

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Respondent.

No. 17867-A

4. The District contested certain issues and, thus, a hearing on the petition was conducted by an agent of the Commission. On July 20, 1978, the Commission issued its direction of election.

5. Thereafter, an election in an appropriate bargaining unit was conducted by an agent of the Commission. On September 8, 1978, the Commission certified the Union as the exclusive bargaining representative of all regular full-time and regular part-time maintenance and custodial employees, cooks and bus drivers in the employ of Winter Joint School District No. 1, excluding managerial, supervisory and confidential employees.

6. Following certification, the Union and the District began to engage in bargaining for an initial collective bargaining unit covering the wages, hours and working conditions of employees in the bargaining unit described above. Among the subjects discussed was a proposal relative to back pay for employees in the bargaining unit.

7. During the course of bargaining, Mr. Dahl for the Union was informed by Mr. Kiegan and the school board bargaining committee of the District's contention that certain employees, among them Mrs. Joy Rinhart, had been terminated from the District's employ and thus, should not be eligible to receive the back pay subject under discussion at the bargaining table.

8. The parties reached agreement on the terms of an initial labor agreement which was ratified by both parties and became effective on August 24, 1979.

9. The agreement provided for, inter alia: 1) Article VII - a procedure for the processing of grievances which does not culminate in a binding arbitration step for the resolution of unresolved grievances; and, 2) Appendix B - a one-time supplemental back wage payment for the school year 1977-1978 and 1978-1979 for employees who were "on the payroll" of the District as of the effective date of the agreement, August 24, 1979.

10. Cooks and bus drivers do not actually perform services for the District during the summer months.

11. Pursuant to Appendix B, the District made back payment to returning bargaining unit employees who had been performing services for the District at the end of the 1978-1979 school year although these employees were not actively engaged in providing services to the District on August 24, 1979.

12. Mrs. Joy Rinhart did not receive back pay pursuant to Appendix B of the agreement.

13. Mrs. Rinhart was first employed by the District as a kindergarten bus driver for the 1977-1978 school year.

14. In August 1978, Mrs. Rinhart was advised by Mr. Kiegan that the kindergarten bus driver route was discontinued and that she did not have a job to which to return.

15. Thereafter, Mrs. Rinhart filed for unemployment compensation benefits which were contested by the District in two separate proceedings before unemployment examiners.

16. The appeal tribunal of the Wisconsin Department of Industry, Labor and Human Relations found that Mrs. Rinhart had not refused employment with the District and ruled that she was entitled to receive unemployment benefits.

17. In May 1979, Mrs. Rinhart was rehired by the District to perform services as a regular bus driver for a two week period.

18. Mrs. Rinhart was employed by the District as a regular bus driver for the 1979-1980 school year.

19. Mrs. Rinhart filed two grievances regarding her entitlement to back pay on September 21, 1979 and October 3, 1979.

20. Thereafter, the grievances were denied by the District.

21. After certain unfruitful settlement discussions, the Union filed on May 12, 1980 the instant complaint alleging that the District had violated the collective bargaining agreement by failing to pay back pay to Joy Rinhart.

Based upon the above and foregoing, the Examiner hereby makes and issues the following

CONCLUSION OF LAW

1. The Winter Joint School District No. 1 by failing to pay back pay to Mrs. Joy Rinhart has violated the terms of the collective bargaining agreement existing between it and the General Teamsters Union Local 662 and has committed prohibited practices thereby within the meaning of Section 111.70(3)(a)(5), Wis. Stats.

Upon the basis of the above and foregoing Findings of Fact and Conclusion of Law, the Examiner hereby enters the following

ORDER

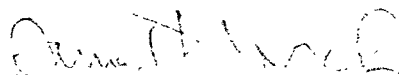
It is hereby ordered that the Winter Joint School District No. 1, its agents and assigns shall immediately:

1. Cease and desist from violating the terms of the collective bargaining agreement existing between it and the General Teamsters Union Local 662.
2. Take the following affirmative action which the Examiner finds will effectuate the policies of Section 111.70, Wis. Stats.
 - (a) Abide by the terms of the agreement generally and more particularly make payment to Mrs. Joy Rinhart in accordance with the provisions of Appendix B.
 - (b) Notify all employees by positing in conspicuous places at the Winter Joint School District No. 1 where employees are employed copies of the notice attached hereto and marked as Appendix "A". Said notice shall be signed by the Employer, and shall be posted immediately upon receipt of a copy of this order and shall remain posted for sixty (60) days thereafter. Reasonable steps shall be taken by the Employer to ensure that said notices are not altered, defaced or covered by other material.
 - (c) Notify the Wisconsin Employment Relations Commission within twenty (20) days of the date of this order regarding what steps it has taken to comply herewith.

Dated at Madison, Wisconsin this 23rd day of December, 1980.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By



James D. Lynch, Examiner

APPENDIX "A"

NOTICE TO ALL EMPLOYEES

Pursuant to an Order of the Wisconsin Employment Relations Commission, and in order to effectuate the policies of the Municipal Employment Relations Act, we hereby notify our employees that:

1. We will comply with the terms of the collective bargaining agreement between the District and General Teamsters Union Local 662 by making payment to Mrs. Joy Rinhart pursuant to the provisions of Appendix B of the agreement.

