STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

JUNEAU COUNTY HIGHWAY EMPLOYEES, LOCAL 569, WCCME, AFSCME, AFL-CIO,		
Complainant,	:	Case V No. 17022 MP-264
vs.	:	Decision No. 12547
JUNEAU COUNTY HIGHWAY COMMITTEE, JUNEAU COUNTY, WISCONSIN,		
Respondent.		

Appearances:
Mr. Walter J. Klopp, District Representative, WCCME, AFSCME, AFL-CIO, appearing on behalf of the Complainant.
Mr. Richard C. Kelly, District Attorney, Juneau County, appearing on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The above named Complainant having, on July 25, 1973, filed a complaint with the Wisconsin Employment Relations Commission wherein it alleged that the above named Respondent had committed prohibited practices within the meaning of the Wisconsin Municipal Employment Relations Act; and a hearing on said complaint having been held at Mauston, Wisconsin, on August 17, 1973, Zel S. Rice II being present; and the Commission having considered the evidence and arguments, and being fully advised in the premises, makes and issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. That Juneau County Highway Employees Local 569, WCCME, AFSCME, AFL-CIO, hereinafter referred to as the Complainant, is a labor organization having its principal offices at 4646 Frey Street, Madison, Wisconsin; and that Walter J. Klopp is the business representative of the Complainant.

2. That Juneau County, Wisconsin, hereinafter referred to as the Respondent, is a Municipal Employer having its principal offices at the Juneau County Courthouse, Mauston, Wisconsin; that the Respondent operates a Highway Department; and that Francis Finucan is employed by the Respondent as its Highway Commissioner.

3. That, at all times material herein, the Respondent has recognized the Complainant as the exclusive collective bargaining representative for all regular full time and regular part time employes of the Highway Department, excluding the Highway Commissioner, supervisory personnel, confidential employes and temporary employes; and that the parties hereto have been parties to a series of collective bargaining agreements.

4. That, with the exception of a brief period during 1970, a practice existed prior to May 15, 1973 in the collective bargaining

unit described above, whereby truck drivers employed in said bargaining unit reported for work one half hour earlier than other employes in said unit, for the purposes of maintenance of their equipment; and that said practice, known to the parties as "greasing time", was restored in 1970 following the filing of a grievance by the Union concerning its discontinuance.

5. That, on August 10, 1971, the Complainant gave the Respondent notice of its desire to amend the collective bargaining agreement between the parties for the year 1972; that the Complainant's demands in negotiations for a collective bargaining agreement for 1972 included reduction of the normal work week to forty hours per week, and payment for overtime at the rate of time and one half for all hours worked outside of the normal work day and all hours worked on Saturday, Sunday and holidays; that the parties thereafter engaged in negotiations and eventually entered into a collective bargaining agreement for the year 1972, which, among other things, provided for a normal work week of forty five hours during the six months beginning on or about May 1, and for a normal work week of forty hours during the six months beginning on or about November 1; and that the 1972 collective bargaining agreement between the parties also provided that employes working in excess of the normal work weeks be paid at their regular hourly rate.

6. That, on August 10, 1972, the Complainant gave the Respondent notice of its desire to amend the collective bargaining agreement between the parties for 1973; that the Complainant's demands in negotiations for a collective bargaining agreement for the year 1973 included reduction of the normal work week to forty hours per week and payment for overtime at the rate of time and one half for all hours worked outside of the normal work day and all hours worked on Saturday, Sunday and holidays; that, further, the Complainant requested a guaranteed work day of eight hours and a guaranteed work week of forty hours; that the parties thereafter engaged in negotiations and eventually entered into a collective bargaining agreement for the year 1973 which contained the following provisions pertinent hereto:

"ARTICLE IV
GRIEVANCE PROCEDURE

Any grievance or dispute which may arise between the parties including the application, meaning or interpretation of this agreement, shall be settled in the following manner:

Step 1: The grievance shall be presented by both the aggrieved party and the Union Steward in writing to the Highway Commissioner within 20 working days following the date of the grievance or the employee's knowledge of its occurrence. The Highway Commissioner shall respond in writing to the aggrieved party within 7 working days.

Step 2: If the grievance still remains unadjusted, it shall be presented to the Highway Committee in writing within seven working days after the response of the Highway Commissioner is due. The Highway Committee shall respond in writing within several working days. Failure by the Highway Committee to reply within this period shall be construed as a decision favorable to the employee. The Highway Committee may, upon request of either party in interest, conduct a hearing for the purpose of ascertaining the facts involved in said dispute.

