STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

RACINE EDUCATIONAL ASSISTANTS ASSOCIATION, Complainant,

vs.

RACINE UNIFIED SCHOOL DISTRICT and THE BOARD OF EDUCATION OF THE RACINE UNIFIED SCHOOL DISTRICT, Respondents.

Case 140
No. 53281
MP-3101

Decision No. 28614-D

Appearances:

Weber & Cafferty, S.C., Attorneys at Law, by **Mr. Robert K. Weber,** 2932 Northwestern Avenue, Racine, Wisconsin 53404, appearing on behalf of the Racine Educational Assistants Association.

Melli, Walker, Pease & Ruhly, S.C., Attorneys at Law, by **Mr. Jack D. Walker** and **Mr. Douglas E. Witte,** 119 Martin Luther King, Jr. Boulevard, P.O. Box 1664, Madison, Wisconsin 53701-1664, and **Mr. Frank L. Johnson,** Director of Employee Relations, 2220 Northwestern Avenue, Racine, Wisconsin 53404, appearing on behalf of the Racine Unified School District and the Board of Education of the Racine Unified School District.

ORDER

On August 22, 1996, the Wisconsin Employment Relations Commission issued an Order Granting Petition for Rehearing in the above matter to allow it to determine whether it had made material errors of law or fact in Dec. Nos. 28614-A, B. The parties thereafter filed written argument in support of and in opposition to their respective positions, the last of which was received September 27, 1996.

Having considered the matter and being fully advised in the premises, the Commission is persuaded that no material errors of law or fact were made but that it is appropriate to give the parties an opportunity to reach agreement on an appropriate remedy.

NOW, THEREFORE, it is

ORDERED

The Commission's Findings of Fact and Conclusion of Law stand unchanged.

The Commission's Order is suspended for a period of thirty (30) days from the date of this Order. Absent agreement by the parties, the Commission's remedial Order will take effect at the end of the 30 day period.

Given under our hands and seal at the City of Madison, Wisconsin this 7th day of January, 1998.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Meier /s/
James R. Meier, Chairperson

A. Henry Hempe /s/
Henry Hempe, Commissioner

Paul A. Hahn /s/
Paul A. Hahn, Commissioner

RACINE UNIFIED SCHOOL DISTRICT

MEMORANDUM ACCOMPANYING ORDER

BACKGROUND

On June 16, 1996, Examiner Lionel L. Crowley issued Findings of Fact, Conclusion of Law and Order determining that by unilaterally implementing a new wage schedule, Respondent Racine Unified School District had unlawfully modified the wage status quo for Hearing Interpreters represented by the Racine Educational Assistants Association for the purposes of collective bargaining.

In reaching his determination, the Examiner rejected District defenses of waiver and necessity. As to the waiver issue, the Examiner found the waiver defense inapplicable because the Association was not obligated to bargain over loss of status quo projections during the contract hiatus. As to necessity, the Examiner concluded that the District could have obtained Hearing Interpreter services from an outside contractor and thus did not have a necessity to unilaterally raise Interpreter wage rates to retain existing District Interpreters.

To remedy the District's violations of Sec. 111.70(3)(a)4 and 1, Stats., the Examiner ordered the District to cease and desist, post a notice, and restore the "status quo ante."

On July 8, 1996, the Examiner's decision became the Commission's by operation of Sec. 111.07(5), Stats.

On July 9, 1996, Respondents filed an untimely petition for review.

By Notice dated July 11, 1996, the Commission advised the parties that Examiner Crowley's decision had become the Commission's decision on July 8, 1996, by operation of Sec. 111.07(5), Stats.

On July 22, 1996, Respondents filed a Petition for Review, Petition for Rehearing and motion to Clarify Order, Advice to the Commission on Compliance which stated, in pertinent part:

. . .

> On October 17, 1995 the Racine Educational Assistant's Association (REAA) sued the District alleging that the District had unilaterally implemented increased wages to hearing interpreter employees who were members of the bargaining unit, and that the implementation violated the Municipal Employment Relations Act.
>
> The District defended principally on the ground that there was a legal necessity to implement. That is, state and federal law (and the District's educational goals) require the District to provide hearing interpreters to hearing impaired

students, and persons with such skills were not available from subcontractors, and were not available from qualified employees at the wage rates in effect in the District before the unilateral implementation. (The District reserves the view that the WERC decisions on unilateral implementation are wrong as a matter of law, but that was not the principal basis for defense).

By a Decision dated June 18, 1996, WERC Examiner Crowley ruled that the District violated the law. The Examiner concluded as a matter of fact that the District could have obtained hearing interpreters from subcontractors for 1995-1996, and therefore there was no necessity. The District submits that this was just plain wrong, and is also wrong as to the 1996-97 school year.

The District sought review by the WERC. On July 11, 1996, the WERC issued an Order asserting that the Examiner's Order had become the Commission's Order by operation of law, and noting that the District, "filed a petition for review on July 9, 1996, one day after expiration of the 20 day period set forth in Sec. 111.07(5), Stats." The WERC Order of July 11, 1996 also directed the District to advise the Commission by July 29, 1996 of the steps it had taken to comply with the Commission's Order on the merits.