By _____
Superintendent, Winter Joint
School District No. 1

Dated this day of December, 1980.

THIS NOTICE MUST BE POSTED FOR SIXTY (60) DAYS FROM THE DATE HEREOF AND MUST NOT BE ALTERED, DEFACED OR COVERED BY ANY MATERIAL.

MEMORANDUM ACCOMPANYING FINDINGS OF FACT,
CONCLUSION OF LAW AND ORDER

Pleadings

The instant complaint alleges that the District violated the terms of the collective bargaining agreement existing between it and General Teamsters Union Local 662 by failing to make back wage payments to Mrs. Joy Rinhart pursuant to the provisions of Appendix B and, thereby, has committed prohibited practices within the meaning of Section 111.70(3)(a)(5), Wis. Stats.

The answer filed herein denies that the District is required by the contract to make such payment to Mrs. Rinhart and, therefore, denies that it has committed a prohibited practice. Further, the District raises three affirmative defenses, addressed later herein, which it contends act as a bar to this proceeding.

Relevant Facts

On September 12, 1977, General Teamsters Union Local 662 filed a petition with the Wisconsin Employment Relations Commission seeking an election among maintenance and custodial employees, cooks, cook's assistants and bus drivers. Certain matters were contested, a hearing was held by an agent of the Commission and a direction of election was thereafter issued on September 9, 1978. The Commission certified General Teamsters Union Local 662 as the exclusive bargaining representative of all regular full-time and regular part-time maintenance and custodial employees, cooks and bus drivers in the employ of Winter Joint School District No. 1, excluding managerial, supervisory and confidential employees. Winter Joint School District No.1, No. 16467 (9/78).

Following certification, the Union and the District began to engage in bargaining for the initial collective bargaining agreement. Among the subjects discussed was a proposal relative to back pay for employees in the bargaining unit. During bargaining, the Union was informed by both William Kiegan, the District Superintendent, and the District's bargaining committee of the District's contention that certain employees, among them Ms. Joy Rinhart, had been terminated from their employment and, thus, should not be eligible to receive the benefit of the back pay proposal under discussion.

The parties reached agreement on the terms of an initial contract which subsequently was ratified by both parties and became effective on August 24, 1979. The agreement provided, among other things, for: 1) Article VII - a procedure for the processing of employee grievances which contains certain time limits relative to the processing of grievances from step to step but which does not culminate on a binding arbitration step for the resolution of unresolved grievances; and 2) Appendix B - a one-time supplemental back wage payment for the school years 1977-1978 and 1978-1979 for employees who were "on the payroll" of the District as of its effective date, August 24, 1979.

In the fall of 1979 pursuant to Appendix B, the District made back payment to returning bargaining unit employees who had been performing services for the District at the end of the 1978-1979 school year although these employees were not actively engaged in performing duties for the District on August 24, 1979. The District does not schedule cooks and bus drivers for work during the summer months when school is not in session. The District has a practice of offering re-employment for the coming school year to employees who were performing services for the District at the end of the preceding spring session.

The District denied back pay benefits pursuant to Appendix B to Mrs. Joy Rinhart.

Mrs. Rinhart was first employed by the District as a kindergarten bus driver for the 1977-1978 school year. In August 1978, Ms. Rinhart was advised by Mr. Kiegan that the kindergarten bus run had been discontinued and that she did not have a job to which to return. Thereafter, Mrs. Rinhart filed for unemployment compensation benefits which were contested by the District on the grounds that she had refused work in two separate proceedings before unemployment examiners. An appeal tribunal of the Wisconsin Department of Industry, Labor and Human Relations found that she had not refused work with the District and ruled that she was entitled to receive unemployment benefits. In May, 1979, Mrs. Rinhart was rehired by the District as a regular bus driver for a two week period at the end of school. Mrs. Rinhart was employed as a bus driver for the 1979-1980 school year.

In September of 1980, Mrs. Rinhart learned that she would not be receiving back pay from the District. After consultation with her Union representative, she filed two grievances regarding her entitlement to back pay on September 21, 1979 and October 3, 1979. Both grievances were denied by the District.

Following certain unfruitful settlement discussions between the Union and the District's labor relations representative, the Union filed on May 12, 1980 the instant complaint alleging that the District had violated the collective bargaining agreement by failing to pay back pay to Joy Rinhart.

Position of the Union

The Union contends that Mrs. Rinhart is entitled to the benefit of Appendix B's back pay provision because she had been recalled from her layoff status in May 1979 by the District to perform regular bus driving duties. The Union states that any discussion regarding Ms. Rinhart's exclusion from the preview of Appendix B was grounded upon the District's express representation that Rinhart, as well as two other former employees, had been terminated from her employment and was no longer performing work for the District.

