

STATE OF WISCONSIN
CIRCUIT COURT
DANE COUNTY
BRANCH 2

SAMELLA WILLIAMS and THE WISCONSIN STATE EMPLOYEES UNION (WSEU),
AFSCME, COUNCIL 24, AFL-CIO,
Petitioners,

vs.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION,
Respondent.

Case No. 90-CV-716
Decision No. 25805-C

NOTICE OF ENTRY OF ORDER

To:
Richard V. Graylow
Lawton & Cates, S.C.
214 West Mifflin Street
Madison, Wisconsin 53703-2594

PLEASE TAKE NOTICE that an order, of which a true and correct copy is hereto attached, was signed by the court on the 10th day of December, 1990, and duly entered in the Circuit Court for Dane County, Wisconsin, on the 10th day of December, 1990.

Dated this 11th day of December, 1990.

DONALD J. HANAWAY
Attorney General

/s/ David C. Rice
DAVID C. RICE
Assistant Attorney General
State Bar NO. 733855 GC
Attorneys for WERC
Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-6823

STATE OF WISCONSIN
CIRCUIT COURT
DANE COUNTY
BRANCH 02

SAMELLA WILLIAMS and THE WISCONSIN STATE EMPLOYEES UNION (WSEU),
AFSCME, COUNCIL 24, AFL-CIO,
Petitioners,

vs.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION,
Respondent.

Case No. 90-CV-716
Decision No. 25805-C

MEMORANDUM DECISION AND ORDER

Samella Williams and the Wisconsin State Employees Union, AFSCME, Council 24, AFL-CIO, ("the union") petition for judicial review of the commission's order of December 5, 1989, affirming a commission examiner's decision that Williams was required to pay interest on monies repaid to her retirement fund ("retirement payback") after her reinstatement to her job. Because I find that the parties' collective bargaining agreement contemplates adherence to ch. 40, Stats., in matters of employee benefits, I conclude that the state lawfully required Williams to pay interest on her retirement payback.

FACTS

The following facts, as found by the commission, are undisputed:

On July 2, 1984, Williams was discharged from her position as a Motor Vehicles Specialist in the Division of Motor Vehicles at the Department of Transportation ("DOT"). Williams filed a grievance concerning the discharge. The parties subsequently reached an agreement settling the grievance. The settlement agreement was executed on December 20, 1984 by Williams, Cindy Manlove, the union's representative, and Eloise Anderson, the State's representative. The settlement agreement provided:

1. The grievant's discharge will be reduced to a disciplinary suspension without pay from July 2, 1984 to August 2, 1984.
2. The grievant will suffer no loss of seniority.
3. The grievant shall not appeal to arbitration the disciplinary suspension.
4. The union and the grievant shall withdraw any and all charges, claims, complaints, grievances, suits (including discrimination) and appeals against the employer and/or D.O.T. arising out of events of the discharge prior to and up to the execution of the settlement agreement.
5. The employer agrees to pay back wages minus deductions in the amount of

\$4,162.46 and restore all benefits as of August 2, 1984.

Petitioners' Exhibit No. 2, Record of February 15, 1989 Hearing.

In October, 1984, for reasons of financial necessity due to her unemployment, Williams withdrew and received a separation benefit from her Wisconsin Retirement System account. The retirement account is administered by the Department of Employee Trust Funds ("DETF"). Before entering into the December 20, 1984 agreement, Manlove informed Anderson that Williams had withdrawn monies from her retirement account.

At the time the settlement agreement was executed, it was understood by all the parties that the monies had been withdrawn and would have to be restored upon Williams' reinstatement. The parties discussed the statutory percentage limits applied to biweekly payroll deductions used to restore the retirement account, but did not reach an agreement as to the specific amount of the biweekly deductions. The settlement agreement itself is silent with respect to the repayment of retirement monies.

