

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

ONEIDA COUNTY EMPLOYEES UNION, LOCAL	:	
#79, AFSCME, AFL-CIO,	:	
	:	Case XVIII
Complainant,	:	No. 21473 MP-732
	:	Decision No. 15374-B
vs.	:	
ONEIDA COUNTY, AND WALLACE SOMMERS,	:	
	:	
Respondents.	:	
	:	

Appearances:

Lawton & Cates, Attorneys at Law, by Mr. John C. Carlson,
 appearing on behalf of Complainant.
Mr. Mark A. Mangerson, District Attorney, appearing on behalf
 of Respondents.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

A complaint of prohibited practices having been filed with the Wisconsin Employment Relations Commission, hereafter Commission, in the above-entitled matter on March 15, 1977, and Complainant having amended said complaint on April 27, 1977; and the Commission having appointed Thomas L. Yaeger, a member of the Commission's staff to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and Order as provided in Section 111.07(5), Stats.; and hearing on said complaint having been held at Rhinelander, Wisconsin on May 23, 1977, before the Examiner; and the parties having filed post hearing briefs by July 11, 1977; and the Examiner having considered the evidence and arguments and being fully advised in the premises, makes the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. That Complainant 1/ Oneida County Employees Union, Local #79, hereafter the Union, was certified on August 19, 1969, as the exclusive collective bargaining agent for all regular full-time and regular part-time courthouse employes excluding elected, supervisory and confidential personnel and maintains offices in Rhinelander, Wisconsin; and that Alyce Dalum, as Deputy County Treasurer, hereafter Dalum, is included in said certified bargaining unit.

2. That Oneida County, hereafter referred to as the Municipal Employer, maintains its offices in Rhinelander, Wisconsin; that Wallace Sommers, hereafter Sommers, was the elected County Treasurer at all times material herein; that when Dalum was Deputy County Treasurer Sommers was her supervisor; and that at all times material hereto, Sommers, in his capacity as Treasurer was acting within the scope of his express and implied authority as an agent for the County.

1/ The Respondents' motion made at hearing to add Dalum as a named Complainant is hereby denied as inappropriate.

3. That at all times material herein the Union and Municipal Employer were parties to a collective bargaining agreement containing the following provisions pertinent to the instant matter:

"ARTICLE I - RECOGNITION

The County hereby recognizes the Union as the exclusive bargaining agent for all regular full-time and regular part-time employees of the Oneida County Courthouse covered by this agreement, but excluding all elected personnel, supervisory personnel and confidential personnel as defined by the Act.

. . .

ARTICLE IV - GRIEVANCE PROCEDURE

Should differences arise between the employees or the Union concerning interpretation, applications or violation of this agreement, this procedure shall be followed:

Section 1. Any employee covered by this agreement who has a grievance shall report his grievance to the steward or other representative of the Union, who shall investigate the grievance thoroughly, and if the Union feels the grievance is warranted, the Union shall request a meeting with the department head. If within seven (7) days no satisfactory agreement has been reached between department heads and employee, the grievance will advance to Section 2.

Section 2. In the event a satisfactory settlement is not reached, the grievance will be submitted in writing to the Wage and Salary Committee of the County Board. Following the meeting, the Committee shall give its answer in writing to the Union within two (2) weeks of this meeting.

Section 3. The Union shall have the right to have present the aggrieved employee or employees and any other Union representatives at all meetings for the purpose of resolving said grievance. No employee shall be caused to suffer loss in pay on account of carrying out the provisions of this grievance procedure.

Section 4. If the matter still remains unsettled, then it shall be submitted in writing to arbitration.

Section 5. The Arbitration Board shall consist of three (3) members; one member to be chosen by the employer, one member to be chosen by the Union. These two members shall choose the third member and he shall be Chairman of the committee. If these two members are unable within ten (10) days to mutually agree upon the choice of a third member, said third member shall be selected by the Wisconsin Employment Relations Commission upon both parties making application for that purpose. The decision of the Arbitration Board shall be submitted to both parties hereto in writing and shall be final and binding upon both parties. Each party shall bear the cost of its arbitrator, and both parties shall equally share the cost of the third arbitrator.

