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-D

Appearances:

Lawton & Cates, S.C., Attorneys at Law, 214 West Mifflin Street, Madison, Wisconsin 53703-2594, 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 AFFIRMING FINDINGS OF FACT AND REVERSING CONCLUSION OF LAW AND ORDER

Examiner Christopher Honeyman having on June 7, 1985, issued Findings of Fact, Conclusion of Law and Order with Accompanying Memorandum in the above matter wherein he concluded that Complainants had not established by a clear and satisfactory preponderance of the evidence that the payment of COLA adjustments was part of the status quo Respondent was obligated to maintain upon expiration of the parties' collective bargaining agreement; and Complainants having on June 19, 1985, timely filed a petition with the Commission pursuant to Sec. 111.07(5), Stats., seeking review of the Examiner's decision; and the Wisconsin Employment Relations Commission having on March 5, 1986, issued its Order Modifying Examiner's Findings of Fact 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 employes 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 the Commission having on April 23, 1986, issued an Order granting the County's Petition for Rehearing for the purpose of affording the parties an opportunity to adduce additional evidence and arguments regarding:

> Fact and circumstances relating to the January, 1982 nonpayment of COLA that tend to show what the parties' mutual understanding was, if any, about whether hiatus COLA payments were a part of the compensation arrangements in place at that time.

and then Chairman Torosian having written the following concurring opinion as to said Order:

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.

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."

and hearing having been held on November 7, 1986 in Kenosha, Wisconsin after unsuccessful efforts by the parties to resolve their dispute; and the parties having thereafter submitted written argument the last of which was received June 1, 1987; and the Commission having considered the matter and concluded that it should reaffirm its March 5, 1986 Findings of Fact but reverse its Conclusion of Law and Order;

NOW, THEREFORE, it is

ORDERED 1/

A. That the Commission's March 5, 1986 Findings of Fact are hereby reaffirmed.

1/ Pursuant to Sec. 227.48(2), Stats., the Commission hereby notifies the parties that a petition for rehearing may be filed with the Commission by following the procedures set forth in Sec. 227.49 and that a petition for judicial review naming the Commission as Respondent, may be filed by following the procedures set forth in Sec. 227.53, Stats.

227.49 Petitions for rehearing in contested cases. (1) A petition for rehearing shall not be prerequisite for appeal or review. Any person aggrieved by a final order may, within 20 days after service of the order, file a written petition for rehearing which shall specify in detail the grounds for the relief sought and supporting authorities. An agency may order a rehearing on its own motion within 20 days after service of a final order. This subsection does not apply to s. 17.025(3)(e). No agency is required to conduct more than one rehearing based on a petition for rehearing filed under this subsection in any contested case.

(Footnote 1/ continued on page 3)

1/ Continued

227.53 Parties and proceedings for review. (1) Except as otherwise specifically provided by law, any person aggrieved by a decision specified in s. 227.52 shall be entitled to judicial review thereof as provided in this chapter.

(a) Proceedings for review shall be instituted by serving a petition therefor personally or by certified mail upon the agency or one of its officials, and filing the petition in the office of the clerk of the circuit court for the county where the judicial review proceedings are to be held. Unless a rehearing is requested under s. 227.49, petitions for review under this paragraph shall be served and filed within 30 days after the service of the decision of the agency upon all parties under s. 227.48. If a rehearing is requested under s. 227.49, any party desiring judicial review shall serve and file a petition for review within 30 days after service of the order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. The 30-day period for serving and filing a petition under this paragraph commences on the day after personal service or mailing of the decision by the agency. If the petitioner is a resident, the proceedings shall be held in the circuit court for the county where the petitioner resides, except that if the petitioner is an agency, the proceedings shall be in the circuit court for the county where the respondent resides and except as provided in ss. 77.59(6)(b), 182.70(6) and 182.71(5)(g). The proceedings shall be in the circuit court for Dane county if the petitioner is a nonresident. If all parties stipulate and the court to which the parties desire to transfer the proceedings agrees, the proceedings may be held in the county designated by the parties. If 2 or more petitions for review of the same decision are filed in different counties, the circuit judge for the county in which a petition for review of the decision was first filed shall determine the venue for judicial review of the decision, and shall order transfer or consolidation where appropriate.

(b) The petition shall state the nature of the petitioner's interest, the facts showing that petitioner is a person aggrieved by the decision, and the grounds specified in s. 227.57 upon which petitioner contends that the decision should be reversed or modified.

