STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

| | |
|---|---|
| CHEQUAMEGON UNITED TEACHERS,<br><br>Complainant,<br><br>vs.<br><br>WASHBURN PUBLIC SCHOOLS,<br><br>Respondent. | Case 39<br>No. 54377 MP-3210<br>Decision No. 28941-A |

Appearances:

Mr. Barry Delaney, Executive Director, Northern Tier UniServ-West, P.O. Box 311, Hayward, WI 54843, appearing on behalf of Complainant.

Weld, Reilly, Prenn & Ricci, S.C., by Ms. Kathryn J. Prenn, 4330 Golf Terrace, Suite 205, P.O. Box 1030, Eau Claire, WI 54702-1030, appearing on behalf of Respondent.

## FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

On August 26, 1996, Chequamegon United Teachers filed a complaint with the Wisconsin Employment Relations Commission alleging that Washburn School District had unilaterally changed employes' terms of health insurance, in violation of Sec. 111.70(3)(a)1 and 4, Stats. The Commission appointed Christopher Honeyman, a member of its staff, to act as Examiner in this matter and to make and issue Findings of Fact, Conclusion of Law and Order, as provided in Sec. 111.07, Stats. The Examiner conducted a hearing on March 11, 1997 in Washburn, Wisconsin, at which time the parties were given full opportunity to present their evidence and arguments. A transcript was made, both parties filed briefs and reply briefs, and the record was closed on June 17, 1997. The Examiner, having considered the evidence and arguments and being fully advised in the premises, makes and files the following Findings of Fact, Conclusion of Law and Order.

## FINDINGS OF FACT

1. Chequamegon United Teachers is a labor organization within the meaning of Sec. 111.70(1)(h), Stats., and has its principal office c/o Northern Tier UniServ-West, P.O. Box 311, Hayward, Wisconsin 54843.

2. Washburn School District is a municipal employer within the meaning of Sec. 111.70(1)(j), Stats., and has its principal offices at 305 West Fourth Street, Washburn, Wisconsin.

3. At all times material to this proceeding, Complainant Union has been the exclusive bargaining representative of all regular full-time and regular part-time non-certified employes of the School District of Washburn, excluding supervisory, managerial and confidential employes.

4. Complainant and Respondent have been parties to a series of collective bargaining agreements since 1984. In 1983 Respondent issued an employment handbook referred to as the "Guidelines." These documents have included, among others, the following provisions related to health insurance:

(1983 "Guidelines")

> The Board of Education shall contribute 100 percent for full family or single hospitalization insurance for the current year.

. . .

(1984-85)

> The Board of Education shall contribute 100 percent for full family or single hospitalization insurance for the current year.

. . .

(1985-86)

> The Board of Education shall contribute 100 percent for full family or single hospitalization insurance for the current year.

. . .

(1986-88)

> The Board of Education shall contribute 100 percent for full family or single hospitalization insurance for the current year.

. . .

(1988-90)

> The Board of Education shall contribute 100 percent for full family or single hospitalization insurance for the current year.

. . .

In the event that the health insurance costs increase above twenty percent (20%) from what they were for 1988-89 (using the 1988-89 staff and hours for both years), the following changes will be made in the 1989-90 salary schedule. Each cell of the 1989-90 salary schedule will be reduced by the same cents per hour so that the savings of 1989-90 wages, F.I.C.A. and State Retirement contributions will equal the total dollar insurance costs that exceed a twenty percent (20%) increase above the 1988-89 total health insurance costs.

. . .

(1990-92)

The Board will pay the full single and family premiums for all eligible employees for the 1990-91 year. For the 1991-92 year, the Board will pay the full single and family insurance premiums up to a twenty-two percent (22%) increase. However, if the premium increases more than twenty-two percent (22%), the excess above twenty-two percent (22%) shall be deducted from the employee's paycheck before taxes.

. . .

(1992-94)

The Board will pay the full single and family premiums for all eligible employees for the 1992-93 year. For the 1993-94 year, the Board will pay the full single and family insurance premiums up to a twenty-two percent (22%) increase. However, if the premium increases more than twenty-two percent (22%), the excess above twenty-two percent (22%) shall be deducted from the employee's paycheck before taxes.

. . .