The Examiner's Order required that the District cease and desist from violating its duty to bargain by unlawfully changing the status quo during hiatus by unilaterally implementing a wage schedule and increase. The Examiner's Order also required the District to "[i]mmediately restore the status quo ante and bargain with the Racine Educational Assistants Association regarding wage schedules and increases."

The District is willing to treat the matter as adjudicated in the past, in that the District is willing to refrain from unlawful implementation, and will post the Notice which the Examiner ordered to be posted, unaltered as to paragraphs one and three of the Notice.

The Order to restore the status quo ante (which may mean try to get the money back from the employees) is, however, impossible to attain consistent with the District's educational mission and state and federal law requiring hearing interpreters for the hearing impaired. The "status quo ante" aspect of the Order has never been made the subject of hearing, or argument to either the WERC or the Hearing Examiner, nor has it ever been determined whether the Order was intended to be retroactive, or prospective for some period of time, or both, or neither.

In an effort to comply with the WERC's Order, and maintain its obligations to the students of the District, the District wrote a letter to the REAA dated July 19, 1996, offering to bargain, informing the REAA that the District cannot obtain sufficient hearing interpreters for 1996-97 from subcontractors and stating that it does not believe that it cannot retain its present employees if it cuts their wages, proposing a wage schedule for 1996-97, and notifying the REAA of its intent to implement the proposed wage schedule on the first work day of the 1996-1997

schoolyear. A copy of that letter is attached as Exhibit I to the Affidavit of Keri A. Paulson.

We have here a large school district which will be unable to comply with state and federal law, and will be unable to fulfill its own educational mission, if it must cut its employees wages.

On August 22, 1996, we granted the Petition for Rehearing.

DISCUSSION

On rehearing, the Respondents contend the record does not support the existing determination that Interpreters were available from other sources and thus that there was no "necessity" to unilaterally raise wage rates to retain existing District Hearing Interpreters and fill existing vacancies. Respondents assert the record before the Examiner establishes that only one outside Interpreter was available and then only for "a couple hours" each day. Thus, the Respondents urge that if they were to provide the statutorily-mandated level of Interpreter services to students, the only choice was to raise wage levels to a sufficiently high level to retain existing employes and attract new ones.

The Complainant asserts there is ample evidence in the record to support the existing determination that Interpreter services were available from an outside contractor. Complainant further contends that the Respondents created their own problem by failing to address a long-term issue until the last moment. Lastly, Complainant argues the Respondents failed to prove that the incumbent Hearing Interpreters would have left the District's employ if the wage rate had not been unilaterally increased early in the 1995-1996 school year.

When we review the existing record, we conclude that at least as of September 20, 1995, there was no necessity for the implementation of a new higher wage schedule for District Hearing Interpreters. We reach this conclusion because the record upon which our decision was based contains persuasive evidence that: (1) outside Interpreter services were available; and (2) the District was not in any immediate danger of losing existing Interpreters.

As to the availability of Interpreter services from "outside contractors," District staff advised the District Superintendent by September 5, 1995 memo that: "Until such time as the Interpreters are hired, the vacancies will be filled by SEWCIL Interpreters. . . ."

While it is true that during the February 20, 1996, complaint hearing, there is testimony that SEWCIL ". . . only had perhaps one individual who could give us a couple of hours a day, very limited," we are persuaded the contemporaneous September 5, 1995, memo is the best evidence of the availability of SEWCIL services at the time of the September 20, 1995 implementation. The memo reflects a greater availability than the District claims in support of its "necessity" position.

More importantly, we are not persuaded that as of September 20, 1995, the District was in

any imminent danger of losing any of its veteran or newly-hired Interpreters. It is clear that the newly-hired Interpreters had been assured they would receive a substantial wage increase after 30 days of work as a result of ongoing contract negotiations. However, at the time of implementation, there is no evidence that any employes were threatening to leave the District's employ. Under such circumstances, "necessity" for implementation simply was not present.

Therefore, given that the record establishes some availability of Interpreters from outside sources and that there was no risk of imminent departure of any incumbent Interpreters, there was no necessity for implementation. Thus, the Respondents' action violated Secs. 111.70(3)(a)4 and 1, Stats.

In its complaint and brief to the Examiner, Complainant asked for an "appropriate remedy." Restoration of the status quo is the standard remedy in cases where the status quo is improperly changed. In this case, restoration of the status quo was ordered and requires the

District to return to the pre-implementation wage structure and to recoup from employes the illegally-implemented wage increase. By our Order, we are suspending the status quo portion of our remedy for thirty (30) days to give the parties an opportunity to voluntarily resolve the wage structure and/or recoupment issues. Unless otherwise notified by the parties, these portions of our Order will take effect on February 7, 1998.

Dated at Madison, Wisconsin this 7th day of January, 1998.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Meier /s/
James R. Meier, Chairperson

A. Henry Hempe /s/
Henry Hempe, Commissioner

Paul A. Hahn /s/
Paul A. Hahn, Commissioner

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