. . .

(c) Copies of the petition shall be served, personally or by certified mail, or, when service is timely admitted in writing, by first class mail, not later than 30 days after the institution of the proceeding, upon all parties who appeared before the agency in the proceeding in which the order sought to be reviewed was made.

Note: For purposes of the above-noted statutory time-limits, the date of Commission service of this decision is the date it is placed in the mail (in this case the date appearing immediately above the signatures); the date of filing of a rehearing petition is the date of actual receipt by the Commission; and the service date of a judicial review petition is the date of actual receipt by the Court and placement in the mail to the Commission.

B. That the Commission's March 5, 1986 Conclusion of Law is hereby set aside and the Commission hereby issues the following Conclusion of Law:

CONCLUSION OF LAW

That the Respondent Kenosha County, by failing to pay COLA adjustments to employes represented by Complainants during the contractual hiatus following expiration of the parties' 1982-1983 collective bargaining agreement, did not commit a unilateral change refusal to bargain in violation of Sec. 111.70(3)(a)4, Stats., or derivatively interfere with employes' exercise of their Sec. 111.70(2), Stats., right to bargain collectively through a representative in violation of Sec. 111.70(3)(a)1, Stats.

C. That the Commission's March 5, 1986 Order is hereby set aside and the Commission hereby issues the following Order:

ORDER

That the instant complaint is hereby dismissed.

Given under our hands and seal at the City of Madison, Wisconsin this 24th day of July, 1987.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Stephen Schoenfeld
Stephen Schoenfeld, Chairman

Danae Davis Gordon
Danae Davis Gordon, Commissioner

I dissent

Herman Torosian, Commissioner

KENOSHA COUNTY

MEMORANDUM ACCOMPANYING ORDER AFFIRMING FINDINGS OF FACT AND REVERSING CONCLUSION OF LAW AND ORDER

The historical and procedural posture of this case is recited in the preface to our Order and need not be repeated here. Suffice it to say, the issue in this proceeding is what did the evidence on rehearing establish and what impact does that have on the Commission's March 5, 1986 decision.

POSITION OF THE PARTIES:

The Complainant Unions initially assert that the petition for rehearing should never have been granted as indicated by the fact that the evidence adduced on rehearing was not "new" but rather cumulative, repetitive and redundant. The Complainants argue that the evidence on rehearing only confirmed that the non-payment of COLA in early 1982 was pursuant to the parties' specific agreement to freeze wages for certain specified time periods as part of the 1982-1983 contract settlement. Thus, Complainants contend that the record establishes a "one time only" waiver of the COLA payments the County was otherwise obligated to make during any hiatus. Given the foregoing, Complainants assert that the evidence rehearing does not constitute a valid basis for the Commission to alter its Conclusion of Law and Order in this matter.

Respondent County avers that the Commission properly granted the petition for rehearing and that the evidence presented on rehearing demonstrates that Complainants have failed to meet their burden of proof of establishing that COLA payments were part of the status quo the County was obligated to maintain. Thus, the County contends that the Commission must now reverse its Conclusion of Law to the contrary and dismiss the complaint herein.

Respondent County asserts that the evidence on rehearing clearly demonstrates that there was no agreement regarding a wage/COLA freeze for job security guarantee until March 1982, and that such an agreement was not even under serious consideration prior to January 1, 1982. The Respondent argues that this evidence, especially when combined with Complainant Unions' failure to object to the nonpayment of COLA, warrants a determination that the Commission's March 5, 1986 decision was clearly in error.

Concurring Opinion of Commissioner Danae Davis Gordon:

In granting the County's Petition for Rehearing, a majority of the Commission--then comprised of Chairman Herman Torosian, and Commissioners Marshall Gratz and Danae Davis Gordon--stated at page 3 of its memorandum that:

> 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.

Then Chairman Torosian, while concurring that the petition should be granted, noted that in his opinion, the requested correction would not change the outcome of the decision. Having reviewed the record evidence adduced at the rehearing and after careful consideration of the Commission's March 5, 1986, decision in light of the evidence presented at the rehearing, I conclude that the Examiner's conclusion that "(t)he failure and refusal of the Respondent County to pay COLA adjustments on and after January 1, 1984 was not a unilateral change in wages, hours or working conditions and therefore does not violate Sec. 111.70(3)(a)1 or 4, Wis. Stats." and Order dismissing the complaint should be affirmed. Thus, for the reasons set forth below, I am hereby changing my position as to the appropriate outcome of this case.