DOT reinstated Williams to her position in the Division of Motor Vehicles on December 26, 1984. On January, 15, 1985, DOT issued Williams a check for \$4,162.46 and restored all benefits which Williams lost due to her unemployment between August 2, 1984 and December 26, 1984.

On March 19, 1985, DOT received a letter from DETF which stated that DOT was required under sec. 40.25(5), Stats., to repay the separation benefit in full plus interest, a total of \$4,227.47, within 60 days (by May 15, 1985). DOT timely repaid the entire amount to DETF, restoring Williams's account to its pre-discharge level. Williams repaid the DOT in full by July 5, 1987, nearly entirely through payroll withholdings. At the end of the calendar year 1986, however, there was an unpaid balance of \$965.86.

On June 6, 1986, Manlove wrote to the DOT payroll office inquiring about charging interest on the outstanding balance. In that letter, Manlove informed DOT that the Union would file an unfair labor practice complaint if DOT exercised its statutory discretion to charge the interest. After consulting with DETF, and based on a written opinion letter from DETF, DOT notified Williams on June 30, 1986 of its intent to charge interest pursuant to sec. 40.25(5)(b), Stats. DOT enclosed a copy of the opinion letter to fully inform Williams of the authority under which the DOT was acting. After an initial miscalculation, DOT correctly charged Williams an interest penalty of \$72.44 on the unpaid 1986 calendar year balance of \$965.86, which Williams ultimately paid to the DOT in full. DOT's assessment of the interest charge was not contrary to any provision in the settlement agreement.

On March 10, 1987, Williams and the Union filed an unfair labor practice complaint with the commission. They alleged that the state violated the settlement agreement, and therefore violated secs. 111.84(1)(a), (c) and (d), Stats., by charging the interest penalty to Williams. On February 15, 1989, a hearing was held on the complaint.

On August 3, 1989, the hearing examiner issued her decision, making the above findings of fact and concluding that DOT's assessment of an interest charge on the outstanding balance of the

retirement fund payback did not violate the settlement agreement and therefore does not constitute an unfair labor practice. The examiner decided, contrary to the unions's argument, that the settlement agreement's silence did not restrict the state's right to charge the disputed interest but demonstrated that the settlement agreement did not govern the repayment of the retirement monies.

Williams and the union petitioned the commission for review of the examiner's decision. Williams argued that the settlement agreement, pursuant to sec. 111.93(3), Stats., supersedes the discretion vested in the DOT by sec. 40.25(5)(b) to charge interest on the outstanding balance of a retirement fund payback. On December 5, 1989, the commission affirmed the examiner's decision. The commission reasoned that the settlement agreement's silence on Williams' payback obligations demonstrated their decision to leave that matter outside their agreement and thus presumably subject to applicable provisions of the master bargaining agreement, statutes and/or administrative code.

On December 21, Williams and the union petitioned for rehearing under sec. 227.49., Stats. On January 19, 1990, the commission denied the petition for rehearing. Williams and the union now seek judicial review and reversal of the commission's order.

DECISION

Section 111.93(3), Stats., provides

...Except as provided in ss. 40.05, 40.80(3), 111.91(1)(cm) and 230.88(2)(b), if a collective bargaining agreement exists between the employer and a labor organization representing employes in a collective bargaining unit, the provisions of that agreement shall supersede the provisions of civil service and other applicable statutes related to wages, fringe benefits, hours and conditions of employment whether or not the matters contained in those statutes, rules and Policies are set forth in the collective bargaining agreement.

Construction of a collective bargaining agreement presents a question of law. Tecumseh Products Co. v. Wisconsin Employment Relations Board, 23 Wis. 2d 118, 129 (1964). Under ch. 227, a reviewing court is not bound by an agency's conclusions of law. West Bend Education Association v. WERC, 121 Wis. 2d 1, 12 (1984). However, a court should hesitate to substitute its judgment for the agency's if the agency's determination has a rational basis. American Motors Corp. v. LIRC, 119 Wis. 2d 706, 710 (1984).

