STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

KENOSHA COUNTY EMPLOYEES LOCALS 1090, 990-WELFARE, 1392, and 70, AFSCME, AFL-CIO, Complainants, vs. KENOSHA COUNTY, Respondent.	Case XXVI No. 20784 MP-659 Decision No. 14937-B
KENOSHA COUNTY INSTITUTION EMPLOYEES LOCAL 1392, Complainant, vs. KENOSHA COUNTY, Respondent.	Case XXVII No. 20818 MP-661 Decision No. 14943-B

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

The examiner, on June 2, 1977, having entered his findings of fact, conclusions of law, order and accompanying memorandum; and the complainants and respondent having timely petitioned for review thereof; and the commission having reviewed the record and arguments of counsel, and being advised in the premises:

IT IS ORDERED:

A. That the examiner's findings of fact be, and hereby are, affirmed.

B. That the examiner's second conclusion of law be modified to read as follows:

> 2. That the respondent, by failing to make insurance contributions for striking employes for March 1976, did not violate the parties' 1976 collective bargaining agreements and thus did not commit a prohibited practice within the meaning of sec. 111.70(3)(a)5 of the Municipal Employment Relations Act.

C. That the examiner's third and fourth conclusions of law be reversed and revised to read as follows:

> 3. That the respondent, by unilaterally making wage payments to only those laid off employes represented by complainant local 1392 who did not strike, has not violated sec. 111.70(3)(a)5 of the Municipal Employment Relations Act.

4. That the respondent, by unilaterally making wage payments to only those laid off employes represented by complainant local 1392 who did not strike, has not violated sec. 111.70(3)(a)1 or 4 of the Municipal Employment Relations Act.

D. That all of the rest of the examiner's conclusions of law, other than the second, third and fourth conclusion of law be, and hereby are, affirmed.

E. That the examiner's order be modified to read as follows:

That the respondent, its officers and agents shall immediately:

1. Cease and desist from refusing to submit the April 28, 1976 grievance filed by complainant Local 990 and 990-Welfare to arbitration.

2. Take the following affirmative action which the commission finds will effectuate the purposes of the Municipal Employment Relations Act.

   (a) Comply with the arbitration provisions of the collective bargaining agreement existing between it and complainant Local 990 and 990-Welfare with respect to complainant Locals 990 and 990-Welfare's April 28, 1976 grievance.

   (b) Notify complainant Locals 990 and 990-Welfare that it will proceed to arbitration of said grievance.

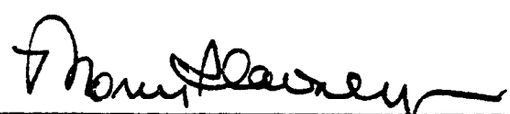
   (c) Participate with complainant Locals 990 and 990-Welfare in the arbitration proceedings before an arbitrator with respect to the April 28, 1976 grievance.

   (d) Notify the Wisconsin Employment Relations Commission in writing within ten (10) days from the date of this Order as to what steps it has taken to comply herewith.

IT IS FURTHER ORDERED that all remaining portions of the complaints be, and the same hereby are, dismissed.

Dated at Madison, Wisconsin this 3rd day of January, 1978.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By 
Morris Slavney, Chairman


Charles D. Hoornstra, Commissioner

KENOSHA COUNTY, XXVI, XXVII, Decision Nos. 14937-B and 14943-B

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

EXAMINER'S DECISION

These actions arise out of the events surrounding the March 1976 strike by certain Kenosha County employes represented by the complainant unions, hereafter collectively referred to as the "union." After hearing the examiner made findings of fact, among which were the following: (1) the parties had a tacit understanding that the terms of the 1975 bargaining agreements would remain in effect unless any of the locals struck; (2) the employer, shortly after the strike began, suspended the county's fringe benefit program effective March 1, 1976; (3) on March 26, 1976, the parties reached tentative settlement on a new contract; (4) in the settlement process the parties had a brief inconclusive discussion about the status of insurance benefits; (5) in the settlement process the parties discussed retroactivity only in respect to wages and seniority; (6) the employer refused to arbitrate a grievance filed under the successor agreement protesting the employer's payment of wages to non-striking employes who the employer believed were prevented from working on March 30, 1976, by pickets, although the employer processed the grievance through the grievance procedure; (7) the employer paid non-strikers' insurance premiums during the month of March 1976 but did not make such payments for strikers; (8) insurance benefits were reinstated for all employes effective April 1, 1976; (9) as part of the settlement agreement the parties agreed to lay off all employes represented by one of the locals and to recall them in order of seniority; (10) notwithstanding this agreement, the employer paid the wages of non-strikers, although they were in such layoff status, but strikers were not paid any wages; (11) the parties discussed the need for an additional shift at the employer's institutions; (12) although the employer initially rejected the union's proposal in that regard, the employer later instituted the additional shift; and (13) the union, despite notice of proposed terms, did not request to bargain about the establishment of the shift or its impact on employes.