In the Commission's March 5, 1986, decision we noted that both the Commission and the Examiner agreed that the COLA language itself and the bargaining history

in this case are supportive of the Union's position that the status quo included continuing COLA adjustments every three months, including payments after expiration of the parties' 1982-83 collective bargaining agreement. However, the Commission, contrary to the Examiner, concluded that the County's January 1, 1982, nonpayment of COLA adjustments--occuring after the expiration of the 1979-81 agreement--did not, in the circumstances, deem that the status quo included non-payment of COLA adjustments. In this regard, the Commission stated the following:

> In our view, the Examiner makes too much of the January 1, 1982, nonpayment, all things considered. The COLA freeze was not the result of negotiation-as-usual between these parties. Rather, it was a central element in a highly unusual (for the public sector) agreement whereby the County severely limited its rights to subcontract and layoff in return for freezes in employe compensation including COLA. Union Representative (then and now) Robert Chybowski testified that discussions of what would be done about COLA were "at the heart" of the parties' negotiations. (tr. 29). There is no evidence indicating when the parties' negotiators began to exchange serious proposals involving a COLA freeze in return for major job security measures. The terms of the 1979-81 agreement provided for notification of desire to modify or terminate to be served no later than the July (1981) meeting of the County Board preceding contract expiration, and it also provided that the "Negotiations of a new agreement, subsequent to receipt of the above-required notice, shall be processed so that a new agreement can be concluded by December 31st if possible." Given these provisions and the highly unusual and significant nature of the agreement that was reached on or before March 8 of 1982, it seems reasonable to conclude that the wage and COLA freeze for major job security pledge trade-off would have been under serious consideration between the parties before January 1, 1982; especially so when it is noted that the agreed-upon limitations on layoff were made effective January 1, 1982.

We surmised that it was by no means clear that the parties had a mutual understanding that COLA adjustments were not to be paid during a hiatus. Rather, "(t)he nonpayment was a single instance which occurred in unusual circumstances that are at least consistent with the notion that at the time of the January 1, 1982 nonpayment of COLA, that nonpayment was a known element in a developing agreement of major significance to both parties whereby wage and COLA adjustments were to be foregone in return for major job security pledges." We went on to find that "the implications of the language and bargaining history" were not counterbalanced by the January 1982 nonpayment and therefore concluded the Union had met its burden of proving--by a clear and satisfactory preponderance of the evidence--that COLA adjustment payments were part of the status quo to be maintained during the contractual hiatus.

The evidence adduced at the November 7, 1986, rehearing clearly demonstrates that there was no agreed upon trade off between wage and COLA freezes for major job security provisions, certainly not before March, 1982. In fact, it is uncontroverted that the parties did not agree to such a proposal until March 8-9, 1982. (Tr. 60; See, Davis' Letter summary of Frederick's testimony dated February 13, 1987). While it is clear from the record that the County consistently maintained throughout negotiations for a successor to the 1983 contract that COLA adjustments should be capped or eliminated given its dire fiscal conditions at that time, it is equally true that the Union continued to propose that COLA adjustments remain uncapped. It was at the parties' fifth negotiations meeting on January 7, 1982, that the County proposed, for the first time, to freeze wages and COLA adjustments for 1982 in exchange for job security guarantees for the 1982 contract year. The County also proposed a wage reopener for 1983 or capping COLA adjustments at 15 cents per hour. Although the Union also proposed a wage and COLA freeze for the first year of the 1982-83 agreement, the Union rejected the County's proposal regarding same.

Between January 15 and March 8, 1982, the following occurred:

*January 15, 1982 - The Union filed a petition for mediation/arbitration.

*February, 1982 - County sets in motion its layoff plan.

*March 3, 1982 - County Board meets and authorizes County Negotiating Committee to offer a package including a wage and COLA freeze for 1982; job security guarantees for 1982; and establishment of uncapped COLA adjustments for 1983.