(1994-96)

The Board will pay the full single and family premiums for all eligible employees for the years 1994-95 and 1995-96.

. . .

5. Beginning with the "guidelines" promulgated by the District before it had a

collective bargaining relationship with Complainant Union, and continuing through the most recent collective bargaining agreement between the parties, the District has provided dental insurance to this bargaining unit. In each document, the applicable language has stated, inter alia:

> The Board of Education agrees to contribute 100 percent for full family or single dental insurance for the current year.

6. At the close of each of a number of collective bargaining agreements, the record demonstrates that there was a hiatus period before the next collective bargaining agreement was agreed upon. The parties stipulated that hiatus periods included the following:

1. July 1, 1996 through the date of the hearing herein.

2. July 1, 1994 to April 4, 1995.

3. July 1, 1992 to January 18, 1993.

4. July 1, 1990 to October 15, 1990.

5. July 1, 1986 to September 21, 1987.

6. July 1, 1985 to October 2, 1986.

7. The record shows that health insurance rates increased by varying amounts on July 1 of every year from 1984 through 1996. The record shows that in each case, whether during a hiatus period or not, the District picked up the increase and paid the full premium amount for both family and single coverage. The record shows that in July, 1996 the District advised the Union at a collective bargaining meeting that it was evaluating whether to pick up the increase for that year in the absence of a new collective bargaining agreement, and that the Union made no direct response. Thereafter, the record demonstrates, the District paid the increase for the first three months (July, August and September) of the applicable period, but began making deductions from employes' paychecks in September, 1996 for ensuing months. The deductions amounted to $16.82 per employe with family coverage and $14.50 per employe with single coverage. Some employes paid the amounts directly rather than have them deducted from their paychecks. Deductions ceased several months later when the District negotiated a new health insurance plan which provided for premiums lower than the previous year's premiums.

8. The District, contrary to the Union, contends that the change to health insurance language which became effective with the 1990 negotiations clearly and unambiguously specified that the District would no longer pick up health insurance increases occurring during a hiatus. The record demonstrates that the District did, however, pick up the increase in July, 1992. The record further demonstrates that the District picked up the increase in July, 1994, following expiration of the 1992-94 collective bargaining agreement. The District, contrary to the Union, contends that picking up the increase on that occasion reflected its good faith negotiating posture in the face of a

failure by Chequamegon United Teachers to ratify a tentative agreement which had already been ratified by the Local Union and by the Board. The record demonstrates further that on no occasion prior to July, 1996 did the District's negotiators inform Union negotiators that the District's interpretation of the health insurance language following the 1988-90 collective bargaining agreement was that such language no longer provided for payment of health insurance increases occurring during a contract hiatus.

9. The record demonstrates that the collective bargaining agreements governing health insurance following the 1988-90 collective bargaining agreement have been ambiguous on their face as to whether payment of health insurance increases during a contract hiatus was required. The record demonstrates that the history of collective bargaining fails to demonstrate a clear communication between the parties concerning the meaning of the language changes negotiated after 1988-90, with respect to their meaning during a contract hiatus. The record further demonstrates that the District's consistent past practice following each collective bargaining agreement, including during hiatus periods in 1992 and 1994, was to pay for the health insurance increase when it occurred. The record therefore shows by a clear and satisfactory preponderance of the evidence that these parties' status quo going into the 1994-96 collective bargaining agreement presumed that the District would pick up a health insurance premium increase if a hiatus occurred following expiration of that agreement.

10. Respondent, by commencing deductions from employes' paychecks and/or requiring employes to contribute out of pocket to cover the health insurance increase from September, 1996 till February, 1997, unilaterally altered the wages and terms of conditions of employment of employes in the bargaining unit identified above.

Upon the basis of the foregoing Findings of Fact, the Examiner makes and files the following

## CONCLUSION OF LAW

By unilaterally modifying wages and terms of employment of represented employes, Respondent has committed a prohibited practice within the meaning of Sections 111.70(3)(a)1 and 4, Stats.

Upon the basis of the foregoing Findings of Fact and Conclusion of Law, the Examiner makes and renders the following

## ORDER 1/

IT IS ORDERED that Washburn School District, its officers and agents shall immediately:

---

1/ Footnote found on page 7.

