STATE OF WISCONSIN
CIRCUIT COURT
TAYLOR COUNTY

LOCAL 617, AMERICAN FEDERATION
OF STATE, COUNTY AND MUNCIPAL
EMPLOYEES, AFL-CIO,

Petitioner,

v.

WISCONSIN EMPLOYMENT
RELATIONS COMMISSION,

Respondent.

Case No. 00-CV-49
[Decision No. 29647-D]
[NOTE: This document was re-keyed by WERC. Original pagination has been retained.]

NOTICE OF ENTRY OF DECISION AND ORDER

To: Aaron Halstead
Shneidman Myers
217 S. Hamilton St., Ste. 400
P.O. Box 2155
Madison, WI 53701-2155

PLEASE TAKE NOTICE that a Decision and 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 3rd day of May, 2001, and duly entered in the Circuit Court for Taylor County, Wisconsin, on the 4th day of May, 2001.

Notice of entry of this Decision and Order is being given pursuant to Wis. Stat. §§ 806.06(5) and 808.04(1).

Dated this 8th day of May, 2001.

JAMES E. DOYLE
Attorney General

David Rice /s/
DAVID C. RICE
Assistant Attorney General
State Bar No. 1014323

Attorneys for Respondent WERC

Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-6823

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Local 617, AFSCME, AFL-CIO, (Union) petitions for review of the Decision and Order of the Wisconsin Employment Relations Commission (Commission) under the Municipal Employment Relations Act (MERA). The Union asks the Court to reverse that portion of the Commission's decision wherein it determined that Taylor County did not alter the status quo when it required Highway Department employees to work five eight-hour days instead of four ten-hour days each week during the summer of 1999. The Union argues that the language of a contract Addendum, the parties' past practice related to that Addendum, and the parties' relevant bargaining history all compel the conclusion that summer work hours of four ten-hour days per week rather than five eight-hour days per week represented the status quo. The Commission and Taylor County argue that, notwithstanding, other reasonable conclusions which might be drawn from this record, the Commission's conclusion that summer work hours of five eight-hour days per week represented the status quo during the summer of 1999 is a reasonable one and, as such, must be affirmed. Because the Court concludes that the

Commission's determination is a reasonable one, it affirms the Decision and Order.

FACTUAL BACKGROUND

Beginning in the summer of 1988, pursuant to an Addendum to the Union's collective bargaining agreement with Taylor County, Taylor County Highway Department employees were permitted to work four ten-hour days per week rather than five eight-hour days. The Addendum provided, in part:

> (1) ...[B]eginning Memorial Day and continuing through the Friday preceding Labor Day, the regular workweek shall be forty (40) hours, and the regular workday shall be ten (10) hours per day, Monday through Thursday,
>
> . . .
>
> (6) The 10-hour day, 4-day workweek will be scheduled in 1989, on the same basis as in 1988 unless either party notifies the other party, in writing, prior to January 1, 1989, that it wishes to discontinue the schedule.
>
> (Ex. 25, p. 17)

An identical Addendum was appended to each successive biennial contract except that the escape clause deadlines were changed to coincide with the years of each contract.

When the 1996-98 contract expired, the parties had not yet reached agreement on a new contract. They, in fact, reached a bargaining impasse in the spring of 1999. As a result of a petition for interest arbitration filed with the Commission, the parties engaged in mediation with a Commission representative.

The mediation was not fruitful. In April of 1999, immediately following an unsuccessful mediation session, Taylor County's personnel committee convened a meeting and voted to direct the Taylor County Highway Commissioner to implement a five eight-hour day work week during the summer of 1999. The committee chairman acknowledged at the hearing in these proceedings that the County's motivation was, in part, retaliation.

The Union filed a prohibited practices complaint against the County under MERA. The Union claimed that the County altered the status quo by requiring Highway Department employees

to work five eight-hour days rather than four ten-hour days per week during the summer of 1999, thereby engaging in a prohibited practice by refusing to bargain with the Union. The Union also argued that the County was motivated by hostility toward the Union's protected, collective bargaining activity.

Following hearing, the hearing examiner agreed with the Union's position. He concluded that the County's insistence upon a five eight-hour per day work week during the summer of 1999 constituted a unilateral change in the status quo during a contractual hiatus representing a per se violation of the County's duty to bargain under MERA. As a result, he ordered the County to pay its Highway Department employees time and one-half for the eight hours they worked each Friday during the summer of 1999, plus interest at 12%. The hearing examiner's order also required the County to post a notice to all employees concerning the remedies imposed.

