

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MILWAUKEE COUNTY FIREFIGHTERS  
ASSOCIATION,

Complainant,

vs.

MILWAUKEE COUNTY,

Respondent.

Case CXLVII  
No. 26976 MP-1166  
Decision No. 18216-B

Appearances:

Godfrey & Kahn, S.C., Attorneys at Law, 780 North Water Street,  
Milwaukee, Wisconsin 53202, by Mr. John V. Kitzke, for  
the Complainant.

Mr. Patrick J. Foster, Principal Assistant Corporation Counsel,  
Milwaukee County, Milwaukee County Courthouse, Room 303,  
901 North 9th Street, Milwaukee, WI 53233, for the Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The above named Complainant having filed a complaint with the Wisconsin Employment Relations Commission on October 28, 1980 alleging that the above named Respondent had committed certain prohibited practices within the meaning of the Municipal Employment Relations Act (MERA); and the Commission having appointed Peter G. Davis, a member of its staff, as Examiner to make and issue Findings of Fact, Conclusions of Law and Order as provided in Sec. 111.07(5), Stats; and hearing on said complaint having been held before the Examiner in Milwaukee, Wisconsin on December 8, 1980; and briefs having been received on January 13, 1981 along with two post-hearing exhibits submitted by the parties; and the Examiner having considered the evidence and arguments of the parties, makes and issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. The Milwaukee County Firefighters Association, herein the Complainant, is a labor organization which functions as the exclusive collective bargaining representative of certain individuals who are employed by Milwaukee County as firefighters.

2. Milwaukee County, herein the Respondent, is a municipal employer.

3. Complainant and Respondent were parties to a 1979-1980 collective bargaining agreement which provided for final and binding impartial resolution of "disputes between the parties arising out of the interpretation, application or enforcement" of its terms and contained the following provisions:

1.03 DURATION OF AGREEMENT

(1) The provisions of this Memorandum of Agreement shall become effective after ratification by both parties in accordance with Section 17.06, C.G.O., and shall terminate on December 31, 1980, unless otherwise modified or extended by mutual agreement of the parties.

(2) Conferences and negotiations shall be carried on between the parties during the year 1980 as follows:

Step 1 - Initial bargaining proposal of each party shall be exchanged at the first regularly scheduled meeting of the Personnel Committee in September, 1980.

Step 2 - Negotiations to begin on or about September 31, 1980.

Step 3 - Conclusion of negotiations November 1, 1980.

(3) This timetable is subject to adjustment by mutual agreement of the parties consistent with the progress of negotiations.

1.04 MANAGEMENT RIGHTS. The County of Milwaukee retains and reserves the sole right to manage its affairs in accordance with all applicable laws, ordinances, resolutions and executive orders. Included in this responsibility, but not limited thereto, is the right to determine the number, structure and location of departments and divisions; the kinds and number of services to be performed; the right to determine the number of positions and the classifications thereof to perform such service; the right to direct the work force; the right to establish qualifications for hire, to test and to hire, promote and retain employes; the right to transfer and assign employes, subject to existing practices and the terms of this Agreement; the right, subject to civil service procedures and the terms of this Agreement related thereto, to suspend, discharge, demote or take other disciplinary action and the right to release employes from duties because of lack of work or lack of funds; the right to maintain efficiency of operations by determining the method, the means and the personnel by which such operations are conducted and to take whatever actions are reasonable and necessary to carry out the duties of the various departments and divisions.

In addition to the foregoing, the County reserves the right to make reasonable rules and regulations relating to personnel policy procedures and practices and matters relating to working conditions, giving due regard to the obligations imposed by this Agreement. However, the County reserves total discretion with respect to the function or mission of the various departments and divisions, the budget, organization, or the technology of performing the work. These rights shall not be abridged or modified except as specifically provided for by the terms of this Agreement, nor shall they be exercised for the purpose of frustrating or modifying the terms of this Agreement. But these rights shall not be used for the purpose of discriminating against any employe or for the purpose of discrediting or weakening the Association.

By the inclusion of the foregoing management rights clause, the Fire Fighters do not waive any rights set forth in Chapter 111.70, Wisconsin Statutes, created by Chapter 124, Laws of 1971, relating to bargaining the impact upon wages, hours or other conditions of employment of employes affected by the elimination of jobs within the unit by reason of the exercise of the powers herein reserved to management.

4. In September, 1980 Complainant submitted its initial proposals for a new contract to Respondent. Said proposals included the following statement:

28. No Subcontracting of Services provided by members of the Association.

The initial bargaining session was held on or about November 11, 1980 and shortly thereafter Respondent submitted its initial proposals to Complainant.

5. In December, 1980 during the term of the parties' 1979-1980 collective bargaining agreement, Respondent decided that the fire protection services at the Milwaukee County Institutions, which were being provided by employes represented by Complainant, should be furnished to the Respondent by the City of Wauwatosa. On or about December 18, 1980 Respondent entered into a contract with the City of Wauwatosa whereby the City of Wauwatosa would begin to provide said fire protection services effective December 31, 1980.

6. Respondent did not bargain with Complainant over its decision to subcontract fire protection services.

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

#### CONCLUSIONS OF LAW

1. As the parties' 1979-1980 collective bargaining agreement provides for final and binding impartial resolution of disputes "arising out of the interpretation, application or enforcement" of said agreement, the Examiner will not assert the Commission's jurisdiction under Sec. 111.70(3)(a)5 of MERA to determine whether Respondent violated Section 1.03(2) of the 1979-1980 agreement.