1. Cease and desist from refusing to bargain with Chequamegon United Teachers by taking unilateral action or otherwise.

2. Take the following affirmative action, which the Examiner finds will effectuate the purposes and policies of the Municipal Employment Relations Act:

a. Immediately reinstate its policy of paying for health insurance increases if and when they occur during a hiatus, during the period beginning September 1, 1996 and ending when a negotiated change in said condition of employment takes effect.

b. Repay to all employes affected by the deduction from and/or direct payment by, employes to cover the 1996 health insurance increase, by payment to each of a sum of money equal to the amount the employe lost by such action, together with interest at the applicable interest rate of twelve percent (12%) per year. 2/

c. Notify all employes, by posting in conspicuous places where employes work, copies of the notice attached hereto and marked appendix A, which notices shall be signed by a responsible representative of the Respondent, shall be posted immediately upon a copy of this order and shall remain posted for thirty days thereafter. Respondent shall take reasonable steps to ensure that said notices are not altered, defaced, or covered by other material.

d. Notify the Wisconsin Employment Relations Commission in writing within twenty (20) days from the date of this Order as to what steps have been taken to comply herewith.

Dated at Madison, Wisconsin this 27th day of June, 1997.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Christopher Honeyman /s/
Christopher Honeyman, Examiner

---

2/ Footnote on following page.

1/ Any party may file a petition for review with the Commission by following the procedures set forth in Sec. 111.07(5), Stats.

Section 111.07(5), Stats.

> (5) The commission may authorize a commissioner or examiner to make findings and orders. Any party in interest who is dissatisfied with the findings or order of a commissioner or examiner may file a written petition with the commission as a body to review the findings or order. If no petition is filed within 20 days from the date that a copy of the findings or order of the commissioner or examiner was mailed to the last known address of the parties in interest, such findings or order shall be considered the findings or order of the commission as a body unless set aside, reversed or modified by such commissioner or examiner within such time. If the findings or order are set aside by the commissioner or examiner the status shall be the same as prior to the findings or order set aside. If the findings or order are reversed or modified by the commissioner or examiner the time for filing petition with the commission shall run from the time that notice of such reversal or modification is mailed to the last known address of the parties in interest. Within 45 days after the filing of such petition with the commission, the commission shall either affirm, reverse, set aside or modify such findings or order, in whole or in part, or direct the taking of additional testimony. Such action shall be based on a review of the evidence submitted. If the commission is satisfied that a party in interest has been prejudiced because of exceptional delay in the receipt of a copy of any findings or order it may extend the time another 20 days for filing a petition with the commission.

**This decision was placed in the mail on the date of issuance (i.e. the date appearing immediately above the Examiner's signature).**

2/ See Wilmot Union High School District, Dec. No. 18820-B (WERC, 12/83), citing Anderson v. LIRC, 111 Wis.2d 245, 258-59 (1983); Madison Teachers Inc. v. WERC, 115 Wis.2d 623 (Ct. App. IV, 10/83).

APPENDIX A

NOTICE TO ALL EMPLOYEES

Pursuant to an Order of the Wisconsin Employment Relations Commission, and in order to effectuate the policies of the Municipal Employment Relations Act, we hereby notify our employes that:

1. We will immediately cease and desist from refusing to bargain with Chequamegon United Teachers concerning health insurance.

2. We will negotiate with Chequamegon United Teachers concerning health insurance prior to making any change in the practice of full payment of increases when they are put into effect.

3. We will repay to all employes affected by the deduction from, and/or direct payment by, employes to cover the 1996 health insurance increase, by payment to each of a sum of money equal to the amount the employe lost by such action, with interest.

Dated this ____ day of June, 1997.

By _____
Washburn School District

THIS NOTICE MUST BE POSTED FOR THIRTY (30) DAYS FROM THE DATE HEREOF

AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL.

Washburn Public Schools

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

Background

The complaint alleges that Washburn School District violated Sections 111.70(3)(a)1 and 4, Stats., by requiring employes to pay either out of pocket or through payroll deduction the increase in health insurance premiums during and after September, 1996, until a February, 1997 re-negotiation of health insurance with a different carrier resulted in lower premiums. The factual background, while extensive, is essentially undisputed, but the parties argue at length concerning the meaning of the underlying contract language both prior to and after 1990.

