STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

CHEQUAMEGON UNITED TEACHERS, Complainant,

vs.

WASHBURN PUBLIC SCHOOLS, Respondent.

Case 39
No. 54377
MP-3210

Decision No. 28941-B

Appearances:

Mr. Barry Delaney, Executive Director, Northern Tier UniServ-West, P.O. Box 311, Hayward, Wisconsin 54843, appearing on behalf of Chequamegon United Teachers.

Weld, Reilly, Prenn & Ricci, S.C., by **Attorney Kathryn J. Prenn,** 4330 Golf Terrace, Suite 205, P.O. Box 1030, Eau Claire, Wisconsin 54702-1030, appearing on behalf of Washburn Public Schools.

ORDER MODIFYING AND AFFIRMING EXAMINER'S FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

On June 25, 1997, Examiner Christopher Honeyman issued Findings of Fact, Conclusion of Law and Order with Accompanying Memorandum in the above matter wherein he concluded that Respondent Washburn Public Schools had committed prohibited practices within the meaning of Secs. 111.70(3)(a)1 and 4, Stats., by unilaterally modifying employe wages and conditions of employment. He ordered Respondent to cease and desist from such conduct and to take certain affirmative action to remedy the violations found.

Respondent timely filed a petition with the Wisconsin Employment Relations Commission seeking review of the Examiner's decision pursuant to Secs. 111.70(4)(a) and 111.07(5), Stats. The parties thereafter filed briefs in support of and in opposition to the petition, the last of which was received on September 3, 1997.

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

ORDER

The Examiner's Findings of Fact, Conclusion of Law and Order are affirmed as modified below.

A. Examiner Findings of Fact 1-8 are affirmed.

B. Examiner Findings of Fact 9 and 10 are set aside.

C. Examiner Conclusion of Law is modified to read:

> By failing to pay the full health insurance premiums during the hiatus following the expiration of the 1994-1996 contract, Respondent Washburn Public Schools modified the status quo as to wages and conditions of employment and thereby committed prohibited practices within the meaning of Secs. 111.70(3)(a)4 and 1, Stats.

D. Examiner Order is affirmed.

Given under our hands and seal at the City of Madison, Wisconsin this 5th day of June, 1998.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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

A. Henry Hempe /s/
A. Henry Hempe, Commissioner

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

Washburn Public Schools

**MEMORANDUM ACCOMPANYING
ORDER MODIFYING AND AFFIRMING EXAMINER'S
FINDINGS OF FACT,CONCLUSION OF LAW AND ORDER**

The Pleadings

In its complaint, Complainant Chequamegon United Teachers allege that Respondent Washburn Public Schools violated Secs. 111.70(3)(a)1 and 4, Stats., by unilaterally modifying the status quo as to health insurance premium payments. Complainant asks that Respondent be ordered to make affected employes whole with interest and to post an appropriate notice.

In its answer, Respondent denies that it committed any prohibited practices and alleges that its actions were consistent with its status quo obligations. Respondent contends the complaint is frivolous and asks for dismissal of the complaint along with its costs and attorney's fees.

The Examiner's Decision

The Examiner concluded that Respondent failed to maintain the status quo as to health insurance premiums when it required employes represented by Complainant to make premium payments from September 1996 through January 1997. He therefore found that Respondent had thereby violated Secs. 111.70(3)(a)1 and 4, Stats., and ordered Respondent to make the affected employes whole with interest and to post a notice.

When analyzing the Respondent's status quo obligations as to health insurance premiums, the Examiner looked first to the language of the expired 1994-1996 contract and concluded that, on its face, the language could reasonably be interpreted as supporting either party's position in the litigation. He further concluded that there was no bargaining history which would assist in interpreting the expired contract language. However, when the evidence of past practice was considered, the Examiner concluded that the Respondent was obligated to pay health insurance premium increases which occur during a contract hiatus. He stated:

> 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.

