

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MILWAUKEE DISTRICT COUNCIL NO. 48,
AMERICAN FEDERATION OF STATE, COUNTY,
AND MUNICIPAL EMPLOYEES, AFL-CIO,

Complainant,

vs.

MILWAUKEE COUNTY,

Respondent.

Case LXV
No. 17960 MP-362
Decision No. 12739-A

Appearances:

Goldberg, Previant & Uelmen, Attorneys at Law, by Mr. John S.
Williamson, appearing for Complainant.

Mr. Patrick J. Foster, Corporation Counsel, appearing for Respondent.

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

Milwaukee District Council No. 48, American Federation of State, County, and Municipal Employees, AFL-CIO, herein Complainant, having filed a complaint with the Wisconsin Employment Relations Commission, herein Commission, on May 20, 1974, 1/ wherein it alleged that Milwaukee County, herein Respondent, had committed certain prohibited practices within the meaning of Section 111.70(3)(a)1 and 4 of the Municipal Employment Relations Act, herein MERA; and the Commission on May 31, having appointed Amedeo Greco, a member of its staff, to act as Examiner to make and issue Findings of Fact, Conclusions of Law and Order as provided for in Section 111.07(5) of the Wisconsin Employment Peace Act, made applicable to municipal employment by Section 111.70(4)a of MERA; and the parties thereafter having waived a hearing and having submitted a joint stipulation of facts on September 6; and briefs having been received by January 3, 1975; and the Examiner having considered the evidence and the arguments and briefs of Counsel, and being fully advised in the premises, makes and issues the following Findings of Fact, Conclusion of Law and Order.

FINDINGS OF FACT

1. That the Complainant, Milwaukee District Council No. 48, American Federation of State, County, and Municipal Employees, AFL-CIO, is a labor organization within the meaning of Section 111.70(1)(j) of the Wisconsin Statutes, and has its principal offices located at 3427 West St. Paul Avenue, Milwaukee, Wisconsin, 53208.

2. That Respondent, Milwaukee County, is a Municipal Employer within the meaning of Section 111.70(1)(a) of the Wisconsin Statutes, and has its principal offices located at 901 North 9th Street, Milwaukee, Wisconsin, 53233.

1/ Unless otherwise noted, all dates hereinafter refer to 1974.

3. That Complainant is the certified collective bargaining representative for certain employees employed by Respondent and that Complainant and Respondent were parties to a collective bargaining agreement with an expiration date of December 31.

4. That Part 1, Section D, of said contract contains a "Management Rights" clause which provides in part:

"(D) MANAGEMENT RIGHTS. The County of Milwaukee retains and reserves the sole right to manage its affairs in accordance with all applicable laws, ordinances, regulations and executive orders. Included in this responsibility, but not limited thereto, is the right to determine the number, structure and location of departments and divisions; the kinds and number of services to be performed; the right to determine the number of positions and the classifications thereof to perform such service; the right to direct the work force; the right to establish qualifications for hire, to test and to hire, promote and retain employees; the right to transfer and assign employees, subject to existing practices and the terms of this agreement; the right, subject to civil service procedures and the terms of this agreement related thereto, to suspend, discharge, demote or take other disciplinary action and the right to release employees from duties because of lack of work or lack of funds; the right to maintain efficiency of operations by determining the method, the means and the personnel by which such operations are conducted and to take whatever actions are reasonable and necessary to carry out the duties of the various departments and divisions.

In addition to the foregoing, the County reserves the right to make reasonable rules and regulations relating to personnel policy procedures and practices and matters relating to working conditions, giving due regard to the obligations imposed by this Agreement. However, the County reserves total discretion with respect to the function or mission of the various departments and divisions, the budget, organization, or the technology of performing the work. These rights shall not be abridged or modified except as specifically provided for by the terms of this Agreement, nor shall they be exercised for the purpose of frustrating or modifying the terms of this Agreement. But these rights shall not be used for the purpose of discriminating against any employee or for the purpose of discrediting or weakening the Union."