Taylor County petitioned the Commission for review of the decision of the hearing examiner. The Commission affirmed the hearing examiner's conclusion that the County had retaliated against the Union by requiring Highway Department employees to work a five-day work week during the summer of 1999. It also affirmed the hearing examiner's cease and desist order in respect to the retaliation violation. The commission, however, reversed the hearing examiner's conclusion that the County had altered the status quo during a contractual hiatus when it required Highway Department employees to work five eight-hour days per week during the summer of 1999. As a consequence, it also reversed the hearing examiner's money damages remedy. The commission explained its decision reversing the examiner's status quo determination as follows:

> 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. The dynamic status quo is defined by relevant language from the expired contract as historically applied or as clarified by bargaining history, if any.

Here, the question before us is whether the status quo the County was obligated to maintain during the summer of 1999 was established by the generic date-free language of . . . the expired contract which stated [that] "the regular work week shall be forty (40) hours, Monday through Friday, eight (8) hours per day" or by the Addendum which contained a four ten hour day summer option.

Looking first at the language of the Addendum itself, we conclude that there is substantial evidence that the Addendum was not part of the status quo the County was obligated to maintain during the contract hiatus. Two sections of the language are particularly instructive. First, the Addendum begins with the phrase "The parties agree that in 1996, 1997, and 1998. . ." This language on its face indicates that the Addendum has no application beyond 1998 (i.e. does not apply to the summer of 1999). Second, the Addendum concludes with a provision which states:

> 6) The ten hour day, four day week work period will be scheduled in **1996-1998** on the same basis as in 1990, unless either party notifies the other party, in writing, **prior to January 1, 1997 or January 1, 1998**, that it wishes to discontinue the schedule. (emphasis added).

It is our view that if the Addendum was to be part of the County's status quo obligations for the summer of 1999, the Addendum would have included the phrase "**or January 1, 1999**" after "or January 1, 1998". It does not.

Given all of the foregoing, we conclude the date and year specific language of the Addendum supports a conclusion that a work week of four ten hour days was not part of the status quo applicable to the summer of 1999. Our conclusion is consistent with our decision in **Washburn Public Schools**, Dec. No. 28941-B (WERC, 6/98) regarding the status quo implications of using specific dates/years in contract language.

Looking at the analytical factor of past practice, we find that because this is the first contract hiatus to occur since the inception of the Addendum, there is no evidence of past practice to help us in out status quo analysis.

Turning to bargaining history, the evidence is mixed. The Union correctly asks why would the County feel compelled to take specific action to ban the four ten hour day schedule for the summer of 1999 if the County thought it had no status quo obligation to maintain the schedule in the first place. On the other hand, during bargaining for the 1999-2001 contract, the County never proposed to delete the Addendum – a bargaining position consistent with the view that the Addendum had automatically expired. We find the evidence of bargaining history inconclusive.

In summary, we have contract language which is supportive of a status quo which does not include a four ten hour day summer schedule, no evidence of past practice, and inconclusive bargaining history. On that basis, we conclude that the status quo for summer hours was not the four ten hour days of the Addendum but rather the five eight hour days set forth in Article 4, Section 1 of the expired 1996-1998 agreement. Thus, we reverse the Examiner's conclusion to the contrary and find that the County did not violate Sec.

111.70(3)(a)4, Stats., by scheduling work on a five eight-hour day basis during the summer of 1999.

(Commission's Decision, pp. 10-12; bold in original; citations omitted except for **Washburn Public Schools.**).

The Union argues that the Commission's determination that a five eight-hour day work week rather than a four ten-hour day work week represented the status quo during the summer of 1999 is not supported by the record and is, thus, unreasonable.

The parties have briefed the matter; the Court's decision follows.

DECISION

The Court reviews the Commission's decision to determine whether it reached a reasonable determination, applying a proper legal standard to relevant facts. **Verhaagh Labor & Industry Review Com'n**, 204 Wis.2d 154, 554 N.W.2d 678 (1996). The Court must affirm the Commission's determination so long as a reasonable fact finder could have reached such a determination. **Barnes v. DNR**, 178 Wis.2d 290, 306, 506, N.W.2d 155 (Ct. App. 1993). Such is the case, even if other, equally reasonable interpretations could be drawn from the same record. **Jefferson County v. WERC**, 187 Wis.2d 647, 651-53, 523 N.W.2d 172 (Ct. App. 1994). The Commission's status quo determination under MERA is entitled to "great weight". **Id.** at 187 Wis.2d 651-55.