POSITIONS OF THE PARTIES

Respondent

Respondent contends the Examiner erred when he concluded that Respondent had violated Secs 111.70(3)(a) 1 and 4, Stats., by requiring employes to make health insurance premium payments during a contract hiatus. Respondent asks that the Examiner be reversed and that the complaint be dismissed.

Respondent asserts the expired contract language clearly creates a status quo under which Respondent is not obligated to pay any health insurance premium increases during a contract hiatus. Respondent argues the Examiner erred when he found the language to be ambiguous and failed to give effect to the words "for the years 1994-95 and 1995-96."

Respondent alleges the Examiner also failed to properly evaluate the parties' past practice. Respondent contends the Examiner failed to limit his consideration of past practice to situations involving the same contract language as is present herein. Respondent further argues that because the past practice relied on by the Examiner was not unequivocal, clearly enunciated and acted upon, and readily ascertainable over a reasonable period of time, use of that practice was inappropriate.

Lastly, Respondent contends the Examiner improperly concluded that evidence of bargaining history was of no assistance when interpreting the language of the expired contract. Respondent asserts the evidence of bargaining history, particularly the historical evolution of the contract language dealing with payment of insurance premiums, is supportive of the Respondent's view of its status quo obligations.

Given all of the foregoing, the Respondent asks that the Examiner be reversed.

Complainant

Complainant asserts the expired contract language governing the outcome of this dispute unambiguously obligated the Respondent to pay the health insurance premium increases during the contract hiatus. Thus, although the Examiner ultimately reached the correct result, Complainant disagrees with the Examiner's assessment that the contract language is ambiguous.

Complainant argues that the Examiner correctly concluded that the parties' past practice supported a conclusion that the status quo required Respondent to make payment of the increased premiums. However, the Complainant asserts the Examiner improperly discounted portions of the parties' practice when reaching his conclusion.

Lastly, Complainant contends the Examiner properly concluded that evidence of bargaining history does not support the Respondent's position in this litigation. Complainant alleges that when properly evaluated, the parties' bargaining history is consistent with the Examiner's conclusion that Respondent's conduct violated Secs. 111.70(3)(a)1 and 4, Stats.

DISCUSSION

It is well settled that during a contract hiatus, absent a valid defense, a municipal employer violates Sec. 111.70(3)(a)4, Stats., if it takes unilateral action as to mandatory subjects of bargaining in a manner inconsistent with its rights under the dynamic status quo.

ST. CROIX FALLS SCHOOL DIST. V. WERC, 186 WIS.2D 671 (1994) AFFIRMING DEC. NO. 27215-D (WERC, 7/93); RACINE EDUCATION ASSOCIATION V. WERC, 214 WIS.2D 352 (1997); VILLAGE OF SAUKVILLE, DEC. NO. 28032-B (WERC, 3/96); MAYVILLE SCHOOL DISTRICT, DEC. NO. 25144-D (WERC, 5/92) AFFIRMED MAYVILLE SCHOOL DISTRICT V. WERC, 192 WIS.2D 379 (1995); JEFFERSON COUNTY V. WERC, 187 WIS.2D 647 (1994) AFFIRMING DEC. NO. 26845-B (WERC, 7/94); CITY OF BROOKFIELD, DEC. NO. 19822-C (WERC, 11/84). The dynamic status quo is defined by relevant language from the expired contract as historically applied or as clarified by bargaining history, if any. CITY OF BROOKFIELD, SUPRA; SCHOOL DISTRICT OF WISCONSIN RAPIDS, DEC. NO. 19084-C (WERC, 3/85); VILLAGE OF SAUKVILLE, SUPRA.

Here, the parties disagree as to whether the status quo obligated the Respondent to pay the increase in health insurance premiums which occurred during a portion of the contract hiatus which followed the expiration of the parties' 1994-1996 contract.

The record establishes that the first four collective bargaining agreements between these parties contained the following contract language:

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

Upon the expiration of these four contracts, the parties' had successfully bargained a successor agreement only once. During each of the three contract hiatuses which resulted from the parties' failure to timely bargain a successor agreement, the Respondent paid the increase in health insurance premiums which occurred.