. . .

ARTICLE VI - SENIORITY - PROMOTIONS - LAY-OFF

. . .

Section 2. Seniority shall be lost by any of the following acts:

1. A proper discharge.

. . .

Section 5. Whenever a vacancy arises or a new position is created which would be under Union jurisdiction, the County will post a notice of such vacancy or new position on the Union bulletin board for a period of five (5) days. This posting shall include job qualifications and wage scale. At the end of the five-day posting, the County will remove the notice and job will be filled within five (5) days. Employees on vacation or sick leave will be notified of job postings by the Union. Present employees within the bargaining unit shall be given preference before any new employee is hired. The posting procedure shall apply to vacancies in all Deputy positions so that consideration may be given to employees within the Courthouse, however, the Elected Official shall have the right to appoint the Deputy of his own choice.

A copy of all job postings shall be mailed to the Secretary of Local #79.

. . .

ARTICLE VII - VESTED RIGHTS OF MANAGEMENT

Section 1. The right to employ, to promote, to transfer, to discipline and discharge employees and to establish work rules is reserved by and vested exclusively in the Oneida County Board through its duly appointed Wage and Salary Committee and duly appointed department heads. (The reasonableness of the exercise of the aforementioned vested rights shall be subject to the grievance procedure.)

. . .

ADDENDUM NO. 1 TO LABOR AGREEMENT

Courthouse Salary Schedule 1976

<u>Job Classification</u>	<u>Office</u>	<u>Jan. 1, 1976</u>
Deputy County Clerk	County Clerk	\$748.00
Deputy Register of Deeds	Register of Deeds	648.00
Deputy County Treasurer	County Treasurer	648.00"

4. That on December 21, 1976, Sommers advised Dalum that he would not be re-appointing her as Deputy County Treasurer and that December 31, 1976, would be her last day in her position; that on December 21, 1976, Dalum, with the help of Union steward Onson, drafted a grievance pursuant to the contractual grievance procedure contending Sommers' termination of her employment was violative of Article VI(2) of the aforementioned collective bargaining agreement; that also on said date Union steward Onson wrote a letter to Sommers wherein she requested to meet with him concerning Dalum's grievance; and that on December 22, 1976, Onson personally delivered the grievance and letter to Sommers' office.

5. That on December 27, 1976, Sommers told Onson that he would not change his position in the Dalum matter and, that he would not be

calling her back to work; and, that on the same date Onson submitted the Dalum grievance to Phelan, Chairman of the Oneida County Wage and Salary Committee, pursuant to Article VI(2) of the aforementioned collective bargaining agreement.

6. That on January 4, 1977, the Wage and Salary Committee met with the grievant, Union and Sommers on Dalum's grievance pursuant to Article VI(2) of the aforementioned collective bargaining agreement; that no decision was reached at said grievance meeting concerning the disposition of the Dalum grievance; that, however, the Wage and Salary Committee, at a regular business meeting on January 11, 1977, discussed the disposition of said grievance; that during said business meeting a motion was made to uphold Sommers' decision concerning Dalum's continued employment but, was defeated for lack of a second; and, that immediately thereafter another motion was made that Dalum's grievance be deemed meritorious and that she be reinstated to her position of Deputy County Treasurer without loss of pay; and that said second motion did carry.

7. That on January 12, 1977, pursuant to the decision made the day before, the Wage and Salary Committee wrote to the grievant, Union Secretary-Treasurer and Sommers advising them that the grievance was being settled on the basis of reinstating her to the position of Deputy County Treasurer without loss of pay; that the grievant received said letter; that she reported for work pursuant to said letter on January 17, 1977, but was not allowed to work by Sommers; that on several occasions thereafter she reported for work and was turned away by Sommers and to date has not been allowed to assume the position of Deputy County Treasurer pursuant to the settlement of her grievance.