The parties's collective bargaining agreement, excepting the settlement agreement, is Joint Exhibit No. 1, a part of the Record of the February 15, 1989 hearing before the commission. Joint Exhibit No. 1 contains at least the following references to ch. 40, Stats.:

ARTICLE II Recognition and Union Security

Section 13: Loss of Benefits

2/13/6 All (Wisconsin Retirement Fund) contributions shall be in accordance with

ch. 40, Wis. Stats.

ARTICLE XIII Employee Benefits

Section I: Health Insurance

13/1/2 Effective November 1, 1983 the Employer agrees to pay 90% of the gross premium for the single or family standard health insurance plan offered to State employes by the group insurance board or 107% of the gross premium of the alternative qualifying plan offered under s. 40.03(6)

13/1/3 Effective November, 1984 the Employer agrees to pay 90% of the gross premium for the single or family standard health insurance plan offered to State employes by the group insurance board or 105% of the gross premium of the alternative qualifying plan offered under s. 40.03(6)

Section 2: Life Insurance

13/2/2 The Employer agrees to continue in effect the present administration of the group life insurance plan provided under the provisions of Chapter 40 of the 1979 Wisconsin Statutes

Section 4: Income Continuation Insurance

13/4/1 The Employer agrees to continue in effect the income continuation program and the administrative provisions of the program provided under Chapter 40 of the 1981 Wisconsin Statutes

13/5/10 The Employer agrees to continue in affect the provisions of subsection 230.35(2m) and 40.16(3) of the 1981 Wisconsin Statutes, which provide that at the time of retirement or in the event of death, accumulated unused sick leave shall be converted at current value and credited to the employee's account. The conversion credits once recorded shall be used on behalf of the employee or surviving spouse, child(ren), or other dependents to offset the cost of the monthly health insurance premiums as provided under the provisions of 40.16(3) 1981 Wisconsin Statutes.

13/6/5 Employes shall be allowed to use their earned vacation from their last year of service prior to retirement or their accumulated sabbatical leave time, or both, for a payment of medical insurance premiums at the group rate for post retirement periods under 40.16(3), 1981 Wisconsin Statutes.

Joint Exhibit No. 1, Record, pages 23, 91-99.

I conclude from these many references to chapter 40, Stats., that the parties intended in the master collective bargaining agreement that ch. 40 govern all aspects of employe benefits. Whether the collective bargaining agreement as a whole supersedes ch. 40 or whether the settlement agreement

itself is silent on retirement payback is irrelevant in this instance. The master collective bargaining agreement expressly and implicitly incorporates the provisions of ch. 40 in matters of employee benefits.

Section 40.25, Stats., provides in part:

(5)(b) The full amount of the benefit paid, plus interest at the effective rate, shall be repaid to the Wisconsin retirement system by the employer of an employee whose rights and creditable service are reestablished under par.(a) within 60 days after the effective date of the employee's reinstatement. The amount repaid by the employer under this paragraph shall be deducted by the employer from any payment due the employee as a result of the resolution of the appeal or, if that amount is insufficient, the balance shall be deducted from the employee's earnings... The employer may charge interest at a rate not in excess of the current year's assumed rate on any amount unpaid at the end of any calendar year after the year of reinstatement.

Therefore, I construe the collective bargaining agreement as a whole to permit application of sec. 40.25(5)(b) in this case and I conclude that DOT lawfully required Williams to pay interest on the balance of her retirement payback which remained unpaid after the year of her reinstatement. The commission's determination to that effect has a rational basis.

CONCLUSION AND ORDER

For the reasons above and based upon the record herein, the December 5, 1989 order of the Wisconsin Employment Relations Commission in this case is affirmed.

Dated this 10th day of December, 1990.

BY THE COURT

/s/ Michael B. Torphy
Michael B. Torphy, Jr.
Circuit Judge

cc:
Attorney Richard V. Graylow
214 West Mifflin Street
Madison, WI 53703-2594

AAG David C. Rice
P.O. Box 7857
Madison, WI 53707-7857