On the basis of these findings, the examiner concluded that the employer violated no provision of MERA by suspending insurance coverage for employes while they were on strike; by failing to retroactively reinstate insurance coverage for striking employes for March 1976; or by establishing a new shift. On the other hand, the examiner concluded the employer violated MERA by making wage payments to non-strikers; and by refusing to arbitrate the grievance.

On the basis of these findings and conclusions, the examiner, inter alia, ordered the employer to cease and desist from refusing to bargain and interfering and to proceed to arbitration on the grievance.

THE PETITIONS FOR REVIEW

The union timely petitioned for review. It has taken exception to the examiner's findings that the parties had a tacit understanding that the terms of the 1975 bargaining agreements would remain in effect "unless any of the complainant locals struck," and that "early in March the parties had had a brief inconclusive discussion about the status of insurance benefits." It also has taken exception from each of the examiner's conclusions of law finding no violation of MERA by

the employer. In addition, the union argues that the examiner committed prejudicial error by admitting certain parol testimony.

The employer also petitioned for review. It has taken exception to the examiner's finding that the employer processed the grievance through the contractual grievance procedure. It also has taken exception to the examiner's conclusion of law that the employer's refusal to arbitrate was in violation of MERA.

The parties have filed briefs, and their arguments contained therein are discussed below.

DISCUSSION

Examiner's finding of a tacit agreement to continue the expired collective bargaining agreement unless there was a strike.

In paragraph 7 of the findings of fact the examiner found:

> ". . . that as bargaining continued after January 9, 1976, the parties had a tacit understanding that the terms of the 1975 bargaining agreements would remain in effect unless any of the Complainant Locals struck the Respondent . . . ."

The union excepted from this finding in its petition for review. It apparently has abandoned this position, however, since it does not argue the point in its brief. Moreover, the record clearly supports the examiner's finding. See Tr. 21-22. Accordingly, the commission affirms the examiner's finding in this respect.

Examiner's finding of an inconclusive discussion about the status of insurance benefits in March.

In paragraph 9 of the findings of fact the examiner found:

> ". . . that early in March the parties had had a brief inconclusive discussion about the status of insurance benefits. . . ."

The union excepted from this finding in its petition for review. Again, however, it apparently has abandoned this contention since it does not argue the point in its brief. Moreover, the record clearly supports the examiner's finding. See Tr. 34. Accordingly, the commission affirms the examiner's finding in this respect.

Examiner's finding that the employer processed the grievance.

In paragraph 10 of the findings of fact the examiner found:

> ". . . that said grievance was processed through the contractual grievance procedure . . . ."

The employer excepted from this finding in its petition for review. However, it abandoned this argument by failing to pursue it in its brief.

Moreover, the examiner's finding is supported by the record. The parties stipulated to the truth of the allegations in paragraphs 22, 23 and 24 of the complaint, which allege that a grievance was filed, that arbitration was requested, and that the arbitration request was

denied. Tr. 27-28. Attached to the complaint is the grievance, which alleges discrimination; the personnel committee's answer denying the grievance; and the employer's letter of July 14, 1976, refusing to arbitrate the grievance on the ground that no contract was in effect at the time of the grievance. Accordingly, the commission affirms the examiner in this respect.

Examiner's conclusion of no violation for terminating insurance benefits during strike.

The examiner concluded that the employer, by suspending insurance benefits while the employes were striking, did not refuse to bargain or interfere with the rights of employes in violation of MERA. The union argues that insurance benefits attach to the employment relationship, that the employment relationship is not terminated by even an illegal strike, and that these benefits are not like wages which represent compensation for services performed.