1990-1992 Contract and The Hiatus Following its Expiration

In the parties' fifth contract (1990-1992), the health insurance premium language changed. The Complainant's initial proposal sought deletion of the phrase "for the current year" from the contract language in the expired agreement. Respondent's initial offer sought to cap health insurance cost increases at 15 percent for each year of the contract. Ultimately, the parties reached agreement on the following language, which then appeared in the 1990-1992 contract.

> 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.

During the contract hiatus, which followed the expiration of the 1990-1992 contract, the Respondent paid the increase in premium which occurred on or about July 1, 1992.

1992-1994 Contract and The Hiatus Following its Expiration

Complainant's initial proposal for the parties' next contract (1992-1994) sought to amend the health insurance premium language to read:

> The Board will pay the full single and family premiums for all eligible employees.

Respondent's initial proposal stated:

> For all eligible employees, the Board of Education shall contribute up to $383.38 per month toward the family health insurance plan premium and the full premium toward the single health insurance plan premium.

Ultimately, the parties agreed on 1992-1994 contract language which paralleled the 1990-1992 contract language in all respects except for updating the years covered by the contract (i.e. "1990-91" became "1992-93" and "1991-92" became "1993-94").

During the contract hiatus which followed the expiration of the 1992-1994 contract, the Respondent paid the increase in premium which occurred on or about July 1, 1994.

1994-1996 Contract and The Hiatus Following its Expiration

Complainant's initial proposal for the 1994-1996 contract was identical to its initial proposal for the 1992-1994 contract.

Respondent's initial proposal stated:

> The District shall pay the full premium for health insurance for all employees who are regularly scheduled to work 2,080 hours per year. For all other employees who are regularly scheduled to work at least twenty(20) hours per week, the District shall make a prorated contribution toward the health premiums based on the employee's regularly scheduled annual hours of work compared to 2,080 hours.

The parties ultimately reached agreement on contract language which stated:

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

For the first three months of the contract hiatus which followed the expiration of the

1994-1996 contract, the Board paid the premium increase which occurred on or about July 1, 1996. For the next four months of the hiatus, the Respondent required the employes to pay said premium increase which action, in turn, prompted the Complainant to file the instant complaint.

Before determining whether the status quo did or did not obligate Respondent to pay the premium increase, it is worth noting that an employer cannot pick and choose when it will honor the status quo and when it will not. Put another way, if Respondent is correct that the status quo did not obligate it to pay the premium increases, then Respondent violated the status quo by paying the increase for the first three months of the hiatus. Even where the status quo is modified in a manner which benefits employes, Sec. 111.70(3)(a)4, Stats., is violated. RACINE UNIFIED SCHOOL DISTRICT, DEC. NO. 28614-D (WERC, 1/98).

Turning to the merits of the parties' dispute, it is important to note at the outset that the parties have tended to litigate this case as if it were a grievance arbitration. Complainant argues the language of the expired agreement is clear and unambiguous and that , in effect, no further analysis is needed. Respondent asserts that evidence of past practice was improperly considered by the Examiner because it claims there was only one relevant hiatus period and that this single episode cannot constitute a practice.

As the Examiner understood, a status quo analysis is different than a grievance arbitration analysis. The language of the expired agreement, any practice, and any bargaining history are all to be considered when determining the parties' rights under the status quo. SAINT CROIX FALLS SCHOOL DISTRICT, DEC. NO. 27215-D, SUPRA; CITY OF BROOKFIELD, SUPRA; SCHOOL DISTRICT OF WISCONSIN RAPIDS, SUPRA; VILLAGE OF SAUKVILLE, SUPRA. When we review the language, the practice and the bargaining history, we conclude the Examiner was correct when he determined that the status quo required Respondent to make the disputed payments.

