STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

RANDOM LAKE UNITED EDUCATION ASSOCIATION, Complainant,

vs.

RANDOM LAKE SCHOOL DISTRICT, Respondent.

Case 30
No. 58011
MP-3554

Decision No. 29998-C

Appearances:

Attorney Michael J. VanSistine, Legal Counsel, Wisconsin Education Association Council, P.O. Box 8003, Madison, Wisconsin 53708-8003, appearing on behalf of Random Lake United Education Association.

Davis & Kuelthau, S.C., by **Attorney Paul C. Hemmer,** 605 North 8th Street, Suite 610, Sheboygan, Wisconsin 53081-4525, appearing on behalf of Random Lake School District.

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

On September 13, 2001, Examiner Coleen A. Burns issued Findings of Fact, Conclusions of Law and Order with Accompanying Memorandum in the above matter wherein she determined that Respondent had committed prohibited practices within the meaning of Sec. 111.70(3)(a)4 and 1, Stats., by unilaterally implementing retirement health insurance benefits. She ordered Respondent to cease and desist from such conduct and to post a notice to employees.

Both Complainant and Respondent timely filed petitions with the Wisconsin Employment Relations Commission seeking Commission review of the Examiner's decision pursuant to Secs. 111.07(5) and 111.70(4)(a), Stats. The parties thereafter filed written argument – the last of which was received on January 14, 2002.

Having reviewed the record and being fully advised in the premises, the Commission makes and issues the following

ORDER

A. The Examiner's Findings of Fact are affirmed.

B. The Examiner's Conclusions of Law 1 – 7 are affirmed.

C. The Examiner's Conclusions of Law 8 – 9 are modified to read:

> 8. Article VI of the parties' July 1, 1997 – June 30, 1999 contract constitutes the agreement of the parties as to the rights of teachers retiring during the term of that contract to receive and pay for health insurance coverage. For the duration of the 1997-1999 contract, each party was entitled to rely on the bargain they had struck as to the matters covered by Article VI and thus neither party had an obligation to bargain with the other over any modification of these matters which would take effect prior to July 1, 1999. Thus, Complainant had no obligation to bargain with Respondent over Respondent's April 27, 1999 offer to employees regarding a Respondent contribution toward the cost of health insurance.

D. The Examiner's Conclusion of Law 10 is renumbered Conclusion of Law 9 and modified to read:

> 9. When Respondent offered a health insurance premium contribution directly to employees represented for the purposes of collective bargaining by Complainant, Respondent engaged in illegal individual bargaining and thereby

committed a prohibited practice within the meaning of Secs. 111.70(3)(a)4 and 1, Stats. When individual employees accepted Respondent's offer, Respondent unilaterally modified the parties' contractual Article VI agreement as to a mandatory subject and thereby committed a prohibited practice within the meaning of Secs. 111.70(3)(a)4 and 1, Stats.

E. The Examiner's Order is affirmed.

Given under our hands and seal at the City of Madison, Wisconsin, this 15th day of August, 2002.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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

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

Chairperson Steven R. Sorenson did not participate.

Random Lake School District

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

THE EXAMINER'S DECISION

The Examiner concluded that Respondent unilaterally altered the health insurance benefit available to Complainant-represented employees upon their retirement and thereby violated its duty to bargain within the meaning of Sec. 111.70(3)(a)4 and derivatively Sec. 111.70(3)(a)1, Stats.

In reaching this conclusion, the Examiner determined:

1. The employees affected by the unilaterally offered benefit were not retirees but were active employees represented for the purposes of collective bargaining by the Complainant at the time the offer was made. Therefore, the Examiner had jurisdiction over the complaint allegations.

2. The matter was not made moot by Respondent's subsequent withdrawal of the health insurance benefit offer.

3. The unilaterally offered benefits are mandatory subjects of bargaining because they are deferred compensation offered to current employees who subsequently retire.

4. Complainant did not waive its right to bargain over the matter through language in the 1997-1999 contract.

5. Complainant did not waive its right to bargain over the matter by its inaction as to a similar offer made by Respondent two years earlier.

6. Because it demanded to bargain over the issue, Complainant did not acquiesce to Respondent's offer.

7. Bargaining over the issue of retirement benefits in the context of the negotiations for a 1999-2001 agreement did not meet the Respondent's obligation to bargain over the unilateral offer made during the term of the 1997-1999 agreement.

