

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MILWAUKEE DISTRICT COUNCIL 48,
AMERICAN FEDERATION OF STATE, COUNTY
AND MUNICIPAL EMPLOYEES, AFL-CIO
AND ITS AFFILIATED LOCAL 366,

Complainant,

vs.

MILWAUKEE METROPOLITAN SEWERAGE
DISTRICT,

Respondent.

Case CXXXV
No. 24835 MP-998
Decision No. 17123-B

Appearances

Podell, Ugent & Cross, S.C., by Mr. Alvin R. Ugent, Attorney
at Law, 207 East Michigan Street, Suite 315, Milwaukee,
Wisconsin, 53233, appearing on behalf of the Complainant.
Mr. Nicholas M. Sigel, Assistant City Attorney, 800 City Hall,
200 East Wells Street, Milwaukee, Wisconsin, 53202,
appearing on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Milwaukee District Council 48, American Federation of State, County and Municipal Employees, AFL-CIO and its affiliated Local 366, having on June 29, 1979, filed a complaint with the Wisconsin Employment Relations Commission alleging that Milwaukee Metropolitan Sewerage District had committed prohibited practices within the meaning of the Municipal Employment Relations Act (MERA); and the Commission having appointed Thomas L. Yaeger, a member of its staff, to act as Examiner and to make and issue Findings of Fact, Conclusions of Law, and Order in the matter as provided in Section 111.07(5) of the Wisconsin Statutes; and a hearing on said Complaint having been originally scheduled for August 9, 1979, but postponed on several occasions at the parties request and ultimately held on June 24, 1980, in Milwaukee, Wisconsin; and the parties having filed post-hearing briefs by November 18, 1980, and the Examiner, having considered the evidence and arguments and being fully advised in the premises makes and enters the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. That Milwaukee Metropolitan Sewerage District, hereinafter referred to as the Sewerage District, is a municipal employer with its principal office located at 735 North Water Street, Milwaukee, Wisconsin 53202.

2. That Milwaukee District Council 48, American Federation of State, County and Municipal Employees, AFL-CIO and its affiliated Local 366, hereinafter referred to as Local 366, is a labor organization with its principal offices located at 3427 West St. Paul Avenue, Milwaukee, Wisconsin 53208, and is the certified collective bargaining representative of certain employees in the employ of the Sewerage District.

No. 17123-B

3. That Local 366 and the Sewerage District were, for the period January 1, 1977 through December 31, 1978, parties to a collective bargaining agreement governing wages, hours and conditions of employment of certain employees of the Sewerage District; that said labor agreement contained a grievance procedure which provided for final disposition of grievances through binding arbitration and which was extended beyond the contract's expiration by mutual agreement; and that said labor agreement also contained the following provisions which also appeared in the parties 1975-76 agreement.

PART II

B. Union Negotiating Committee. The Union shall advise the Commission of the names of its negotiators. A total of up to sixty-four (64) hours bargaining time shall be paid for annually in negotiations during regular working hours. The Union may allocate the distribution of the sixty-four (64) hours among the members of its bargaining committee as it sees fit. The notification shall be at least forty-eight (48) hours in advance of a scheduled negotiation session unless there is less than forty-eight (48) hours between negotiations sessions, and then as soon as possible. The sixty-four (64) hours of bargaining time may be extended by mutual agreement.

Schedule A

W. Letter of Intent.

The existence or contents of a 'Letter of Intent' dated '1-21-71' and the parties' 1973-74 bargaining history concerning a past practice clause and 'Permanent Assignments' provision shall not be referred to by either party in any fact finding, interest or grievance arbitration, or other proceeding or action.

4. That in prior negotiations for the 1977-78 contract the Sewerage District paid for all scheduled work hours Local 366 bargaining team members spent in said negotiations; that during negotiations for said agreement, Local 366 made a bargaining proposal that the Sewerage District conform the contract to its practice with respect to paying Local 366 bargaining team members for all work hours spent in negotiations; that Mortier, Sewerage District chief negotiator, rejected this demand but assured Local 366 that the practice would continue notwithstanding the contractual limitation on pay for said hours, and thereafter, the proposal was dropped by Local 366.

