

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-C

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.

ORDER AFFIRMING EXAMINER'S FINDINGS OF FACT
CONCLUSIONS OF LAW AND ORDER

Examiner Thomas L. Yaeger having on March 17, 1981, issued his Findings of Fact, Conclusions of Law and Order with Accompanying Memorandum in the above-entitled matter wherein he concluded that the Respondent had committed prohibited practices within the meaning of Section 111.70(3)(a)4 and 1 of the Municipal Employment Relations Act (MERA) by unilaterally discontinuing a past practice of paying employees for all regularly scheduled work hours spent by them in collective bargaining, and wherein the Examiner ordered Respondent to reimburse employees for all scheduled work hours spent in bargaining for a successor agreement to the 1977-1978 contract, to bargain regarding said practice upon request of Complainant, and to post the appropriate notices; and the Respondent having on April 6, 1981 filed a petition for Commission review of said decision pursuant to Section 111.70(5), Stats.; and the parties having filed briefs in the matter, the last of which was received July 31, 1981, and the Commission having reviewed the record in this matter including the petition for review and the briefs filed in support thereof and in opposition thereto, and being satisfied that the Examiner's Findings of Fact, Conclusions of Law and Order should be affirmed in their entirety,

NOW, THEREFORE, it is

ORDERED

That the Examiner's Findings of Fact, Conclusions of Law and Order in the above entitled matter be and the same hereby are affirmed.

Given under our hands and seal at the City of
Madison, Wisconsin this 16th day of March, 1982

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Gary L. Covelli
Gary L. Covelli, Chairman

Morris Slavney
Morris Slavney, Commissioner

Herman Torosian
Herman Torosian, Commissioner

No. 17123-C

MEMORANDUM ACCOMPANYING ORDER AFFIRMING EXAMINER'S
FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

Background

The instant complaint alleged that Respondent committed prohibited practices within the meaning of Sections 111.70(3)(a)1, 2 and 5 of MERA. Complainant contended that Respondent breached the parties' contract by failing to pay employees for all regularly scheduled work hours spent by them in collective bargaining for a successor agreement to the 1977-78 contract. It also argued that Respondent's failure to pay for all time spent in negotiations constituted a unilateral change in the parties' past practice and as such constituted bad faith bargaining by Respondent. Respondent denied Complainant's allegations.

The Examiner's Decision

After review of the record along with the briefs of the parties, the Examiner found that he could not assert the Commission's jurisdiction with respect to the merits of the Section 111.70(3)(a)5 breach of contract allegation because the Complainant had failed to exhaust the final and binding contractual grievance procedure in the agreement. He also held that Respondent did not violate Section 111.70(3)(a)(2) of MERA because there was no evidence to establish Respondent's domination or interference with the internal administration of Complainant's organization as contemplated by MERA. He did, however, consider Complainant's Section 111.70(3)(a)1 and 4 allegations and made the following Findings of Fact:

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 of 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 contractually 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.

Based upon the foregoing Findings of Fact, the Examiner made the following Conclusions of Law:

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.

It is Findings of Fact 3, 4, 5 and Conclusions of Law 2 and 3 to which Respondent takes exception in its Petition for Review.

The Petition for Review

In support of its petition for review the District contends that the Examiner's Findings of Fact are "clearly erroneous". In said regard the District takes issue with the Examiner's finding of a binding past practice of paying for bargaining time which occurred during negotiations for the 1977-1978 collective bargaining agreement inasmuch as said alleged practice is contrary to the express provision in said agreement. The District further argues that in the negotiations

involved herein there was no request by the Union to bargain the matter of payment for hours spent bargaining in excess of the 64 hours set forth in the last agreement. The District argues that the record established the fact that the Union suggested that the District's negotiator "handle the matter" regarding the change in contract language and the past practice.

The District also argues that a substantial question of law and administrative policy is raised by the legal conclusions made by the Examiner and that prejudicial error resulted from the District's lack of notice that the Union's case was predicated on "its claim of bad faith bargaining" during negotiations leading to the successor 1979-1980 agreement. The District further notes that "the complaint was not amended during the course of the hearing to conform to such proof". The Respondent would have the Commission reopen the matter and permit the Respondent "to argue or file a memorandum in support" of its petition, and amend the Examiner's decision to conform with its petition.

The Union contends the Examiner did not commit any prejudicial error, and further that the findings made by the Examiner were supported by the evidence adduced during the course of the hearing.

Discussion

With respect to the District's contentions regarding the unilateral termination of the past practice relating to paying the Union's bargaining team for regularly scheduled work hours spent in negotiations, we are satisfied that the record supports the Examiner's Findings of Fact that the past practice did exist; that the Union had relied thereon to the extent that during the bargaining on the 1977-1978 agreement it had dropped its bargaining proposal which sought to conform the contractual language to said past practice, and that the District unilaterally terminated said practice during the course of bargaining on the 1979-1980 agreement. We also affirm the Examiner's legal conclusion and accompanying rationale to the effect that the payment of wages to employees of the Union bargaining team for regularly scheduled work hours spent in bargaining relates to a mandatory subject of bargaining, and that the unilateral termination of a practice relating to same constituted a violation of the District's duty to bargain such change under Section 111.70(3)(a)4 of MERA.


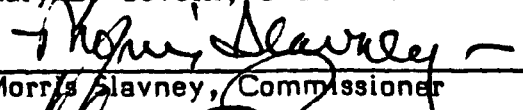

Turning to the District's claim of surprise regarding the Union's reliance upon past practice, we note that the Union's complaint specifically alleged that the District engaged in "bad faith negotiations", and that the District had committed a prohibited practice within the meaning of Section 111.70(3)(a)4 of MERA. We also note that Counsel for the District cross-examined the Union's president following the latter's direct testimony with regard to the establishment of the claimed "past practice" relating to payment of unlimited negotiating time during working hours. It should also be pointed out that the District did not call any witnesses to rebut the testimony of said Union officer. Nor did the District, during the course of the hearing, claim that it was "surprised" as a result of that testimony, and it did not request an adjournment to produce any testimony or evidence in regard thereto.

A review of the brief filed by the District with the Examiner indicates that it was entirely devoted to the issue as posed therein by the District - "Has there been bad faith bargaining on the part of the Respondent?" Approximately nine pages of said brief were devoted to arguments and exhibits introduced during the course of the hearing to support the District's claim that it had not failed to fulfill its statutory duty to bargain. For some reason not set forth in its president with respect to commitment made by the District's negotiator relating to

Examiner, and that said Findings substantiate the Conclusions of Law and Order made by the Examiner, we have affirmed his decision.

Dated at Madison, Wisconsin this 16th day of March, 1982

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By 
Gary L. Covelli, Chairman

Morris Slavney, Commissioner

Herman Torosian, Commissioner