STATE OF WISCONSIN
CIRCUIT COURT BRANCH 10
RACINE COUNTY

RACINE UNIFIED SCHOOL DISTRICT,

Petitioner,

vs.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION,

Respondent.

MEMORANDUM DECISION
Case No. 98-CV-752
[**Decision No. 28614-E]**
[NOTE: This document was re-keyed by WERC. Original pagination has been retained.]

The above named Petitioner, hereinafter referred to as District, filed its petition for Judicial Review of Administrative Agency Decision on February 4, 1998 requesting review of the January 7, 1998 Decision and Order of the Wisconsin Employment Relations Commission, hereinafter referred to as Commission, all pursuant to sec. 227.52, Stats.

The District alleges in its Petition that the Commission erroneously interpreted sec. 111.70, et seq., Stats., and acted outside of its discretionary authority with respect to remedy.

The Commission's Order of January 7, 1998 affirmed the Commission's Decision and Order of July 8, 1996, which Decision and Order adopted the Findings of Fact, Conclusions of Law and Order of the Examiner of June 18, 1996.

The District seeks reversal of the Commission's Order and, in the alternative, for modification of the Order. The Commission filed its Statement of Position and Counter-Petition on February 18, 1998 seeking a judgment and decree confirming and enforcing its Order.

On review questions of fact are resolved by application of the "substantial evidence" test; questions of law are resolved by application of deference to the Commission's interpretation on a "great weight" basis, a "due weight" basis or a "de novo" basis.

Definitions of "substantial evidence" are found in Gateway City Transfer Co. v. Public Service Comm., 253 Wis. 397, 405-407, 33 N.W.2d 134 (S.Ct. 1948), Robertson Transport Co. v. Public Service Comm., 39 Wis.2d 653, 657-658, 159 N.W.2d 636 (S.Ct. 1968) and Princess House, Inc. v. DILHR, 111 Wis.2d 46, 53-54, 330 N.W.2d 169 (S.Ct. 1983). Of particular note is sec. 227.57(6), Stats., which provides, in part:

> "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."

An oft quoted definition of "substantial evidence" appears in the Princess House, Inc. case, supra, at page 54:

> "Evidence that is relevant, probative, and credible, and which is in a quantum that will permit a reasonable fact finder to base a conclusion upon it, is 'substantial evidence.' "

In this case the facts were virtually undisputed.

Foundational to this matter is the axiom that the District and Board of Education are charged with certain responsibilities and duties. In particular sec. 118.01, Stats., spells out certain of these duties and there are other laws which dictate what the District and Board must do, such as, Chapter 121, School Finance. In addition to the host of State laws there are Federal mandates as referred to in the hearing transcript such as the

Disability Educational Act of 1990. Sec. 115.85., Stats., requires the District and Board ". . .ensure that such. . .programs and services are available. ." Both the United States and Wisconsin Constitutions speak to public education. Violation of these State and Federal mandates may result in severe sanctions.

In this matter the Association is the Racine Educational Assistants Association which Association includes interpreters for hearing impaired/deaf children.

The Association filed its complaint claiming violation of sec. 111.70(3), Stats., by the District and the Board, to-wit: that the District and Board violated ". . .by unilaterally implemented its proposal to increase the pay rates for the classification of Hearing Interpreter during a hiatus period on the basis of necessity which the Association asserts to be untrue and pretextual." (Examiner Findings, page 1, June 18, 1996)

The last collective bargaining agreement between the District and Association expired on August 24, 1993. Though bargaining had taken place thereafter no new agreement had been reached between the parties for any period subsequent to that date. As of the Summer of 1995 and prior to the commencement of the 1995-1996 school year no new agreement was in place. Hearing Interpreters were paid according to the Matron Assistant schedule which provided for pay range of $9.47 per hour (Assistant I) to $10.24 per hour (Assistant III).