5. That the Sewerage District and Local 366 commenced negotiations for a successor agreement to the 77-78 labor agreement in October, 1978; that in December 1978 during negotiations for the 1979-80 contract the issue of pay for time spent in bargaining by Local 366 bargaining committee members was first raised by the Sewerage District Personnel Director; that by letter dated May 22, 1979 the Sewerage District informed Local 366 it intended to follow the provision of the labor agreement, Part II-Section B, Union Negotiating Committee, and only pay up to 64 hours of bargaining time annually for negotiations held during regular working hours; that the Sewerage District informed Local 366 by letter on May 23, 1979, of its position on paid and unpaid union release time and placed Local 366 on notice as to the procedure it would follow concerning paid and unpaid union release time; that by another letter on the same date (May 23, 1979) the Sewerage District advised Local 366 what its payroll records disclosed concerning bargaining team members who were absent from work for contract negotiations and

requested Local 366 to advise it as to how to distribute the contractual provided for 64 paid hours among said employees; that Local 366 informed the Sewerage District on May 24, 1979, that it viewed the May 23, 1979, letter concerning union release time as a proposal to change existing contract language and past practice; that the Sewerage District informed Local 366 by letter on May 29, 1979 that its aforesaid May 23, 1979 letter was a notice of the Sewerage District's position on current contract language and that if past practice was in conflict with the labor agreement it was the Sewerage District's intention to abide by the agreement; that the Sewerage District did not bargain with Local 366 concerning its decision to only pay for the 64 hours provided for in the 1977-78 contract, and its disregard of the prior practice of going beyond the contract limitation and Mortier's assurance of the continuance of that practice; that Local 366 bargaining team members were not paid for all scheduled work hours spent in bargaining for the 1979-80 contract; and that on June 29, 1979, Local 366 filed the instant complaint.

6. That Local 366 did not file a grievance concerning the Sewerage District's alleged violation of the parties 1977-78 collective bargaining agreement by refusing to pay for more than 64 hours paid negotiating time.

On the basis of the above and foregoing Findings of Fact, the Examiner makes and issues the following:

CONCLUSIONS OF LAW

1. That Local 366 did not exhaust or attempt to exhaust the grievance and arbitration procedure established by the collective bargaining agreement between Local 366 and the Sewerage District with respect to its claim of breach of contract and, therefore, the Examiner will not assert the jurisdiction of the Commission to determine if the Sewerage District breached the 1977-78 contract.

2. That, inasmuch as paying employees for time spent in collective bargaining during regular working hours is a matter which is primarily related to wages, it is a mandatory subject of bargaining about which the Sewerage District had a duty to collectively bargain with Local 366, within the meaning of Section 111.70 (1)(d) of the Municipal Employment Relations Act.

3. That the Sewerage District's refusal to pay for more than 64 hours annually of regular working hours spent by its employees engaged in collective bargaining between it and Local 366 for a successor agreement to the parties 1977-78 contract unilaterally terminated a past practice of paying employees for all regular working hours spent in collective bargaining with Local 366 and thereby committed a prohibited practice within the meaning of Section 111.70(3)(a) 4 and 1 of the Municipal Employment Relations Act.

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

ORDER


1. Cease and desist from:
 - a. Refusing to bargain with Local 366 by unilaterally discontinuing a past practice of paying employees for all regular scheduled work hours spent by them in collective bargaining between it and Local 366.
2. Take the following affirmative action which the Commission finds will affectuate the policies of the Municipal Employment Relations Act:
 - a. Reimburse employees for all scheduled work hours spent in collective bargaining between the Sewerage District and Local 366 for a successor collective bargaining agreement to the 1977-78 contract.
 - b. Upon request, bargain to agreement or impasse prior to discontinuance in future negotiations of the practice of paying employees for regular scheduled work hours spent in negotiations with it and Local 366.
 - c. Notify all employees, by posting in conspicuous places on its premises, where notices to all employees are usually posted, a copy of the notice attached hereto and marked "Appendix A". Such notice shall be signed by an official of the Sewerage District and shall be posted immediately upon receipt of a copy of this order. Such notice shall remain posted for sixty (60) days thereafter. Reasonable steps shall be taken to insure that said notice is not altered, defaced or covered by other material.
 - d. Notify the Wisconsin Employment Relations Commission in writing within twenty (20) calendar days following the date of this Order as to what steps have been taken to comply herewith.

It Is Further Ordered that the complaint be dismissed as to all violations of MERA alleged, but not found herein.

