COURT OF APPEALS
DECISION
DATED AND FILED

February 26, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-1671 **Cir. Ct. No. 00CV49**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

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

PETITIONER-APPELLANT,

V.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION AND TAYLOR COUNTY,

RESPONDENTS-RESPONDENTS.

APPEAL from an order of the circuit court for Taylor County: DOUGLAS T. FOX, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Local 617, AFSCME, AFL-CIO, appeals an order affirming a decision of the Wisconsin Employment Relations Commission. The commission found that Taylor County did not alter the status quo by requiring its highway department employees to work a five, eight-hour-per-day workweek

rather than a four, ten-hour-per-day workweek during the summer of 1999. Local 617 argues that a four, ten-hour-per-day workweek was the status quo after the 1996-98 collective bargaining agreement expired. Therefore, according to Local 617, the County violated the Municipal Employment Relations Act (MERA). We conclude that the commission could reasonably find that a five, eight-hour-per-day workweek was the status quo during the summer of 1999. Therefore, we affirm the order.

BACKGROUND

¶2 Local 617 represents employees of the highway department. Local 617 and the County were parties to a series of collective bargaining agreements. The agreement for the period January 1, 1996, through December 31, 1998, contained an addendum that provided in pertinent part:

> RE: TEN HOUR, FOUR DAY WORKWEEK
>
> 1) The parties agree that in 1996, 1997, and 1998 beginning Memorial Day and continuing through the Friday preceding Labor Day, the regular work week shall be forty (40) hours, and the regular work day shall be ten (10) hours per day, Monday through Thursday, except for two (2) patrolmen whose regular work day schedule be ten (10) hours per day, Tuesday through Friday.
>
> ….
>
> 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.

The addendum was first added to the 1988-89 collective bargaining agreement and was continued in each successor contract with the dates updated to coincide with the period of the agreement.

¶3 In 1998, the parties commenced negotiations for an agreement to succeed the 1996-98 agreement. In January 1999, Local 617 filed a petition for interest arbitration pursuant to WIS. STAT. § 111.70(4)(cm)6. On April 1, the parties met with a commission investigator who attempted to mediate the dispute. At the mediation, the parties bargained over the modified work schedule. The County offered to include the addendum in the successor agreement if Local 617 was willing to make concessions in existing leave of absence provisions. Local 617 rejected this proposal and the parties were unable to reach an agreement. Immediately after the mediation session ended, the County eliminated the four, ten-hour-per-day workweek for the summer of 1999.

¶4 Subsequently, the parties began to provide the commission's investigator with their respective final proposals for submission to an interest arbitrator. Local 617 attempted to negotiate the addendum into the body of the contract. However, neither the County's nor Local 617's final proposal contained an offer that the addendum be eliminated.[1]

¶5 On April 26, 1999, Local 617 filed a prohibited practices complaint with the commission under MERA. First, Local 617 alleged that the County altered the status quo by requiring highway department employees to work a five, eight-hour-per-day workweek rather than a four, ten-hour-per-day workweek during the summer of 1999, thereby committing a prohibited practice by refusing to bargain with Local 617. Second, Local 617 alleged the County altered the work schedule as a result of its hostility toward Local 617.

[1] Local 617's final proposal was selected by the arbitrator in an April 26, 2000, interest arbitration award. Thus, the parties' 1999-2001 contract does not contain the addendum.

¶6 A hearing was held before an examiner. The examiner concluded that: (1) the County altered the status quo when it changed the summer work schedule contrary to the addendum; and (2) the County's decision to change the summer work schedule was motivated, in part, by hostility toward Local 617's protected, concerted activity. The examiner ordered the County to pay the highway department employees eight hours at time and one-half for each Friday worked in the summer of 1999.

¶7 The County petitioned the commission for administrative review of the examiner's decision and order. On June 12, 2000, the commission entered its own decision and order. The commission reversed the examiner's decision with respect to the status quo issue and the portion of the order requiring the County to pay the employees compensation for the change in the work schedule in 1999. The commission concluded that the addendum was not part of the status quo the County was obligated to maintain during the contract hiatus.

¶8 In reaching its decision, the commission relied on the language of the addendum itself. First the commission looked to the phrase, "The parties agree that in 1996, 1997, 1998" and determined that the language on its face indicated that the addendum had no application beyond 1998. Second, the commission relied on the last part of the addendum and concluded 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."