It was at the parties next bargaining meeting on March 8-9, 1982, that they, for the first time, agreed to a settlement which included wage and COLA freeze/job security provisions of the sort discussed and relied upon by the Commission in its March 5, 1986 decision. Thus, in my view, we have a situation where in the one other instance of a hiatus between contracts--upon expiration of the 1979-81 agreement--the County did not pay COLA adjustments and there is no evidence of a mutual understanding that the payments were to be made during the hiatus. As the Examiner concluded, the Union did not object, grieve or otherwise complain about the nonpayment. I note that the Union essentially argues that the fact that the parties agreed to freeze COLA payments for 1982 explains why no payments were made in January, 1982. However, the agreement to freeze COLA payments was reached March 8-9, 1982, and made retroactive to January. I also find the fact that the Union proposed a wage and COLA freeze for 1982 to be of little weight on the question of whether a COLA payment was due and owing as of January 1, 1982 (upon expiration of the 1979-81 agreement). For, the record clearly shows the parties neither agreed to a wage/COLA freeze in January or before, nor did the Union ever demand a hiatus payment, it now argues is due.

There being no satisfactory explanation for the Union's conduct in not protesting the nonpayment during the hiatus upon expiration of the 1979-81 agreement, I now find it more reasonable to conclude that hiatus COLA adjustments were not part of the status quo. In these circumstances I find the evidence of what actually occurred during any previous hiatus to be determinative of what is to occur during any subsequent hiatus. In other words, the fact that COLA adjustments were not paid in January, 1982 leads me to conclude that they were not required to be paid in January, 1984 (after the 1982-83 agreement expired).

Although I believe the implications of the language contained in Article VIII, Sec. 8. 1(e) and the bargaining history are supportive of the Union's position, the evidence of nonpayment of COLA adjustments in January, 1982 clearly supports the County's position and I find the Union has not met its burden of proving by a clear and satisfactory preponderance of the evidence that payment of COLA adjustments was part of the status quo. I therefore, conclude the County did not commit a unilateral change refusal to bargain in violation of Sec. 111.70(3)(a)4 and 1, Stats. The Commission's decision of March 5, 1986, should be reversed and the complaint dismissed in its entirety.

Dated at Madison, Wisconsin this 24th day of July, 1987.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Danae Davis Gordon
Danae Davis Gordon, Commissioner

Concurring Opinion of Chairman Stephen Schoenfeld:

I find merit to Respondent's position that the Commission's earlier decision was predicated upon an erroneous assumption involving the circumstances surrounding the COLA nonpayment and the job security pledge agreed to between the parties and that said error had a material impact on the Commission's ultimate conclusion that Respondent's nonpayment of same was unlawful.

Thus, the Commission's Memorandum accompanying said decision noted:

> In our view, the Examiner makes too much of the January 1, 1982, nonpayment, all things considered. The COLA freeze was not the result of negotiation-as-usual between

> these parties. Rather, it was a central element in a highly unusual (for the public sector) agreement whereby the County severely limited its rights to subcontract and layoff in return for freezes in employe commpensation including COLA. Union Representative (then and now) Robert Chybowski testified that discussions of what would be done about COLA are "at the heart" of the parties' negotiations. (tr. 29). There is no evidence indicating when the parties' negotiators began to exchange serious proposals involving a COLA freeze in return for major job security measures. The terms of the 1979-81 agreement provided for notification of desire to modify or terminate to be served no later than the July (1981) meeting of the County Board preceding contract expiration, and it also provided that the "Negotiations of a new agreement, subsequent to receipt of the above-required notice, shall be processed so that a new agreement can be concluded by December 31st if possible." Given those provisions and the highly unusual and significant nature of the agreement that was reached on or before March 8 of 1982, it seems reasonable to conclude that the wage and COLA freeze for major job security pledge trade-off would have been under serious consideration between the parties before January 1, 1982; especially so when it is noted that the agreed-upon limitations on layoff were made effective January 1, 1982 (emphasis added).

Upon closer scrutiny, it is now clear that there was no record evidence before the Commission at that time to support its assertion that "it seems reasonable to conclude that the wage and COLA fringe for major job security pledge trade-off would have been under serious consideration between the parties before January 1, 1982; especially so when it is noted that the agreed-upon limitations on layoff were made effective January 1, 1982." The Rehearing likewise failed to produce any evidence to that effect. To the contrary, the Rehearing established that there was not even any discussion of this trade-off until after January 1, 1982 and that the mutual agreement between the parties on this overall issue was not reached until March 1982. Accordingly, the Commission's earlier determination to the contrary was in error.

