STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

TEAMSTER'S UNION LOCAL NO. 695, Complainant, vs. COUNTY OF SAUK, Respondent.	Case XXVI No. 25806 MP-1077 Decision No. 17657-D

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

Examiner Dennis P. McGilligan having on March 24, 1981 issued his Findings of Fact, Conclusions of Law and Order with Accompanying Memorandum in the above-entitled matter, wherein he concluded that the County of Sauk had committed prohibited practices within the meaning of Section 111.70(3)(a)1 and 4 of the Municipal Employment Relations Act by failing to bargain over a mandatory subject of bargaining and having therefore ordered the County to cease and desist therefrom, and to take affirmative steps to remedy same; and the County having on April 13, 1981, filed a petition for Commission review of said decision, pursuant to Section 111.07(5), Stats.; and the parties having filed briefs in the matter, the last of which was received on May 14, 1981, and the Commission, having reviewed the record in the matter, including the petition for review and the briefs filed in support of and opposition thereto, being satisfied that the Examiner's decision be affirmed

NOW, THEREFORE, it is

ORDERED

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

Given under our hands and seal at the City of Madison, Wisconsin this 26th day of February, 1982.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Gary L. Covelli, Chairman

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Morris Slavney, Commissioner

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Herman Torosian, Commissioner

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

BACKGROUND

In its complaint the Union alleged that the Employer had violated its duty to bargain under Section 111.70(3)(a)4 of MERA by (1) unilaterally terminating a sick leave credit transfer policy and (2) unilaterally discontinuing fair share deductions. The Union also alleged that the Employer's unilateral actions violated the parties' bargaining agreement and that the Employer had refused to arbitrate a grievance, all in violation of Section 111.70(3)(a)5 of MERA. The Union further asserted that the Employer's actions constituted illegal interference within the meaning of Section 111.70(3)(a)1 of MERA. The Employer denied that its actions were violative of MERA and asserted that the contract had expired and, with it, the Employer's obligation to make fair share deductions and submit disputes to the grievance procedure. The Employer further asserted that the sick leave transfer policy had been instituted and operated without its knowledge, was in direct violation of the terms of the collective agreement and, therefore, could be discontinued summarily. The Employer denied the Union's contention that there had been an oral agreement on the sick leave transfers and, while not denying that such transfers had taken place over a four year period, suggested that the Sheriff was constitutionally barred from binding the County through a past practice. Finally, the Employer alleged that the Sheriff's own participation, and that of his family, in the transfer of sick leave credits, operated to prevent him from binding the County.

THE EXAMINER'S DECISION

In his decision the Examiner initially concluded that, inasmuch as the Employer had completely rejected the grievance arbitration provisions in the parties' collective bargaining agreement, it was appropriate to assert the Commission's jurisdiction under Section 111.70(3)(a)5 of MERA to determine whether the Employer's actions had violated said agreement. 1/ Finding that the parties' contract had expired and with it the Employer's contractual obligation to make fair share deductions, the Examiner concluded that the Employer's discontinuance of fair share deductions did not violate a collective bargaining agreement. As to the Employer's termination of the sick leave policy, the Examiner found that no contractual agreement regarding the policy existed and thus that the Employer had not violated a collective bargaining agreement in that regard. The Examiner dismissed the refusal to arbitrate allegation for lack of proof.

Turning to the refusal to bargain allegations, the Examiner, citing Gateway Vocational, Technical and Adult Education District, 2/ found that because the fair share provision of the expired contract inures to the benefit of the labor organization and does not primarily relate to the employer-employe relationship, said provision does not survive the expiration of the contract as a component of the status quo as to wages, hours and working conditions, which the Employer must maintain until it meets its bargaining obligation. As the Employer thus had no duty to extinguish its bargaining obligation before discontinuing fair share deductions upon the expiration of the contract, the Employer actions were not found to violate Section 111.70(3)(a)4.

