STATE OF WISCONSIN CIRCUIT COURT BARRON COUNTY

Northwest United Educators,

Petitioner,

-vs-

The Wisconsin Employment Relations Commission and Hayward Community School District,

Respondents.

MEMORANDUM DECISION AND ORDER

Case No. 88 CV 129

Decision No. 24259-B

NATURE OF THE CASE

This is a certiorari review, pursuant to Chapter 227, Wis. Stats. of a Decision and Order of the Wisconsin Employment Relations Commission (Commission) which in pertinent part held that the Hayward Community School District (District) did not violate Section 111.70(3)(a) 1, 3, 4, or 5, Wis. Stats.[1], in terminating a teacher, Anita Zalewski's (Zalewski) employment.

Zalewski and her union, Northwest United Educators (Union) have petitioned this Court to hold that under the facts of record and the plain language of the parties' master agreement, the District improperly discharged this teacher and that the Commission erred in finding that it did not.

ISSUES

1) Are the Commission's findings supported by substantial evidence?

2) Was the Commission's interpretation and application of the parties collective bargaining agreement reasonable?

DECISIONS

1) The Commission's finding and determination that Zalewski was a temporary employee entitled to the relief awarded by the Examiner are supported by substantial evidence of record and are affirmed.

2) Because the Commission has not enunciated its findings and reasoning in support of its decision that the term, "rights and benefits" applied solely to the temporary term of Zalewski's employment and that just cause was provided automatically by the termination of the need for the temporary employee, the matter is remanded to the Commission with directions.

RATIONALE

I

The Commission came to address this case under Section 110.70(3)(a)5, Wis. Stats. because the parties' master agreement did not contain an arbitration clause. Hence the Commission's function was to interpret the disputed provisions of the collective bargaining agreement and determine the intent of the parties.

The Court's mandate is to determine whether the Commission acted properly within statutory rules and within the parameters of its discretion. Although the Court has decided to remand with instructions as to certain issues, it is appropriate to address some collateral points which have been raised in the Union's argument.

II

Fundamentally, the District found itself with a problem as it faced the 1986 school year. Its Middle School reading teacher, Brady, had precipitously resigned and a new teacher needed to be installed until a permanent successor could be advertised for, interviewed and hired. Zalewski had served the District on an ad hoc basis before and agreed to do so at this time. She knew that the offered position was not designed to be permanent, she did not expect permanence; and later when she had, along with others, applied for the permanent position, had the realistic expectation that someone else might land the job, Zalewski Tr. p. 17. The Commissioner found the above as fact.[2] Zalewski began her teaching in September and served until December, 1986, at that time the Christmas Vacation began coincidental to the hiring of the new permament teacher, a Mrs. Hanson. Zalewski was then advised that the need for her help had expired.

III

The Union has steadfastly maintained three things:

1) That the contract provided in Article 1 that upon completion of thirty continuous days of employment[3], The

temporary teacher became a "full time teacher..."entitled to...full rights to employment under the master contract..." Hearing Record, Ex. 10.

2) That full rights under the master contract included the right to a showing of just cause before Zalewski could be terminated.

3) That "just cause" was never shown by the District, hence Zalewski was wrongfully discharged.

The District had been equally persistent in its contention that Zalewski was not a temporary employee but rather as they would have it, a euphemistic hybrid called a "long term substitute". The Examiner and Commission dispatched that theory with persuasive logic and bracing alacrity and the Court is in entire agreement. Further discussion on that issue is not warranted.

IV

The Examiner, having concluded Zalewski was a temporary employee, then determined what her "rights and benefits" were. He found that "benefits" meant she was entitled to compensation for the fringes the District did not award her after her first thirty days. He also found that "rights" pertained to rights to the temporary position. This, the Examiner and Commission subsequently held, meant that after thirty days in her temporary slot, Zalewski could not be jockeyed around to another slot nor removed from her temporary slot without being afforded the full mechanics of the master agreement, ie. "just cause", see ART XIII, Discipline Procedures, Hearing Record, Ex. 8.

The Examiner and Commission ultimately held that because Zalewski had no reasonable expectation of continued (permanent) employment and the filling of the position preforce ended the "temporary need" and "limited specific time" of the employment, it automatically followed that these events provided "just cause" to let Zalewski go.

Because the terms "rights and benefits" are capable of being understood in two or more possible senses (and in this case certainly are) the terms are ambiguous and it is proper to look to the parties' bargaining history to determine their intent. The Commission did so, the Court will do so, to determine of the Commission acted reasonably, see Board of Education, Brown Deer School v. WERC, 86 Wis. 2d, 201 (1978).