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

CONCLUSIONS OF LAW

1. That Complainant Oneida County Employees Union Local #79 is a labor organization within the meaning of Section 111.70(1)(j), Stats.
2. That Oneida County is a Municipal Employer within the meaning of Section 111.70(1)(a), Stats.
3. That County Treasurer Sommers at all times material hereto was acting on behalf of the County within the scope of his authority, express or implied within the meaning of Section 111.70(1)(a), Stats.
4. That the position of Deputy County Treasurer is properly included within the County Courthouse employes bargaining unit.
5. That the settlement of Alyce Dalum's grievance by the County Wage and Salary Committee is a legally enforceable collective bargaining agreement for purposes of Section 111.70(3)(a)5, Stats.
6. That by refusing to reinstate Alyce Dalum pursuant to the grievance settlement reached with the County Wage and Salary Committee, Wallace Sommers, County Treasurer as agent of the County, and the County violated a collective bargaining agreement, thereby committing a prohibited practice within the meaning of Section 111.70(3)(a)5, Stats.

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

ORDER

IT IS ORDERED that Respondents Oneida County and Wallace Sommers, County Treasurer, their officers and agents, shall immediately:

1. Cease and desist from refusing to adhere to the terms of the grievance settlement agreed to by the County Wage and Salary Committee on January 11, 1977.


2. Take the following affirmative action which the undersigned finds will effectuate the purposes of Section 111.70, Stats.

- (a) Immediately comply with the terms of the aforementioned settlement agreement by reinstating Alyce Dalum to the position of Deputy County Treasurer without loss of pay for the period January 1, 1977, through January 16, 1977, and, in addition pay to Alyce Dalum a sum of money equal to that which she would have earned, including all benefits, had she been reinstated on January 17, 1977, and continued in her employment to the present, less any amount of money that she earned or received that she otherwise would not have earned or received had she been reinstated as the County's employe as Deputy County Treasurer pursuant to the settlement of the grievance.
- (b) Notify all employes by posting in conspicuous places in County offices where employes work, copies of the notice attached hereto and marked "Appendix A" which notice shall be signed by the County Board Chairman and County Treasurer, and shall be posted immediately upon receipt of a copy of this Order and shall remain posted for thirty (30) days thereafter. Reasonable steps shall be taken by Respondents to ensure that said notices are not altered, defaced or covered by other material.
- (c) Notify the Wisconsin Employment Relations Commission in writing, within twenty (20) days following the date of this Order, as to what steps have been taken to comply herewith.

Dated at Madison, Wisconsin this 14th day of December, 1977.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By


Thomas L. Yaeger, Examiner

APPENDIX "A"

NOTICE TO ALL EMPLOYEES

Pursuant to an Order of the Wisconsin Employment Relations Commission, and in order to effectuate the policies of the Municipal Employment Relations Act, we hereby notify our employees that:

1. WE WILL comply with the terms of the January 11, 1977, grievance settlement agreement reached with Local #79, AFSCME, AFL-CIO and Alyce Dalum.
2. WE WILL immediately reinstate Alyce Dalum to the position of Deputy County Treasurer, and we will pay to Alyce Dalum a sum of money equal to the money she would have earned, including all benefits, had she been reinstated pursuant to the grievance settlement agreement.
3. WE WILL NOT in any other or related matter interfere with the rights of our employees, pursuant to the provisions of the Municipal Employment Relations Act.

By _____
Oneida County Board Chairman

Oneida County Treasurer

Dated this ____ day of December, 1977.

THIS NOTICE MUST BE POSTED FOR THIRTY (30) DAYS FROM THE DATE HEREOF AND MUST NOT BE ALTERED, DEFACED OR COVERED BY ANY MATERIAL.

MEMORANDUM ACCOMPANYING FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

DISCUSSION

Complainant's Position

The Union argues that the law of Wisconsin concerning the appointive powers of elected county officials is clear and, that said powers may be lawfully modified by negotiation between the employer and the exclusive bargaining agent for employees employed by a county by virtue of being appointed to their position by an elected official. They contend that such modifications are contained in the subject collective bargaining agreement and that pursuant to said agreement deputies cannot be terminated without cause.

