STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MILWAUKEE DISTRICT COUNCIL 48, AFSCME, AFL-CIO,	:	
Complainant,	:	Case CVIII No. 23784 MP-915 Decision No. 16713-B
vs.	:	
MILWAUKEE COUNTY,	:	
Respondent.	:	

Appearances:

Mr. Patrick J. Foster, Principal Assistant Corporation Counsel, Milwaukee County, Milwaukee County Courthouse, Room 303, Milwaukee, Wisconsin 53233, appearing on behalf of Milwaukee County.

Podell, Ugent & Cross, S.C., by Mr. Alvin R. Ugent, 735 West Wisconsin Avenue, Suite 500, Milwaukee, Wisconsin 53233, appearing on behalf of Milwaukee District Council 48, AFSCME, AFL-CIO.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Milwaukee District Council 48, AFSCME, AFL-CIO, having filed a complaint of prohibited practices with the Wisconsin Employment Relations Commission, hereinafter Commission, alleging that Milwaukee County committed prohibited practices within the meaning of Section 111.70 of the Municipal Employment Relations Act; and the Commission on December 6, 1978, having appointed Michael F. Rothstein, a member of its 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) Wis. Stats.; and Michael F. Rothstein having on March 6, 1979, conducted a hearing in the matter; and prior to any further action in the matter, Michael F. Rothstein having resigned his employment with the Commission; and the Commission having on October 7, 1981, substituted the undersigned as Examiner; and the Examiner having considered the evidence, briefs and arguments and being fully advised in the premises makes and files the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. That Milwaukee District Council 48, AFSCME, AFL-CIO, hereinafter referred to as the Union, is a labor organization, and its principal office is located at 3427 West St. Paul Avenue, Milwaukee, Wisconsin 53208.

2. That Milwaukee County, hereinafter referred to as the County, is a municipal employer, and has its offices at 901 North 9th Street, Milwaukee, Wisconsin 53233.

3. That at all times material herein, the Union has been, and is, the certified collective bargaining representative for certain employes of the County; that the Union and County have been parties to a collective bargaining agreement which became effective prior to January 1, 1978 and expired on December 31, 1978, covering the wages, hours and conditions of employment of said employes and that said agreement provided in pertinent part as follows:

PART 2

2.16 BLUE CROSS-BLUE SHIELD INSURANCE

(1) The County shall pay the full cost of the employe's Blue Cross and Blue Shield and major

medical insurance coverage or an equal amount toward the cost of Compcare. Compcare premiums in excess of Blue Cross and Blue Shield and major medical shall be paid by the employe.

(2) Existing Blue Cross-Blue Shield benefits shall be increased as follows effective January 1, 1977:

(a) Improve outpatient diagnostic X-ray and laboratory coverage by eliminating the $200 limitation per calendar year.

(b) Increase Surgical Care Blue Shield SM-100 from $5,000 to $10,000 per period of disability.

(c) Increase Blue Cross and Surgical Care Blue Shield major medical plan from $10,000 to $100,000.

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PART 6

6.03 SAVING CLAUSE. If any article or part of this Memorandum of Agreement is held to be invalid by operation of law or by any tribunal of competent jurisdiction, or if compliance with or enforcement of any article or part should be restrained by such tribunal, the remainder of this Memorandum of Agreement shall not be affected thereby and the parties shall enter into immediate negotiations for the purpose of arriving at a mutually satisfactory replacement for such article or part.

4. That in 1973, Surgical Care Blue Shield offered to provide coverage for non-therapeutic abortions; however, the County did not agree to add this benefit to its coverage; that beginning in 1973 Blue Cross (hospital) would not deny benefits to a participant for services in connection with any abortion and this benefit became part of the coverage for County employes.

5. That in 1977, bill AB-321 was introduced in the Wisconsin legislature which provided in pertinent part as follows:

59.07 (136) SUBSIDY OF ABORTIONS RESTRICTED. (a) No county or any agency or subdivision thereof may authorize funds for or pay to any physician or surgeon or any hospital, clinic or other medical facility for or in connection with the performance of any abortion except under the conditions and in accord with the requirements specified in s. 20.927.

6. That at all times material herein, Harry Donoian was the Associate Director for the Union and acted on its behalf; that Mr. Donoian, on behalf of the Union, wrote a letter opposing enactment of AB-321; that Senator Carl W. Thompson in a letter to his Senate Colleagues dated February 6, 1978 quoted the following excerpts from Donoian's letter:

"Our contracts presently provide for elective abortion under family contracts in Milwaukee City and County.