To remedy the prohibited practices found, the Examiner concluded that because Respondent had already rescinded the unilateral offer, she would not make rescission part of her remedial order. Further, because Complainant did not ask that Respondent cease making payments to employees receiving benefits under the offer, the Examiner concluded that she would not order the end to such payments. Because she rejected Complainant's claim that affected employees were unlawfully induced to retire by the illegally offered benefits, the Examiner rejected Complainant's remedial requests for additional retirement contributions and for an adjustment in the calculation of a qualified economic offer.

POSITIONS OF THE PARTIES ON REVIEW

The Respondent

Respondent urges the Commission to reverse the Examiner and dismiss the complaint.

Respondent first argues that the Examiner erred when concluding that Respondent's offer was a mandatory subject of bargaining. Citing GREEN COUNTY, DEC. NO. 21144 (WERC, 11/83) and CITY OF BROOKFIELD, 153 WIS.2D 238 (CT. APP. 1989), Respondent contends that matters related to benefits for retired employees are mandatory subjects of bargaining only where the current employees will retire during the term of the successor agreement. Because its offer only applied to employees who would retire during the term of the then existing 1997-1999 contract, Respondent contends that its offer was not a mandatory subject of bargaining.

Respondent next contends that the Examiner erred by concluding that Complainant demanded to bargain over the retirement offer. To the contrary, Respondent asserts that Complainant only asked that the offer be withdrawn. Respondent contends that Complainant's request was not sufficient to trigger a bargaining obligation.

Respondent further asserts that the Examiner erred by failing to consider the extensive bargaining by Respondent over early retirement benefits during negotiations over the 1999-2001 contract.

Respondent argues that its unilateral offer did not threaten or coerce unit members or undermine Complainant's status as the collective bargaining representative. Respondent characterizes the offer as a $25,000 gift to unit members which was part of a successful effort to avoid laying off any employees. Respondent further contends that the offer was not a self-help measure designed to achieve a collective bargaining goal and thus did not constitute a refusal to bargain.

Respondent contends that its action did not modify existing contractual retirement benefits. It argues that the 1997-1999 contract was silent on the topic; that its action only affected individuals who the Complainant no longer represented; and thus that its action did not violate the duty to bargain by modifying an existing benefit for unit employees.

Respondent argues the Examiner erred by concluding that Respondent's action was inconsistent with the status quo as to retirement benefits. Respondent argues that because the 1997-1999 contract was silent on this topic, the status quo as to retirement health insurance contributions was established by the Respondent's practice (begun in 1997) of unilaterally contributing toward such health insurance premiums.

Respondent alleges that its action had no negative impact either on the bargaining unit or negotiations for a successor agreement. Respondent thus argues that it should not be sanctioned for a course of conduct that did no harm and does not contravene any labor law principles. Respondent points out that Complainant has always been prepared to withdraw this complaint.

Given the contractual silence on the matter of retirement health insurance contributions, Respondent asserts that it was exercising its statutory right to "manage the workforce" by making the offer in question and did not violate its duty to bargain by doing so.

Respondent argues the Examiner erred by failing to find that Complainant's conduct waived any right to bargain. Respondent contends that by Complainant's failure to demand bargaining over the Respondent's 1997 and 1999 offers of retirement benefits, Complainant waived its right to bargain.

Respondent alleges that the decision of the Examiner has "no practical basis" because the conduct of the parties would have been the same even if the Respondent had withdrawn its 1999 offer as demanded by Complainant. Further, Respondent asserts its conduct avoided the need to lay off employees. In this context, Respondent contends that it ought not be found to have committed a prohibited practice.

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

Complainant

Complainant urges the Commission to affirm the Examiner. It argues that Respondent's arguments reflect "disdain" for Commission precedent and reaffirm the need for a meaningful remedy.

Citing GREEN COUNTY, SUPRA, Complainant contends that an appropriate remedy should deter future wrongdoing and insure that Respondent did not benefit from its wrongful conduct. Complainant asserts that the Examiner's remedy does not sufficiently deter Respondent from engaging in future wrongdoing and allows Respondent to benefit from its wrongful conduct.

Therefore, Complainant asks that the Examiner's remedy be modified to make the illegally offered benefit the status quo from which future bargaining between the parties proceeds.

DISCUSSION

As to the issues raised by Respondent's petition for review, we affirm the Examiner's determination that Respondent committed prohibited practices within the meaning of Secs. 111.70(3)(a)4 and 1, Stats. We have modified her Conclusions of Law to a limited extent to more precisely respond to the waiver arguments made by Respondent and identify the nature of the Respondent's illegal conduct.