The reasonableness of the Commission's determination here turns upon the question of what represented the status quo during the summer of 1999 in respect to Highway Department work hours. The status quo must be determined by examining the language of the expired agreement, the parties' past practices relative to the agreement, and the parties' bargaining history. **Jefferson County**, at 187 Wis.2d 655-56.

Not surprisingly, the Union on one side and the Commission and Taylor County on the other reach divergent conclusions when examining this record in light of those three factors.

The Union argues that the language of the Addendum is instructive in that it contains no sunset provision. The Union points to another side agreement which the parties entered into in conjunction with the 1988-89 contract regarding employer-employee sharing of health care premiums. That side agreement contained an explicit sunset provision. The Union argues that the lack of such language in this Addendum indicated an intention on the part of the parties that the Addendum not sunset.

The Commission and Taylor County argues that the language of the Addendum leads to the opposite conclusion, i.e., that it is less likely that the Addendum was intended to be a part of the status quo obligation during the summer of 1999. They point to the fact that the parties' collective bargaining agreements provided for five eight-hour work days in generic, date-free language with the four ten-hour day language in the Addendum to each biennial contract providing that the special summer hours would be effective in the specified years unless either party exercised its rights under the escape clause. They argue that the lack of sunset language, even given the presence of such language in another letter of understanding, is not by itself conclusive evidence that the Addendum became the status quo.

The Union also points to the parties' past practice in respect to the summer work hours provided for in the Addendum. The Union argues that the parties followed the Addendum's summer work hours during three previous contract hiatus periods. It claims that the first contract expired on December 31, 1989, with the subsequent biennial contract not being signed until January of 1991; that the 1990-91 contract expired on December 31, 1991, with the 1992-93 contract not being signed until August of 1992; and that the 1994-95 contract expired on December 31, 1995, with the 1996-98 contract not being signed until 1996. The Union points out that the

parties followed the four-day ten-hour work schedules throughout that period, notwithstanding the lack of a signed contract.

Taylor County and the Commission respond that the Commission was not given an opportunity to consider that argument inasmuch as it was first advanced in these proceedings before this Court. In any event, they point out that in each previous instance a tentative contract had been successfully negotiated before each of the summers in question and that a written contract had not been signed simply because the parties were still in the process of working out specific language before printing the final document. The Commission points out that it was the burden of the Union to establish by a clear and satisfactory preponderance of the evidence that there was a previous contract hiatus and that the parties' past practice was relevant to a determination of the status quo. Section 117.07(3), Stats. Because the Union did not raise the issue before the Commission, the Commission's conclusion that this was the first contract hiatus since the inception of the Addendum and that the parties' past practice in that respect was, thus, not instructive, was a reasonable one.

Finally, the Union argues that the Commission's interpretation of the parties' past bargaining history relevant to the Addendum was unreasonable. The Union notes that the Addendum was never the subject of bargaining after the initial agreement when it was attached to the 1988-89 contract. Afterwards it was simply attached to each successive contract without discussion. Therefore, the Union argues, the only reasonable conclusion which could be drawn is that neither party believed it necessary to mention the Addendum in negotiations in order to continue its existence.

The Commission, in its decision, acknowledged that the Union's interpretation of the parties' bargaining history was not unreasonable. It noted, however, that the parties' bargaining history was also consistent with a conclusion that the County, by virtue of the fact that the County

never proposed to delete the Addendum during bargaining for the 1999-2001 contract, viewed the Addendum as having automatically expired upon the expiration of the previous biennial contract. Accordingly, the Commission and Taylor County argue that the Commission's determination that the evidence of bargaining history was inconclusive is a reasonable one.

The Court concludes that, under the facts adduced at hearing, a reasonable fact finder could determine that either the eight-hour five-day work week or the ten-hour four-day work week represented the status quo during the summer of 1999. Thus, the Commission's decision that the five-day eight-hour work week represented the status quo is reasonable and, as such, must be affirmed.

The Union also challenged the Commission's reversal of the hearing examiner's order requiring payment of monetary damages. Because that argument is premised upon the Union's contention that the Commission erred by reversing the hearing examiner's determination concerning the status quo, it is rendered moot by the Court's decision affirming that determiniation.

ORDER

UPON THE FOREGOING, IT IS HERBY ORDERED, that the decision of the Wisconsin Employment Relations Commission and its resulting order be and is hereby affirmed.

Dated this 3rd day of May, 2001.

BY THE COURT:

Douglas T. Fox /s/

Douglas T. Fox, Circuit Court Judge.

Taylor County Clerk of Circuit Court
Copy to: Mr. Aaron N. Halstead
Mr. David C. Rice
Mr. John J. Prentice