Step 3: If the grievance remains unadjusted, it may be referred to mediation provided by the Wisconsin Employment Relations Commission. Grievances involving disciplinary action shall be processed beginning at the first step unless said disciplinary action is the result of a direct order of the Commissioner, in which case, the grievance shall be processed beginning at the second step.

Step 4: Either party, if grievance remains unresolved, may file charges of a prohibited practice to obtain a determination of the issue, where such grievance involves an alleged violation of this collective bargaining agreement with respect to wages, hours and conditions of employment affecting the employees.

The time limit set forth in the grievance procedure may be extended by mutual agreement of the parties.

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ARTICLE VI
EMPLOYER'S RIGHTS

The employer retains the sole right to hire, discipline, discharge, layoff, assign, promote and transfer employees subject only to the restrictions and regulations governing the exercise of these rights as are expressly provided in this contract. However, the Union and/or an employee shall have the right of appeal through the grievance procedure as provided in Article IV of this agreement.

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ARTICLE VIII
HOURS OF WORK

The regular hours of work in each day shall be consecutive except for interruptions for lunch periods. The normal work week for outside employees shall consist of forty-five consecutive hours, Monday through Friday, for the six (6) month period starting on or about May 1, commencing at 7:00 a.m. to 12:00 noon and from 12:30 p.m. to 4:30 p.m. The normal work week shall consist of forty hours Monday through Friday, for six (6) month period starting on or about November 1, commencing at 8:00 a.m. to 12:00 noon and from 12:30 p.m. to 4:30 p.m.

The normal work week for the mechanics shall consist of forty-two and one-half consecutive hours, Monday through Friday, from January 1 to December 31 commencing at 7:00 a.m. to 12:00 noon and from 1:00 p.m. to 4:30 p.m.

The normal work week for the salaried employees shall consist of forty consecutive hours, Monday through Friday, from January 1 to December 31, commencing at 8:00 a.m. to 12:00 noon and from 1:00 p.m. to 5:00 p.m. except for employees that may be assigned other hours of work by the Highway Commissioner.

The normal work week for the nightman employed during winter months and the normal work week for the rest area employees shall be as set by the Highway Commissioner.

Employees working in excess of the above hours during any week shall be paid at their regular working rate, except that during the six (6) month period commencing on or about May 1, employees shall be paid at the rate of one and one-half times the normal rate of pay for hours worked in excess of the normal work day. Time and one-half shall be paid for any work performed on Sundays and Holidays the year around, except rest area employees and winter nightman who will be governed by the first sentence of this paragraph. Any employees called back to work on the same day after having completed their regular work day and before their next regular scheduled starting time shall be guaranteed a minimum of 2 hours pay at their regular hourly rate, except that during the six (6) month period commencing on or about May 1 employees shall be guaranteed said call-in pay at the rate of one and one-half (1 1/2) times the normal rate of pay.

The guaranteed work week for the six (6) month period commencing on or about May 1 shall be 45 hours and the guaranteed work week for the six (6) month period commencing on or about November 1 shall be 40 hours.

. . .

ARTICLE XIX
MISCELLANEOUS PROVISIONS

. . .

2. Should any provision of this agreement be found to be in violation of any Federal or State Law or Civil Service Rule by a court of competent jurisdiction, all other provisions of this agreement shall remain in full force and effect for the duration of this agreement, and any benefit, privilege or working condition existing prior to this agreement not specifically covered by this agreement shall remain in full force and effect and if proper notice is given by either party as the desirability of amending, modifying or changing such benefit, privilege or working condition, it shall be subject to negotiation between the parties.

. . ."

7. That, prior to May 1, 1973, all greasing time worked under the practice described in Paragraph 4 hereof was compensated for by the Respondent at the employes' regular hourly rate of pay; that on or about May 10, 1973, representatives of the Complainant demanded that greasing time hours worked on and after May 1, 1973 be compensated at the overtime rate of one and one half times the employes' normal rate of pay; that Finucan referred the matter to the Highway Committee of the Respondent; that, thereafter, Finucan posted notice on the bulletin board where notices to employes are customarily posted, notifying employes that the practice of scheduling greasing time would be discontinued on or about May 15, 1973; and that, on or about May 15, 1973, the Respondent ceased to schedule greasing time for truck drivers outside of the normal work week.

