RACINE COUNTY CIRCUIT COURT BRANCH II
JUDGE: Stephen A. Simanek

RACINE EDUCATION ASSOCIATION and RACINE UNIFIED SCHOOL DISTRICT, Petitioner,
v.
WISCONSIN EMPLOYMENT RELATIONS COMMISSION, Respondent.

DECISION NO. 27986-C
Case No. 96-CV-09842
Case No. 96-CV-1030

NOTICE OF ENTRY OF FINAL ORDER

TO: Mr. Jack D. Walker, Melli, Walker, Pease & Ruhly, S.C. Suite 600, Insurance Building 119 Martin Luther King, Jr. Blvd., P. 0. Box 1664, Madison, WI 53701-1664, Attorney for Racine Unified School District.

Mr. Robert K. Weber Hanson, Gasiorkiewicz & Weber, S.C., 514 Wisconsin Avenue, Racine, WI 53403, Attorney for Racine Education Association.

PLEASE TAKE NOTICE that a memorandum decision and final order affirming the decision of the Wisconsin Employment Relations Commission, of which a true and correct copy is hereto attached, was signed by the Court on the 12th day of December, 1996, and duly entered in the Circuit Court for Racine County, Wisconsin, on the 12th day of December, 1996.

Dated this 12th day of December, 1996.

JAMES E. DOYLE, Attorney General

JOHN D. NIEMISTO, Assistant Attorney General, State Bar No. 1012658, Attorneys for Defendant, Wisconsin Personnel Commission

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DECISION No. 27986-C
Case No. 96-CV-0984
Case No. 96-CV-1030

DECISION ISSUED: 12-12-96

Memorandum Decision and ORDER

INTRODUCTION

This matter comes before the Court on Petitions for Review brought by the Racine Education Association (REA) and Racine Unified School District (Unified) pursuant to Wisconsin Statutes, Section 227.53 to review the April 15, 1996, decision of the Wisconsin Employment Relations Commission (WERC) that REA's insistence on the exclusion and/or silence of Frank Johnson during a meeting on December 17, 1993, constituted a violation of Wis. Stats. Sec. 111.70(3)(b)3, and James Ennis' cancellation of a March 4, 1994, meeting did not violate Sec. 111.70(3)(b)3.

FACTS

REA and Unified have been parties to a series of collective bargaining agreements and were engaged in negotiations for a successor agreement when the matters at issue in these proceedings arose. At the suggestion of Commission mediator Henry Hempe and School Board President Garrett, Superintendent Armstead and REA Executive Director Ennis agreed to meet December 17, 1993, to discuss issues related to year-round schools. Armstead brought members of Unified's administrative staff to the meeting, including Unified's principal collective bargaining spokesperson, Frank Johnson. Ennis brought two unit members with him, one of whom is the chairperson of an REA committee whose responsibilities include managing, bargaining, and drafting bargaining proposals. Ennis is REA's principal collective bargaining spokesperson.

At the start of the meeting, Ennis objected to the presence of some Unified staff and advised Armstead that he would not meet if Johnson was allowed to participate. Armstead advised Ennis that he felt Johnson should be present at any meeting regarding "labor negotiations." Johnson told Ennis that Ennis' position was a "prohibited practice."

Armstead and Ennis had a side meeting, and it was agreed that

Johnson could be present but could not speak. Armstead agreed that Johnson could not speak because Ennis would otherwise have refused to meet. The meeting proceeded with Johnson taking detailed notes of the matters discussed.

On or about March 1, 1994, Armstead and Ennis agreed to meet on March 4, 1994, to discuss whether there were bargaining issues which could be resolved through adoption of administrative policies or regulations by Unified.

Before the March 4 meeting was held, Unified filed a prohibited practice complaint with the Commission alleging Ennis, conduct during the December 17, 1993, meeting violated sec. 111.70(3)(d)3, Stats., which mandates good faith bargaining by both sides.

