the identity of the insurance carrier in midterm of the contract. However, the finding and the conclusion of the Commission that any right in this area was waived is entitled to great weight because of the expertise of that institution. This is recognized in a number of cases which have held that not only the findings of the agency but even its legal conclusions are entitled to greater weight because of the expertise involved in the decision. Milwaukee v. WERC, 71 Wis. 2d 709.

The findings of the Commission are conclusive; the findings support the Commission's order and award; and the Commission did not exceed its powers or reach erroneous conclusions of law. The decision of the Commission is, therefore, affirmed.

Dated this 19th day of January, 1983, at Green Bay, Wisconsin.

BY THE COURT:

William J. Duffy
Circuit Judge

[1]This concept is discussed at some length in Collective Bargaining, Chamberlain and Kuhn, McGraw Hill, 2nd Ed., at P.132 et seq.

Archibald Cox is quoted as follows:

> "There are too many people, too many problems, too many unforseeable contingencies to make the words of the contract the exclusive source of rights and duties."

These changes, however, in the opinion of the authors, may not be in derogation of the contract.