Once this fact is removed from consideration, we therefore are left with a record which shows that: (1) there is no evidence that the parties in negotiations leading up to agreement on the contractual COLA provision ever discussed whether COLA payments would have to be made during a contractual hiatus; (2) there is no evidence that the parties in negotiations leading up to agreement on the contractual COLA provision ever agreed that COLA payments would have to be paid during a contractual hiatus; (3) no such COLA payments were made during the 1982 contract hiatus following expiration of the 1979-1981 contract; (4) the Union at that time neither grieved nor formally complained, nor in any other way protested, said nonpayment; and (5) there is no evidence that COLA payments have ever been paid in any previous contractual hiatuses before the one at hand. In such circumstances, I conclude that Complainants have failed to meet their statutory burden of proof that the expired 1982-1983 contract mandated COLA payments during the subsequent contractual hiatus. Accordingly, the Commission's prior March 5, 1986 decision and order should be reversed and the complaint should be dismissed in its entirety.

In so finding, I am of course mindful that the Commission's earlier decision relied on the fact that the County in negotiations leading up to the 1979-1981 contract failed in its attempt to have the contract specify the exact dates that COLA payments--which were being converted from a semi-annual basis under the prior contract to a quarterly basis in the successor contract--would have to be made throughout its three year duration. This one fact, however, cannot be given much weight since there is no evidence that the parties in their negotiations ever discussed the separate question of whether COLA payments would have to be paid following the contract's expiration. Inasmuch as the Union thereafter acquiesced to the County's refusal to make said COLA payments after the 1979-1981 contract expired, I believe that the mutual action of the parties at that time better reflected their understanding over whether said payments were mandated under this language.

By the same token, the Commission's earlier decision rested in part upon the language in Article VIII, Section 8.1(e), of the expired 1982-1983 contract which provided that "Thereafter, there shall be quarterly (COLA) adjustments . . ." This language admittedly is ambiguous enough to support the Union's claim that COLA adjustments were to be paid following the contract's termination. However, given the absence of any specific discussion in negotiations between the parties on this issue, it is just as possible that the parties agreed to the term "Thereafter" to refer only to the many quarterly COLA payments which were to be paid during the several years that their contracts were to be in effect, rather than to any payments past the contracts' expiration dates. Accordingly, given all of the foregoing I find that this ambiguous language, standing alone, is an insufficient basis for finding that the County had ever agreed to make any such payments following expiration of the 1982-1983 contract.

Dated at Madison, Wisconsin this 24th day of July, 1987.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Stephen Schoenfeld
Stephen Schoenfeld, Chairman

Dissenting Opinion of Commissioner Herman Torosian

For reasons stated in the Commission's March 5, 1986 decision and my concurring opinion in the Commission's Order Granting Petition for Rehearing, I find that the County was obligated to pay cost of living adjustments during the 1984 hiatus period. In short, I reach my conclusion based on the contractual COLA language and the parties' bargaining history regarding same.

Commissioner Davis Gordon relies on the fact that the Union did not protest the non-payment of COLA during the hiatus upon expiration of the 1979-81 agreement as the convincing factor in determining that the status quo did not require the payment of COLA. Chairman Schoenfeld also relied on the Union's non-protestation but to a much lesser degree. The Commission in its March 5 decision did not find this to be a determinative factor because the Commission felt "that the wage and COLA freeze for major job security pledge tradeoff would have been under serious consideration between the parties before January 1, 1982;", thereby explaining the Union's lack of protest. While evidence adduced at rehearing establishes that the wage and COLA freeze in exchange for a major job security pledge was not under serious consideration prior to January 1, 1982, the evidence does establish that the proposed exchange certainly was a serious consideration shortly thereafter during bargaining on January 7, 1982. On said date the Union proposed a wage and COLA freeze for 1982 in return for a guarantee of no layoff, as earlier proposed by the County, but the parties remained apart with respect to COLA in 1983. Despite the fact that the parties did not reach a settlement of their collective bargaining agreement until March 8, 1982, the fact remains that the Union at least as of January 7, 1982 had come to grips with and reached a decision that a wage and COLA freeze in 1982 was acceptable to the Union in exchange for job security. Thus as early as January 7, 1982 this exchange was a known and accepted element in developing an agreement of major significance to both parties. This more than adequately explains the Union's lack of protest of non-payment of COLA during the 1982 hiatus period. Thus, I find reliance on the Union's non-protest by Commissioner Davis Gordon and Chairman Schoenfeld, to the extent he so relies, in support of their conclusion that status quo under the circumstances of this case does not require the payment of COLA to be unreasonable and without merit.

Dated at Madison, Wisconsin this 24th day of July, 1987.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By
Herman Torosian, Commissioner