Ennis met with Armstead briefly on March 4, 1994, but indicated that he would not proceed to discuss the planned topic because he believed he would be engaging in the same conduct which had prompted Unified's prohibited practice complaint. Ennis left without any further discussion.

The Commission determined that both meetings were for the purpose of collective bargaining over mandatory and permissive subjects of bargaining.

STANDARD OF REVIEW

Section 227.57, Stats., provides that the review of an administrative decision "shall be conducted by the court ... and shall be confined to the record .... Subsections (5) and (6) provide that:

> (5) The court shall set aside or modify the agency action if it finds that the agency has erroneously interpreted a provision of law and a correct interpretation compels a particular action, or it shall remand the case to the agency for further action under a correct interpretation of the provision of law.
>
> (6) If the agency's action depends on any fact found by the agency in a contested case proceeding, the court shall not substitute its judgment for that of the agency as to the weight of the evidence on any disputed finding of fact. The court shall, however, set aside agency action or remand the case to the agency if it finds

> that the agency's action depends on any finding of fact that is not supported by substantial evidence in the record.

A reviewing Court must accept findings of the agency if they can be supported by substantial evidence. Substantial evidence does not mean a preponderance of evidence, but rather whether reasonable minds could reach the same conclusion as reached by the agency. *Wisconsin Environmental Decade v. Public Service Commission*, 98 Wis.2d 682, 298 N.W.2d 205 (1980); *Town of Ashwaubenon v. State Highway Commission*, 17 Wis.2d 120, 115 N.W.2d 498 (1962).

Substantial evidence "is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Samens v. LIRC*, 117 Wis.2d 646, 659, 345 N.W.2d 432, 437 (1984).

It is not required that the evidence be subject to no other reasonable equally plausible interpretations. *Hamilton v. ILHR Department*, 94 Wis.2d 611, 288 N.W.2d 857 (1980). When more than one inference reasonably can be drawn, the agency's finding is conclusive. *Vocational, Technical & Adult Educ. Dist. No. 13 v. DILHR*, 76 Wis.2d 230, 240, 251 N.W.2d 41, 46 (1977). The reviewing Court cannot evaluate the credibility or weight of the evidence. *Bucvrus-Erie Co. v. DILHR*, 90 Wis.2d 408, 418, 280 N.W.2d 142, 147 (1979).

In the case of *Gateway City Transfer Co. v. Public Service Commission*, 253 Wis. 397, 34 N.W.2d 238 (1948), it was pointed out that in reviewing administrative decisions, "substantial evidence" did not include the idea of the Court weighing the evidence to determine if a burden of proof was met or whether a view was supported by the preponderance of the evidence. Such tests are not applicable to administrative findings and decisions. Substantial evidence is equated with that quantity and quality of evidence which a reasonable person would accept as adequate to support a conclusion.

In applying these standards of review, this Court must accord due weight to the experience, technical competence, and specialized knowledge of the Commission, as well as the discretionary authority conferred upon it. Sec. 227.57 (10), Stats.

The deferential review required of this Court is emphasized by case law. For example, "substantial evidence" necessary to support findings of fact requires only that the record contain evidence from which a reasonable mind could arrive at the same

conclusion reached by the Commission. The court so stated in *Madison Gas & Elec. Co. v. Public Serv. Comm.*, 109 Wis.2d 127, 133, 325 N.W.2d 339, 342-43 (1982):

> Substantial evidence does not mean a preponderance of the evidence. Rather, the test is whether, taking into account all the evidence in the record, "reasonable minds could arrive at the same conclusion as the agency." (citation omitted).

The Commission's Findings may be set aside only if a reasonable person could not have made those findings. *Daly v. Natural Resources Board*, 60 Wis.2d 208, 220, 208 N.W.2d 839, 846 (1973), cert. denied, 414 U.S. 1137 (1974). The Commission's Findings may be supported by substantial evidence even if contrary to the great weight and clear preponderance of the evidence. See *Robertson Transport. Co. v. Public Serv. Comm.*, 39 Wis.2d 653, 658, 159 N.W.2d 636, 638 (1968). In short, this Court's review of the Commission's Findings of Fact must accord great deference to those Findings.