Discussion

The standard applicable in Wisconsin to changes, if any, to terms and conditions of employment following a hiatus in a collective bargaining agreement is the "dynamic status quo" doctrine, as expressed in School District of Wisconsin Rapids. 3/ In Wisconsin Rapids 4/ the Commission identified some controlling principles, in the following terms:

> 1. Where the expired compensation plan or schedule, including any related language -- by its terms or as historically applied or as clarified by bargaining history, if any--provides for changes in compensation during its term and/or after its expiration upon employe attainment of specified levels of experience, education, licensure, etc., the employer is permitted and required to continue to grant such changes in compensation upon the specified attainments after expiration of the compensation schedule involved. (To do otherwise would undercut the majority representative and denigrate the bargaining process in a manner tantamount to an outright refusal to bargain.)
>
> 2. Where the expired compensation plan or schedule, including related language--by its terms or as historically applied or as clarified by bargaining history, if any--provides that there is to be no advancement on the schedule during its term or no advancement

3/ Dec. No. 19084-C, (WERC, 3/85).

4/ Dec. No. 19084-C, at pg. 17.

on the schedule after its expiration, then the

> employer is prohibited by its duty to bargain from unilaterally granting such advancement. 5/

Wisconsin Rapids involved a pay schedule rather than insurance, but the same principles apply. In essence, the "dynamic status quo" under Wisconsin Rapids requires an analysis of the parties' own history to determine whether that history can be most fairly read as providing for freezing of dollar amounts during a hiatus. Where ambiguity in the contract language does not allow the contract itself to answer the question, such classically recognized aids to contract interpretation as the history of collective bargaining and past practice come into play.

Complainant Union contends that the 1994-96 language does not contain a cap on what the District will pay towards health insurance premiums and does not specify a specific dollar amount. Complainant argues that the language "for the years 1994-95 and 1995-96" merely reflects the duration clause in the contract, and that the District's consistent past practice until July 1996 had been to pay the health insurance increases promptly whether they occurred during a contract hiatus or not. Complainant points to testimony from all of its witnesses to the effect that no communication, either directly or through a mediator, was ever received by the Union's negotiating team to the effect that the District intended the language of the 1990 and subsequent contracts to be interpreted as not providing for future hiatus payments of health insurance increases. Complainant also contends that if the Board's interpretation is adopted, it is inexplicable why the Board would have paid the 22 percent health insurance increase which went into effect on July 1, 1992, because the language of the contract which had just expired on that date reads the same as the 1994-96 language except that the 22 percent cap has been deleted for 1994-96. Complainant argues that the same problem would apply to why the District picked up the increase on July 1, 1994. Complainant requests a make-whole remedy plus interest and notice-posting.

Respondent contends that the evidence of its witnesses demonstrates that from the mid-1980's onward, a consistent desire of the District was to cap health insurance, though this played out differently in different rounds of negotiation. The District argues that the introduction of references to specific years in 1990 and subsequent years' health insurance language unambiguously reflected a change negotiated at the bargaining table, under which the District had no further obligation to pay an increase during a hiatus except as specified in that language. The District argues that the 1990-92 language required payment of up to a 22 percent

---

5/ The Commission noted (at fn. 16):

> The principles stated herein are not intended to answer the additional question of how specific the expired language must be for schedule advancement to be deemed a part of the status quo where there is no past pattern of advancement on a given schedule either during the life of the schedule or during prior hiatuses between such schedules.

increase, and that the District followed that language in paying the increase on July 1, 1992. With respect to 1994, the District makes the same argument. It adds, however, that on that occasion, it was merely evidencing good faith as a result of the tentative agreement, not wanting to place itself in the same posture as the Union, which had voted down the agreement on an area-wide basis after agreeing to it locally. The District argues that by contrast, the 1994-96 language was different. The District contends that by the date of its preliminary final offer in 1994, its negotiating posture was one of "hardball" and that the object of that offer's containing no mention of health insurance was to force the Union to recognize that payment of an increased level of health insurance represented value to employes. The District argues that if no proposal had been made by the Union concerning health insurance, the existing language, tied as it was to the years 1992-93 and 1994-95, would have resulted in the District making no payment at all toward health insurance for the following year. The District contends that when an agreement was subsequently reached providing for "full payment" for the years 1994-95 and 95-96, this represented a departure from the previous language and was now clearly tied to the specified year's premiums. The District contends that it therefore has in fact maintained the status quo, following a period of generosity from July to September while it determined what to do, by making the deductions for the increases thereafter.