¶9 Next, the commission found that the bargaining history between the County and Local 617 was inconclusive. Finally, the commission found that there was no evidence of past practice to help in the analysis because this was the first hiatus to occur since the inception of an addendum.

¶10 Local 617 petitioned for review in circuit court. The court affirmed the commission's decision.

STANDARD OF REVIEW

¶11 We review the commission's decision, not that of the circuit court. ***Stafford Trucking, Inc. v. DILHR***, 102 Wis. 2d 256, 260, 306 N.W.2d 79 (Ct. App. 1981). We must affirm the commission's determination as long as a reasonable fact finder could have reached the same determination, even if other, equally reasonable interpretations could be drawn from the same record. ***Barnes v. DNR***, 178 Wis. 2d 290, 307, 506 N.W.2d 155 (Ct. App. 1996). The commission's status quo determination under MERA is entitled to great weight. ***Jefferson County v. WERC***, 187 Wis. 2d 647, 651-55, 523 N.W.2d 172 (Ct. App. 1994).

DISCUSSION

¶12 An employer has a duty under MERA to maintain the status quo with respect to mandatory subjects of bargaining during contract negotiations. ***Id.*** at 654. Any unilateral change in employment conditions constitutes a refusal to bargain collectively and an interference with the right of municipal employees to bargain collectively. ***Id.*** The status quo is determined by examining three factors: (1) the contractual language from the expired collective bargaining agreement; (2) bargaining history; and (3) past practices of the parties. ***Id.*** at 655-56.

¶13 The issue here is whether the County changed the status quo when it required highway department employees to work a five, eight-hour-per-day workweek rather than a four, ten-hour-per-day workweek during the summer of

1999. Local 617 and the County reach opposite conclusions when examining the record in light of the three factors.[2]

I. THE CONTRACTUAL LANGUAGE

¶14 Local 617 argues that the commission's reading of the contractual language was erroneous. Local 617 adopts the examiner's rationale and contends that, like the collective bargaining agreement, the addendum did not expire at the end of the last year stated in the addendum. Local 617 further contends that the addendum does not contain a "sunset provision," although the parties knew how to use that type of provision because one was contained in a letter of understanding appended to the 1988-89 agreement.[3] Finally, Local 617 asserts that the commission's status quo determination is inconsistent with its previous decisions in ***City of Brookfield Employes Union Local 20 v. City of Brookfield***, No. 19822-C (WERC, Nov. 1984), and ***Chequamegon United Teachers v. Washburn Pub. Schs.***, No. 28941-B (WERC June 1998).

¶15 The commission began its analysis by examining the contractual language from the expired collective bargaining agreement. It noted that the bargaining agreement expressly provided for a five, eight-hour-per-day workweek. By comparison, the commission noted that the addendum providing a four, ten-hour-per-day workweek in the summer began with the language, "The parties

[2] Local 617 additionally argues that the examiner's remedy must be reinstated. Because we conclude that the County did not change the status quo, we need not address this argument. *See* ***Sweet v. Berge***, 113 Wis. 2d 61, 67, 334 N.W.2d 559 (Ct. App. 1983).

[3] At nearly the same time as the parties signed the summer work hours addendum affixed to the 1988-89 agreement, the parties signed another side letter. Paragraph 4 of the letter stated: "Both parties agree that this Letter of Understanding sunsets on December 31, 1989, unless otherwise extended by mutual agreement …."

agree that in 1996, 1997, and 1998 …." In addition, the addendum expressly provided that the four, ten-hour-per-day workweek "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." The commission observed that the addendum did not provide for the notice of discontinuance on January 1, 1999, and concluded that in the absence of that language, it is less likely that the addendum was to be part of the County's status quo obligations for the summer of 1999. Based upon the specific language of the addendum, the commission concluded that a four, ten-hour-per-day workweek was not part of the status quo.

¶16 We note that the 1996-1998 collective bargaining agreement had a duration clause stating that the agreement would be in full force and effect from January 1, 1996, through December 31, 1998. If the agreement had a single provision dealing with hours of work during summer months, those terms clearly would constitute the status quo for periods of contract hiatus. However, the agreement provided for a five, eight-hour-per-day workweek, while the addendum provided for a four, ten-hour per day workweek during the summer months. Since the addendum had specific language identifying the years in which it would apply, and since the agreement contained a provision providing for a five, eight-hour-per-day workweek, we conclude that the commission could reasonably read the contractual language to conclude that the status quo required a five, eight-hour-per-day workweek.