As of August 17, 1995, a couple of weeks before the Fall semester was to commence, the District needed seven (7)

interpreters and had two (2). In her letter of August 24, 1995, Keri A. Paulson, Employee Relations Supervisor, correctly writes: ". . ., with the start of the new school year, this problem will be at a crisis stage." (Exhibit 2) In his letter of August 29, 1995, James J. Ennis, Executive Director, takes no issue with characterizing the situation as an "emergency". (Exhibit 6)

The only reasonable conclusion to be drawn from the undisputed facts is that the District was mandated to provide hearing interpreter services and could not do so as of the commencement of the 1995-1996 Fall semester. Under penalty of law the District was compelled to act. A crisis with far reaching consequences to the students affected existed and the District faced liability consequences if it did not act.

The District suggests that the Commission erred in that "The Examiner and Commissioner erroneously determined that the District did not face a necessity." (District's Brief, page 2) This is not accurate because the Commission's Decision does not necessarily take issue with the "crisis" and the Commission (adopting the Examiner's Findings, Conclusions and Order and issuing its own Memorandum on rehearing) does not directly dispute that such a crisis compelling District action existed.

There is not a scintilla of credible evidence in the record to contradict a conclusion that there existed "necessity" as of the commencement of the Fall, 1995 semester which required the District to act.

While it is true that a search of the transcript will

disclose that Mr. Ennis opined that no necessity existed, necessity in the context of the question is not defined and if he was expressing his opinion with regard to the "crisis" then such opinion has no weight or evidence value as it has no factual underpinnings and obviously cannot be a basis upon which any finding or conclusion can be based.

Focusing on September 20, 1995 the Commission reasoned that the District did not have a "necessity" to act at that time by unilaterally raising Interpreter wages because ". . .the District could have obtained Hearing Interpreter services from an outside contractor." (Commission Memorandum, Background, page 4) The Commission later explained: "We reach this conclusion because the record upon which our decision was based contains persuasive evidence that: (1) outside Interpreter services were available;. . ."

The testimonial record consists of 136 pages and the testimony of eight (8) witnesses. Witnesses numbers 1, James Ennis, 2, Susan Henken, 3, Jill Zelechowski, 4, Stephanie Eide, 5, Laura Collins, 7, Shelley Kritek and, 8, Keri Paulson did not testify that "outside Interpreter services were available". Witness number 6, Mary Jane Hernandez, testified specifically that "outside Interpreter services" were <u>not</u> available.

There were 33 exhibits received. A single exhibit containing a single paragraph is the "persuasive evidence" deemed by the Commission to be "in a quantum that will permit a reasonable fact finder to base a conclusion upon it." The memo

from May Jane Hernandez to Superintendent Armstrong dated September 5, 1995 reads, in part: " * Until such time as Interpreter are hired, the vacancies will be filled by SEWCIL Interpreters at $30.00 per hour."

The only reasonable interpretation of this statement is that the writer of the memo intended to take a certain action.

The Commission concluded that this intent to act was the same as the ability to fulfill the act. Such conclusion can only be arrived at by (a) speculating that SEWCIL Interpreters were, in fact, available and (b) totally disregarding the credible evidence that they were not available. The Commission's interpretation of the statement is erroneous and so is its conclusion as expressed in its Memorandum. When the Commission implicitly found that "outside Interpreter services were available" it erred because there is no substantial evidence that such conclusion is correct.

The ultimate conclusion reached by the Commission is that there was a violation by the District.

Impasse has been used in the same context as stalemate. Wisconsin Tel. Co. v. Wisconsin E. R. Board, 253 Wis. 584, 587, 34 N.W.2d 844. Where not otherwise defined, words are given their ordinary meaning. Impasse is defined as "A situation in which no progress can be made; a deadlock or stalemate". The American Heritage College Dictionary, Third Edition.

