STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

WEST CENTRAL EDUCATION ASSOCIATION - SOMERSET EDUCATION SUPPORT PERSONNEL, Complainant, vs. SOMERSET SCHOOL DISTRICT, Respondent.	Case 25 No. 44894 MP-2420 Decision No. 26742-B

Appearances:

Mr. Stephen Pieroni, Staff Counsel, Wisconsin Education Association Council, P.O. Box 8003, Madison, Wisconsin 53708-8003, appearing on behalf of the Complainant.

Weld, Riley, Prenn & Ricci, S.C., Attorneys at Law, by Ms. Kathryn J. Prenn, 715 South Barstow, P.O. Box 1030, Eau Claire, Wisconsin 54702-1030, appearing on behalf of the Respondent.

ORDER AFFIRMING EXAMINER'S FINDINGS OF FACT AND CONCLUSIONS OF LAW AND AFFIRMING AND MODIFYING EXAMINER'S ORDER

On September 18, 1991, Examiner Coleen A. Burns issued Findings of Fact, Conclusions of Law and Order with Accompanying Memorandum in the above-entitled matter. She therein concluded that Respondent Somerset School District had committed prohibited practices within the meaning of Secs. 111.70(3)(a)4 and derivatively (3)(a)1, Stats. by unilaterally altering an employe's wages and conditions of employment. To remedy the violation, the Examiner ordered the District to cease and desist from taking such action and to post a notice.

The Complainant West Central Education Association - Somerset Education Support Personnel filed a petition with the Wisconsin Employment Relations Commission on October 4, 1991, seeking Commission review of the Examiner's Order pursuant to Secs. 111.70(4)(a) and 111.07, Stats. The parties thereafter filed written argument in support of and in opposition to the petition, the last of which was received on February 24, 1992.

Having considered the matter and being fully advised in the premises, the Commission makes and issues the following

ORDER 1/

1/ Pursuant to Sec. 227.48(2), Stats., the Commission hereby notifies the parties 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.

227.53 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.

. . .

continued

A. The Examiner's Findings of Fact and Conclusions of Law are hereby affirmed.

B. The Examiner's Order is affirmed as modified through the addition of the following:

> (c) Pay Connie Burch the sum of money with interest 2/ equal to $2.00 per hour for each hour of summer curriculum typing work performed by Jan Hendrickson during the summer of 1990.

Given under our hands and seal at the City of Madison, Wisconsin this 7th day of April, 1992.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
A. Henry Hempe, Chairperson

_____
Herman Torosian, Commissioner

_____
William K. Strycker, Commissioner

1/ continued

> (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.

2/ The applicable interest rate is the Sec. 814.04(4), Stats., rate in effect at the time the complaint was initially filed with the agency. Wilmot Union High School District, Dec. No. 18820-B (WERC, 12/83), citing Anderson v. LIRC 111 Wis.2d 245, 258-59 (1983) and Madison Teachers Inc. v. WERC, 115 Wis.2d 623 (CtApp IV, 10/83). The instant complaint was filed on November 29, 1990, at a time when the Sec. 814.04(4), Stats., rate in effect was "12% per year."

MEMORANDUM ACCOMPANYING ORDER AFFIRMING EXAMINER'S FINDINGS OF FACT AND CONCLUSIONS OF LAW AND AFFIRMING AND MODIFYING EXAMINER'S ORDER

The Examiner's Decision

In her decision, the Examiner correctly found that while the Respondent District and the West Central Education Association - Somerset Education Support Personnel were bargaining a first contract, the District offered certain summer work to bargaining unit employe Burch at $5.00 per hour. Burch advised the District that she was only willing to perform the work for $7.00 per hour, the rate with which the Examiner correctly concluded the District was obligated to pay that specific unit employe for the work in question under the District's duty to bargain status quo obligations. The District then offered the work to unit employe Hendrickson who performed the work for $5.00 per hour. The Examiner correctly determined that the District's action violated Secs. 111.70(3)(a)4 and 1, Stats.

When determining whether Complainant's request for monetary relief was appropriate, the Examiner analyzed the situation presented to her in terms of a voluntary quit/constructive discharge analogy. She reasoned that if the reduction in pay produced a change in the unit employe's working conditions which was so difficult or unpleasant as to be intolerable, then the unit employe would be entitled to back pay under a constructive discharge analogy. However, the Examiner concluded that the $2.00 per hour pay reduction was not sufficient to create intolerable working conditions. Therefore, she found the employe's refusal to perform the work at the $5.00 per hour rate more analogous to a voluntary quit and thus did not order any back pay relief.