We begin with Respondent's contention that the April 1999 offer does not relate to a mandatory subject of bargaining because it only applied to employees who would retire during the term of the 1997-1999 contract.

In GREEN COUNTY, SUPRA, the Commission stated the following as to the duty to bargain over proposals that would give benefits to current employees upon their retirement:

> Clearly, retirement benefits bargained as part of an overall compensation package need not be limited to the payment of a pension, but they may well include payments of health insurance premiums or, as here, the right to continue in a group health insurance program. Wages bargained in exchange for the performance of work as an active employee (prior to retirement) can take the form of payments and fringe benefit privileges paid to the employe contemporaneously with the active service of (sic) deferred so that payment to the employe occurs at a later date. Whether contemporaneous or deferred, the compensation involved is in exchange for the work performed by the employe during the term of the contract prior to retirement. Deferred compensation can be funded through an escrow or trust fund arrangement or on a pay-as-you-go basis, absent provisions of law to the contrary not present herein. Decisions as to what payments and fringe benefit privileges employes will receive for their work and when they will receive those payments and be entitled to those fringe

> benefit privileges are all matters primarily related to wages of bargaining unit employes for work performed during the contract term regardless of how much of the compensation package is payable contemporaneously with the work performed as opposed to at and during retirement or some portion thereof.
>
> Thus, in our view, if the instant clause applies only to current employes who retire during the term of the agreement, it would be a mandatory subject even thought (sic) the County's obligations to such individuals would begin only at the time of the individuals' retirement.
>
> The proposal at issue herein states in pertinent part: "Upon retirement, employes shall, at their option be permitted to participate in the group health insurance program . . ." As written, we interpret the proposal as applying only to current members of the bargaining unit, who retire while the terms of the agreement **at issue** are in effect, as a future retirement benefit; because the proposal, by its terms, covers only "employes". Those who have retired prior to the effective date of the new agreement are no longer employes of the County. (emphasis added)

The Court of Appeals found this reasoning persuasive in CITY OF BROOKFIELD V. WERC, 153 WIS.2D 238 (CT.APP 1989).

The Respondent does not generally contest the concept that retirement benefits for employees are primarily related to wages. However, Respondent cites the highlighted phrase "at issue" from the above-quoted portion of GREEN COUNTY and argues that: (1) when the April 1999 offer was made, only the 1999-2001 contract was "at issue;" and (2) because the offer was only available to those who retired during the term of the 1997-1999 agreement, the offer is not a mandatory subject of bargaining.

We understand GREEN COUNTY and the phrase "at issue" quite differently from Respondent and conclude that GREEN COUNTY provides substantial support of the Examiner's conclusion that the April 1999 offer was a mandatory subject of bargaining.

As stated in the above-quoted portion of GREEN COUNTY, retirement benefits for current employees are mandatory subjects. Such benefits are deferred compensation for the services being provided by employees. Respondent's offer provided deferred compensation to current employees who might elect to retire during the term of the 1997-1999 contract. Thus, under the above-quoted GREEN COUNTY analysis, Respondent's offer is a mandatory subject of bargaining. When applied to this dispute, the GREEN COUNTY phrase "at issue" refers to the 1997-1999 contract -- the contract term to which the offer applied. Thus, we reject Respondent's argument.

We turn next to the Respondent's related contentions that the 1997-1999 contract does not cover the subject addressed by its offer and that Complainant was obligated to but did not demand to bargain over the April 1999 offer.

Respondent argues that because the 1997-1999 contract does not provide for an employer contribution toward retiree health insurance premiums, the contract is silent on the matter. Respondent's argument reflects too narrow a view as to when a contract does or does not cover a subject.

Contrary to Respondent, a contract is not silent on a matter if the matter is not specifically addressed. As the Court held in CADOTT EDUCATION ASS'N V. WERC, 197 WIS.2D 46, 57-58, (CT.APP. 1995):

> We agree with the examiner in *Janesville*: To conclude that the bargaining agreement is silent on the subject because it does not explicitly focus upon said issue would be to ignore the fact that a contract cannot possibly deal specifically with all of the potential problems which are generated in an employer-employe relationship.

See also CITY OF BELOIT, DEC. NO. 27990-C (WERC, 7/96)

Here, Article VI of the 1997-1999 contract addresses the subject of "FRINGE BENEFITS AND COMPENSATION" and includes a provision relating to "Health Insurance" which in turn specifically speaks to health insurance for retiring teachers and who pays for this benefit. Thus, we think it clear that the contract is not silent on the subject of the Respondent's April 1999 offer. Therefore, we affirm the Examiner's determination that Article VI addresses the matter in dispute.

