

CIRCUIT COURT
COUNTY OF KENOSHA
BRANCH 2

LOCAL 70 et al,
Petitioners,

vs.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION,
Respondent.

Case No. 87-CV-1367
Decision No. 22167-D

DECISION

The petition for review by the petitioner asks this Court for an order holding that the Wisconsin Employment Relations Commission committed material errors of law, improperly applied MERA, unlawfully granted a petition for rehearing, and made improper legal conclusions.

The basic issues to be resolved revolve primarily around the following questions: Was the failure of Kenosha County to make and pay cost of living adjustments following the expiration of the 1982-83 collective bargaining agreement a unilateral change in wages or benefits and therefore unlawful refusal to bargain? Did the "dynamic status quo" doctrine mandate a continuation of the COLA payments by Kenosha County after the expiration of the agreement and before a new agreement was signed?

The Court will not summarize the facts, and to some extent they are undisputed. On review this Court is not to redetermine the facts. The Commission properly granted a petition for rehearing if it felt further information was needed and that different inferences could be made from the facts it had already determined. The decision of the Commission should not be reversed unless this Court would find from the record and the evidence that a reasonable person, acting reasonably, could not have reached a decision from the evidence and its inferences. Hamilton v DILHR, 94 Wis 2nd, 611; 288 NW 2nd, 587 (1980).

Respondents and intervener cite a private sector case which held COLA payments are not a condition of employment and do not survive the expiration of a contract. Petitioners cite a Michigan public sector case which said it is a condition of employment which does survive the expiration of an agreement. The Commission in our case assumes a COLA clause may survive, but a majority of the Commission specifically found that petitioners failed to prove that the status quo covered COLA during a contract hiatus.

The Commission deciding our case examined language of the agreement, past practice during contractual hiatuses, and the bargaining history. Kenosha County claimed that under an earlier contract, which expired December 31, 1981, it did not pay COLA during the contract hiatus. An

apparent attempt by the County to present evidence of what happened after the 1976-78 agreement expired was apparently denied. However, as pointed out by one of the commissioners, the petitioners herein had the burden of proof and failed to show that COLA payments had ever been paid in any previous contractual hiatuses.

To avoid prolixity, this Court will try to concisely state its thoughts on the use of the word "Thereafter" in the 1982-83 agreement as said word relates to the quarterly COLA adjustments. The word did appear in the earlier agreement, and I am not convinced the word "Thereafter" referred to any payments after the agreements ended. Two members of the Commission decided that when the petitioners herein failed to object to the cut off of COLA after January 1, 1982 this showed a past practice under which the petitioners and the County did not have any mutual understanding that COLA would be paid after December 31, 1983 without a new contract. In any event, the word "Thereafter" did not mean enough to the unions to cause them to object after January 1, 1982. The unions' action or in this case non-action, speak clearly as to their understanding of the contractual language.

Whatever the contract language and the bargaining history, the petitioners' failure to complain in January of 1982 exhibited the understanding of the parties that hiatus COLA adjustments were not part of the contract or status quo. If no agreement on COLA and the "freezing" thereof was reached until March of 1982, what happened to the January 1, 1982 adjustment? If anyone dare argue that in 1982 complaining by the unions was not thought about, because the Commission was using a "static" rather than a "dynamic" view of the status quo, such an argument, if anything, would show the. County and union never expected COLA beyond expiration of the 1980-81 contract or of the 1982-83 contract which concerns us now. Regardless of this Court's theories, theories are not necessary as a basis for this Court to hold the Commission acted correctly in our case and its decision and order must be affirmed.

This Court has carefully reviewed the record in this case. It is not going to conduct a de novo review of the evidence. There was a rational basis for the Commission's decision. The burden of proof, by a clear and satisfactory preponderance, was on the petitioners to show a violation of Wisconsin Statutes. There simply is no noteworthy evidence in the record showing a past practice of the petitioners and Kenosha County requiring the continuation of COLA after expiration of any collective bargaining agreement. There is clear evidence to the contrary.

Whether the "dynamic" status quo doctrine should be applied to COLA benefits in absence of contract language so requiring will not be answered by this Court. The Commission assumes it should be, this assumption is accepted by this Court, and the Commission must be affirmed if the doctrine is applicable. If the doctrine were not applicable, this case would most probably not be before this Court for review as the contract language is at least ambiguous.

In summary, assuming the "dynamic" status quo doctrine is applicable the Commission looked at the agreement, bargaining history, and past practices, weighed the evidence and made its decision. The decision was legal and proper. Neither the bargaining history nor the agreement required payment of COLA during a hiatus. The Commission found there was no past practice of payment, but of actual non-payment, and this requires affirmation of its order.

Dated this 31st day of July, 1989.

BY THE COURT:

/s/ Paul F. Wokwicz
Paul F. Wockwicz
Circuit Judge, Br. 2