

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Respondents.

Case XVIII
No. 21473 MP-732
Decision No. 15374-C

No. 15374-C

MEMORANDUM ACCOMPANYING ORDER AFFIRMING FINDINGS OF
FACT, CONCLUSIONS OF LAW AND ORDER

THE EXAMINER'S DECISION:

The Examiner found, inter alia, that Respondent Sommers, the elected County Treasurer, was an agent of the Respondent County and the supervisor of Alyce Dalum, Deputy County Treasurer; that on December 21, 1976 Sommers advised Dalum that he would not reappoint 1/ her Deputy County Treasurer and that December 31, 1976 would be her last day in that position; that Dalum filed a grievance alleging that such action was a violation of Article VI, Section 2 of the collective bargaining agreement which provides for termination of seniority rights by a "proper discharge"; that said grievance was appealed to the Respondent County's Wage and Salary Committee pursuant to the terms of the grievance procedure; that the Wage and Salary Committee considered and adopted a motion in which it found Dalum's grievance to be meritorious and provided that she be reinstated to her position without loss of pay; that on January 12, 1977 the Committee advised Dalum, Sommers and the Complainant Union's Secretary-Treasurer that the grievance was being settled on the basis of reinstating Dalum to the position of Deputy County Treasurer without loss of pay; and that although Dalum reported to work on January 17, 1977, and on several occasions thereafter, Sommers turned her away and has not allowed her to assume the position of Deputy County Treasurer.

Based on these findings of fact, the Examiner concluded inter alia, that Sommers 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) of the MERA; that the position of Deputy County Treasurer is properly included in the bargaining unit of County courthouse employees; that the settlement of Dalum's grievance constituted a legally enforceable collective bargaining agreement; and that the County had violated a collective bargaining agreement and committed a prohibited practice within the meaning of Section 111.70(3)(a)5 of the MERA by the actions of Sommers in refusing to reinstate Dalum pursuant to the grievance settlement reached with the Wage and Salary Committee.

Finally, the Examiner ordered the Respondent County and the Respondent Sommers, their officers and agents, to cease and desist from refusing to adhere to the grievance settlement; to comply with the terms of said settlement agreement by reinstating Dalum to the position of Deputy County Treasurer without loss of pay for the period from January 1, 1977 to January 16, 1977 and make her whole for all lost pay and benefits since January 17, 1977; to notify its employees of its compliance with the terms of the order; and to notify the Commission of steps taken to comply with the order.

1/ Sommers had been originally appointed County Treasurer in 1973 and first elected in 1974. He had been re-elected in 1976. Dalum was an opposition candidate in both 1974 and 1976. Sommers reappointed Dalum in 1974. He gave three reasons for refusing to reappoint her in 1976, which reasons were subsequently found not to constitute proper grounds for termination by the County's Wage and Salary Committee. There are no other full-time employees in the Treasurer's office.

PETITION FOR REVIEW:

In their petition for review, 2/ the Respondents allege that the Examiner's Finding of Fact No. 2 was clearly erroneous as indicated by the clear and satisfactory preponderance of the evidence. It reads as follows:

"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."

In addition, the petition alleges that the Examiner's Conclusions of Law Nos. 3, 5 and 6 raise substantial questions of law and administrative policy concerning the legality of the parties' collective bargaining agreement and the "purported settlement of the grievance." They read as follows:

"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.

. . .

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."

Finally, the Respondents contend that those portions of the Examiner's order which require compliance with the settlement agreement and reinstatement of Dalum with back pay and benefits are contrary to Section 59.19, Stats. and against the laws of Wisconsin and are thus "illegal, unenforceable and void."

BRIEF IN SUPPORT OF PETITION FOR REVIEW:

In their brief in support of the petition for review, the Respondents argue: (1) since the parties' collective bargaining agreement violates the doctrine of the delegation of powers and is contrary to the Statutes, it is void and therefore the Examiner's decision should be reversed and his order vacated; and (2) assuming, arguendo, that the

2/ The petition for review was filed on December 30, 1977. It was filed as a protective measure. In the meantime the Respondents herein had obtained an alternative writ of prohibition from the Circuit Court of Oneida County directing the Commission and Examiner Yaeger to refrain from further proceedings. On April 6, 1978 the Court granted the Commission's motion to quash said writ and dismissed the Respondent's petition for a writ of prohibition absolute pursuant to its opinion of March 30, 1978. Oneida County and Wallace Sommers v. WERC et al. (No. 8119).

parties' collective bargaining agreement is not void, the Commission must construe said agreement in harmony with the statutes and must, as a result, find that Dalum was not improperly discharged.