Where, as here, the contract addresses a subject, the parties are entitled to live with the bargain they have struck and thus neither party is obligated to bargain further over their respective rights and obligations during the term of their contract as to that subject. BELOIT, SUPRA. Therefore, as to the Respondent's April 1999 offer regarding payment of health insurance premiums, the Complainant had no obligation to demand that the Respondent bargain over that topic. Complainant could have restricted its response to the April 1999 offer to its request that Respondent rescind the offer. Thus, even if the Examiner had erred when interpreting Complainant's response as including a demand to bargain, that error would be of no consequence in this proceeding because Complainant had no duty or right to waive. Complainant, like Respondent, was entitled to stand pat on the bargain struck for the duration of the contract. However, viewed as a whole, we are satisfied that the Examiner correctly found that Complainant demanded to bargain over the April 1999 offer and we affirm her in that regard.

Respondent next argues that the Examiner erred when concluding that the parties' bargaining over retirement benefits as part of the 1999-2001 contract negotiations was irrelevant. Again we agree with the Examiner. The April 1999 offer was not part of the 1999-2001 negotiations and was limited in its effect to a portion of the 1997-1999 contract term. The 1999-2001 bargaining is irrelevant to the question of whether Respondent committed prohibited practices by making and then implementing its April 1999 offer.

We respond next to Respondent's contention that its conduct ought not be found to be illegal because it did no harm, did not undermine Complainant, and did not coerce any employees. As reflected in our Conclusion of Law 9, Respondent's conduct breached its duty to bargain in two different ways. First, the April 1999 offer was individual bargaining with employees. Such bargaining is prohibited activity under the Municipal Employment Relations Act. CITY OF MARSHFIELD, DEC. NO. 28973-B (WERC, 3/98). If Respondent wants to seek to modify the wages, hours and conditions of employment of the employees Complainant represents for the purposes of collective bargaining over these matters, Respondent is obligated to make the offer only to Complainant. It is then up to Complainant to decide how to respond to the offer. While Respondent does have free speech rights and may elect to **subsequently** advise employees that it made the offer to Complainant, ASHWAUBENON SCHOOL DISTRICT, DEC. NO. 14774-A (WERC, 10/77), Complainant is the employees' collective bargaining representative. When Respondent bargained directly with the employees, it violated Sec. 111.70(3)(a)4, Stats.

Contrary to Respondent, when the employer ignores the collective bargaining representative and makes an offer directly to the employees, Complainant's authority and standing as the collective bargaining representative is clearly undermined and an employer thereby unquestionably has interfered with employees' Sec. 111.70(2), Stats., right "to bargain collectively through representatives of their own choosing . . ." Thus, we reject Respondent's argument that the Examiner erred when she concluded Respondent's conduct also violated Sec. 111.70(3)(a)1, Stats.

As set forth in Conclusion of Law 9, Respondent also violated its duty to bargain and interfered with employee rights when it modified the parties' contractual Article VI bargain by implementing its April 1999 offer as to employees Mueller and Snodgrass. This is so because unilateral changes in mandatory subjects of bargaining undercut the integrity of the collective bargaining process in a manner inherently inconsistent with the statutory mandate to bargain in good faith. CITY OF BROOKFIELD, DEC. NO. 19822-C (WERC, 11/84); GREEN COUNTY, DEC. NO. 20308-B (WERC, 11/84). Thus, we again reject the Respondent's "no harm, no foul" defense. Contrary to Respondent's arguments, its conduct did indeed cause harm and was contrary to basic labor law principles. The employees exercised their Sec. 111.70(2), Stats., rights to select Complainant as their representative for the purposes of collective bargaining.

The employees are harmed and their Sec. 111.70(2), Stats., rights infringed upon when Respondent ignored the collective bargaining process and unilaterally modified the contractual rights Complainant had bargained for the employees.

In reaching this conclusion, we necessarily reject Respondent's contentions that because similar May 1997 conduct by Respondent went unchallenged, Respondent had the right to repeat such conduct in 1999 and/or that the 1997 conduct modified the terms of the July 1, 1997 - June 30, 1999 contract. The 1997-1999 contract establishes the parties' rights as to retirement benefits for individuals employed during the period of July 1, 1997 - June 30, 1999. Conduct that occurred **prior to** the term of the 1997-1999 contract can hardly be viewed as amending the 1997-1999 contract or as a waiver of the right of Complainant to protect the integrity of that contract and the process that produced it.