Dated at Madison, Wisconsin this 17th day of March, 1981.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By


Thomas L. Yaeger, Examiner

MEMORANDUM ACCOMPANYING FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

Breach of Contract

Local 366 contends that the parties had mutually agreed to extend the amount of paid bargaining time to cover all hours spent in negotiations, consistent with the provision for same in Part II, Section B of the 1977-78 collective bargaining agreement. In support thereof, Complainant points to the past practice of the parties, a letter dated January 16, 1976 setting forth an agreement on "union release time", bargaining proposals made by the employer in September 1978 to abolish all side agreements, and the letters sent by the Sewerage District to Local 366 to demonstrate that it was changing what had been an accepted past practice between the parties. 1/

The Sewerage District contends that even though the agreement between the parties expired, the grievance and arbitration rights of the employees have been continued. Therefore, because this dispute is concerned with Part II, B of the parties 1977-78 contract it should be resolved through those procedures and not in this forum.

It is the Commission's policy not to assert its jurisdiction to determine the merits of breach of contract allegations when there exists a collective bargaining agreement providing for final and binding arbitration of such disputes and said procedure has not been exhausted. 2/ In the instant matter, the evidence demonstrates that although the parties agreement expired on December 31, 1978, the grievance and arbitration provisions thereof were continued by the parties. However, Local 366 did not attempt to grieve the alleged breach of contract and adduced no evidence to excuse same. The Examiner, therefore, will not assert the Commission's jurisdiction to determine the merits of the alleged breach of contract violation.

Refusal to Bargain

Local 366 avers that payment for time spent by employees in negotiating is a mandatory subject of bargaining and that the Sewerage District unilaterally changed that practice without first bargaining its discontinuance to impasse or agreement. Local 366 insists that the Sewerage District's refusal to pay for all time spent in negotia-

1/ Local 366 also argues the letter of intent signed January 1, 1971 supports its contention that the parties have agreed that its representatives would be paid by the Sewerage District for all time spent during regular working hours in negotiations. This letter states . . . "Retain same hours in contract with the understanding that all Bargaining Committee members will be paid for hours spent in negotiations held during such employees work hours." However, "Schedule A, W. Letter of Intent" of the parties 1977-78 collective bargaining agreement explicitly prohibits either party from referring to the January 1, 1971 letter of intent "in any fact finding, interest or grievance arbitration or other proceeding or action". Therefore, no consideration has been given to Complainant's contention that this 'Letter of Intent' supports its position.

2/ Oostburg Joint School District No. 14, (11196-A) 11/72.

tions effectively prevented the employees from engaging in the protected concerted activity of collective bargaining. In support thereof Local 366 argues that the Sewerage District chose to withhold payment in excess of sixty four hours even though it must have known this action would be inherently destructive of the employees ability to bargain collectively. Said actions resulted in negotiations being greatly drawn out forcing the parties to meet on weekends, evenings and in some cases not at all due to scheduling problems, and subjected Local 366's representatives to great strain and eventually demoralized them.

Contrariwise, the Sewerage District argues that complainant's claims it bargained in bad faith are not justified. In support thereof it contends that any monetary dispute should be resolved under the procedures available in the parties agreement, that Local 366 failed to demonstrate that it refused to consider any request to extend by mutual agreement the 64 hours, nor did Complainant demonstrate that it made such a request.

In City of Madison (16590) 10/78, the Commission held that a Union's bargaining proposal calling for the payment of employees regular wages for time spent attending an arbitration hearing during his scheduled work hours was primarily related to wages and, therefore, was a mandatory subject of bargaining. In rejecting the City's arguments that it was authorizing expenditures not for a public purpose the Commission said

"More importantly, we find that the reimbursement called for in the instant proposal is more than a payment of individuals who help the Union cause difficulties for the City. It is reimbursement of individuals for their efforts to (sic) furtherance of the process of peaceful resolution of disputes in a manner promotive of the policies underlying MERA, and set forth in Sec. 111.70(6) and implied in Sec. 111.70(4)(cm), Stats."