¶17 Local 617 argues that the parties' intent not to "sunset" the addendum is established by the deliberate use of that term in a side letter to the 1988-89 agreement. However, the use of this term in the 1988-89 agreement does

not compel the conclusion that the workweek specified in the addendum necessarily becomes the status quo.

¶18 In ***City of Brookfield***, the commission ruled that during a contract hiatus, the employer lawfully reverted from a work schedule specified in a side agreement to the work schedule specified in an expired contract. ***Id.*** at 2-3. The side agreement specifically provided that the work schedule constituted summer hours for a "trial period" that ended on a particular date. ***Id.*** at 5.

¶19 Had the addendum in this case contained similar language as the side agreement in ***City of Brookfield***, it would have been easier for the commission to conclude that the language of the expired 1996-1998 agreement constituted the status quo for the summer of 1999. However, the absence of that language does not require the commission to reach a contrary result.

¶20 In ***Washburn Public Schools***, the contract at issue stated that the employer would pay for health insurance premiums for all eligible employees "for the years 1994-95 and 1995-96." ***Id.*** at 4-5. The commission concluded that the status quo required the employer to continue to pay the premiums. However, the commission observed:

> 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 would 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.

Id. at 8.

¶21 ***Washburn Public Schools*** supports the commission's position that the use of specific years in a contract may reasonably be relied upon in determining that the status quo does not require the employer to continue a practice as part of the status quo. Further, the commission in that case noted that the examiner had concluded that "on its face, the language could reasonably be interpreted as supporting either party's position in the litigation." ***Id.*** at 3. Here, the language in the addendum can reasonably be interpreted as supporting both the position of Local 617 and the commission. Therefore, the commission's interpretation of the contract language is reasonable. ***Jefferson County***, 187 Wis. 2d at 651-53.

II. THE PARTIES' BARGAINING HISTORY

¶22 Local 617 challenges the commission's conclusion that the bargaining history evidence was mixed or inconclusive. Local 617 argues that the commission's conclusion that the addendum automatically expired is inconsistent with the fact that neither party had believed it was necessary to mention the addendum in prior negotiations in order to continue its existence.

¶23 However, during the mediation on April 1, 1999, the County proposed including the addendum in the contract in return for concessions by Local 617. Following the mediation, Local 617 attempted to negotiate the terms of the addendum into the body of the contract. Further, when the parties exchanged final proposals for submission to an interest arbitrator, after the County had already reverted back to a five, eight-hour-per-day workweek, neither the County nor Local 617 proposed that the addendum be eliminated.[4] We conclude

[4] As noted earlier, the parties' 1999-2001 contract does not contain the addendum.

that the commission could reasonably interpret the County's proposal at the mediation and its failure to propose elimination of the addendum as evidence that the terms of the addendum were not part of the status quo.

III. THE PARTIES' PAST PRACTICE

¶24 The commission found that since this was the first contract hiatus to occur since the inception of the addendum, "there is no evidence of past practice to help us in our status quo analysis." Local 617 argues that the relevant past practice would be the manner in which the parties observed the summer work schedule during those summers in which no addendum was in place. Local 617 contends the evidence does not support the commission's conclusion and that there was in fact a previous contract hiatus.

¶25 However, Local 617 did not make this argument before the examiner or the commission. In fact, after the examiner specifically found that past practice was not applicable because the parties always had reached agreement before Memorial Day and the addendum applied, Local 617 never intimated that the examiner's finding was incorrect.

¶26 We will not consider issues beyond those that were properly presented below. ***Goranson v. DILHR***, 94 Wis. 2d 537, 545, 289 N.W.2d 270 (1980). Here, the circuit court properly refused to consider Local 617's past practice argument because Local 617 did not raise the issue in the administrative proceeding before the commission. We must do likewise. Based upon the record, the commission reasonably could conclude that this was the first contract hiatus to occur since the inception of the addendum, and that there was no past practice of the parties that would be relevant to determining the status quo.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.