

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

LOCAL 70, HIGHWAYS, AFSCME,
AFL-CIO; LOCAL 990
COURTHOUSE AND CLERICAL,
AFSCME, AFL-CIO; LOCAL 990
WELFARE PROFESSIONALS,
AFSCME, AFL-CIO; LOCAL 1090
PARKS, AFSCME, AFL-CIO; and
LOCAL 1392 INSTITUTIONS,
AFSCME, AFL-CIO,

Complainants,

vs.

KENOSHA COUNTY,

Respondent.

Case 70
No. 33965 MP-1635
Decision No. 22167-C

Appearances:

Lawton & Cates, S.C., Attorneys at Law, Tenney Building, 110 East Main Street, Madison, Wisconsin 53703-3354, by Mr. Richard V. Graylow, appearing on behalf of the Complainants.

Mulcahy & Wherry, S.C., Attorneys at Law, 815 East Mason Street, Suite 1600, Milwaukee, Wisconsin 53202-4080, by Mr. Mark L. Olson, and Mr. Jon E. Anderson, appearing on behalf of the Respondent.

ORDER GRANTING PETITION FOR REHEARING

The Wisconsin Employment Relations Commission having on March 5, 1986, issued its Order Modifying Examiner's Findings of Fact and Reversing Examiner's Conclusion of Law and Order in the above matter wherein it concluded that Respondent Kenosha County violated Secs. 111.70(3)(a)4 and 1, Stats., when it failed to pay COLA adjustments to employees represented by Complainants during a contractual hiatus; and Respondent County having on March 24, 1985, filed a Petition for Rehearing pursuant to Sec. 227.12, Stats., wherein it alleged that the Commission had made a material error of fact relative to the timing and circumstances surrounding a compensation freeze/job security agreement between the parties which, in turn, led the Commission to make a material error of law as to the status quo which Respondent County was obligated to maintain during the contractual hiatus; and Respondent County having supplemented said Petition on March 27 and April 21, 1986, wherein it asserted inter alia that there was newly discovered evidence relative to the expiration of the 1976-1978 collective bargaining agreement which addresses "the status quo issue"; and Complainants having on April 3, 1986, filed a statement in opposition to the Petition; and the Commission having considered the matter and being satisfied that the County's petition sets forth a basis for granting rehearing in the above matter to the extent noted in the Order;

NOW, THEREFORE, the Commission issues the following

ORDER

1. That the County's petition for rehearing is granted to the extent noted in 2, below.

2. That at a time and in a manner to be established by the Commission in consultation with the parties, the parties to the above matter shall be afforded an opportunity to adduce additional evidence and arguments regarding:

facts and circumstances relating to the January, 1982 non-payment of COLA that tend to show what the parties' mutual

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understanding was, if any, about whether hiatus COLA payments were a part of the compensation arrangements in place at that time.

Given under our hands and seal at the City of
Madison, Wisconsin this 23rd day of April, 1986.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Marshall L. Gratz
Marshall L. Gratz, Commissioner

Danae Davis Gordon
Danae Davis Gordon, Commissioner

I concur

By Herman Torosian
Herman Torosian, Chairman

KENOSHA COUNTY

MEMORANDUM ACCOMPANYING ORDER
GRANTING PETITION FOR REHEARING

Section 227.12(3), Stats., establishes the standards applicable in a case of this kind as follows:

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.

There was no evidence adduced at the hearing bearing directly on the question of when a COLA freeze was first considered by the parties. The Commission inferred from various record facts that the COLA freeze concept had been under consideration by the parties prior to January 1, 1982. In turn, that inference was one of the factors on which the Commission based its conclusion that "it is by no means clear that the January 1, 1982 non-payment represented a mutual understanding that hiatus COLA adjustments were not ordinarily due as a part of the status quo." Commission Memorandum at 8.

In its petition, the County asserts that the Commission's inference regarding when a COLA freeze was under consideration by the parties was erroneous. It further states that it is prepared to offer proof to that effect and asserts that correction of the error will change the outcome in the case.

Without deciding whether the requested correction would change the outcome of the case, we are persuaded that the claimed error is sufficiently "material" to warrant the ordered rehearing. The rehearing will permit us to determine whether our above-noted inference and conclusion in our Memorandum were erroneous and, if so, to purge our decision of the taint of any such error and to reconsider the merits of the case in light of the correction.

We have declined the County's request to expand the scope of the matters reheard to include "other evidence which relates to the expiration of the 1976-1978 collective bargaining agreement, and which addresses the 'status quo' issue, as to payment of COLA during the contract hiatus." The County had ample opportunity to prepare itself regarding that issue in advance of the hearing and at a minimum could have sought an adjournment if it was surprised by the testimony adduced by the Union on that subject at the hearing. Since it had those opportunities, the County does not meet the standard for introduction of new evidence on that issue contained in Sec. 227.12(3)(c), Stats.

Dated at Madison, Wisconsin this 23rd day of April, 1986.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Marshall L. Gratz
Marshall L. Gratz, Commissioner

Danae Davis Gordon
Danae Davis Gordon, Commissioner

CONCURRING OPINION OF CHAIRMAN TOROSIAN

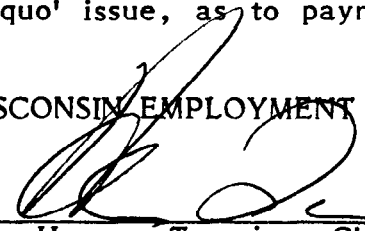
I concur with the majority that the claimed error is sufficiently "material" to warrant the ordered hearing. However, in my view, the requested correction will not change the outcome in the case. In my opinion, the timing of the "freeze-for-job-security" proposals is not outcome determinative given the COLA

language alone, and especially in light of the bargaining history relative thereto and the parties' "waiver and entire agreement" provisions of their 1982-83 agreements. 1/ Therefore, while the re-hearing will allow the Commission to purge its decision of the alleged error, any resultant correction would not be sufficient, in my view, to warrant reversal or modification of the Commission's order.

Finally, for reasons stated by the majority, I agree that the County's request to expand the scope of the matters reheard to include "other evidence which relates to the expiration of the 1976-78 collective bargaining agreement, and which addresses the 'status quo' issue, as to payment of COLA during the contract hiatus" should be denied.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By


Herman Torosian, Chairman

1/ Said provision in material part reads as follows:

"Waiver or any breach of this Agreement by either party shall not constitute waiver of any future breach of this Agreement."

We stated in our decision (at p. 8) that said language indicates "that the parties did not intend that great weight be placed on isolated instances in which practice was inconsistent with the meaning conveyed by language and bargaining history."