Enactment of AB 321 would mean an end to all of these benefits which we have negotiated and paid for.

The State of Wisconsin would be putting its hands in the pockets of District Council 48's members and stealing part of the wage settlements which we have negotiated. This is intolerable. We would oppose such an attempt through the courts or whatever method we think appropriate."

7. That in the Senate, an amendment was offered to AB-321 which provided in pertinent part as follows:

> "(3) This section does not prohibit the state or any subdivision, agency or municipality thereof from negotiating with or providing for its employes insurance coverage for abortions through a health care or liability policy. The state or any subdivision, agency or municipality thereof may use state or local funds to pay for such coverage."; and

that said amendment was tabled by the Senate.

8. That in 1978, the Wisconsin legislature enacted Chapter 245, Laws of 1977 which provides, in pertinent part, as follows:

> 59.07(136) SUBSIDY OF ABORTIONS RESTRICTED. No county or agency or subdivision of the county may authorize funds for or pay to a physician or surgeon or a hospital, clinic or other medical facility for the performance of an abortion except those permitted under and which are performed in accordance with s 20.927.

9. That, after the effective date of Section 59.07(136) Stats., the County informed Blue Cross-Blue Shield that it would no longer pay the cost of elective abortions except those permitted under s. 20.927 Stats.; and that Blue Cross thereafter discontinued payments in connection with elective abortions.

10. That the County did not notify the Union of the change in insurance benefit prior to effecting such change; and that the County did not give the Union the opportunity to bargain about said change or the impact of said change.

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

CONCLUSIONS OF LAW

1. That the Respondent, by unilaterally changing the insurance coverage for bargaining unit employes, did not discriminate with respect to hire, tenure or other terms or conditions of employment for the purpose of encouraging or discouraging membership in Complainant, and therefore did not commit a prohibited practice in violation of 111.70(3)(a)3 of MERA.

2. That the Respondent, by unilaterally changing the insurance coverage for bargaining unit employes, did not interfer with, restrain or coerce all or any of its employes in the exercise of their rights set forth in Sec. 111.70(2) of MERA and therefore did not commit a prohibited practice in violation of Sec. 111.70(3)(a)1 of MERA.

3. That the Respondent, by unilaterally changing the insurance coverage for bargaining unit employes, did not violate the terms of a collective bargaining agreement previously agreed upon by the parties, and therefore did not commit a prohibited practice in violation of Section 111.70(3)(a)5 of MERA.

4. That the Respondent's change in insurance coverage was required pursuant to Section 59.07(136) Wis. Stats. and such change is a prohibited subject of bargaining and by not bargaining with Complainant about said change, Respondent did not commit a prohibited practice within the meaning of Section 111.70(3)(a)4 of MERA.

5. That the impact of the change in insurance coverage pursuant to Sec. 59.07(136) does affect the wages, hours and conditions of employment and the Respondent's refusal to bargain the impact of said change is a prohibited practice within the meaning of Section 111.70(3)(b)3 of MERA.

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

ORDER

IT IS HEREBY ORDERED that Milwaukee County, its officers and agents shall, upon request, immediately engage in collective bargaining with Milwaukee County District 48 concerning the impact of the unilateral change in insurance coverage pursuant to Section 59.07(136).

It is further ordered that the complaint be dismissed as to all alleged violations of MERA alleged, but not found herein.

Dated at Madison, Wisconsin this 11th day of November, 1981.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Lionel L. Crowley
Lionel L. Crowley, Examiner

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The facts giving rise to the complaint are not in dispute. The County unilaterally changed its insurance coverage by deleting hospitalization benefits for elective abortions. The County alleges that the change was made solely for the purposes of complying with Section 59.07(136) Wis. Stats.

UNION'S POSITION:

The Union argues that Section 59.07(136) is limited to the public funding of non-therapeutic abortions for the indigent and the term "funds" in that section does not include insurance payments pursuant to a negotiated agreement. The Union, relying on the contract clause of the constitution, also contends that Section 59.07(136) cannot be interpreted in a way that impairs the parties' contract. It asserts that Section 111.70 and Section 59.07(136) must be harmonized. Insurance coverage is primarily related to wages, hours and conditions of employment and thus is a mandatory subject of bargaining and an employer cannot unilaterally change such coverage without violating its duty to bargain under 111.70(3). Additionally, the employer cannot unilaterally modify the parties' collective bargaining agreement without violating Section 111.70(3)(a)5. Alternatively, the Union points to the Savings clause of the contract which provides that where a part of the Agreement is held invalid by operation of law, then the parties must meet and enter negotiations for the purpose of replacing such part. Therefore, the County's failure to negotiate at all on this subject is a violation of Section 111.70(3)(a)5.