The practice of the parties is the decisive evidence in this dispute. If we had only the language of the expired agreement to consider, we could reasonably conclude that the use of specific years in the contract creates a status quo which freezes the Respondent's premium payment obligations at a monthly level no higher than that in effect when the contract expires. But we have more than the language to consider. The payment of the premium increases which occurred after the expiration of all three contracts with "specific year" health insurance premium language speaks far louder regarding the status quo than does the expired contract language on its face.

Respondent places much significance on removal of the word "current" from the parties' contracts effective with the 1990-1992 agreement and the substitution of the specific years covered by the contract. Yet upon the expiration of the first contract in which Respondent accomplished the removal and substitution (1990-1992), Respondent paid the contract hiatus premium increases -- just as it had done when the word "current" was in the contract.

Respondent followed the same practice upon the expiration of the 1992-1994 contract. The Examiner concluded that this evidence of practice should not be held against Respondent because the action occurred in the context of Complainant's failure to ratify a tentative agreement. We disagree. Upon expiration of the 1992-1994 contract, Respondent was obligated

to honor the status quo until the parties ratified a new contract. The existence of a tentative agreement did not extinguish or alter the Respondent's status quo obligation. Absent mutual agreement or necessity, it is a violation of the duty to bargain in good faith to modify the status quo to implement some or all of a tentative agreement before ratification or receipt of an interest arbitrator's award. SAUK COUNTY, DEC. NO. 22552-B (WERC, 6/87). Here, there was no ratification, necessity or mutual agreement. Thus, we cannot honor Respondent's claim that it made the payments not out of a status quo obligation but instead as part of a good faith bargaining tactic of implementing a tentative agreement which had been rejected. Respondent's claimed justification for its conduct is illegal and cannot be credited. Thus, Respondent's payment of the hiatus health insurance premium increases following expiration of the 1992-1994 contract is legitimately considered as part of a status quo analysis.

Even following the expiration of 1994-1996 agreement with its specific use of "1994-95" and 1995-96," Respondent paid the hiatus health insurance increases for the first three months. Respondent proffers no explanation as to why these payments were made if not to honor its status quo obligations. While Respondent ceased paying the increase with the fourth month of the hiatus (and prompted this complaint), we conclude that the payments during the first three months are properly viewed as evidence supportive of the result we reach herein.

Consideration of bargaining history, the third element of a status quo analysis, does not provide significant support for either party's position.

In the narrow sense of bargaining history, there is no conclusive evidence of any face to face dialogue between the parties regarding the alleged hiatus impact of any of their respective proposals or of changes in the health insurance premium language. However, it is worth noting that even if Respondent had advised Complainant that the use of specific years in the contract language meant an end to the payment of premium increases which occurred during any hiatus, such advice would not have been very credible in the face of Respondent's behavior to the contrary.

In the broader sense of bargaining history, the evolution of the parties' health insurance language generally reflects the parties' basic struggle over the allocation of health insurance costs and provides no significant insights as to the status quo. Respondent cites Complainant's unsuccessful efforts to eliminate any reference to "specific years" as signifying an understanding by Complainant that Respondent had no hiatus premium increase obligations. Complainant counters by asserting that it sought to eliminate the specific years to avoid having to propose that the specific years be changed each time the parties bargain a contract. Absent evidence of practice, the inferences Respondent asks us to draw are more plausible than those of Complainant. However, Respondent is again haunted by evidence of its practice. Respondent simply did not act in a manner consistent with the bargaining history inference it asks us to draw.

Given all of the foregoing, our consideration of the language, the practice and the bargaining history causes us to conclude that the status quo obligated Respondent to continue to pay the hiatus premium increase in dispute. Therefore, we affirm the Examiner's conclusion that Respondent's failure to make these payments violated Secs. 111.70(3)(a)4 and 1, Stats., and his order that affected employes be made whole with interest and that an appropriate notice be

posted. We have modified his Findings and Conclusion to more precisely reflect our view of the case.

Dated at the City of Madison, Wisconsin this 5th day of June, 1998.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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

A. Henry Hempe /s/
A. Henry Hempe, Commissioner

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

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