Similarly, great deference must be accorded the Commission's Conclusion of Law. This Court must accept the conclusions of the Commission even if other interpretations of Ch. 111 are equally consistent with the statute's purpose, as the court held in *Environmental Decade v. ILHR Dept.*, 104 Wis.2d 640, 644, 312 N.W.2d 749, 751 (1981):

> However, the construction and interpretation of a statute by the administrative agency which must apply the law is entitled to great weight and if several rules or applications of rules are equally consistent with the purpose of the statute, the court should defer to the agency's interpretation.

This Court must sustain the Commission's conclusions as long as they are reasonable, despite the existence of other reasonable views:

> If the commission's legal conclusion is reasonable, however, the court will sustain the commission's view even though an alternative view may be equally reasonable.

Farmers Mill of Athens, Inc. v. ILHR Dept., 97 Wis.2d 576, 580, 294 N.W.2d 39, 41 (Ct. App. 1980) (footnote omitted).

ISSUE

Does substantial evidence in the record support the Decision of the Commission?

DISCUSSION

Wis. Stats. Sec. 111.70(l)(a) provides:

> "Collective bargaining" means the performance of the mutual obligation of a municipal employer, through its officers and agents, and the representative of its municipal employes in a collective bargaining unit, to meet and confer at reasonable times, in good faith, with the intention of reaching an agreement, or to resolve questions arising under such an agreement, with respect to wages, hours and conditions of employment,.... The duty to bargain, however, does not compel either party to agree to a proposal or require the making of a concession. Collective bargaining includes the reduction of any agreement reached to a written and signed document. The employer shall not be required to bargain on subjects reserved to management and direction of the governmental unit except insofar as the manner of exercise of such functions affects the wages, hours and conditions of employment of the municipal employes in a collective bargaining unit. In creating this subchapter the legislature recognizes that the municipal employer must exercise its powers and responsibilities to act for the government and good order of the jurisdiction which it serves, its commercial benefit and the health, safety and welfare of the public to assure orderly operations and functions within its jurisdiction, subject to those rights secured by municipal employes by the constitutions of this state and of the United States and by this subchapter.

Wis. Stats. Sec. 111.70(2) provides:

> RIGHTS OF MUNICIPAL EMPLOYEES. Municipal employees shall have the right of self-organization, and the right to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in lawful, concerted

activities for the purpose of collective bargaining or other mutual aid or protection ....

Wis. Stats. Sec. 111.70(3)(a) provides in part:

PROHIBITED PRACTICES AND THEIR PREVENTION. (a) It is a prohibited practice for a municipal employer ... :

1. To interfere with, restrain or coerce municipal employes in the exercise of their right 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 ...
4. To refuse to bargain collectively with a representative of a majority of its employes in an appropriate collective bargaining unit ....

Wis. Stats. Sec. 111.70(3)(b) provides:

(b) It is a prohibited practice for a municipal employer, individually or in concert with others:
...
3. To refuse to bargain collectively with the duly authorized officer or agent of a municipal employer, provided it is the recognized or certified exclusive collective bargaining representative of employes in an appropriate collective bargaining unit. Such refusal to bargain shall include, but not be limited to the refusal to execute a collective bargaining agreement previously agreed upon.

The Commission's ultimate determination in these consolidated proceedings turned on the underlying facts, and its ultimate conclusions are mixed questions of fact and law. The Commission's ultimate conclusion in case 0984 that the REA's representative, James Ennis' (Ennis) conduct at the December meeting was in effect a refusal to bargain, and thus constituted bad-faith bargaining, was reasonable and is supported by substantial evidence. Likewise, the Commission's conclusion in case 1030 that Ennis' refusal to participate at the March 4 meeting did not violate REA's duty to bargain was reasonable in view of the surrounding circumstances.