8. That, on May 25, 1973, a grievance was filed with Finucan protesting the discontinuance of one half hour daily greasing time on

trucks, and requesting reinstatement of the practice; that, on June 5, 1973, Finucan responded to said grievance, denying same; that, on June 12, 1973, the grievance concerning discontinuance of the greasing time practice was appealed to the Highway Committee at the second step of the grievance procedure; that, on June 13, 1973, the Highway Committee responded to said grievance, denying same; that, on June 15, 1973, Klopp made a request of the Wisconsin Employment Relations Commission for the appointment of a mediator to participate in the processing of the grievance at Step 3 of the grievance procedure; that the Respondent refused to concur in the mediation of the grievance concerning the discontinuance of the greasing time practice; and that, on June 25, 1973, the Commission advised Klopp of the Respondent's position concerning mediation.

Based on the above and foregoing Findings of Fact, the Commission makes the following

CONCLUSIONS OF LAW

1. That the mediation process indicated in Step 3 of the grievance procedure of the 1973 collective bargaining agreement between the Complainant and the Respondent is a voluntary, as opposed to mandatory, step; and that the Respondent, Juneau County, by refusing to participate in mediation on the grievance concerning the discontinuance of the greasing time practice, has not violated, and is not violating, the 1973 collective bargaining agreement existing between Juneau County and Juneau County Highway Employees Local 569, WCCME, AFSCME, AFL-CIO, and therefore Respondent Juneau County has not committed, and is not committing, prohibited practices in said regard within the meaning of Section 111.70(3)(a)(5) of the Municipal Employment Relations Act.

2. That, through their collective bargaining, the Complainant, Juneau County Highway Employees Local 569, WCCME, AFSCME, AFL-CIO and the Respondent, Juneau County established normal work day, normal work week, and guaranteed work week periods; that greasing time scheduled for truck drivers during 1973 prior to May 15, 1973 fell outside of the normal work day, normal work week, and guaranteed work week established by the 1973 collective bargaining agreement; that the Respondent, Juneau County retained authority to assign and schedule work in addition to the normal and guaranteed periods specified in the 1973 collective bargaining agreement; that therefore the Respondent, Juneau County, by its discontinuance of scheduling greasing time outside of the normal work day, has not violated, and is not violating, the 1973 collective bargaining agreement existing between Juneau County and Juneau County Highway Employees Local 569, WCCME, AFSCME, AFL-CIO, and further therefore Respondent, Juneau County, has not committed, and is not committing, prohibited practices within the meaning of Section 111.70(3)(a)(5) of the Municipal Employment Relations Act.

Based on the above and foregoing Findings of Fact and Conclusions of Law, the Commission makes the following

ORDER

IT IS ORDERED that the complaint initiating the instant matter be, and the same hereby is, dismissed.

Given under our hands and seal at the City of Madison, Wisconsin, this 7th day of March, 1974.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Morris Slavney
Morris Slavney, Chairman

Zel S. Rice II, Commissioner

Howard S. Bellman
Howard S. Bellman, Commissioner

JUNEAU COUNTY, V, Decision No. 12547

MEMORANDUM ACCOMPANYING
FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

In its complaint, filed on July 25, 1973, the Union alleged that the County violated the existing 1973 collective bargaining agreement by unilaterally discontinuing the practice of allowing greasing time for truck drivers and, further, that the County also violated the collective bargaining agreement by refusing to concur in the mediation of the grievance filed by the Union concerning the greasing time dispute. The County filed an answer on August 14, 1973, wherein it contended that the greasing time had been rescheduled to conform to the normal work day specified in the collective bargaining agreement between the parties, and that the mediation step of the grievance procedure required the consent of both parties, so that no violations of the agreement had occurred.

A hearing was held at Mauston, Wisconsin, on August 17, 1973, before Commissioner Zel S. Rice II. Both parties made arguments at the close of the hearing. The transcript of the proceedings was completed on December 26, 1973.

POSITION OF THE UNION:

The Union contends that a procedural violation occurred when the County refused to participate in mediation on the greasing time grievance at Step 3 of the grievance procedure. The Union seeks a finding that the mediation step was obligatory on the County and that its refusal to mediate, in and of itself, constitutes a violation of the agreement. Turning to the merits of the grievance, the Union relies first on its recognition as the exclusive bargaining agent, claiming that the County's unilateral discontinuance of greasing time violated its obligations to the Union. The Union contends that the scheduling of greasing time, in addition to the usual work day, was a well established past practice which had previously been protected by the Union. The Union asserts that the greasing time practice was discontinued only after the Union attempted to enforce the overtime premium provisions of the 1973 agreement. Finally, the Union asserts that Section 2 of Article XIX of the 1973 agreement mandates the continuation of such established past practice.