The subject dispute is concerned with the payment of wages for Local 366 bargaining committee members who attend negotiation sessions during their scheduled work hours. The undersigned is persuaded that the collective bargaining process in issue herein is even more fundamental to the furtherance of the policy of MERA to encourage the voluntary settlement of labor disputes through collective bargaining. 3/ Consequently, wages paid to employees participating in that process clearly are mandatory subjects of bargaining about which the Sewerage District has a duty to bargain. 4/

Implicit in the Sewerage District's defense to the charges of refusal to bargain, inter alia, is that the provision's of the 1977-78 labor agreement constitute a waiver by Local 366 of its right to demand to bargain about pay for employees' time spent in bargaining. Standing alone, that argument has merit, but the bargaining history herein negates that theory. The un rebutted testimony of Robert Vandehei, President of Local 366, was that during bargaining for the 1977-78 collective bargaining agreement the Union had a bargaining

3/ Section 111.70 (6), MERA.

4/ See also, Axleson, Inc., 97LRRM 1234 (1978); American Shipbuilding Co., 94LRRM 1422 (1976).

proposal to eliminate the 64 hour contractual limitation on pay for bargaining time to be consistent with prior practice. Furthermore, the Sewerage District's chief negotiator told the Union in those negotiations, when the proposal was discussed, that although the Sewerage District was agreeable to paying employees their wages for time spent in negotiations and gave his assurance that the practice would continue, he did not want to contractualize same, and thereby bring it to the attention of other labor organizations with whom there was a bargaining relationship. On the basis of that assurance, Local 366 withdrew its proposal to eliminate the 64 hour limitation contained in Part II, B of the contract.

In light of the assurance given Local 366 concerning continuation of the Sewerage District policy to pay for more than 64 hours of time spent in negotiations by its employees, it is reasonable to conclude therefrom that Local 366 was induced to drop its negotiating proposal in reliance upon Mortier's representations. Thus, it would be patently unreasonable to now permit the Sewerage District to rely upon that contract language in furtherance of its claim that same is evidence of a waiver by Local 366 of its right to demand to bargain over the Sewerage District's decision not to pay for more than 64 hours of Local 366 members time spent in collective bargaining. Consequently, the undersigned finds the Sewerage District is estopped from arguing that Part II, B operates as a waiver of Local 366's right to bargain about the change in practice.

Thus, what transpired is that the Sewerage District gave no notice of its intent to terminate its practice of paying for an unlimited number of hours spent by Local 366 members in bargaining. Rather, it presented the termination of the prior practice to Local 366 as afait accompli. 5/ It thereby unilaterally discontinued the past practice and precluded Local 366 from bargaining about same. This unilateral change in a past practice concerned with a mandatory subject of bargaining constituted a prohibited practice within the meaning of Section 111.70(3)(a)4 of MERA.

Domination

Complainant argues that the Sewerage District violated Section 111.70(3)(a)2 of MERA when it refused to pay for all time spent in negotiations during normal work hours. Respondent counters that the Complainant has a fair share provision and dues check-off provision, that after the agreement expired these provisions continued in effect, and that the Complainant was therefore financially able to continue negotiations.

The statutory prescription against employer domination contemplates an employer's active involvement in creating or supporting a labor organization which is representing its employees. 6/ However, there

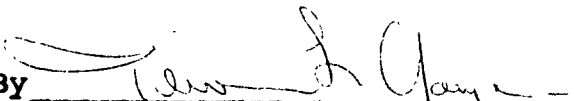
5/ Fennimore Joint School Dist. No. 5 (11865-A) 6/74.

6/ Richmond Schools (14691-A,B) 6/76.

is no evidence to establish Sewerage District domination or interference with the internal administration of Complainant's organization as contemplated by MERA. Therefore, the Examiner finds that the Respondent did not violate Section 111.70(3)(a)2 of MERA and dismisses that portion of the complaint.

Dated at Madison, Wisconsin this 17th day of March, 1981.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By 
Thomas L. Yaeger, Examiner

Appendix "A"

Notice to All Employees Represented
by Milwaukee District Council 48, AFSCME,
and Its Affiliated Local 366

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 employees that:

1. We Will immediately reimburse employees for all scheduled work hours spent in collective bargaining on behalf of Local 366 for a successor collective bargaining agreement to the 1977-78 contract.
2. We Will, upon request, bargain with Local 366 to agreement or impasse prior to discontinuance in future negotiations of the practice of paying employees for regular work hours spent in negotiations on behalf of Local 366.
3. We Will refrain from all other forms of interference, restraint, and coercion of employees in the exercise of their rights under Section 111.70(2) of the Municipal Employment Relations Act.

Dated this _____ day of _____, 1981.

By _____
Milwaukee Metropolitan Sewerage District