Positions of the Parties

On review, Complainant argues that the Examiner's Order should be amended to make Burch whole for Respondent's denial of the opportunity to perform the work at the appropriate $7.00 per hour rate. Complainant contends that the Examiner's Order rewards the Respondent for acting illegally inasmuch as the bad faith bargaining produced a savings of $2.00 per hour for each hour of work available. Complainant argues that the constructive discharge analogy utilized by the Examiner is inappropriate under the fact situation presented herein and is also unnecessarily burdensome to employes. In this regard Complainant asserts that the constructive discharge test requires a showing not only that the change in working conditions was so unpleasant as to force the employe to resign and also that the Respondent was motivated to make the change in response to an employe's union activity.

Complainant argues that the conventional remedy for a violation of Sec. 111.70(3)(a)4, Stats., includes making employes whole for losses suffered as a result of the illegal unilateral change. Complainant alleges the remedial goal should be to place the employe in the same position they would have been in had the illegal activity not occurred. Complainant contends that the Commission's Order in Brown County, Dec. No. 20857-B (WERC, 7/85) is particularly instructive in this regard. Complainant asserts that in Brown County employes who were illegally laid off when their work was subcontracted were eligible for make whole relief even if they did not apply for work with the subcontractor. Here, Complainant asserts that, like Brown County, the employe's make whole right should not be adversely affected because she did not

accept work under conditions generated by Respondent's illegal conduct.

Should the Commission conclude that it is inappropriate to make whole unit employe Burch who would not perform work at an illegally established wage rate, then Complainant contends in the alternative that appropriate remedies would include requiring the Respondent to pay unit employe Burch the $2.00 per hour difference between the $5.00 per hour and the $7.00 per hour rate for the work in question or ordering the District to pay an additional $2.00 per hour to the unit employe Hendrickson who ultimately performed the work. Such remedies would not allow the Respondent to benefit from its violation of the Municipal Employment Relations Act and thus would be appropriate.

In response to the arguments raised by the Respondent on review, Complainant contends that a "work, then grieve" theory should be inapplicable to a prohibited practice proceeding because an employer would then be placed in the desirable position of being able to unilaterally reduce an employe's wage to any level and then forcing the employe to work under those conditions until the unilateral change was litigated. Complainant asserts that employes should not be forced to choose between working under intolerable conditions and forfeiting their right to make whole relief. As to the issue of mitigation, Complainant asserts that mitigation is an affirmative defense which the Respondent has the burden of proving. Here, Complainant contends that there is no evidence on the record as to the unit employe's failure to mitigate. In any event, Complainant argues that because the employe informed Respondent she was willing to perform the work at $7.00 per hour, the employe is eligible for a make whole order.

In conclusion, the Complainant argues that the Commission should issue a make whole order which furthers the underlying principles of the Municipal Employment Relations Act.

The Respondent District urges the Commission to affirm the Examiner. It contends that the constructive discharge doctrine utilized by the Examiner constitutes the best available framework for analyzing the unique remedial issue presented in this case. The District asserts that none of the cases cited by the Complainant involve situations where the affected employe refused an offer of work. Thus, the District asserts that the Complainant's reliance upon Brown County and other cases is misplaced.

As to the Complainant's specific criticisms of the Examiner's constructive discharge analogy, the District notes that the Examiner only used one prong of the constructive discharge test utilized by the NLRB. Thus, the District contends that the Examiner properly limited her analysis to the question of whether continued work under the wage offered by the Respondent was "unnecessarily burdensome." The Examiner did not require Complainant to show any animus. The District asserts that there is nothing in the record to render Burch's working conditions so intolerable as to justify her refusal to accept the work offered to her.

The District cites the "work, then grieve" doctrine as an additional basis for excluding a back pay remedy herein. The District asserts that Burch had access not only to the collective bargaining process in which the parties were engaging but also to the instant prohibited practice proceeding as means by which she could have obtained a retroactive wage adjustment had she accepted the offered work.

The District also contends that Burch is not entitled to a make whole remedy because she failed to mitigate her damages by seeking other employment.

If any back pay is to be awarded in this case, the District asserts that the monies should go to Hendrickson, the individual who performed the work. It argues that such a remedy would strike the appropriate balance under the unique circumstances of this case. No monetary benefit would be received by the Respondent District by virtue of its prohibited practice and the employe who refused to performed the work would not receive a windfall.