5. That said contract also provides in Part III, Section A, entitled "Departmental Work Rules", that:

"The Union recognizes the prerogative of the County to operate and manage its affairs in all respects in accordance with its responsibilities, duties and powers, pursuant to the statutes of the State of Wisconsin, the ordinances and resolutions of the County and the rules of its Civil Service Commission. The Union recognizes the exclusive right of the County to establish reasonable work rules. The County shall meet with the Union to study such rules for the purpose of making their application uniform insofar as possible throughout the County Services.

Participation in such studies shall be limited to employee representatives from the affiliated Local which represents the employees in the department under study."

6. That Part IV, Section A(1), entitled "Resolution of Disputes", provides in part that:

"The disputes between the parties arising out of the interpretation, application or enforcement of this Memorandum of Agree-

ment, including employee grievances, shall be resolved in the manner set forth below."

7. That Part IV, Section B(1), entitled "Grievance Procedure", states:

"(1) APPLICATION: EXCEPTIONS. A grievance shall mean any controversy which exists as a result of an unsatisfactory adjustment or failure to adjust a claim or dispute [sic] by an employee or group of employees concerning the application of wage schedules or provisions relating to hours of work and working conditions. The grievance procedure shall not be used to change existing wage schedules, hours of work, working conditions, fringe benefits and position classifications established by ordinances and rules which are matters processed under other existing procedures.";

and that said contract also provides for final and binding arbitration.

8. That on or about March 13, the Milwaukee County Civil Service Commission amended Rule VII, Section 4(1) of its rules regarding suspension, demotion, and discharge, by adopting the following rules:

"CIVIL SERVICE RULE VII, SECTION 4 (REVISED)

Section 4. CAUSES FOR SUSPENSION, DEMOTION OR DISCHARGE.

(1) The following are declared to be cause for suspension, demotion, or discharge of any officer or employee from the classified service of the County of Milwaukee, though charges may be based upon causes and complaints other than those here enumerated, namely:

- (a) Theft of private or county property.
- (b) Unauthorized use, misuse or destruction of or damage to county property or property of any employee.
- (c) Unauthorized use of county premises.
- (d) Violation of rules or practices relating to security of county property or county premises.
- (e) Unauthorized use, duplication or possession of county keys.
- (f) Distributing or posting handbills, pamphlets or other written or printed material in any work area without authorization.
- (g) Posting, removing or tampering with county bulletin board material without authorization.
- (h) Failure to observe parking or traffic regulations on county property as established by ordinance or departmental rules.
- (i) Violation of rules or practices relating to safety.
- (j) Littering, creating or contributing to unsanitary or unsafe conditions on county premises.
- (k) Refusing or failing to obey orders of supervisor whether written or oral.
- (l) Refusing or failing to comply with departmental work rules.
- (m) Threatening, intimidating, coercing or harassing employees or supervision at any time.
- (n) Making false or malicious statements, either oral or written, concerning any employee, the county or its policies.
- (o) Unexcused absence.
- (p) Unexcused tardiness.