The Commission determined that Ennis' conduct in refusing to allow Unified's representative, Frank Johnson, to actively participate in the December meeting constituted a failure to bargain in good faith, but his actions at the March 4 meeting did not. The Commission has had substantial experience in evaluating relevant evidence and resolving such disputes. Therefore, the Commission's ultimate legal conclusion in the matter reflects "interpretation and application of the law [which] is of long standing" and is particularly subject to its "experience, technical competence and specialized knowledge ...." *West Bend*, 121 Wis.2d at 12; sec. 227.57(10), Stats. The Court, therefore, affirms the Commission's ultimate legal conclusions because a "rational basis exists for them," *West Bend*, 121 Wis.2d at 13; *School Dist. of Drummond v. WERC*, 121 Wis.2d 126, 135, 358 N.W.2d 285 (1984).

The Commission made factual findings drawn directly from evidence in the record. Although other equally plausible interpretations of the facts may be reached, it is for the agency to determine which view of the facts it wishes to accept. Because the Commission's factual findings are supported by substantial evidence in the record, this Court affirms all of the Commission's findings and conclusions.

REA's principal contention is that the December 17, 1993, meeting was not "a collective bargaining session" and therefore there could be no violation of the duty to bargain in good faith.

Section 111.70(3)(d)(3) provides that it is a prohibited practice:

> 3. To refuse to bargain collectively with the duly authorized officer or agent of a municipal employer, provided it is the recognized or certified collective bargaining representative of employes in an appropriate bargaining unit.

The Commission concluded that Ennis' refusal to allow Unified's representative, Frank Johnson, to actively participate in the December 17, 1993, meeting was in effect a refusal to meet with Unified's duly authorized representative for the purpose of collective bargaining.

REA contends that it did not attend and participate in the December 17 meeting for the purpose of collective bargaining. REA cites the Commission examiner's decision which reached that conclusion but which conclusion the Commission rejected. The

Commission succinctly stated its reasons in its memorandum decision:

> Here, we are satisfied that there was some uncertainty in the parties' minds as to whether the December 17 meeting was for the purpose of collective bargaining. We note, for instance, that neither side was represented at the meeting by its normal bargaining team.
>
> However, we are also satisfied that the meeting ultimately evolved into collective bargaining over both mandatory and permissive subjects of bargaining related to year-round schools. Given the evolution of the meeting and the critical nature of the right to control the identity of one's own bargaining team, we are persuaded that Ennis' insistence on Johnson's exclusion and/or silence during the December 17 meeting violated sec. 111.70(3)(d)(3), Stats. While the violation may not have been intended, we think the right in question is so important that any intrusion violated the law.

REA apparently believes, as did the examiner, that Ennis' motivation in attending the December 17 meeting controlled over the substance of the matters discussed. Collective bargaining is not so limited. Sec. 111.70(l)(a), Stats., defines collective bargaining:

> The performance of the mutual obligation of a municipal employer, through its officers and agents, and the representatives of its employes, to meet and confer at reasonable times, in good faith, with the intention of reaching an agreement, or to resolve questions arising under such an agreement, with respect to wages, hours and conditions of employment.

As already indicated, the December 17 meeting was arranged with the assistance of mediator Henry Hempe and School Board President Garrett for the purpose of discussing various issues related to Unified's year-round school proposal. Based primarily on the detailed notes taken by Unified's representative, Frank Johnson, at the December 17 meeting, which uncontroverted notes were incorporated into the Commission's Finding of Fact 5, it is clear that the meeting was, in reality, a bargaining session. Numerous topics related to the year-round school proposal were discussed by the participants with the obvious purpose of reaching some

consensus. Those notes indicate that the following topics, among others, were discussed: who would do the teaching; pay issues; bumping rights; schedules for paychecks; timing for implementation, ways for teachers to opt out of the program; use of specialists; vacation planning; intramural sports; teacher conferences; snow days; preparation time; student discipline; and other less significant issues.

There simply is no merit to the contention that the Commission's determination finds no support in the record. Clearly, there is substantial evidence to support the Commission's findings that bargaining over mandatory and permissive subjects took place.