DISCUSSION

The remedial authority and discretion of the Commission under Secs. 111.07(4) and 111.70(4)(a), Stats. is to be exercised "to effectuate the purposes of the Municipal Employment Relations Act (MERA)." WERC v. Evansville, 69 Wis.2d 140, 158 (1974); Board of Education v. WERC, 52 Wis.2d 625, 635 (1971). In Board of Education, supra, the Court defined the purposes of MERA as "fair employment and peaceful negotiation and settlement of municipal labor disputes." Section 111.70(6) of MERA declares "The public policy of the State as to labor disputes arising in municipal employment is to encourage voluntary settlement through the procedures of collective bargaining."

Where an employer violates its MERA duty to bargain by unilaterally altering the status quo, the purposes of MERA are generally best served by an order which restores the parties to the conditions in effect prior to the violation and which makes affected employes whole. Brown County v. WERC, 138 Wis.2d 254, 264 (1987); Unified School District No. 1 of Racine County v. WERC, 81 Wis.2d 89, 92 (1977). Such orders do not allow the employer to take advantage of its unlawful activity and serve to meaningfully prevent and deter a future violation. City of Brookfield, Dec. No. 19822-C (WERC, 11/84).

The status quo wage rate for the work in question was $7.00 per hour. The District had the work performed for $5.00 per hour. The Complainant persuasively argues that the Examiner's failure to order any back pay allowed the Respondent District to profit by its unlawful activity and does not deter future violations of the duty to bargain. Therefore, we are satisfied that the Examiner's constructive discharge/voluntary quit analysis is not appropriate in this case and that her Order must be modified. However, having reached this general conclusion, the question becomes one of determining the specific remedy which best effectuates the purposes of MERA.

So that the Respondent District does not profit from its action and is appropriately encouraged to resolve future disputes through collective bargaining, it is clear that the District must at a minimum be ordered to pay an additional $2.00 per hour for the work which was performed. The District argues that if additional compensation is ordered, said monies should be awarded to Hendrickson, the unit employe who ultimately performed the work. However, the Examiner correctly determined that the status quo violation was the District's failure to offer the work in question to Burch at Burch's regular $7.00 rate of pay. Thus, the work in question was Burch's and it was her personal rate of pay which defined the wage level for the work. Under these circumstances, we conclude it appropriate that Burch receive the benefit of the monetary relief.

In reaching this conclusion, we have considered the District's mitigation argument. However, Complainant correctly argues that failure to mitigate is an affirmative defense as to which Respondent has the burden of proof. 3/

3/ Glamann v. St. Paul Fire Ins., 140 Wis.2d 640 (1987).

Respondent did not present evidence to support its contention that Burch failed to seek other employment after rejecting summer work with the District. Thus, Respondent's mitigation claim is rejected.

However, we have also considered but rejected the Complainant's contention that under the rationale for the Commission's Order in Brown County, supra, Burch should receive $7.00 per hour for work she was entitled to perform. In Brown County, the employer improperly subcontracted unit work without bargaining. Make whole relief was ordered for the employes who would have continued to work but for an improper layoff. The Complainant argues that the Commission's make whole relief was ordered even though the employes did not apply for work with the subcontractor. By analogy, the Association contends that if the employes in Brown County are entitled to back pay despite their choice not to apply for work with the subcontractor, then Burch should receive full back pay despite her decision not to work. While the Association is correct that our Order in Brown County includes make whole relief, the question of whether a failure to apply for work with the subcontractor should reduce back pay is presently being litigated before the Commission and thus is unresolved. Further, as noted by the District, in Brown County the employes did not have Burch's choice of continuing to perform the work, albeit at a reduced rate. Thus, Brown County is not particularly supportive of Complainant's position herein.

Although we are satisfied that our remedial authority would allow us to grant the order sought by the Complainant, we conclude that granting Burch $2.00 per hour for the work in question best effectuates the purposes of MERA. The Respondent does not profit from its conduct and future violations are deterred. Burch's personal stake in the status quo is acknowledged but in the context of her voluntary decision not to perform the work.

Given the foregoing, we have affirmed the Examiner's Findings of Fact and Conclusions of Law and affirmed and modified her Order.

Dated at Madison, Wisconsin this 7th day of April, 1992.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
A. Henry Hempe, Chairperson

_____
Herman Torosian, Commissioner

_____
William K. Strycker, Commissioner