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Two documents have become associated with the same 23489CC2 filename in the WERC electronic archives.

Both of those documents have been combined into the single 23489CC2.pdf for future electronic archiving purposes.

M. Gratz
11-20-03

STATE OF WISCONSIN
CIRCUIT COURT
SAUK COUNTY

SAUK COUNTY,
Petitioner,

vs.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION,
Respondent.

Case No. 88-CV 27
Decision No. 23489-C

DECISION

This case involves a 1985 collective bargaining contract for 1985 between the employer (petitioner) and certain county employees. The contract is created by law rather than by routine agreement signed by the parties. The parties did not agree, so the dispute went to an arbitrator who made a decision on October 15, 1985. The contract called for fair share deductions and the county made such deductions after the award, but not retroactively. Whether the contract required such retroactive deduction of fair share is the basic issue here.

The Union representing the county employees (hereinafter "Union") filed a complaint alleging the county had violated Section 111.70(3)(a)7, Wis. Stats. by failing to pay the retroactive fair share payments. The WERC appointed an examiner who tried the cause on June 19, 1986. A decision was entered on October 7, 1987. The county appealed from an adverse decision by the examiner. The Commission, on December 22, 1987, affirmed the examiner's decision on the ground the County's petition was not timely filed.

The County then, on January 8, 1988, commenced this action to challenge the WERC decisions. Judge Curtin made a decision on June 1, 1989 affirming the WERC decision that the appeal to the Commission was not timely. An Order for affirmance was entered on June 28, 1989. Apparently thereafter all parties requested the Court to decide the issues on the merits, so a new Order of August 8, 1989 vacated the Order of June 28, 1989.

We are left with the decision of June 1, 1989 on timeliness, and Judge Curtin's statement that a decision on the merits is indicated.

It, no doubt, is somewhat unique to proceed to a decision on the merits after the Court has, in effect, ruled it has no jurisdiction. However, I accept the foregoing situation and judgment and Judge Curtin's statement that a decision is required and proceed accordingly.

The facts set forth in petitioner's brief appear to be undisputed and I include here those facts I feel relevant.

"AFSCME, Local Union No. 3148, AFL-CIO has represented employees at the Sauk County Health Care Center since about 1980. In the five years of such representation preceding the filing of the complaint in this action, the County and the union negotiated four separate labor contracts, covering the calendar years 1981, 1982, 1983-84, and 1985. (Case 111, No. 31531, MP-1469, Jt. Ex. No. 1; Jt. Ex. No. 2 (Case 67, No. 34706, MP-1686, Jt. Ex. No. 1); and Jt. Ex. No. 1, respectively.) Some form of fairshare has been a part of every one of those contracts.

In 1981, the first contract included a modified fair-share clause, but agreement was not reached until the latter part of that year. When that contract was ratified, however, the union security provisions were not made retroactive to the start of the agreement. Deductions were made prospectively only. (Ex. 2, Case 67, Tr. at pp. 31-33).

In 1982 and 1983-84, contracts each expired before agreement on successor contracts could be reached. (Tr. 33-35) During the hiatus periods between the contract expiration and the interest arbitration awards which created new contracts, the County never deducted fair-share contributions. (Tr. 34) Even after the new contracts were ratified in each of these years, the County never made retroactive fair-share deductions covering the hiatus periods, it only withheld prospectively from the dates of ratification. In 1982, the union did not object to the County's interpretation of the fair-share clause as being prospective only. In the 1983-84 contract, the union initially objected but later withdrew that objection. (Tr.34)

The union and the County entered into a collective bargaining agreement covering the period of January 1, 1983 through December 31, 1984 on February 28, 1984. It included a full fair-share provision. (Jt. Ex. 2, Record o f Case 67, Jt. Ex. 1). That contract, as had been the previous agreement, was the result of a mediation-arbitration award that was rendered in the middle of the contract term. During that hiatus period, the County, as it did in this case, did not withhold either union dues or fair-share contributions. The County also did not withhold fair-share contributions retroactively.

