STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of	
MILWAUKEE DISTRICT COUNCIL 48, AFSCME, AFL-CIO	Case CXIII No. 24163 DR(M)-118 Decision No. 17832
and	
MILWAUKEE COUNTY	
For a Declaratory Ruling	

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, CONCLUSION OF LAW AND DECLARATORY RULING

Milwaukee District Council 48, AFSCME, AFL-CIO having filed a petition with the Wisconsin Employment Relations Commission requesting that the Commission issue a declaratory ruling, pursuant to Section 111.70(4)(b) of the Municipal Employment Relations Act to determine whether Milwaukee County has a duty to bargain a particular discipline and discharge provision with said Petitioner; and hearing having been conducted fefore Stephen Schoenfeld, a member of the Commission's staff, on March 19, 1979, and the parties having submitted post-hearing briefs, the last of which was received on August 23, 1979; and the Commission having considered the evidence and arguments adduced by the parties and being fully advised in the premises, makes and files the following

FINDINGS OF FACT

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

2. That Milwaukee County, hereinafter referred to as the County, has its offices at 901 North 9th Street, Milwaukee, Wisconsin.

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 in said relationship the Union and the County have been parties to successive collective bargaining agreements covering the wages, hours and conditions of employment of the employes represented by the Union; that in negotiations leading to a two-year agreement, commencing January 1, 1979, the Union and the County agreed, as they had in past agreements, that a permanent umpire would issue final and binding awards with respect to disputes arising over the interpretation and/or application of the terms of their collective bargaining agreement; that, in addition, the Union proposed to expand the jurisdiction of said umpire to matters involving the discharge of employes in the unit, and to discipline of employes in the unit, where the discipline involved a suspension of more than ten days; that such proposal reads as follows:

4.06 DISCIPLINE AND DISCHARGE

(1) In cases where an employee is disciplined, suspended or discharged, the Union shall have the right to refer such discipline, suspension or discharge to the permanent umpire (or such other umpire or arbitrator as may be selected pursuant to 4.05), who shall proceed in accordance with the provisions provided for herein. In the event the employee elects to have his discipline or discharge heard by the Civil Service Commission (or Personnel Review Board) this section shall not apply.

(2) In the event such discipline, suspension or discharge is referred to the permanent umpire, such reference shall, in all cases, be made within 60 working days from the effective date of such suspension, discipline or discharge. The decision of the umpire shall be served upon the Department of Labor Relations and the Union. In such proceedings the provisions of sec. 4.05 (3)(c) shall apply.

(3) Where discipline or discharge is to be imposed because of tardiness, unexcused absence or sleeping on duty, incidents of such conduct which occurred more than 12 months prior to the current alleged incident shall not be taken into account in determining the severity of such discipline or discharge.

4. That the County contended that the above proposal relates to a prohibited subject of bargaining, inasmuch as determinations as to the propriety of discipline of employes over ten days, and as to the discharge of employes are, pursuant to Sec. 63.10, Wis. Stats., solely within the jurisdiction of the Milwaukee County Civil Service Commission; and that as a result, during their negotiations, the Union and the County, as part of their existing collective bargaining agreement, included the following provision therein:

4.08

. . .

(2) If it is determined by a tribunal of competent jurisdiction that discipline and discharge of employes in Milwaukee County is a mandatory subject of bargaining, the parties will reopen this Agreement within 30 days of receipt of such order for the purpose of negotiating those issues which are a proper subject for codetermination relating thereto. However, in the event the parties are unable to reach agreement, the provisions of s. 63.10, Wis. Stats., shall apply.

5. That on February 16, 1979 the Union filed the petition herein requesting the Wisconsin Employment Relations Commission to determine whether the proposal of the Union, as set forth in para. 3., supra,

constitutes a mandatory subject of bargaining within the meaning of the provisions of the Municipal Employment Relations Act.

Upon the basis of the above and foregoing Findings of Fact, the Commission makes and issues the following

CONCLUSION OF LAW

That the proposal made by Milwaukee District Council 48, AFSCME, AFL-CIO, in collective bargaining with Milwaukee County, to the effect that said Union has the right to proceed to final and binding arbitration, before an umpire selected by the Union and the County, with respect to disputes arising from the discipline, suspension or termination of employes of the County, which employes are represented in collective bargaining by the Union, cannot be harmonized with Sec. 63.10, Wis. Stats., relating to civil service procedures covering certain County employes, and that, therefore, said proposal constitutes a prohibited subject of bargaining within the meaning of the Municipal Employment Relations Act.