2. Complainant, through Section 1.04 of the parties' 1979-1980 collective bargaining agreement, waived any right it may have had to bargain over Respondent's decision to subcontract certain fire protection services and thus Respondent's failure to bargain over said decision did not constitute a prohibited practice within the meaning of Sec. 111.70(3)(a)4 of MERA.

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

#### ORDER

That the instant complaint be, and the same hereby is, dismissed.

Dated at Madison, Wisconsin this 2nd day of February, 1981.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By

  
Peter G. Davis, Examiner

MEMORANDUM ACCOMPANYING FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND ORDER

Complainant alleges that Respondent has committed prohibited practices within the meaning of Sections 111.70(3)(a)4 and 5, Stats., respectively, by refusing to bargain over the decision to subcontract certain fire protection services and by failing to comply with the bargaining timetable contained in Section 1.03(2) of the parties' 1979-1980 contract. 1/ Respondent denies said allegations asserting that it had no duty to bargain over the decision to subcontract because (1) such a decision is a permissive subject of bargaining and (2) because, in any event, Complainant had contractually waived any right to insist that Respondent bargain about same. As to Complainant's assertion that Respondent violated Section 1.03(2) of the 1979-1980 contract, Respondent argues that such a dispute should be resolved through the grievance-arbitration procedure contained in said contract.

Refusal to Bargain

Absent waiver, Section 111.70(3)(a)4 precludes a municipal employer from unilaterally implementing any change in a mandatory subject of bargaining unless it has discharged its duty to bargain with the bargaining representative of its employees. 2/ Here it is clear that Respondent did not bargain with Complainant over the decision to subcontract. Thus if the decision to subcontract was a mandatory subject of bargaining and if Complainant did not waive its right to bargain, Respondent must be found to have committed a prohibited practice under Section 111.70(3)(a)4. However, such a conclusion is unwarranted herein because the record establishes that Complainant has contractually waived any right to demand bargaining over the instant decision to subcontract. A discussion of the basis for this finding follows.

Section 1.04 of the parties' 1979-1980 contract provides a listing of rights retained by Respondent including:

. . . the right to determine . . . the kinds and number of services to be performed; . . . the right to maintain efficiency of operations by determining the method, the means and the personnel by which such operations are conducted and to take whatever actions are reasonable and necessary to carry out the duties of the various departments and divisions.

Said Section ends with the following statement:

By the inclusion of the foregoing management rights clause, the Fire Fighters do not waive any rights set forth in Chapter 111.70, Wisconsin

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1/ During the hearing Complainant amended its complaint by dropping its allegations that Respondent had violated Sections 111.70(3)(a)1, 2 or 3, Stats.

2/ Madison Jt. School Dist. (12610) 4/74; New Richmond Jt. School Dist. (15172-A) 7/77, aff'd Comm. (15172-B) 5/78.

Statutes, created by Chapter 124, Laws of 1971, relating to bargaining the impact upon wages, hours, or other conditions of employment of employees affected by the elimination of jobs within the unit by reason of the exercise of the powers herein reserved to management. (emphasis added)

Waiver of a duty to bargain will not be found absent clear and unmistakable evidence. 3/ By agreeing to the foregoing language which explicitly recognizes Respondent's ability to eliminate jobs and retains bargaining rights for Complainant only as to the impact of job elimination, it must be found that Complainant clearly and unmistakably waived for the duration of the contract any right it may have had to bargain over a decision to subcontract. 4/ As the instant decision to subcontract was made during the term of the 1979-1980 agreement, waiver has been found. Given this finding, the Examiner finds it unnecessary to determine whether the decision to subcontract was a mandatory or permissive subject of bargaining. Similarly no opinion need be expressed as to the mandatory or permissive nature of Complainant's subcontracting proposal for the parties' 1981 contract.

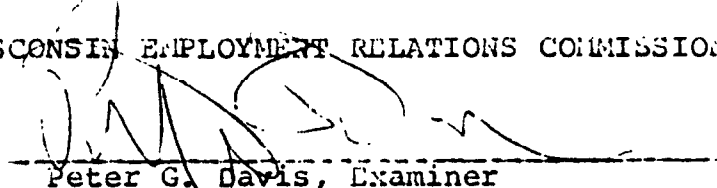
#### Violation of Contract

In cases too numerous to cite, the Commission has held that where there exists a contractual procedure for the binding and impartial resolution or disputes regarding compliance with a bargaining agreement, it will not assert its jurisdiction under Sec. 111.70(3)(a)5, Stats., to determine whether a contractual violation has occurred. As the parties' 1979-1980 contract contains such an impartial binding procedure, the Examiner will not reach the merits of Complainant's assertion that Respondent violated the bargaining timetable contained in Section 1.03(2) of said contract.

Dated at Madison, Wisconsin this 2nd day of February, 1981.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

BY

  
Peter G. Davis, Examiner

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3/ Ibid.

4/ Complainant does not appear to dispute the foregoing interpretation of Section 1.04 and indeed has deemed it necessary to place a no subcontracting proposal on the bargaining table. Instead Complainant seems to argue that because the parties are currently bargaining over the terms of a new contract which Complainant hopes will include its no subcontracting proposal, Respondent cannot exercise the rights which it has contractually retained. Said argument is hopelessly in conflict with existing labor law and would, if adopted, destroy the essential stability provided by binding labor contracts of a specific duration.