The Respondents point out that the Supreme Court held in WERC v. City of Neenah 75 Wis. 2d 602 (1977) that a collective bargaining agreement which is contrary to law is null and void. According to the Respondents the 1976 collective bargaining agreement, to the extent that it attempts to restrict the appointment powers of the elected County Treasurer, is contrary to law because it conflicts with Section 59.19, Stats., and Section 17.10(6) and (7), Stats., as well as the doctrine of non-delegation of legislative powers. In concluding that the agreement conflicts with the statutes, the Respondents attempt to distinguish the facts in the recent case entitled Glendale Professional Policemens Association v. City of Glendale, 83 Wis 2d 90 (1978)--a case decided after the examiner's decision was issued herein--on the basis that here there is an irreconcilable conflict between the agreement and the statutes. Furthermore, because of this conflict the agreement should be declared null and void since a finding that the agreement prevails would result in an unlawful delegation of legislative power emasculating Section 59.19 Stats., which is a statute of state-wide concern. In this regard the Respondents argue that the constitutional doctrine of home rule is not here involved.

With regard to their alternative argument, the Respondents allege that the Commission must endeavor to harmonize terms of the collective bargaining agreement with Section 59.19, Stats., in accordance with the Supreme Court's decision in the Glendale case and Muskego Norway Consolidated Joint School District No. 9 v. WERB 35 Wis. 2d 151 (1967). The Respondents point out that the Examiner specifically declined to interpret the 1976 collective bargaining agreement and argue that said agreement, properly interpreted, can be reconciled with the statutes. According to the Respondents the settlement agreement is not a lawful application of the 1976 collective bargaining agreement.

POSITION OF THE COMPLAINANT:

The Complainant did not file a brief in opposition to the petition for review and relies instead on its brief before the Examiner in support of its position that the Examiner's decision should be sustained.

Relevant to the issues raised herein, that brief contends:

1. The County's reference to the contractual grievance procedure contained in the 1976 agreement, of a grievance over the conditions under which a deputy appointed pursuant to Section 59.19 can be terminated, was lawful. The Complainant relies primarily on the Commission's decision in Oconto County (12970-A) 3/75 in support of this argument.
2. The County is bound by its valid agreement to resolve the grievance on the basis of the finding of the Board's Personnel and Salary Committee that the termination of Dalum was in violation of the collective bargaining agreement.

It is the Complainant's position that the Court's decision in Glendale supports this result. In addition, it points out that since there was no award of an arbitrator here involved, it cannot be argued that the Committee's decision was in excess of its authority, which, unlike an arbitrator's, is not contractual.

DISCUSSION:

In their brief, the Respondents do not repeat their claim that the Examiner's Finding of Fact No. 2 was erroneous and apparently

abandon such claim. In either case, the un rebutted evidence of record indicates that Sommers was Dalum's supervisor and his actions herein were undertaken in that capacity on behalf of the County which is the Municipal Employer in this case.

Similarly, the Respondents do not argue, with regard to their claim contained in the petition for review, that the Examiner's Conclusion of Law No. 3 is in error. The provisions of Section 111.70(1)(a), Stats., would clearly attribute the actions of Sommers to the County as the Municipal Employer.

The two arguments in the Respondents' brief relate exclusively to their claim that the Examiner's conclusions of law numbered 5 and 6 are in error.

In our opinion, the Respondents' arguments confuse the parties' 1976 collective bargaining agreement with the settlement agreement of Dalum's grievance filed thereunder. We agree with the Examiner that since the Complainant's pleadings and arguments rely exclusively on the terms of that settlement agreement, the only issue properly before the Commission is the legality and enforceability of that agreement. ^{3/} The question of the correctness of possible alternative constructions of the 1976 collective bargaining agreement suggested by the Respondents' alternative argument is not here in issue. By the terms of the settlement agreement reached, the collective bargaining agreement has been interpreted and applied by the parties as prohibiting the instant termination of Dalum because proper cause was necessary and lacking.