The union filed a similar complaint with the WERC when the County ceased withholding dues in 1983. The union contended, in part, that the County's failure to retroactively withhold union dues and fair-share contributions for the periods of the hiatus constituted a refusal to implement the mediation-arbitration award. (Ex. 2, Case 67 Transcript at p. 67)

Ultimately, this complaint was dismissed by the WERC. It was dismissed at the union's request, based upon the union's representation that the interest arbitration award had "resolved all outstanding issues." (Ex. 7 and 8) It was so dismissed despite the fact that the County did not withhold those union dues or fair-share contributions from the employees' checks retroactively and the union was aware of that fact prior to withdrawing its complaint. (Ex. 2, Case 67, Employer's Exhibits 7 - 8; Transcript at pp. 27-28)

Negotiations for the 1985 agreement, the contract at issue in this case, commenced prior to contract expiration. The union filed another petition for mediation-arbitration in mid-December of 1984. During the negotiations, neither the County nor the union proposed to change the fair-share language in the collective bargaining agreement. (Ex. 2, Transcript of Case 67 at pp. 10-12.) In January of 1985, when the 1983-84 contract expired, the County, as it had always done before, ceased union dues check-offs and fair-share deductions. (Ex. 2, Case 67, Joint Exhibit 2)

In the mediation-arbitration proceedings, each party was required to submit their final offer on the disputed items still in negotiations. The County's final offer, the union's final offer, and the tentative agreements to that point were silent on the issue of whether fair-share and union dues were to be deducted retroactively. The union's final offer specifically indicated that their wage offer was to be retroactive to January 1, 1985, however.

On October 15, 1985 the mediator-arbitrator issued his award. That award did not make any changes in the fair-share language nor did it even address the question of whether fair-share was to be deducted prospectively or retroactively. (.Jt. Ex. No. 6) As it had in prior contract years, the County made fair-share and union dues deductions prospectively, but not retroactively. The union again filed a complaint with the WERC alleging that the County's failure to make retroactive fair-share deductions violated numerous provisions of Wis. Stats. Section 111.70,(3)(a).

On October 7, 1987, Examiner David E. Shaw issued his proposed.Findings of Fact, Conclusions of Law and an Order. In that decision, he concluded that Sauk County had violated Wis. Stat. Section 111.70(3)(a) 7, and derivatively Wis. Stat. Sec. 111.70(l@)(a) 1, but no other section of MERA, by refusing to retroactively withhold fair-share contributions and union dues. In reaching that conclusion, the examiner acknowledged that his holding represented a ruling on an issue "that has not been addressed before this by the commission." (Examiner's decision at p. 17) The examiner concluded that there was no past practice of withholding fair-share payments and dues prospectively only, that a fair-share/voluntary dues deduction provision is most likely to be considered an economic item to be applied retroactively, and that a violation of (3)(a) 7 could be found even where the contract language alleged to be violated was never at issue in the mediation-arbitration proceeding.

On October 28, 1987, 21 days after the date of the examiner's decision, the WERC received the County's petition for review of the examiner's decision. The WERC, sua sponte, issued an order confirming the examiner's decision by "operation of law.".

DECISION

For the purposes of this decision, my attention will be directed to the award of the examiner since

the commission attempted no changes in
such award.

Essentially the Court considers we are faced with a "contract" case since the award of the arbitrator merely selected which party's offer would be preferred. The Union's offer in effect became the collective bargaining agreement or contract. The examiner was faced with the issue of interpretation of an admittedly ambiguous contract provision.
The examiner in effect found that at the time of the entry into the contract, it was the intent of both parties to provide for retroactive deduction of fair share fees for all previous months of 1985.

The briefs of the County and the Union dispute whether this Court should give "great weight" or "due weight" to the Examiner's interpretation. The Commission brief argues that the Commission's interpretation must be
sustained if it is reasonable.

The Court sees little, if any, emphasis in the Examiner's decision on ascertaining the intent of the parties as to the ambiguous part of the contract.

> The foundation of all rules for construction of contracts is the intention of the parties. 17 Am. Jur. 2d, pg. 631, Sec. 244.

There are well recognized rules governing the construction of contracts. It is clear neither party attempted, in its offer, to spell out by contract the issue of retroactive payments. Regardless of the reason, for the Commission or the Court to find agreement thereon when, obviously, no agreement existed, would he contrary to good law.