V

A.

The Union has taken no small umbrage with the Examiner's and Commission's rationale, which attempted to dispose of the "rights and benefits" and "just cause" issues. First, it is vexed because the WERC did not adopt as its final holding, either of the parties' interpretation of the recognition clause agreement.

The Court's initial reaction is mystification that the Union would spend any time belaboring the fact that the Commission demolished the District's position. That position was wrong, the Union said so, the Examiner said so, the Commission said so, and the Court is not going to say them nay.

Nonetheless, it is hubristic to then conclude that because the opposition's position was fully repudiated, its own position is automatically the ultimate truth. It does not follow that because one litigant's jurisprudential aircraft has crashed and burned, that the other side's aircraft still flies high.

No authority was cited, and there is only a hopeful, "we think it axiomatic", in support of the proposition that the soul of the parties' agreement lies in their respective argumentation. The reasonableness of the Commission's determination must be sought from the entire record, not just the argumentation of counsel, Board of Education, Brown Deer, supra, and from the parties intent, not just counsel's logic, Armstrong v. Colletti, 88 Wis. 2d, 148.

B.

The Union is also upset that the Examiner based his Decision upon the theory that Zalewski was not as a temporary employee in the bargaining unit, School District of Pittsville, Dec. No. 21806 (WERC, 8/86).

I confess that the Examiner's analysis seems to compare apples and pomegranates and I do not understand the connection between bargaining status and eligibility for contract protection under the facts of this case. Moreover, the Commission, in its admittedly terse per curiam affirmance, noticeably avoids reliance upon the Examiner's seeming conclusion and fashioned its own harmonization, see Footnote No. 4, Decision of Commission.

However, the Commission correctly noted that the seminal issue in the case was defining "just what those 'rights and benefits' are for a temporary teacher."

C.

Generally,

> "Neither the Commission or this Court should substitute its own construction of the contract provisions for that which the parties through practical interpretation have placed thereon. Practical construction by the parties of labor agreements should, if anything, be accorded wider scope than the interpretation of ordinary commercial contrcts." Cutler Hammer, Inc. v. Industrial Commission, 13 Wis. 2d, 618, 634.

The problem with the application of that prescription here, of course, is that there is no affirmative history of practical construction "by the parties". Although the District had used the equivalent of temporary[4] teachers numerous times before, the Union did not see fit to join issue as it has done here[5]. Hence, we have no practical application in our case except perhaps by negative inference.[6] In the absence of a history of practical application, it becomes necessary to analyze the testimony of the respective parties to determine their intent. In this case, the primary witnesses were Robert West, the Union's negotiator at the time of the time of the contract construction, and Jack White, the District Superintendent at the same time. Mrs. Zalewski also testified,[7] but we do not base our judgment on her evidence. West testified inter alia, that:

> "If there was a position for which there was no employee currently employed, and it just happened to be a position that the District needed, that that would be a temporary, and that if that employee filled the temporary need for longer than thirty days, then they were covered by the agreement." West Tr., p. 27, L. 19-24.

And further:

> "I attempted, and we discussed that at the bargaining table, that the idea of a temporary was at least that would give them up to thirty days to go out and recruit and they could still have the job filled with a temporary employee who is not covered by the collective bargaining agreement." West Tr. p. 29/30, L. 21-1.

Judging from this testimony, the Union anticipated the District's needs and desires to recruit the best available teacher and the consequent time necessary to do so. This testimony also supports the Union's contention that at the end of the thirty days, the temporary employee was covered by the agreement. Perhaps the Commission saw it differently, but it fails to make mention of that, and the record reveals no opposing testimony from the District.

In all events, the Commission upheld the Examiner's quantum leap conclusion that rights and benefits alluded to only rights and benefits in the temporary employment.

Frankly, this Court cannot tell if the Examiner and then the Commission, believed Mr. West or not.[8] If they did not, they should say so. But they do not point to any other evidence, either testimonial or precedential, to support a contrary conclusion, including the one that they arrived at. Moreover, they conclude that "just cause" termination was necessarily included in the hiring of the permanent teacher. Once again, no testimony, no precedent, no analysis is offered to support that conclusion. It is not enough to say Mrs. Zalewski had no reasonable expectation of permanent employment, for to do so, is perfectly true and perfectly meaningless in the context of this case. First, at the outset, maybe she didn't expect the job to last thirty days; second, maybe she wasn't conversant with the contract language, which was arguably supportive of her continued employ; and third, it begs the question. Why doesn't the contract mean what the Union has always (and Zalewski now says) said it means?