If the settlement agreement is contrary to an affirmative command of law as contended by the Respondents, it is unenforceable. Section 17.10(6) and (7) and Section 59.19, Stats., provide in relevant part as follows:

"17.10 Removal of appointive county officers. Appointive county officers may be removed as follows:

. . .

(6) OTHERS. All other appointive county officers, by the officer, or body that appointed them, at pleasure, except probation officers and their substitutes appointed pursuant to ch. 48 who may be removed for cause only. Removals by a body, other than the county board, consisting of 3 or more members may be made by an affirmative vote of two-thirds of all the members thereof.

(7) GENERAL EXCEPTION. But no county officer appointed according to merit and fitness under and subject to a civil service law, or whose removal is governed by such a law, shall be removed otherwise than as therein provided.

. . .

59.19 Deputies; oath, salary; temporary vacancy. (1) The county treasurer may appoint in writing one or more deputies to aid him in the discharge of the duties of his office. Such deputy or deputies, in the absence of the treasurer from his office or in case of a vacancy in said office or any disability of the treasurer to perform the duties of his office, unless another is appointed therefor as provided in sub. (2), may perform all the duties of the office of treasurer until such vacancy is filled or such disability is removed. The person or persons so appointed shall take and file the official oath. They shall file their appointment

^{3/} We note that the agreement provides that disputes over the interpretation of the agreement which are not settled in the procedure shall be submitted to arbitration.

with the county clerk. The county board may, in its discretion, at its annual meeting or at any special meeting, provide a salary for each such deputy."

There is a serious question in this case as to whether the Deputy County Treasurer is properly denominated a "county officer." It may be that a deputy is a "de facto county officer" only during those periods of time when the Treasurer's office is unfilled or the incumbent is absent or disabled. This is so because a deputy county treasurer would, under those circumstances, exercise a portion of the sovereign power of the State. 4/ However, assuming, arguendo, that a deputy county treasurer is a county officer within the meaning of Section 17.10(6), Stats., that provision merely makes explicit what is otherwise implicit in Section 59.19(1), Stats.--that the treasurer enjoys discretion to remove as well as to appoint his or her deputy. However, Section 17.10(7), Stats., and several provisions of Chapter 59, Stats., particularly Section 59.15(2) and (4), Stats., 5/ make it clear that

4/ See Sections 59.12 and 15.13 Stats. which omit reference to deputies and Martin v. Smith 239 Wis. 314 wherein the Supreme Court reiterated the definition of "public office": "where for the time being a portion of the sovereignty, legislative, executive or judicial, attaches to be exercised for the public benefit." In that case the Court repeated its earlier observation in the case of Sieb v. Racine 176 Wis. 624 (1922), that a public office often, but not indispensably, has a term and requires an oath. See also Sheboygan County v. Parker 70 US 93 (1865) where the U.S. Supreme Court defined a county officer as "one by whom the county performs its political functions, exercising its public powers, trusts or duties continuously and as a part of the regular and permanent administration of government."

5/ "(2) APPOINTIVE OFFICIALS, DEPUTY OFFICERS AND EMPLOYEES.
(a) The board has the powers set forth in this subsection, sub. (3) and s. 59.025 as to any office, department, board, commission, committee, position or employe in county service (other than elective offices included under sub. (1), supervisors and circuit judges) created under any statute, the salary or compensation for which is paid in whole or in part by the county, and the jurisdiction and duties of which lie within the county or any portion thereof and the powers conferred by this section shall be in addition to all other grants of power and shall be limited only by express language.

(c) The board may provide, fix or change the salary or compensation of any such office, board, commission, committee, position, employe or deputies to elective officers without regard to the tenure of the incumbent (except as provided in par. (d)) and also establish the number of employes in any department or office including deputies to elective officers, and may establish regulations of employment for any person paid from the county treasury, but no action of the board shall be contrary to or in derogation of the rules and regulations of the department of health and social services pursuant to s. 49.50(2) to (5) relating to employes administering old-age assistance, aid to dependent children, aid to the blind and aid to totally and permanently disabled persons or ss. 63.01 to 63.17.