1/ While neither party objected to this portion of the Examiner's rationale, we wish to point out that the Commission asserts its jurisdiction over the breach of contract claim not because the Employer had repudiated the arbitration process in an existing contract but rather because, due to the expiration of the contract, the arbitration procedure was no longer available to resolve the breach of contract claim.

2/ (14142-A,B) 1/78.

As to the Employer's duty to bargain over the sick leave credit transfer policy, the Examiner made the following Findings of Fact:

> 10. That prior to February of 1980 there existed a policy and practice by which an employer could transfer earned sick leave to another employe if an authorization of the transfer was signed by the donor, the Union Steward, and the Sheriff or Chief Deputy; that on or about February 14, 1980, Merle Baker received a copy of a letter dated February 8, 1980, to Sheriff Alan B. Shanks from Dudley Newson stating inter alia:
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> > By official action of the Personnel Committee, I am hereby informing you that the donation of sick leave credits to any employee by other employees from their accumulated sick leave earned pursuant to Article XI of the Collective Bargaining Agreement is contrary to the explicit language of that Agreement between Sauk County and Local No. 695, representing employees of the Sauk County Sheriff's Department, and any payments made on this basis are unauthorized, illegal, and shall be terminated forthwith.
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> that on February 15, 1980, Newsom confirmed the change in the above practice in a conversation with Baker.
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> 11. That there was no oral agreement reached between the Union and the County in negotiations for the 1976 collective bargaining agreement concerning the transfer of sick leave; that, however, there was a policy and practice regarding the transfer of sick leave as noted in Finding of Fact 10, above, in effect from 1976 until the February, 1980, letter of Dudley Newsom noted above; that on more than forty occasions bargaining unit employes donated sick leave to another employe and obtained the approval of the Sheriff or Chief Deputy; that on several occasions the Sheriff himself was involved in the transfer of sick leave; that the aforementioned transfers of sick leave between employes occurred on several occasions without a Union Steward's signature and that on each occasion until February of 1980 where an individual had received the donor's approval for the transfer of sick leave it had been approved by the Sheriff or his representative and made.

Citing Town of Caledonia 3/ the Examiner found that as the sick leave credit transfer policy did exist and constituted a mandatory subject of bargaining involving the employer-employe relationship, the Employer could not discontinue said policy until it had met its duty to bargain with the Union over the policy. As the Employer had unilaterally terminated the policy without so bargaining, the Examiner found a violation of Sec. 111.70(3)(a)4 and a derivative violation of Section 111.70(3)(a)1 of MERA.

The Examiner deemed the Employer's argument regarding the lack of a binding practice to be unpersuasive. The Employer asserted that Article VI, Sec. 4 of the Wisconsin Constitution operated to prevent any practice of the Sheriff from binding the County. Article VI, Sec. 4 provides in relevant part:

> Sheriffs . . . shall be chosen by the electors of the respective counties once in every two years . . . Sheriffs shall hold no other office; they may be required by law to renew their security from time to time; and in default of giving such new security their office shall be deemed vacant, but the County shall never be made responsible for the acts of the Sheriff." (emphasis added)

3/ (16237-A, B) 10/78.

The Employer maintained that in binding the County to a past practice in the Sheriff's Department, the Examiner would be making the County responsible for the acts of the Sheriff - a violation of the Constitution. The Examiner noted, however, that the constitutional provision was intended to prevent the County from being a surety and to spare the County treasury from liability to third parties damaged by acts of the Sheriff (Bablitch & Bablitch v. Lincoln County, 82 Wis. 2d 574, 579 (1977)). The Examiner further noted this Commission's determination that the Sheriff was not only an elected official, but also an agent of the County and a supervisory employe (Chippewa County (17328-B) 5/80). As an agent of the County, the Examiner concluded, the Sheriff was fully capable of binding the County to a practice without offending the Constitution.