One fair interpretation of the parties' history of bargaining over health insurance language, at least since 1990, could be that both parties have attempted to have the benefit of changes in that language without an explicit discussion of what their respective proposals were intended to obtain. The Union points out, correctly, that there is no evidence that the District ever explained even prior to that year the theory which it advances here concerning the meaning of the term "current year" -- i.e. that since one year or another is always current, this language required the District to pay the increases promptly at any time, hiatus or no hiatus. Similarly, there is no evidence in the record that either party communicated with the other effectively concerning its reading of the varieties of subsequent language proposed and adopted. On its face, the language that remained consistent from 1990 onwards (i.e. that language which specifically listed each year) could be interpreted either as specifying a rate frozen in dollar terms as applied during that contract year, or as merely a formal reference to the duration clause of the contract. On its own, this language fails the clarity necessary to convince me that it was the equivalent either of a firm guarantee of full payment, no matter what that amount might be after a hiatus, or that it represented the equivalent of a specified fixed dollar amount per month, regardless of any subsequent increases. The parties evidently knew how to negotiate either kind of alternative language, but settled instead for this ambiguous formula.

At the same time, as already noted, the discussion at the bargaining table appears to have been cursory at best with respect to the hiatus issue. Even at the point where the District contends it was most concerned by both the Union's conduct, in turning down a tentative agreement that had been ratified locally by both sides, and that it responded by a maneuver to try to put the pressure on the Union to take responsibility for proposing health insurance language, the District witnesses testified only to communicating with a mediator concerning their intentions as to the next hiatus. They did not testify to any direct communication with the Union. There is, meanwhile, no evidence in the record that such communication was in fact made through the mediator, since all of the

Union witnesses denied having heard any such intention on the District's part and there is no other evidence available. The history of collective bargaining is therefore unhelpful in interpreting this contract language.

The past practice, however, favors Complainant's position, despite Respondent's best efforts. This is not so much, in my view, because of the mere fact that in every hiatus period prior to 1996, the District had paid the insurance premium increase. The District has, with respect to 1994 in particular, an extraneous reason for having desired to make that payment. I do not believe that a party which manifests good faith, by following through on a tentative agreement which has been turned down by its opponent, should be penalized for doing so by a subsequent interpretation of that agreement which fails to give any value to that party's action.

But the hiatus payment on July 1, 1992 is more revealing. In that year, the District was, by its own terms, the beneficiary of language newly negotiated in the prior collective bargaining agreement, which referred to specific years for the first time. The substantive difference between the 1990-92 contract and the 1994-96 contract was that in the earlier of those agreements, the District was obliged to pay up to a 22 percent increase during the second year, while in the most recent agreement it was obliged to pay "the full single and family premiums" for both years. But if the formulation of language in the 1994-96 agreement meant that the District had no obligation to apply the word "full" in the dynamic sense, i.e. as including an increase of any size which occurred after June 30, 1996, then it is inexplicable why the District would have felt it had any obligation to pay any increase, even one capped at 22 percent, which occurred after June 30, 1992. Yet pay it the District did.

I simply cannot follow the logic of Respondent's argument that seeks to distinguish these two events. Coupled with the fact that no communication was ever effectively made by the District to the Union to the effect that the District intended the facially ambiguous language first negotiated in 1990 to relieve it from hiatus obligations to pick up increases in health insurance, and further coupled with the fact that there exists no previous instance in which the District had not picked up the increase, I conclude that the clear and consistent past practice of the District prior to 1996 was to pick up such increases. That being so, application of the Wisconsin Rapids principles leads me to conclude that the parties' 1994-96 collective bargaining agreement, on balance, is best interpreted as providing for continued full payment of health insurance during the subsequent hiatus. The District accordingly acted unilaterally and in violation of its obligation to bargain in good faith by its suspension of such payments three months later.

Dated at Madison, Wisconsin this 27th day of June, 1997.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Christopher Honeyman /s/
Christopher Honeyman, Examiner