(d) The board or any board, commission, committee or any agency to which the board or statutes has delegated the authority to manage and control any institution or department of the county government may contract for the services of employes, setting up the hours, wages, duties and terms of employment for periods not to exceed 2 years.

(e) The board may also provide and appropriate moneys for an employe awards program to encourage and to reward unusual and meritorious suggestions and accomplishments by county employes.

. . .

(4) INTERPRETATION. In the event of conflict between this section and any other statute, this section to the extent of such conflict shall prevail."

such discretion is not without limitation. The County Board may limit such discretion through the establishment of merit and fitness requirements under a civil service law and pursuant to its power to establish wages, hours and working conditions for salaried deputies and other employees. There is apparently no civil service ordinance here which limits the treasurer's discretion to remove or refuse to reappoint a deputy. However, the County has, through the collective bargaining agreement as applied by its Wage and Salary Committee 6/ agreed to limit that discretion pursuant to its powers to establish wages, hours and working conditions. Such an agreement is binding and limits the otherwise unfettered discretion of the treasurer to remove or refuse to reappoint his or her deputy. 7/

In our opinion, this conclusion is not inconsistent with the Supreme Court's recent decision in the Glendale case. In discussing the difficulty of attempting to harmonize the provisions of collective bargaining agreements negotiated pursuant to the provisions of the MERA with prior existing legislation, the Court in that case observed:

" . . . we have held that collective bargaining agreements and statutes also governing conditions of employment must be harmonized whenever possible. When an irreconcilable conflict exists, we have held that the collective bargaining agreement should not be interpreted to authorize a violation of law. WERC v. Teamsters Local No. 563, supra."

The facts in this case are remarkably parallel to the facts in the Glendale case. There, the City of Glendale, through its collective bargaining agreement, agreed to place a limit on the police chief's otherwise broad discretion under Section 62.13(4)(a), Stats., to appoint subordinates. The Court found that such limitation did not contradict an "express command of law" nor did it constitute a bargaining away of something that was not within the power of the City to bargain. The chief's discretion, like the discretion of the treasurer, was held to be subject to the power of the municipal employer to establish conditions of employment and its duty to bargain with regard to those conditions.

We agree with the County that the constitutional home rule powers of cities and villages are not here in issue. However, that distinction does not compel a different conclusion. While we agree that the provisions of Section 59.19 Stats. deal with matters of state-wide concern, the provisions of the MERA likewise deal with matters of state-wide concern. The potential conflict between the provisions of the MERA and the provisions of Section 59.19, Stats., can be avoided by harmonizing those provisions in much the same manner and with the same result as in the Glendale case. The legislative purpose of

6/ Oneida County Code Section 2.02(18) authorizes the Committee to act on behalf of the County according to a legal memorandum of the County's Corporation Counsel introduced in evidence.

7/ See Oconto County (12970-A) 3/75 and Oconto County (14740) 6/76, aff'd Dane Co. Cir. Ct. sub. nom. Oconto County v. WERC (152-467) 2/9/77. See also, 63 OAG 147 (1974) wherein the Attorney General concluded:


"Provisions of a county civil service ordinance enacted under sec. 59.07 (20), Stats., or collective bargaining agreement entered into pursuant to sec. 111.70, Stats., establishing a procedure to be followed prior to discharge of a classified employee, supersede and modify provisions of sec. 59.38(1), Stats., which authorize a clerk of court to discharge a deputy clerk of a court at pleasure."


allowing county treasurers discretion to appoint and remove deputies, can be harmonized by making such powers subject to limitations imposed by the conditions of employment established by the county pursuant to Section 59.15(2), Stats., and its obligations under Section 111.70, Stats.

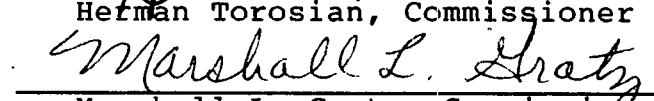
Dated at Madison, Wisconsin this *29th* day of June, 1978.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By


Morris Slavney, Chairman


Herman Torosian, Commissioner


Marshall L. Gratz, Commissioner