The Examiner also rejected the Employer's argument that, irrespective of constitutional disability, the Sheriff could not bind the County under agency law because he had a personal interest in the policy. Citing Bank of California v. Hoffman, 255 Wis. 165, 38 N.W.2d 506 (1949), the Employer submits that an agent may not bind his principal in a transaction where the agent has an undisclosed personal financial interest inconsistent with the principal's best interest. Since the Sheriff and his wife both participated in the transfer of sick leave credits, the Employer argued that his adoption of the practice could attach no liability to the County as his principal. The Examiner distinguished this case from Hoffman on three grounds. First, the Examiner noted that there was no evidence of bad faith on the part of the Sheriff here, whereas the Court in Hoffman found ample evidence of bad faith. Second, the Sheriff here did not withhold information regarding the practice from his principal, as had been the case in Hoffman. Finally, the Sheriff here had only an incidental personal interest in the sick leave transfer policy, while the agent in Hoffman had a substantial and direct financial interest in the transactions under review. The Examiner therefore concluded that the Sheriff's participation in the transfers would not prevent the entire administrative scheme from constituting a binding past practice.

PETITION FOR REVIEW

The Employer's Petition for Review proposes several amendments to the Findings of Fact, and a reversal of the Conclusions of Law and Order to the extent that they found a violation of MERA, and it renews the constitutional and agency arguments.

The Employer first requests that the Commission strike any reference in Findings 10 and 11 to a "policy" or "practice" relating to sick leave credit transfers, alleging that these are actually Conclusions of Law. It further seeks to amend Findings 10 and 11 by adding language intended to show that no one in the County administration outside the Sheriff's Department had knowledge of the transfer practice before February 8, 1980. Finally, the Employer requests a specific finding that the Sheriff and his wife made use of the credit transfer system.

The above mentioned changes in the Findings are sought in order to bolster the legal arguments raised by the Employer, both of which go to the Sheriff's capacity to bind the County. First, the Employer maintains, as it did before the Examiner, that the Wisconsin Constitution specifically forbids the result in this case. Article IV, Section 4. Second, it renews its assertion that the Sheriff's personal stake in the transfer of sick leave credits rendered him incapable of acting as the County's agent for the purpose of establishing a binding past practice.

The Union urges that the Commission affirm the Examiner's Findings of Fact, Conclusions of Law and Order. However, should the Commission find that the Petition for Review has merit, the Union would urge the Commission to overturn the Examiner's finding that (1) no oral agreement on the sick leave transfer policy was reached in 1976, and that (2) the termination of the policy did not violate the Maintenance of Benefits clause in the parties' expired contract.

DISCUSSION

As to the assertion that Findings of Fact 10 and 11 should be amended, the Employer suggests that the words "practice" and "policy" denote conclusions of

law rather than findings of fact. It is undisputed that the employes of the Sheriff's Department had, as a matter of course, been able to transfer their sick leave credits to other employes. It is similarly undisputed that this state of affairs existed for four years with the knowledge and approval of the supervisory personnel within the department. The Employer's objection is premised on the legal consequences which attach to the finding. The fact that a legal conclusion may follow from a factual finding does not change the nature of the finding. The record in this case fully supports the finding made by the Examiner.

The Employer also seeks an amendment to Finding of Fact 10 to the effect that no person outside the Sheriff's Department was aware of the existence of this transfer practice. Such a finding would be inappropriate, as the record reflects only the fact that Ms. Carol Bassett, the Employer's Personnel Coordinator, was wholly unaware of the policy. The testimony of the Personnel Committee members indicated that they had never entered into an oral agreement on the subject. The record does not affirmatively demonstrate a lack of knowledge on the part of prior negotiating committees or the County Board. While the record would not support a finding that there was knowledge of the policy outside of the Sheriff's Department, neither does it support a finding that there was not. Most importantly, it should be noted that knowledge of the policy outside of the Sheriff's Department was not relevant to the Examiner's decision, as the Examiner found that the Sheriff was an agent of the Employer whose actions bound the principal.

The Employer asks that Finding of Fact 11 be expanded to specify that credit transfers were made to members of the Sheriff's own family. The findings adequately reflect the record on this point, and thus there is no need for the amendment requested.