We agree with the examiner's reasons stated in his memorandum for rejecting the union's argument. Insurance premium contributions, like wages, are a form of compensation entitlement to which is contingent upon the performance of services, and a strike, whether lawful or not, discharges the employer from any obligation to continue those benefits for the duration of the strike.

Examiner's conclusion that successor agreement did not require retroactive payment of insurance contributions.

The examiner concluded that, notwithstanding the duration clause, which was retroactive to January 1, 1976, the successor collective bargaining agreement does not require the employer to retroactively reinstate "insurance coverage" for striking employes for March 1976. The union excepted from this finding and alleges that the examiner committed prejudicial error by considering parol evidence in reaching this conclusion.

We agree with the union that the agreement is unambiguous in that the duration clause, read in light of the insurance clause, creates a general obligation on the employer's part to make insurance contributions 1/ and provide other contractual benefits, retroactively to January 1, 1976, and that therefore the examiner's consideration of parol evidence to vary that agreement was improper. However, we agree with his conclusion that the employer did not violate the agreements by failing to make such contributions for striking employes for March 1976. In our opinion the union's argument fails to distinguish between the effective date of the obligation with circumstances discharging performance of that obligation.

There is no claim here that the employer failed to make insurance contributions in January and February 1976. The claim presented is that the employer failed to make such contributions for striking employes during the period of the strike. For the reasons noted above we conclude that the employer was discharged from any obligation to make insurance contributions for strikers during the period of the strike. As noted therein we see no difference between earned benefits such as insurance contributions and wages. If we were to conclude that the employer was obligated to make insurance contributions during the strike because of the duration clause, it would also be necessary

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1/ We conclude that the examiner's conclusion should be corrected to reflect that the employer failed to make contributions in March of 1976.

to conclude that the employer was obligated to make wage payments to strikers as well. In the absence of a positive statement in the agreement to the effect that the employer agreed to make such contributions on behalf of striking employes, it is unreasonable to conclude, on the basis of the duration clause, that it agreed to do so.

Examiner's conclusion that employer wrongfully paid wages to laid off non-strikers.

As part of the settlement, the employer and the union agreed that all employes involved would be laid off and recalled in seniority order. The employer nevertheless paid wages to non-strikers in such layoff status. The examiner concluded that such payments violated the terms of the settlement agreement. In addition, he concluded that such payments constituted a refusal to bargain and an interference with the rights of the employes. As a remedy, rather than order the paid employes to return the monies, the examiner ordered the employer to cease and desist from such activity.

The employer takes no exception to the examiner's conclusion of law or order. However, the commission proceeds to discuss this conclusion because of the important public policy issues involved.

We agree with the examiner's analysis of the contractual question, i.e., that the employer effectively circumvented the layoff-recall agreement by paying laid off non-strikers. However, we believe this agreement is void as a matter of law as tending to induce support for illegal strike activity, and therefore is unenforceable.

The agreement to lay off all employes and recall them in seniority order can have no purpose or effect other than to induce employes to strike. The instant municipal employe strike was prohibited under sec. 111.70(4)(l), MERA.

At the end of a strike, the effect of the shutdown frequently prevents an employer from commencing operations anew with a full work force, and there ordinarily is some lag time before the full employe complement again is needed. In this respect, the agreement calling for recall on a seniority basis is proper. However, the agreement first to lay off all employes serves to discourage municipal employes from seeking to work. While the effort of some employes to return to work exacerbates the tensions in a strike situation and often is disruptive of a peaceful settlement of the dispute, the legislature has given the employes no choice in the matter by its prohibition of strike activity.

A contractual provision which tends only to further unlawful strike activity is void even though the tendency is indirect rather than direct. In City of Wauwatosa 2/ the commission held that a union proposal that firefighters not be required to man any firehouse in a neighboring community in which there was a substantial labor dispute was a prohibited subject of bargaining. The commission there said:

> "The proposal, therefore, operates only to perpetuate the effect of strike activity and its direct consequences in the neighboring community. Since strikes by firefighters are prohibited, sec. 111.70(4)(l), Stats., it would be contrary to the policy of this legislative prohibition to

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2/ (15917), 11/77.

sanction this proposal as potentially a term in a collective bargaining agreement."