It is stated by the Examiner in his June 18, 1986 Memorandum that: "It is well settled that, absent a valid defense, a

unilateral change in the status quo wages, hours or conditions of employment during a contractual hiatus is a per se violation of the employer's duty to bargain under the Municipal Employment Relations Act." Page 28.

The District restates this as ". . .a per se rule prohibiting unilateral implementation upon reaching impasse is not a reasonable interpretation of the statute." (District Brief, page 17)

The Commissions emphasis is on the phrases "during a contractual hiatus" and "absent a valid defense". The District's emphasis is on "impasse". Essentially the District says implementation can occur at impasse and impasse occurred in this matter. The threshold question for the District is whether there was impasse.

The District in its Brief writes: "Despite repeated attempts to reach an agreement with the Association, the District was unable to do so and determined that it had a "necessity" to implement. . ." Page 2. The District suggests that sec. 111.70(4) (cm), Stats., does not prohibit implementation on impasse. District's Reply Brief, pages 9-10.

On impasse: The District's first written proposal is set forth in the Paulson letter of August 24, 1995. (Examiner Finding number 12.) Of significance it refers to "these employees" meaning, of course, the hearing interpreters. The Association's response came on August 25, 1995 in the Ennis letter and states, in part: "Hearing Interpreters and all

assistants will settle together and there is no justification for the Board to act for one group of assistants and not all." (Examiner Finding number 13.) Obviously, there was disagreement as to the group to be covered. However, this hurdle was apparently successfully negotiated on August 29, 1995. Following this meeting the District and Association exchanged proposals in the following sequence: District proposal August 30; Association proposal September 5; District proposal September 5. (Examiner Finding numbers 15 and 16.) Based on an informal remark made by the Association's Director made after the District's proposal of September 5 was communicated to him the District without anything further declared impasse on September 15. (Hearing transcript pages 97-98. Examiner's Finding number 18 and 19) The record does not reflect any contact between the parties after the remark and before the September 15 letter. In other words the District did nothing to verify the Associations formal response to its last proposal. If the District was somehow relying on past history in interpreting Mr. Ennis's remark there is no evidence of such reliance or history.

In order to meet its needs and the necessity of the situation the District interviewed and hired hearing interpreters. In the words of Jill Zelechowski, a hearing interpreter who had been employed by the District since September, 1995: "My instructor from where I went to college through the interpreter program had called me during the summer, August, I believe, ´95, and had said there was a sign language

interpreter job open in Racine, full benefits -- well, not full benefits. Full time, $12.50 and hour. ..." (Transcript page 34) It is obvious that the her wage was not a negotiated one and a reasonable conclusion is that a de facto wage increase was put in place by the District at the new employee interview stage. This conclusion is not compatible with an impasse.

It is undisputed that the parties had reached an agreement proximate to and before the commencement of the Fall, 1995 semester with regard to the "group" being the hearing interpreters and a wage rate increase. Referring to a conversation on August 3, 1995 with James Ennis, Keri Paulson stated: "We had a dialogue about it. He indicated he knew there was a problem and the problem was wages. He told me that he had a lot of discussions on this issue with Jetha Pinkson Lawson, the assistant superintendent of human resources and Shelley Geiselman Kritek, the woman who was the previous witness. And he had said it was okey, that he had reached an agreement with Jetha Pinkston Lawson, and it would be going to the board. And he said we don't have to take it through the contract. You can have Jetha take it to the board and have an agreement. ..." (Transcript page 93). For reasons unexplained in the record and in spite of the fact that the parties had reached an agreement, the agreement was apparently not the subject of further discussions or negotiations and left unanswered is the rhetorical question of how an impasse can be reached when the terms of an informal agreement acceptable to both sides are not further discussed.