- (q) Leaving early and/or failure to be at assigned work area at the start or end of shifts, breaks and/or meal periods.
- (r) Leaving place of work during working hours without authorization, wasting time or loitering.
- (s) Stopping work before designated quitting time.
- (t) Failure or inability to perform the duties of assigned position.
- (u) Substandard or careless job performance.
- (v) Restricting output or engaging in any intentional slowdown, work stoppage or strike.
- (w) Engaging in any unauthorized activity which distracts or disrupts employees in the performance of their duties.
- (x) Interference with normal work flow or departmental procedures.
- (y) Falsification, modification or unauthorized alteration of any county record.
- (z) Knowingly punching or marking another employee's time card, having one's time card punched or marked by another, altering time card for any reason or inaccurately recording time worked.
- (aa) Unauthorized disclosure of confidential or privileged information.
- (bb) Commission of a criminal act.
- (cc) Reporting to work or working while under the influence of intoxicating beverages and/or narcotics or other drugs or having unauthorized possession of same on county premises during working hours.
- (dd) Indecent, criminal or inappropriate conduct on county premises or during working hours.
- (ee) Abusive or improper treatment toward an inmate or patient of any county facility or to a person in custody; provided the act committed was not necessarily or lawfully done in self-defense or to protect the lives of others or to prevent the escape of a person lawfully in custody.
- (ff) Offensive conduct or language toward the public or toward county officers or employees.
- (gg) Sleeping, dozing or lack of attentiveness during working hours.
- (hh) Possession of unauthorized weapons on county premises or during working hours.
- (ii) Provoking or instigating a fight or fighting during working hours or on county premises.
- (jj) Engaging in horseplay or scuffling on county premises during working hours.
- (kk) Engaging in personal activities during working hours.
- (ll) Gambling on county premises or during working hours.
- (mm) Vending, soliciting or collecting contributions for any purpose without authorization on county premises.
- (nn) Inducing or attempting to induce any officer or employee in the county service to commit an illegal act or to act in violation of any departmental or official regulation or order, or the Rules of the Commission.
- (oo) Soliciting or receiving from any person or participating in any fee, gift or other thing of value in the course of one's work, when such fee, gift or other thing of value is given in the hope or expectation of receiving a favor or better treatment than that accorded other persons.
- (pp) Threatening or attempting to use or using political influence, or giving or being in any way involved in giving any money or any other thing of value in return for appointment, promotion, transfer, leave of absence or change in appropriation or pay.
- (qq) Engaging in pernicious political activity by making use of one's position to further the candidacy of any person or engaging in political work during regular working hours. Nothing in this section shall be construed to interfere with the right of any employee in the classified service to become a member of a political club, to attend political meetings,

to express his or her opinion on all political subjects, and to enjoy freedom from all interference in casting his or her vote.

- (rr) Removal of permanent residence to some place outside of Milwaukee County, except as specifically authorized by the Commission or failure to establish permanent residence in Milwaukee County within the time limited by the Commission.
- (ss) Willful violation of any of the provisions of the County Civil Service Act or of the Rules of the Commission or ordinances of Milwaukee County.

(2) When used in this section, these words or terms shall have the following meaning and import:

- (a) Property: Anything of value.
- (b) County Property: Any property owned or leased by or in the custody or control of the county.
- (c) County Premises: Any building or structure or part thereof or any lands owned, leased or in the custody or control of the county or devoted to use by the county.
- (d) County: Milwaukee County, a municipal body corporate, and all of its Agencies, Boards, Commissions, Institutions, Departments and Divisions.

(3) A copy of this section, with any amendments thereto, shall be submitted to the head of every department to be posted by him in such manner as to bring it to the attention of all employees of such department."

9. That by letter dated March 13, Anthony P. Romano, the Chief Examiner of the Milwaukee County Civil Service Commission, advised all Milwaukee County Civil Service employees in pertinent part that:

"For the purpose of clarity and uniformity, the Civil Service Commission has revised its Rule VII, Sec. (4), setting forth causes for suspension, demotion, or discharge. A copy of the new Rule is attached. Please read it carefully and retain it for future reference.

These rules are intended to inform all employees of the type of conduct that will subject them to discipline. No conscientious employee need be alarmed by the change, however. When you examine the provisions of the new Rule, you will find that they are completely reasonable and consistent with the type of conduct that any employer would expect of its employees.

Because these rules apply to all employees of the County, they do not replace rules of conduct established by individual departments limited in their application to unique situations. Such rules remain in full force and effect."

10. That such rules were promulgated without prior notification, consultation, or negotiation with Complainant.

Based upon the foregoing Findings of Fact, the Examiner makes and issues the following

CONCLUSION OF LAW

That Complainant has waived its right to bargain over the promulgation of the above-noted work rules and that, as a result, Respondent did not violate Section 111.70(3)(a)1 and 4 of MERA when it unilaterally adopted said rules without prior notification, consultation, or negotiations with Complainant.