The Commission's statutory charter requires it to explain its reasoning. The Court wants to afford the Commission appropriate deference, but to do so, we must have the path of its reason, not the aftermath of its will. In point of simple fact, the Commission's Decision does not make findings of fact and conclusions of law which are traceable and are articulate. In short, the Commission does not tell us why it did what it did.

CONCLUSION

Because the Court finds that there is substantial evidence of record to support the Commission's conclusion that Anita Zalewski was a temporary employee as that term is defined under Article 1 of the Master Agreement, and because the Court is satisfied that there is substantial evidence of record to justify the Commission's conclusion that that she was entitled to compensatory pay for the fringes which the

District failed to award her as a consequence, that portion of the Findings, Conclusions and Order of the Commission is affirmed.

Because the Court concludes that these proceedings have been impaired materially by the Commission's failure to follow proscribed procedure by enumerating its reasoning and fact finding methodology; and because the Court is unable to determine from the Commission's Decision if its action can be supported by substantial evidence in the record; and because we cannot determine how the Commission exercised its discretion, the Court remands this action to the Commission pursuant to Section 227.57(4),(6),(8), Wis. Stats. Upon remand, the Commission will set forth its analysis of credibility and enunciate its methodology in arriving at its conclusions and order.

SO ORDERED.

Dated at Barron, Wisconsin, this 11 day of April, 1989.

BY THE COURT:

JAMES C. EATON
Circuit Judge, Branch I

FOOTNOTES

1) Section 111.70, Wis. Stats:

(3) PROHIBITED PRACTICES AND THEIR PREVENTION. (a) It is a prohibited practice for a municipal employer individually or in concert with others:

1. To interfere with, restrain or coerce municipal employes in the exercise of their rights guaranteed in sub. (2).

3. To encourage or discourage a membership in any labor organization by discrimination in regard to hiring, tenure, or other terms or conditions of employment; but the prohibition shall not apply to a fair-share agreement.

4. To refuse to bargain collectively with a representative of a majority of its employes in an appropriate collective bargaining unit. Such refusal shall include action by the employer to issue or seek to obtain contracts, including those provided for by statute, with individuals in the collective bargaining unit while collective bargaining, mediation or fact-finding concerning the terms and conditions of a new collective bargaining agreement is in progress, unless such individual contracts contain express language providing that the contract is subject to amendment by a subsequent collective bargaining agreement. Where the employer has a good faith doubt as to whether a labor organization claiming the support of a majority of its employes in an appropriate bargaining unit does in fact have that support, it may file with the commission a petition requesting an election to that claim. An employer shall not be deemed to have refused to bargain until an election has been held and the results thereof certified to the employer by the commission. The violation shall include, though not be limited thereby, to the refusal to execute a collective bargaining agreement previously agreed upon. The term of any collective bargaining agreement shall not exceed 3 years.

5. To violate any collective bargaining agreement previously agreed upon by the parties with respect to wages, hours and conditions of employment affecting municipal employes, including an agreement to arbitrate questions arising as to the meaning or application of the terms of a collective bargaining agreement or to accept the terms of such arbitration award, where previsouly the parties have agreed to accept such award as final and binding upon them.

2) The Examiner found these matters as facts and the Commission adopted them. So does the Court.

3) This meant thirty continuous working days, see West Tr. p.28.

4) The District, of course, called them long term substitutes, but we now recognize them for what they truly were.

5) The Union's explanation for this was essentially that the teachers who may have had a gripe about their treatment, declined to pursue it. The Union's explanation that it did not think it proper to wage test cases at the teachers' expense (at least in emotional terms), makes sense.

6) See Footnote No. 5. On the other hand, the Examiner found as a fact, that the Union had not complained of the earlier conduct and thus, the Examiner appeared to have included that reticence in his case analysis. The Commission seemingly adopted this analysis and as judge of credibility, had a perfect right to do so.

7) The Court has no trouble agreeing with the Commission that Mrs. Zalewski, on her evidence, had no expectation of continued employment, but for reasons described infra, we do not find that fact dispositive of this matter.

8) West's evidence was positive testimony. On remand, we expect the Commissin to deal with it, particularly in the light of Lopez v. Prestige Casualty, 53 Wis. 2d, 25 (1971); State v. Public Serice Comm. (1962), 16 Wis. 2d, 231.