Position of the District

The District contends that it is under no contractual obligation to make back wage payment to Mrs. Rinhart and that its refusal to do so, therefore, is not unlawful. The District predicates its argument upon an alleged oral agreement reached with the Union to restrict the application of Appendix B to employees other than those who had been terminated. Further, the District contends that the language of Appendix B itself does not entitle Mrs. Rinhart to back pay.

Further, the District contends by means of affirmative defenses that the Union should be estopped from the opportunity to litigate its claim herein because: 1) the complaint fails to state a cause of action and, therefore, must be dismissed; and, 2) the Union failed to comply with certain contractual time limits relative to the processing of grievances which it avers resolves the dispute in the District's favor by operation of law.

Procedural Defenses

Initially, the District's contention that the complaint herein fails to state a cause of action is without merit in that it provides "(a) clear and converse statement of the facts constituting the alleged prohibited practice or practices including the time and place of occurrence of particular acts and sections of the act alleged to have

violated thereby." 1/ Accordingly, this argument is dismissed.

Next, the District's argument that the Union failed to comply with certain contractual time limits relative to the processing of grievances thereby resulting in a decision in the District's favor by operation of law is similarly without merit. It must be noted that the grievance procedure lacks a binding arbitration step for the resolution of unresolved grievances. Therefore, it is self-evident that such a failure cannot compromise a party's right to file a complaint alleging a prohibited practice of failure to abide by the terms of a collective bargaining agreement within one year of the date of the alleged unlawful occurrence. 2/

Lastly, the District's argument that the parties entered into an oral agreement during bargaining that certain employees including Mrs. Rinhart were not to receive back pay because they had been terminated should preclude Rinhart from entitlement to Appendix B's provisions can not be sustained. The record is clear that any agreement in this regard was based on the District's express representation that she was no longer employed by the District. However, the record is clear that Rinhart was laid off from her employment, was rehired by the District as a regular driver in May 1979 and worked in that capacity for a two week period of time at school's end. The District may not bind the Union by an alleged agreement based upon its misrepresentation as to Rinhart's employee status. Therefore, no valid agreement to exclude Rinhart from the scope of Appendix B can be said to exist. Having disposed of these preliminary matters, attention must be turned to the merits of the contractual dispute.

Pertinent Contractual Provision and Interpretation

Appendix B of the agreement contains the pertinent language of entitlement hereafter recited:

All employees who are on the payroll of Winter Joint School District No. 1 as of the effective date of this agreement shall be paid back pay on a one-time basis as follows. . . .

First, the effective date of the agreement must be established. To do so, reference must be made to Article XXIV DURATION which provides in relevant part: "This agreement shall commence upon the date of execution by the parties . . . Dated this 24 day of August, 1979." Thus, employees "on the payroll" of the District as of August 24, 1979 are entitled to the benefits of Appendix B.

The remaining question to be resolved is the meaning of the term "on the payroll". As noted earlier, the District made payment pursuant to Appendix B to returning employees although they were not actually scheduled to perform work on August 24, 1979. Therefore, it is apparent that its meaning can not be restricted by a literal application of its terms.

Thus, the language of entitlement must be read in light of the subsequent clauses which provide:

1/ Wis. Adm. code section 12.02(2)(c).

2/ Sections 111.07(14), 111.70(4)(a), 111.70(3)(a)(5), Wis. Stats.

[The pay rate effective on July 1, 1977 X 1.06 X the number of hours (days for bus drivers) worked from July 1, 1977 through June 30, 1978] + [The pay rate effective on July 1, 1977 X 1.06 X 1.07 X the number of hours (days for bus drivers) worked from July 1, 1978 through the ratification date of their agreement] - [The total amount paid or to be paid to the employee for work performed between July 1, 1977 and the ratification date of their agreement] = Back pay.

Employees hired after July 1, 1977 but before June 30, 1978 shall use their hire rate as the July 1, 1977 rate in the formula above. Employees hired after July 1, 1978 shall be paid back pay by adding 7% to the pay rates paid between July 1, 1978 and the ratification date of their agreement.

Making reference thereto, it is clear that the formula relates to the period from July 1977 (roughly contemporaneous with the pendency of the election petition filed with the Commission) up to and through August 24, 1979. It is thus apparent that it arises as a result of the lengthy representation and negotiation processes attendant to this initial labor agreement and is intended to provide wage adjustments for that period of time. This insight, especially when coupled with the application given to it by the District as to whom payments was made discussed earlier, evidences an intention to reward those employees in the bargaining unit who were in the District's employ as of the date the agreement was executed.

Relief

Having so concluded, the facts establish that Mrs. Joy Rinhart was such an employee who, as a result, is entitled to receive back pay in accordance with the terms of Appendix B.

In addition thereto the Union seeks an order of reinstatement for Joy Rinhart. In this respect, it must be assumed that the Union is contending that Rinhart was unlawfully laid off by the District in the fall of the 1978-1979 school year. However, inasmuch as there was no contract in existence at the time to provide her job security in the event of a layoff, the District's action is presumed to be taken within the bounds of its lawful authority.

The District is hereby ordered to take the corrective action prescribed by the terms of Order entered herein.

Dated at Madison, Wisconsin this 23rd day of December 1980.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By 

James D. Lynch, Examiner