This reasoning applies here, and the examiner recognized the point in discussing the question whether the employer's action constituted unlawful interference. He said (memorandum, pp. 11-12):

> ". . . [T]he instant strike was not protected concerted activity and thus if the potential impact of Respondent's action was solely upon employes' future propensity to strike, no statutory violation would be found. However, the unilateral extension of wages to certain employes which occurred after the strike had been resolved and which violated the newly established bargaining agreement has a tendency not only to affect future strike decisions but also to undermine the future position of Complainant as bargaining representative. When an employer grants benefits in such a manner, employes might well begin to wonder about the utility of supporting their bargaining representative."

The error in this reasoning is that the bargaining representative is entitled to no support in respect to its unlawful strike activity.

Similarly, the examiner's conclusion that the employer's unilateral action violated its duty to bargain would frustrate the legislative purpose to prohibit strikes. While an unlawful strike does not discharge the duty to bargain, there is no duty to bargain in a way which aims to secure employe propensity to strike in the future.

Our holding must be qualified so as not to permit an employer to upset the balanced relationship contemplated by the legislature between employers and unions of their employes. The fact of an illegal strike would not permit an employer to respond so disproportionately as to undermine the capacity of the union effectively to represent employes in the future. For example, had the employer here increased the wages of non-strikers above the negotiated rate, we would hold such response was disproportionate to the problem at hand. Here, however, the employer's response was only to pay non-strikers the amount they otherwise would have received but for the unlawful strike.

Accordingly, we have reversed the examiner's third and fourth conclusions of law.

Examiner's conclusion that employer wrongfully refused to arbitrate grievance.

The union grieved over the employer's payment of wages to non-strikers who the employer thought were prevented from working on March 30, 1976, by pickets. The grievance alleged that the employer's action was discrimination, and the successor agreement prevents employer discrimination. The examiner concluded that the grievance states a claim which on its face calls for the interpretation of the collective bargaining agreement, found the employer's refusal to arbitrate to be in violation of that agreement, and ordered the employer to arbitrate.

The employer argues that there could be no violation of the collective bargaining agreement since none was in existence at the time of the alleged violation. We agree with the examiner, however, that the question is not whether the grievance occurred when no contract existed but whether the grievance stated a claim that in the successor contract the employer agreed to arbitrate such grievances anyway.

On the merits of the grievance, the employer contended that it paid the non-strikers on March 30 in the belief that they were prevented from working by pickets. Neither party has argued for or against the truth of respondent's belief in these proceedings before the commission. Accordingly, the commission is faced with unresolved fact questions: what was the employer's reason for its conduct? Was the employer's belief true or false? Since these basic fact issues have not been litigated here and since the grievance on its face states an arbitrable claim, both the factual issues as well as the issue of what constitutes discrimination within the meaning of the agreement are for the arbitrator to decide.

On the other hand, if the evidence were to establish the truth of the employer's defense, we would not have ordered arbitration, since, in order to prevail, the union would have to succeed on a construction of the agreement which frustrates the no-strike provision in MERA.

Examiner's conclusion that employer did not refuse to bargain by establishing new shift.

The examiner concluded that the decision to establish an additional shift is a permissive rather than a mandatory subject of bargaining, although the impact of that decision is bargainable. Further, he found that the union had waived its right to bargain about the impact.

The union argues that the establishment of the new shift is a mandatory subject of bargaining since it relates to employes' hours. However, we feel the decision to add a shift primarily concerns the level and quality of services the municipal employer chooses to offer the public. Since such decision does affect employes' hours, the impact of that decision is a mandatory subject of bargaining.

We also agree with the examiner's finding of a waiver of the right to bargain about the impact. In affirming the examiner in this respect, however, we do not hold that the employer continues to be free of a bargaining duty respecting the impact of its decision on the employes. Rather, we are holding only that the terms as initially imposed on the employes lawfully were implemented because the union, despite prior notice of the employer's intent, failed to seek an opportunity to bargain on those terms.

Dated at Madison, Wisconsin this 3rd day of January, 1978.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Morris Slavney, Chairman

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Charles D. Hoornstra, Commissioner