COUNTY'S POSITION:

The County contends that Section 59.07(136) applies to all public funding of non-therapeutic abortions. It points to the legislative history, which includes the Union's notice to the legislature of its concern that the law would be construed to take away benefits and the defeat of the amendment which would have excluded insurance payments from Section 59.07(136), as establishing a legislative intent to prohibit the use of all government funds including insurance premiums. The County counters the Union's contract clause argument by pointing out that the contract clause has been held to be subordinate to the police power of the state for the protection of the public morals, public health, safety or welfare which was the basis on which Section 59.07(136) was passed. The County maintains that the passage of Section 59.07(136) made its insurance payments related to non-therapeutic abortions illegal and therefore a prohibited subject of bargaining. It asserts that Sections 111.70 and 59.07 are in conflict and cannot be harmonized. Regarding the Savings Clause, the County asserts that since the law makes it illegal to expend funds for non-therapeutic abortions, the replacement of this benefit cannot be negotiated.

DISCUSSION:

As a general rule, an employer may not make a change in a mandatory subject of bargaining without first negotiating such change with the exclusive bargaining agent. 1/ The Commission has consistently held that it is a per se refusal to bargain to make a unilateral change in wages, hours or conditions of employment without negotiations. 2/ The Commission has held that the scope of insurance

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1/ Madison Jt. School Dist. No. 8, (12610) 4/76; City of Madison, (15095) 12/76; NLRB v. Katz, 369 U.S. 736, 82 S. ct. 203, 8 L. Ed. 2d 1107(1962).

2/ Fennimore Jt. School District, (11865) 7/74; Winter Jt. School District No. 1, (14482-B) 3/77.

coverage is a mandatory subject of bargaining. 3/ Generally, where the collective bargaining agreement contains a provision such that the alleged activity may also constitute a violation of this agreement, the Commission will defer to arbitration except where the issues cannot be determined by the criteria contained in the provision of the collective bargaining agreement. 4/ Both parties to the instant dispute agree with these general principles; however, the County asserts that upon passage of section 59.07(136) the coverage for this single item became a prohibited subject and therefore an exception to the general rules. The issue in this case therefore involves the application of 111.70 Wis. Stats. in light of another Statute, 59.07(136). The Wisconsin Supreme Court has held that the interpretation of the relationship of two statutes is within the special competence of the Courts. 5/ In reviewing a Commission decision interpreting a statute other than Chapter 111, no special weight will be given the Commission's interpretation. The general rule applied by the Commission where two statutes are involved, is to harmonize the statutes where possible so that effect can be given to both. 6/ However, where an irreconcilable conflict exists between statutes, the result cannot be a collective bargaining agreement which authorizes a violation of law. 7/

Applying these principles, the undersigned concludes that Section 59.07(136) cannot be harmonized with Section 111.70(3)(a)4. This conclusion is based on the plain language of the Statute and the legislative history which indicates that the issue in this case was considered by the legislature and an amendment was offered to permit insurance payments. The amendment failed. Inasmuch as the County pays 100% of the premiums, the undersigned concludes that to require the County to make payments for the coverage previously provided would be to require it to commit an illegal act, hence the payment of funds for an abortion except as provided in Sec. 20.927 is a prohibited subject of bargaining.

The Union also points to Sec. 59.07(2)(c) Wis. Stats., which permits counties to pay insurance premiums, as legislative authorization for the continuation of the present insurance benefit. The legislature is presumed to enact a statute with full knowledge of other statutes and since Sec. 59.07(136) was enacted after Sec. 59.07(2)(c), Section 59.07(136) must be given effect over the prior enacted statute and therefore the Union's reliance on 59.07(2)(c) is misplaced.

The Union's argument that the change in insurance coverage interfered with, restrained or coerced employes in the exercise of their rights as set forth in Section 111.70(2) of MERA is not persuasive. The Commission has held that not all unilateral changes in wages, hours and conditions of employment conclusively interfere with, restrain or coerce employes in the exercise of their right set forth in Sec. 111.70(2). An employer's unilateral changes in response to changes in the Fair Labor Standards Act did not constitute a prohibited

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3/ City of Jefferson, (15482-A) 8/77; Village of Grafton, (14424-A) 11/76.