The circumstances surrounding the March 4, 1994, meeting are significantly different than those surrounding the December 17 meeting. Ennis had refused to meet with Unified at the December 17 meeting if Unified's principal negotiator, Frank Johnson, was allowed to actively participate. This conduct on the part of Ennis effectively dictated to Unified the composition of their representatives at that meeting. Shortly before the March 4 meeting, Unified had filed its prohibited practice complaint with the Commission based on the incident involving Frank Johnson. Because the prohibited practice complaint had been filed against REA, Ennis refused to attend the scheduled March 4 meeting. Clearly, the environment had changed between December 17 and March 4.

Ennis may have personally believed the purpose of the December 17 meeting was not a collective bargaining session, but rather an informal discussion concerning matters of mutual interest to REA and Unified. Such understanding would help to explain why he did not want Frank Johnson, Unified's chief negotiator, to actively participate in the meeting. Had Johnson been allowed to actively participate, REA could not later contend that the informal discussion was not in fact a negotiating session.

The March 4 meeting also was arranged by Commission mediator Hempe. Ennis was to meet with Superintendent Armstead ostensibly for the purpose of narrowing issues in bargaining. Frank Johnson, Unified's negotiator, was not scheduled to be present at this meeting. It perhaps is significant that Johnson is the only person authorized by Unified's board to negotiate collective bargaining agreements with the Association.

As indicated, by March 4, there was absolutely no doubt Unified believed that these meetings (December 17 and March 4) were for

the purpose of collective bargaining. Filing the prohibited practice complaint, which is at issue in these proceedings, confirmed that fact. The Commission's finding that Ennis believed he would be committing a prohibited practice if he entered into negotiations on March 4 under those circumstances is undisputed. Why he believed that to be true is not clearly reflected in the record. Nevertheless, the record contains substantial evidence to establish that REA did not violate its duty to negotiate in good faith when Ennis refused to meet with Superintendent Armstead on March 4.

When one party in a collective bargaining relationship refuses "to meet and confer at reasonable times, in good faith, with the intention of reaching an agreement," (sec. 111.70(l)(a)), the Commission looks to the "totality of conduct" or "totality of circumstances" surrounding the refusal/failure to meet to determine whether in fact a prohibited-practice has been committed. See *Jerome Filbrandt Plumbing*, Dec. No. 27045-C (WERC 9/92) *aff'd by the Court of Appeals, District III*, January 31, 1995, No. 94-1584, unpublished; *Adams County*, Dec. No. 11307-A (WERC 4/73). c.f., *NLRB v. Schwab Foods Mfg*., 858 F.2d 1285, 1292 (7th Cir. 1988).

Over the years, there have been numerous decisions by the Commission concerning what activity constitutes a refusal to bargain in good faith under both the Municipal Employment Relations Act and the Employment Peace Act. See *LaCrosse Hospital*, Dec. No. 5946 (2/9/61), *aff'd LaCrosse County Circuit Court*, March 1962; *Hebe Tile Company*, Dec. No. 23512-A (WERC 5/87); *Charles Johnson*, Dec. No. 7396 (1965), *aff'd Brown County Circuit Court*, August 1965; *City of Madison*, Dec. No. 15079 (WERC/78); *Green County*, Dec. No. 20308-D (WERC/84). It is difficult to imagine an area where any administrative agency would have greater experience and expertise, nor where its application of the law to fact would be entitled to greater weight. Since there is substantial evidence in the record to support the Commission's findings and its ultimate conclusions are reasonable under the totality of the circumstances, the Court affirms those findings and conclusions in their entirety.

To be affirmed, the Commission's decision need only be a reasonable one from among other reasonable alternatives. The Commission's decision is, at minimum, one reasonable alternative.

THEREFORE, it is ORDERED that the April 15, 1996, Decision of the Commission ought to be and hereby is AFFIRMED in all respects.

The petitions for review are dismissed on their merits.

BY THE COURT:

Dated at Racine, Wisconsin, this 12th day of December, 1996.

Stephen A. Simanek
Circuit Court Branch 2