Turning to the Employer's constitutional argument, there is no dispute in this case as to whether the acts of the Sheriff were sufficient to bind the County, had the actor been other than the Sheriff. The Employer suggests that this Sheriff lacked capacity, both institutionally and personally to bind the County.

The Wisconsin Constitution provides, in Article VI, Sec. 4, that ". . . the county shall never be made responsible for the acts of the sheriff." A binding past practice involves making management, in general, responsible for the acts of one of its members. The Employer maintains that, where the management is a county and the member is the Sheriff, this provision prohibits the Commission from finding a binding past practice.

This provision of the Constitution reflects the fact that the traditional duties of the Sheriff were more conducive to litigation than those of other constitutional county officers. The Wisconsin Supreme Court in interpreting the provision found that its purpose was to prevent the County from acting as a surety, and to guard the County treasury from third party claims against the Sheriff. 4/

The administration of a collective bargaining agreement is not one of the traditional duties which were the focus of the amendment. 5/ The County stands at no greater risk because the employes here are supervised by the Sheriff than it would if they were supervised by any other elected County official. The distinction urged by the Employer is thus without rational basis. The actions of the Sheriff in this instance, and the attendant liability, are not in the class from which the amendment insulates the County. There being no conflict between

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4/ Bablitch & Bablitch v. Lincoln County, 82 Wis. 2d 574 (1977).

5/ The Commission has previously commented on the dual role of the county sheriff both as an independent elected official and as a supervisory employe and agent of the County. See Chippewa County (17328-B) 5/80.

a finding of liability under Sec. 111.70(3)(a)1 and 4 of MERA and the Wisconsin Constitution, 6/ the Commission affirms the Examiner's conclusion that a sheriff may bind the county through past practice. 7/

As to the Employer's arguments regarding the impact of the Hoffman case, it is clear that the Sheriff's wife, as a member of the bargaining unit, engaged in the transfer of sick leave credits. The Employer contends that this granted the Sheriff a personal interest in the creation and administration of the policy, thus disqualifying him from acting as the County's agent in that regard. The Employer relies on Bank of California v. Hoffman, 255 Wis. 165, 38 N.W.2d 506 (1949) to support this contention.

The fiduciary breach which was the basis of the Court's decision in Hoffman is clearly absent here. Hoffman concerned a trust arrangement with multiple transactions, all of which directly and substantially benefitted the fiduciary. The record in this case shows no similar pattern. There is no suggestion that the policy in question was initiated for the personal benefit of the Sheriff, 8/ nor that it was so administered. Rather, it is clear that any benefit to the Sheriff was purely incidental to the general benefit enjoyed by all members of the Department. The Examiner's conclusion that the Sheriff acted, not from personal motives, but as an agent of the County is fully supported by the record.

Having agreed with the Examiner that a binding sick leave credit transfer practice existed and further agreeing that said practice could not be terminated until the Employer met its bargaining obligation, the Commission has affirmed the Examiner's Conclusion that the Employer's unilateral termination of the policy violated Sections 111.70(3)(a)4 and 1 of MERA.

Dated at Madison, Wisconsin this 26th day of February, 1982.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Gary L. Covelli
Gary L. Covelli, Chairman

Morris Slavney, Commissioner

Herman Torosian, Commissioner

6/ There is a sentence in the Examiner's dicta to the effect that MERA modifies the Constitution. Reviewing the Examiner's reasoning, it is clear that he did not base his decision on this misstatement, but rather held, as we do, that the two were harmonious.

7/ The Commission would note that, even if the sheriff was constitutionally unable to bind the county, the record would still support the finding of a binding past practice. Of the 60 transfer forms entered into evidence, 50 bore the signature of the Chief Deputy, not the Sheriff. The Chief Deputy is a supervisory employe and, under the Respondent's reasoning, would be the highest ranking agent of the county in the Sheriff's Department.

8/ The testimony at the hearing indicated quite the contrary. It is apparent that this policy was first proposed by the Union in the course of negotiations on the collective agreement.