Upon the basis of the above and foregoing Findings of Fact and Conclusion of Law, the Examiner makes the following

ORDER

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

Dated at Madison, Wisconsin, this 28th day of January, 1975.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Amedeo Greco
Amedeo Greco, Examiner

MEMORANDUM ACCOMPANYING FINDINGS OF FACT,
CONCLUSION OF LAW AND ORDER

The Union primarily contends as a general proposition that it can bargain over the promulgation of work rules, that the right is negated only if it has clearly waived its right to bargain over such an issue, that no such waiver here exists, and that therefore, Respondent's unilateral promulgation of the work rules herein was violative of Section 111.70(3)(a)1 and 4 of MERA.

Respondent, on the other hand, denies that it has committed any such prohibited practice. As affirmative defenses, it maintains: (1) that the Civil Service Commission has the authority to unilaterally issue work rules under the common law and Section 63.02(1) of the Wisconsin Statutes; (2) that Complainant here has contractually waived its right to bargain over the promulgation of said rules; and (3) that the issue herein should be deferred to the contractual grievance-arbitration procedure.

With respect to point (3), the deferral issue, the facts establish that Complainant's case is predicated on the theory that Respondent has violated the independent statutory duty to bargain provided for in Sections 111.70(3)(a)1 and 4 of MERA. As a result, Complainant does not claim that Respondent's promulgation of the work rules herein constituted a breach of the contract which would otherwise be prohibited under Section 111.70(3)(a)5 of MERA. Since Complainant therefore is not alleging a breach of contract, and inasmuch as deferral to grievance-arbitration is appropriate only in cases of alleged contractual violations, the undersigned finds that deferral here is unwarranted and that, as a result, the merits of the case must be considered.

Turning, then, to whether Complainant has waived its right to bargain over the promulgation of the rules, the record on this point establishes that Part 1, Section D, of the contract, entitled "Management Rights", provides, inter alia, that:

"In addition to the foregoing, the County reserves the right to make reasonable rules and regulations relating to personnel policy procedures and practices and matters relating to working conditions, giving due regard to the obligations imposed by this Agreement." (Emphasis added)

Elsewhere, Part 3, Section A, entitled "Departmental Work Rules", provides in part that:

"The Union recognizes the exclusive right of the County to establish reasonable work rules. The County shall meet with the Union to study such rules for the purpose of making their application uniform insofar as possible throughout the County Services." (Emphasis added)

Considered together, then, this language provides that "the County reserves the right to make reasonable rules and regulations" and, most importantly, that "[T]he Union recognizes the exclusive right of the County to establish reasonable work rules." (Emphasis added). The word "exclusive", of course, by its very definition connotes unilateral control and action. As a result, and because words must be accorded their common meaning, there is no question but that Complainant has

contractually agreed that Respondent can unilaterally promulgate work rules, 2/ without any prior bargaining with Complainant. That being so, the undersigned finds that this language constitutes a clear and unmistakably waiver of whatever statutory rights Complainant may have to bargain over the promulgation of such work rules.

Accordingly, the undersigned finds unpersuasive Complainant's claims that: (1) no waiver exists because the parties have bargained over this issue in their past collective bargaining negotiations; and (2) Respondent is precluded from changing its work rules under contractual language which provides that "[T]he umpire . . . shall neither add to, detract from nor modify the language of any Civil Service rule or resolution or ordinance . . ." For, as to point (1), it is entirely possible (and indeed here evident) that parties can initially negotiate over work rules in contract negotiations and then later agree in those negotiations, for whatever reasons, that the employer has the unilateral right to promulgate such rules. Complainant's reliance on point (2) is also misplaced since an impartial umpire (or arbitrator) is frequently required to operate within certain contractual restraints which have little, if any, bearing on the respective rights which the parties themselves retain under their contract. That is obviously the case, where, as here, the contract specifically provides that an employer has the "exclusive" right to do something.

Based upon the foregoing considerations, and for the reasons noted above, the undersigned therefore concludes that Complainant has waived its right to bargain over the promulgation of the work rules, and that, as a result, the complaint should be dismissed.

Dated at Madison, Wisconsin, this 28th day of January, 1975.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Amedeo Greco
Amedeo Greco, Examiner

2/ The only qualifications on the exercise of this unilateral right are that the rules must be reasonable and uniform in their application. Those qualifications are not here in issue.