POSITION OF THE COUNTY:

The County contends that the word "may" in Step 3 of the grievance procedure should be interpreted as making the mediation step optional or voluntary, so that the County's refusal to participate in mediation concerning the greasing time grievance did not constitute a violation of the agreement. The County adduced evidence concerning the bargaining history of the "Hours of Work" article of the 1973 agreement, and of a repeated quest by the Union for shorter work hours. The County contends that the parties have bargained concerning the hours of work in the Highway Department, that the Union demanded shorter work hours and obtained concessions, and that the discontinuance of greasing time outside of the normal work day established by the agreement is consistent with that agreement. (The County also points out that the greasing and maintenance work is now scheduled within the normal work day and week established by the agreement.)

DISCUSSION:

The procedural aspects of the case have a potential impact on the jursidiction of the Commission in the matter, and are therefore

the first subject of attention. The grievance procedure set forth in the 1973 collective bargaining agreement between the parties does not contain any provision for the final and binding arbitration of disputes concerning the interpretation or application of the agreement. The Commission has jurisdiction to determine allegations of violation of a collective bargaining agreement as prohibited practices under Section 111.70(3)(a)(5) of the MERA. The prohibited practice authority of the Commission may be invoked by one party, without the consent of the other party, by the filing of a properly executed complaint. The Commission has previously indicated its policy to defer to arbitration, where the parties have made provision in their agreement for the final and binding arbitration of disputes, but no question of deferral is presented here. Step 4 of the grievance procedure contained in the 1973 agreement between the parties makes specific reference to prohibited practice proceedings before the Commission, but it is clear that no such contractual provision is necessary to invoke the authority of the Commission in this case.

Mediation under the auspices of the Commission is also mentioned in the grievance procedure of the parties' 1973 agreement. The Commission views mediation as a completely voluntary process, requiring the consent of both parties before a Commissioner or a member of the Commission's staff will attempt to mediate a dispute. Accordingly, when the County refused to participate in mediation in this case, the Commission took no further action on the Union's request for mediation. The language of Step 3 of the grievance procedure is compatible with the view that mediation is a voluntary process. Steps 1 and 2 of the grievance procedure and the provisions of Step 3 dealing with disciplinary cases all make use of the term "shall" and appear to be mandatory procedures. The mediation process is couched in the term "may", and is interpreted as being an optional procedure. The mediation services of the Commission would also be available to the parties without a contractual commitment between them for the use of mediation, and the first sentence of Step 3 is therefore regarded, like Step 4, as a recitation of the options available to the parties rather than as a grant of rights or a listing of obligations.

Article XIX of the collective bargaining agreement provides that "any benefit, privilege or working condition existing prior to this agreement not specifically covered by this agreement shall remain in full force and effect and if proper notice is given by either party as the desirability of amending, modifying or changing such benefit, privilege or working condition, it shall be subject to negotiation between the parties." The evidence establishes that there had been a practice of permitting truck drivers to work one-half hour per day more than other employes, for the purpose of greasing and maintaining their trucks. However, under such past practice the employes were paid at straight time for such one-half hour.

Agreeing with the County, and contrary to the Union, we also find that the parties have bargained about the hours of work and have established standards and guarantees which are in conflict with the greasing time practice which had existed prior to May 15, 1973. It is apparent that the Union won concessions from the County during the bargaining for the 1973 agreement, particularly as to the establishment of premium payments for overtime work and as to the establishment of a guaranteed work week. Employes in the Highway Department were guaranteed forty five hours of work per week during the period beginning May 1, 1973. The County continued to schedule employes for 47 1/2 hours per week after May 1, 1973, and the Union demanded premium pay for the overtime work.

The County conceded that premium pay was payable if such overtime was scheduled, but proceeded to cancel the scheduling of greasing time as overtime.

Since the parties have clearly established the guaranteed work week through their bargaining, the County was under no obligation to schedule normal greasing time or other work outside of the normal and guaranteed work week and day. The bargaining between the parties for their 1973 collective bargaining agreement vitiates the past practice by establishing new and different contractual standards. Because no overtime premiums were called for prior to May 1, 1973, the conflict between the past practice and the new agreement did not become evident until that point in time.

Dated at Madison, Wisconsin, this 14th day of March, 1974.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Morris Slavney
Morris Slavney, Chairman

Zel S. Rice II, Commissioner

Howard S. Bellman
Howard S. Bellman, Commissioner