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

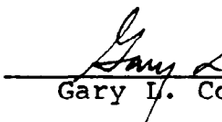
DECLARATORY RULING

That Milwaukee County has no duty to bargain collectively with Milwaukee District Council 48, AFSCME, AFL-CIO with regard to the latter's proposal relating to final and binding arbitration of discipline, suspension and discharge of employes represented by said Union.

Given under our hands and seal at the City of Madison, Wisconsin this 22nd day of May, 1980.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By 
Morris Slavney, Chairman


Gary L. Covelli, Commissioner

Commissioner Torosian has not participated in the instant matter since he participated in mediation with the parties.

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSION OF LAW AND DECLARATORY RULING

During the course of bargaining on a new collective bargaining agreement the Union proposed, in effect, that suspensions of employes for more than ten days, as well as termination of employes, by the County, should be subject to final and binding arbitration by the mutually selected umpire, rather than determined in accordance with the provisions of Sec. 63.10, Wis. Stats., by the Milwaukee County Civil Service Commission, through its Personnel Review Board. The County contends that such a proposal relates to a prohibited subject of bargaining, since, if adopted, it would nullify said statutory provisions. The Union contends that, since the proposal relates to matters affecting the employment conditions of employes in the bargaining unit represented by the Union, the proposal relates to a mandatory subject of bargaining. 1/ The Union avers that Sec. 63.10 contains no language which suggests a waiver of the collective bargaining duty of the County, and further, if there is a conflict between the provisions of the Municipal Employment Relations Act (MERA) and Sec. 63.10, which cannot be harmonized, then the provisions of MERA modifies and controls Sec. 63.10, since MERA was adopted subsequent to Chapter 63. In support of the latter argument the Union relies on the Commission decision in City of Sun Prairie, 2/ wherein the Commission, in resolving a statutory conflict between Sec. 62.13(5) and Sec. 111.77 of MERA, found the latter section controlling since it was adopted subsequently to Sec. 62.13(5).

The Union also argues that the proposal can be harmonized with Sec. 63.10, inasmuch as the existence of the umpire forum for discipline, suspension and discharge of employes provides an alternative forum for the employes involved to challenge such action imposed on them, and since a classified employe may exercise statutory rights by electing to proceed before the Personnel Review Board, or proceed to a final determination by the umpire, there is an accomodation of Sec. 63.10.

The County argues that Sec. 63.10 supercedes the provisions of MERA since said statutory procedure is intended by the legislature to be the exclusive procedure to determine the propriety of such discipline and discharge of County employes. The County also claims that the determination of whether the proposal involved constitutes a mandatory subject of bargaining should be determined by the courts and not the Wisconsin Employment Relations Commission.

Discussion

We deem it appropriate to first consider the jurisdiction of the Wisconsin Employment Relations Commission to determine whether the proposal involved herein relates to a mandatory subject of bargaining or whether such an issue is within the initial jurisdiction of the courts of this State. Sec. 111.70(4)(b) of MERA, in part, provides as follows:

1/ The County does not claim that discipline and/or discharge of employes do not relate to working conditions.

2/ Dec. No. 11703-A, 9/73.

> Whenever a dispute arises between a municipal employer and a union of its employes concerning the duty to bargain on any subject, the dispute shall be resolved by the Commission on a petition for a declaratory ruling.

Thus, it is clear that the WERC has, by statutory mandate, jurisdiction to determine the issue involved herein, subject, of course, to review by the courts.

The Union correctly points out that discipline and discharge certainly has an effect on the working conditions of employes, and that the WERC has previously held in the City of Sun Prairie case that such subjects are mandatory subjects of bargaining under MERA, and generally, so are proposals relating to grievance and arbitration procedures. With respect to our decision in City of Sun Prairie, we wish to note that said case involved a different statutory provision than Sec. 63.10, and we further note that subsequent to that decision the Wisconsin Supreme Court has articulated the proposition that a collective bargaining agreement cannot violate existing law, and that where an irreconsilible conflict exists between a provision in a collective bargaining agreement and a state statute, the statute must prevail. 3/ We must therefore determine whether such a conflict exists between the Union's proposal and Sec. 63.10, which provides as follows:

> (1) Whenever a person possessing appointing power in the county, the chief executive officer of a department, board or institution, the county park commission, county election commission, civil service commission, and county board of welfare as to officers and employes under respective jurisdictions, believes that an officer or employe in the classified service in his or its department has acted in such a manner as to show him to be incompetent to perform his duties or to have merited demotion or dismissal, he or it shall report in writing to the civil service commission setting forth specifically his complaint, and may suspend the officer or employe at the time such complaint is filed. It is the duty of the chief examiner to file charges against any officer or employe in the classified service upon receipt of evidence showing cause for demotion or discharge of such officer or employe in cases where a department head or appointing authority neglects or refuses to file such charges. Charges may be filed by any citizen against an officer or employe in the classified service where in the judgment of the commission the facts alleged under oath by such citizen and supported by affadvait of one or more witnesses would if charged and established amount to cause for the discharge of such officer or employe. The commission shall forthwith notify the accused officer or employe of the filing of such charges and on request provide him with a copy of the same. Nothing in this subsection

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3/ Glendale Professional Policemen's Assn. v. City of Glendale, 83 Wis. 2d 90 (1976).

shall limit the power of the department head to suspend a subordinate for a reasonable period not exceeding 10 days. In case an employe is again suspended within 6 months for any period whatever, the employe so suspended shall have the right of hearing by the commission on the second suspension or any subsequent suspension within said period the same as herein provided for in demotion or dismissal proceedings.

(2) The commission shall appoint a time and place for the hearing of said charges, the time to be within 3 weeks after the filing of the same, and notify the person possessing the appointing power and the accused of the time and place of such hearing. At the termination of the hearing the commission shall determine whether or not the charge is well founded and shall take such action by way of suspension, demotion, discharge or reinstatement, as it may deem requisite and proper under the circumstances and as its rules may provide. The decision of the commission shall be final. [Neither the person possessing the appointing power nor the accused shall have the right to be represented by counsel at said hearing, but the commission may in its discretion permit the accused to be represented by counsel and may request the presence of an assistant district attorney to act with the commission in an advisory capacity.

The plain reading of the above statutory provision indicates that said Civil Service Commission has been authorized by the Legislature to issue final decisions with respect to employe suspensions (more than ten days), demotion, discharge or reinstatement. The Union's proposal would provide employes represented by it with an alternate forum -- the procedure leading to a final award by the umpire. Can the procedure involving the Civil Service Commission and the procedure involving the umpire be harmonized? The Union contends that they can be, since the existence of the umpire forum constitutes an alternative forum for employes in the civil service of the County to challenge discipline, suspension and discharge decisions of supervisory personnel of the County, and since such employes may continue to exercise their civil service rights (Sec. 63.10 procedure), or proceed to final and binding arbitration before the umpire, an accomodation between said statutory provision and its proposal is accomplished. This argument ignores the fact that the statute requires that an employe is entitled to a hearing before the action contemplated against the employe is meted out. The Union's proposal contemplates that the action against the employe has been accomplished prior to proceeding before the umpire. Further, while the Union's proposal would permit the employe to have the Union proceed before the umpire, or grant the employe involved the choice to proceed under Sec. 63.10, the proposed provision does not provide such a choice to the County's appointing authority, or to the supervisory personnel of the County who are involved. 4/

We are aware that the statutory provision involved herein does not require the Civil Service Cimmission to "permit the accused to be

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4/ Even had the proposal provided the parties with alternate forums, it would not alter our conclusion herein.

represented by counsel." However, said Commission has adopted rules which permits such representation. Our Supreme Court has stated that proceedings under Sec. 63.10 are subject to due process. 5/ Therefore, we are satisfied that the Union, or anyone selected by the employe, can properly represent unit members in proceedings held pursuant to Sec. 63.10. We have previously so held in Milwaukee County, (14834-A, B) 6/77.

The Union's contention that its proposal is consonant with Sec. 63.10 is without merit, and for the reasons articulated herein we conclude that the proposal relates to a prohibited subject of bargaining, and therefore, the County has no duty to collectively bargain with the Union with respect thereto.

Dated at Madison, Wisconsin this 22nd day of May, 1980.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Morris Slavney, Chairman

_____
Gary L. Covelli, Commissioner

5/ Stas v. Milwaukee County Civil Service Commission, 75 Wis. 2d 465 (1977).