4/ Milwaukee Board of School Directors, (11330-B) 6/73.

5/ Glendale Professional Policeman's Ass'n v. Glendale, 83 Wis. 2d 90, 264 N.W. 2d 594 (1978).

6/ Muskego-Norway Consolidated Schools Jt. School Dist. No. 9 v. WERB, 35 Wis. 2d 540, 151 W.W. 2d 617 (1967).

7/ Glendale Professional Policeman's Ass'n v. Glendale, 83 Wis. 2d 90, 264 N.W. 2d 594 (1978).

practice during the pendency of a question of representation. 8/ In the instant case, there was no proof that the change in coverage would interfere with the exercise of employe's right under Sec. 111.70(2). Absent such proof, the undersigned concludes the County did not violate Secs. 111.70(3)(a)3 and 3(a)1.

The Union argues that the County's change in coverage violated the collective bargaining agreement in violation of the Federal and State constitution. This argument is not pursuasive, as the Savings Clause of the parties' collective bargaining agreement makes clear that the parties intended the terms of the agreement cannot be applicable if they are inconsistent with the law. The Commission has held that a contractual provision contrary to law is void. 9/ Additionally, the contractual rights in exclusively private enterprises or matters may not be applicable to the public sector where governmental interests and public concerns are involved. 10/ A unilateral change in the collective bargaining agreement by the Employer in compliance with the Privacy Act of 1974, 5 U.S.C. Sec. 552a was held proper. 11/ An Employer's reduction in the amount of its contribution toward health insurance from 65% to 50% during the term of the agreement in accordance with State law was held proper. 12/ The undersigned concludes that the Employer did not violate the collective bargaining agreement by its unilateral change in insurance coverage pursuant to statute.

Having found that the specific insurance coverage for abortions in this case is a prohibited subject of bargaining and the Employer's change therefore does not violate the provision of 111.70 nor the collective bargaining agreement, the Union points to the Savings Clause which requires the parties to negotiate a replacement provision. Since the provision is excluded by law, a replacement that requires the Employer to do an illegal act would likewise be prohibited.

The Commission has held that although an Employer's action is not a mandatory subject of bargaining, the impact of that action may be bargainable where it affects the employes' wages, hours and conditions of employment. 13/ In the instant case, there was a decrease in insurance benefits and while the exact benefit cannot be replaced, the affect on overall benefits can be negotiated. Although this issue was raised in the context of the Savings Clause, the undersigned is of the opinion that the matter relates to the impact of the Employer's action. For example, suppose the legislature passed a law which provided that counties could contribute only 50% of the total health insurance premium for its employes. 14/ Where contracts were in effect covering more than 50% of the premiums, the impact would be quite significant where premiums for family coverage can be well over $100 per month. The result would be a substantial loss to employes and a windfall to the Employer. The employes may have foregone wage increases for this benefit and while replacement of

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8/ City of Sparta, (12778-A) 12/74.

9/ Kenosha County, (14937-B, 14943-B) 1/78.

10/ Susquehanna Valley Cent. School Dist. at Conklin v. Susquehanna Valley Teachers Ass'n., 37 N.Y. 2d 614, 90LRRM 3046 (1975).

11/ Government Employees, Local 2047 v. DGSC, 94 LRRM 20584 (E.D. Vir., 1976).

12/ Holyohe Sch. Committee v Duprey, 102 LRRM 3007 (Mass., 1979) citing Watertown Firefighter Local 1347 v. Watertown, 383 N.E. 2d 494, 100 LRRM 2375 (1978).

13/ Beloit Education Association v. WERC, 73 Wis. 2d 43 (1976); Oak Creek-Franklin School District No. 1, (11827-0) 1/74 (aff. Dane Co. Ci. Ct. (1975).

14/ Holyoke Sch. Committee V. Duprey, supra.

the exact benefit may be a prohibited subject, the impact of this law would be a mandatory subject of bargaining.

While the issue of negotiations on the replacement of the insurance coverage was argued in the context of the Savings Clause, the undersigned concludes that bargaining the impact of the change in coverage is required apart from the Savings Clause. The undersigned deems that a bargaining order is the appropriate remedy as the record does not indicate that the Union submitted a specific request to bargain the impact of the change in insurance coverage.

Dated at Madison, Wisconsin this 11th day of November, 1981.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Lionel L. Crowley
Lionel L. Crowley, Examiner