The Union claims that the grievance filed by Dalum was processed in accordance with the parties' contract and that the action taken by the Wage and Salary Committee in granting said grievance was lawful and binding upon the County and its officers. In this regard the Union insists that the County's referral to the contract grievance procedure of Dalum's grievance was not "ultra vires". Thus, the County Treasurer by refusing to comply with the settlement agreement and, the County Board by failing to take affirmative steps to ensure compliance with the settlement while instead providing the Treasurer with legal assistance to defend against his noncompliance violates Section 111.70, Stats.

Respondents' Position

The Respondents concede that, as a matter of law, county officers' appointive powers are not absolute and, further, agree that deputy positions such as in issue herein are properly included in collective bargaining units of other county employees. However, while acknowledging that Dalum was appropriately included in the collective bargaining unit of courthouse employees nonetheless contend she was not protected by the collective bargaining agreement against loss of her term by not being re-appointed. Respondents argue that the contractual grievance procedure was not available to Dalum and, therefore, even though the County's Wage and Salary Committee mistakenly entertained the grievance and found it meritorious the Respondents are not bound by the result. Lastly, the Respondents claim that their failure to implement the Wage and Salary Committee decision is not a proper subject for consideration by the Commission.

Enforceability of Grievance Settlement

The issue presented by the instant complaint is whether the County Wage and Salary Committee created a legally binding and enforceable grievance settlement agreement. There is no dispute that they granted the grievance, ordered the grievant reinstated and, that the County Treasurer refused and continues to refuse to reinstate the grievant. In determining whether such an agreement was made there will be no consideration given to the merits of the grievance or the settlement except to the extent that the settlement sought to be enforced herein is illegal or otherwise unenforceable. Furthermore, the undersigned will only engage in contract interpretation to the extent that it's indispensable to the resolution of issues appropriately before this tribunal.

The record is clear that the Deputy County Treasurer position was included within the collective bargaining unit governed by the 1976 contract negotiated between the County and Union. Said contract contains

a grievance procedure allowing employes to grieve any difference that might arise between himself/herself and the County regarding interpretation, application, or alleged violations of said contract. Dalum's grievance contended that she had been discharged in violation of Article VI(2) of the contract, pertaining to discharge of employes. The County, however, argues this was not a proper grievance under the contract or, in other words, was not substantively arbitrable. However, it seems clear to the undersigned that it was at least prima facie substantively arbitrable in that the grievance made a claim that on its face was governed by the collective bargaining agreement. 2/ The question of whether in fact it was governed by this contract is not for this tribunal for the reasons set out later herein. Consequently, it was a proper matter for the grievance procedure.

After Dalum's grievance was filed, it was denied by Sommers on December 27, 1976. Thereafter, the Union appealed it to the second step of the contractual procedure. Article VI(2) of the contract provides that the grievance shall be presented to the Wage and Salary Committee at the second step, and that the Committee shall answer the grievance. The Committee's answer to the Dalum grievance was to grant the grievance thereby settling it. Nowhere in said contract are there any limitations on the Committee's authority to settle grievances in the procedure nor has any argument been advanced herein that the Committee lacked such authority. Consequently, the Committee was acting within the scope of its authority in settling this grievance.

A review of the contract grievance procedure reveals it to be a two-step procedure with arbitration to follow if grievances cannot be resolved between the parties. The purpose of having the multi-stage grievance procedure prior to arbitration is to exhaust all possibilities for settlement of the dispute between the parties. In this regard the grievance procedure is said to be ". . . a part of the continuing collective bargaining process". 3/ Consequently, a procedure where the parties designated representatives is without authority to enter into binding settlements of grievances is the exception. Furthermore, as noted above there is no basis for concluding that the Wage and Salary Committee herein lacked such authority to deal with Dalum's grievance.

The Commission has previously found settlements of grievances to be enforceable collective bargaining agreements 4/ reasoning that to find contrariwise would be to impair the integrity and effectiveness of the contractual grievance machinery thereby undermining the collective bargaining relationship. 5/ Herein, the Wage and Salary Committee, acting within its authority, deemed the grievance to be meritorious under the contract and settled it on that basis by ordering Dalum reinstated. Whether, in fact, the grievance was meritorious is not for the Examiner to decide for even if it were not meritorious this fact does not diminish the binding effect of the Wage and Salary Committee's action taken thereon. That is not to say however, that the Commission would enforce an illegal contract.