Having affirmed the Examiner's conclusions that Respondent violated Secs. 111.70(3)(a)4 and 1, Stats., by its conduct, we turn to Complainant's contention that the Examiner's remedy is insufficient.

We begin by noting that the Wisconsin Supreme Court has held that:

> . . . there is no doubt that the WERC has substantial remedial powers to fashion remedies to effectuate the purpose of the statute for fair employment and peaceful negotiation and settlement of municipal labor disputes. BD. OF EDUCATION V. WERC, 52 WIS.2D 625, 635 (1971).

See also LIBBY, MCNEILL & LIBBY V. WERC, 48 WIS.2D 272 (1970); WERC V. EVANSVILLE, 69 WIS.2D 140 (1975); BROWNE V. WERC, 169 WIS.2D 79 (1992).

As the Examiner correctly noted, the conventional WERC remedy for a unilateral change refusal to bargain is to return the parties to the position they were in prior to the illegal conduct. GREEN COUNTY, SUPRA.

Here, because Respondent's offer was for a limited term which has long since passed, the parties have by the passage of time been returned to their pre-April 1999 status as to the benefits available upon retirement during the term of the 1997-1999 contract. Thus, as noted earlier herein, the Examiner did not order Respondent to rescind the offer. As part of the conventional "return the parties to the position they were in" remedy, Complainant could have but did not ask that Respondent be ordered to stop payments to Mueller and Snodgrass or that Respondent recoup monies already paid to these two individuals. In deference to Complainant's position in this regard, the Examiner elected not to order Respondent to take such action even though it would have been consistent with the general conventional remedial

goal of returning the parties to their pre-illegal conduct status. Although Complainant understandably did not want to harm Mueller and Snodgrass, this position does not place Complainant on the "high ground" when complaining that the Examiner's remedy was insufficient.

Consistent with standard WERC remedial practice, the Examiner did order the Respondent to cease and desist from engaging in this illegal conduct and to post a notice to all employees to that effect.

To a large extent, Complainant's remedial concerns flow from the contention that Mueller and Snodgrass would not have retired but for Respondent's illegal conduct. However, as found by the Examiner, the record does not establish that the retirement benefit offered by Respondent played a definitive role in the retirement of either teacher. Neither teacher testified at hearing, their written communications with Respondent are inconclusive, and the cited testimony of the District Administrator only establishes that he did not know "one way or the other" as to whether the benefit played a critical role.

Complainant correctly asserts that one of the remedial purposes identified in GREEN COUNTY is "preventing or discouraging such violations in the future." Complainant argues the Examiner's remedy does not create enough of a disincentive for Respondent to modify its inclination to engage in illegal behavior. In response, we first note that Complainant elected not to challenge Respondent's 1997 conduct and thus it can hardly be said that Respondent is a repeat offender who has demonstrated an indifference to conventional remedies. Further, Respondent has been ordered to cease and desist from such conduct and we presume that Respondent will obey this portion of our Order. In addition, should Respondent engage in such conduct in the future, it would face the potential for the extraordinary remedy of paying Complainant's costs and attorneys fees. STATE OF WISCONSIN, DEC. NO. 29177-C (WERC, 5/99). Thus, we reject Complainant's contention that the existing remedy is inconsistent with the "preventing/discouraging" remedial purpose.

Complainant also correctly points out that GREEN COUNTY identifies a remedial goal of "preventing the party that committed the unlawful change from benefiting from their wrongful conduct, . . ." Complainant asserts that the Respondent benefited here because the retirements produced by the illegal conduct: (1) removed Respondent's incentive to bargain an early retirement provision with Complainant and; (2) generated salary savings when the retirees were replaced with less experienced and thus less expensive teachers. Complainant proposes a variety of remedial alternatives premised on making the $12,500 benefit contained in the April 1999 offer the status quo from which future bargaining proceeds rather than the $0 benefit contained in the 1997-1999 contract.

As noted earlier herein, we are not persuaded that the illegal conduct produced the retirements. Further, Complainant has the right to collectively bargain future contracts that pass savings generated by retirements on to the remaining teachers and/or establish incentives for early retirements. While Complainant admittedly cannot pursue such proposals to interest arbitration if the Respondent elects to make a qualified economic offer, the bargaining process remains a viable means by which to seek such results.

Given all of the foregoing, we have affirmed the Examiner's remedial Order.

Dated at Madison, Wisconsin, this 15th day of August, 2002.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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

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

Chairperson Steven R. Sorenson did not participate.

rb
29998-C