> It is a fundamental principle that a Court may not make a new contract for the parties, or rewrite their contract under the guise of construction. 17 Am. Jur. 2d, pg. 627, Sec. 242.
>
> Course of prior dealings may be considered by the Court to enable the Court to determine the intent of the parties. 17 Am. Jur. 2d, pg. 644, Sec. 251.
>
> If it can be plainly seen from all the provisions of the instrument taken together that the obligation in question was within the contemplation of the parties when making their contract, ** the law will imply the obligation and enforce it. The policy of the law is to supply in contracts what is presumed to have been inadvertently omitted **. The Courts are ** cautious in implying rights, obligations, promises or covenants, lest they make the contract speak where it was intended to be silent **." 17 Am. Jur. 2d, p. 649-651, Sec. 255.
>
> No implied provisions can be inserted to supply an obligation concerning which the contract is intentionally silent. Glass vs. Mancuso (MO) 444 S.W. 2d, 467.
>
> A promise may be implied only where it may be rightfully assumed that it would have been made if attention had been drawn to it, and it is to be implied only to

reach a result which the unequivocal acts of the parties indicate they intended to effect. Genet vs. Del. & H. Canal, 136 N.Y. pg. 593

Terms are to be implied in a contract, not because they are reasonable, but because they are necessarily involved in the contractual relationship so that the parties must have intended them and have only failed to express them because of sheer inadvertence**. 17 Am. Jur. 2d, pg. 651, Sec. 255.

In construing a contract, a Court should ** place itself in the situation occupied by the parties when the agreement was made **. Any previous course of dealing ** may ordinarily be considered. 17 Am. Jur. 2d, Pg. 681, Sec. 272.

A contract will normally be construed against:

(a) the party who drew it and left it ambiguous,

(b) the party for whose benefit it was inserted. 17 Am. Jur. 2d, Section 275.

A criminal law principle is that no one should be required at peril of penalty to speculate on the meaning of penal Statutes. The same rational should apply here, that the County, at the peril of money sanctions, should not be responsible for conduct it should not reasonably understand to be proscribed. 21 Am. Jur. 2d, page 128, Section 16.

The past practice evidence may not have met the Commission's test of acceptance by "both" parties. The evidence did clearly establish that there was no agreement or meeting of the minds on retroactive fair share deductions. It is clear that neither side made any proposal on this for year 1985, and the only safe assumption is that both parties elected to leave it out of the contract.

The past course of conduct as to retroactive payments was well established, i.e., no retroactive payments essentially had been paid in the past four years. The pattern was that the County opposed them and the Union wanted them. There was the one time when the Union actually urged the County not to deduct retroactively. This frame of mind prevailed when the 1985 offers were made and the contract signed. In other words, except on one occasion when the Union rejected retroactive payments, the parties never had a meeting of minds on the issue and made no attempt to resolve the issue in the 1985 offers.

The Court is convinced, based on its review of the facts and the Examiner's decision, that he failed to attempt to and did not follow the cited and established rules for construction of contracts. Wisconsin Stats. 111.70(3) (a) 6 forbids the employer to deduct fair share unless there is an agreement by the parties to sanction this. This is not a case where there is a preponderance of the evidence or even equal evidence to support the Examiner. There is no evidence of an agreement by the County. In fact, the evidence is completely to the contrary.

Especially considering the past course of action in regard to the deduction, the fact that this 1985 contract carried a time of one year, just as prior contracts carried a similar -term, offers no support to the Examiner's conclusion. In fact, the expressed mention/implied exclusion rule tacitly accepted

by the brief of the Commission, mandates a result opposite to that reached by the Examiner.

Since the decision of the WERC must be reversed because of the erroneous interpretation of the contract, the Court feels it unnecessary to spend time on the issues of "prohibited practice" and "referral to an arbitrator".

Dated October 11, 1989.

BY THE COURT:

/s/ Howard Latton
Howard Latton
Circuit Judge

STATE OF WISCONSIN CIRCUIT COURT SAUK COUNTY

SAUK COUNTY,

Petitioner,

v. Case No. 88-CV-27

WISCONSIN EMPLOYMENT RELATIONS COMMISSION,

Respondent. Decision No. 23489-C

ORDER

The above-entitled proceeding having been commenced January 13, 1988, under sec. 111.07(8) and ch. 227, Stats., to review a decision of the Wisconsin Employment Relations Commission under the Municipal Employment Relations Act, secs. 111.07-111.77, Stats.; and

The petitioner having appeared by Robert M. Hesslink, Jr., the Commission having appeared by David C. Rice, Assistant Attorney General, and AFSCME Local Union No. 3148 having appeared by Richard V. Graylow, Lawton & Cates, S.C.; and

The court having reviewed the record and the written arguments of the parties; and

The court having entered its memorandum decision on June 1, 1989;

Now Therefore, IT IS ORDERED that the decision of the Commission is AFFIRMED.

Dated at Baraboo, Wisconsin, this 26th day of June, 1989.

BY THE COURT:

R. F. Curtin

Hon. Robert F. Curtin
Circuit Judge