2/ Oostburg Jt. School Dist. No. 14 (11196-A, B) 12/72; Spooner Jt. School Dist. No. 1 (14416-A) 9/76.

3/ United Steelworkers v. Warrior & Gulf Navigation Co. 80 S.Ct. 1347, 46 LRRM 24 16 (1960).

4/ Stolper Industries, Inc. (8157) 8/67.

5/ Ibid.

It has been a long standing policy of this Commission, when asked to enforce a collective bargaining agreement, to refuse to exercise its authority to enforce an illegal contract or clause. 6/ The legality of bargaining away or bargaining limitations upon the appointive powers of elected county officials, however, has previously been the subject of litigation before this Commission and, the Commission has held that said powers can legally be modified by collective bargaining. 7/

The County herein contends that while said appointive powers may be modified by collective bargaining they were not so modified herein to the extent necessary to cause Dalum's grievance to be meritorious. However, this argument ignores the issue before the Examiner -- is the settlement of Dalum's grievance an enforceable collective bargaining agreement. As noted earlier herein, it's immaterial whether the grievance was meritorious inasmuch as it's the settlement agreement that complainants seek enforced. Consequently, while the contract may have allowed Sommers to terminate Dalum without regard to the propriety of said action, the Wage and Salary Committee thought otherwise. They may have believed the contract did not permit Sommers to act as he did with respect to Dalum's continued employment as Deputy County Treasurer or they may have settled the grievance because of political expediency. But, whatever the reason, it was settled and the settlement had the effect of legally modifying the appointive powers of the County Treasurer. 8/ Therefore, the Dalum grievance settlement represents a binding and legally enforceable collective bargaining agreement.

Section 111.70(1)(a) defines "Municipal Employer" as

". . . any city, county, village, town, metropolitan sewerage district, school district, or any other political subdivision of the state which engages the services of an employe and includes any person acting on behalf of a municipal employer within the scope of his authority express or implied. (Emphasis added).

Sommers when acting within the scope of his authority as County Treasurer was acting on behalf of the County as evidenced by the duties of County Treasurer as set forth in Section 59.20, Stats. Also, in his capacity as Treasurer, he can have a deputy to aide in carrying out his duties 9/ and, necessarily has supervisory authority over said deputy. Acting within his authority, express or implied, as Treasurer and Dalum's supervisor, and after being advised of the settlement of Dalum's grievance, he has steadfastly refused to abide by same. Therefore, inasmuch as Sommers was acting as an agent for the County his conduct is binding upon the County and consequently amounts to a violation of a legally enforceable collective bargaining agreement by a Municipal Employer in violation of Section 111.70(3)(a)5.

6/ Darsons Brothers (2945) 1951.

7/ Oconto County (12970-A) 3/75; Oconto County (14740) 6/76.

8/ Surely, if it's legal to modify the elected official's appointive powers by bargaining a procedure for the posting of and filling deputy positions the same can be done with respect to their removal. (See Oconto, supra.)

9/ Section 59.19(1), Stats.

Remedy

In remedying the prohibited practice it is necessary to distinguish between ordering compliance with the grievance settlement agreement for the period January 1, 1977 to January 17, 1977, and, in addition, making Dalum whole for her losses incurred since Sommers' refusal to reinstate her.

The grievance settlement provided for reinstatement without loss of pay. Thus, the appropriate remedy herein is to order compliance with that agreement and in addition remedy the failure to comply. To remedy the noncompliance, the County and Sommers must make Dolum whole for all losses occasioned by their breach of the agreement. This means putting her in the position she would have been in in terms of her lost wages and fringe benefits had they complied. The same result would obtain even if the settlement agreement merely provided for reinstatement without back pay.

Dated at Madison, Wisconsin this *19th* day of December, 1977.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By *Thomas L. Yaeger*
Thomas L. Yaeger, Examiner