The District points out that the Commission/Examiner never made a finding of impasse. This is correct. The Commission's position in this regard is explained in the June 18, 1996 Discussion by the Examiner: ". . ., the Commission has held that impasse is not a basis on which implementation can occur except during the term of a contract and not during a hiatus which is the situation in the instant case." Page 29. Therefore, no impasse finding was made though there is evidence in the record from which such a finding in this regard, one way or another, could be made. It is not this court's function to make findings or conclusions. Acknowledging such, it would appear from the record reviewed that there was "substantial evidence" that there was no impasse as of September 15, 1995.

The Commission's position in this matter is based on 1984 decisions in City of Brookfield, Dec. No. 19822-C (WERC, 11/84) and Green County, Dec. No. 20308-B (WERC, 11/84). The Commission's interpretation here is given "great weight" deference because all four elements are present. Accordingly, the matter of "necessity" is reexamined based on the second reason given, to-wit: "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: . . .; and (2) the District was not in any immediate danger of losing existing Interpreters."

(Commission, Discussion, page 6, January 7, 1998) This statement is, of course, premised on the District bearing the burden of proof and persuasion on this point. Is there "persuasive evidence" that "the District was not in immediate danger of losing existing Interpreters"? Nothing in the record directly established the pro or con of this conclusion. The Commission's inference apparently drawn is that because none of the witnesses testified unequivocally that they were leaving as of September 20th and because there were no written resignations then there was no "immediate danger". While such inference is not one that this court would draw given the circumstances surrounding the promise of a $12.50 per hour wage vs. the wage actually being paid as of that date, it cannot be held that the inference drawn by the Commission is totally unsupportable in the record.

The Commission rejected the District's defense of "necessity". The reasons given were twofold. The first reason given was based on a finding for which there was no substantial evidence. Such cannot be said of the second reason and therefore that portion of the Findings, Conclusion and Order of the Commission/Examiner which concluded a District violation of sec. 111.70(3) (a) 4, Stats., is affirmed.

The Commissions Order provided for restoration of the status quo ante which would require recoupment of wage paid to the hearing interpreters. Such approach is novel, unique and without rationale or reasonable explanation. The only explanation offered is that restoration of the status quo is the standard

remedy in cases where the status quo is improperly changed. (Commission, Discussion, page 6, January 7, 1998) The Commission did not exercise its discretion but acted in an arbitrary manner relying on a platitude rather than addressing this matter. The test is whether the affirmative action ordered " . . . is considered by the board reasonably necessary to 'effectuate the policies' of the act." WERC v. Evansville, 69 Wis.2d 140, 158-159, 230 N.W.2d 688 (S.Ct. 1975) "Discretion is not synonymous with decision-making. Rather, the term contemplates a process of reasoning. This process must depend on facts that are of record or that are reasonably derived by inference from the record and a conclusion based on a logical rationale founded upon proper legal standards." McCleary v. State, 49 Wis.2d 263, 277, 182 N.W.2d 512 (S.Ct. 1971) In its Brief the Commission argues, page 15, that the ". . .order that the District recover the wage increase is unquestionably a reasonable remedy in a case such as this where the effect of the unlawful action by the employer has changed the status quo." Such statement begs the question of why it is reasonable to punish the beneficiaries of the employer's unlawful action since indeed recoupment of past wages paid and spent is punitive, has no reasonable relationship to deterring the District from violating in the future, actually confers a benefit on the offending party by restoring money to it and will directly cause labor disharmony and discord, will likely cause termination of employment and will cause the affected employees distraction from their employment duties and a host of on-going problems with

the Internal Revenue Service, the Wisconsin Department of Revenue and the Social Security Administration. The status quo ante order places the onus on the innocent parties who in good faith believed they would be performing valuable services for fair pay. Rather than promoting labor peace and effectuate the purposes of the Act the Order does exactly the opposite and was ill thought out. That part of the order requiring the District to restore the status quo ante is hereby set aside and modified to restoration of the status quo prospectively.

Dated this 16 day of November, 1998.

BY THE COURT

Richard J. Kreul /s/

Richard J. Kreul
Circuit Court Judge