STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

THE CITY OF BROOKFIELD LIBRARY EMPLOYEES, LOCAL 20, AFSCME, AFL-CIO,	:	
Complainant,	:	Case XXXV No. 28884 MP-1273
vs.	:	Decision No. 19367-B
CITY OF BROOKFIELD,	:	
Respondent.	:	

Appearances:

Mr. Richard W. Abelson, Representative, South Shore District 2, Wisconsin Council 40, WCCME, AFSCME, AFL-CIO, 2216 Allen Lane, Waukesha, Wisconsin 53186, appearing on behalf of Complainant.

Godfrey, Trump & Hayes, Attorneys at Law, by Mr. Tom E. Hayes, 250 East Wisconsin Avenue, Milwaukee, Wisconsin 53202, appearing on behalf of Respondent.

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

Examiner David E. Shaw having, on November 10, 1982, issued his Findings of Fact, Conclusions of Law and Order with Accompanying Memorandum in the above-entitled proceeding, wherein he concluded that Respondent had not committed prohibited practices within the meaning of Sections 111.70(3)(a)1, 2, 3 or 4 of the Municipal Employment Relations Act (MERA) and therefore ordered that the instant complaint be dismissed in its entirety; and Complainant having, on November 19, 1982, filed a petition for Commission review of said decision; and the parties having filed briefs in the matter, the last of which was received on March 16, 1983, and the Commission having reviewed the record in the matter including the petition for review and the briefs filed in support of and in opposition thereto, and being satisfied that the Examiner's decision should be affirmed;

NOW, THEREFORE, it is

ORDERED 1/

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 15th day of December, 1983.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Herman Torosian /s/
Herman Torosian, Chairman

Gary L. Covelli /s/
Gary L. Covelli, Commissioner

Marshall L. Gratz /s/
Marshall L. Gratz, Commissioner

1/ Pursuant to Sec. 227.11(2), Stats., the Commission hereby notifies the parties that a petition for rehearing may be filed with the Commission by (Footnote continued on Page Two)

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

BACKGROUND

In its complaint initiating this proceeding, the Complainant alleged that the Respondent committed prohibited practices within the meaning of Sections 111.70(3)(a)1, 2, 3, and 4 of the Municipal Employment Relations Act (MERA) by unilaterally changing the work assignments of two bargaining unit employes during the pendency of an election in the unit. In particular, it alleged that after an election petition was filed, the Respondent assigned two employes the duties of a higher classification without any corresponding promotion or reclassification to the respective higher classification and that this action coerced, restrained and interfered with the rights of employes guaranteed them under Sec. 111.70(2), Stats., interfered with the formation of a labor organization, and discriminated against them with respect to conditions of employment. The Complainant further alleged that after it was certified as the exclusive collective bargaining representative, it requested that the employes be reclassified and that the Respondent's denial of said request constituted a refusal to bargain.

In response, the Respondent asserted that it had for some time determined to automate certain library functions by means of a computer, and during and after the transition from manual to computer operations, certain changes were to occur including a reduction in the number of employes and changes in the duties of the remaining employes. It alleged that two employes left during the transitional period and that these positions were not filled but certain of their duties were assigned to the remaining bargaining unit employes. It denied committing any prohibited practice and claimed that the assignment of duties was within the scope of employment of the bargaining unit employes, and therefore, not a mandatory subject of bargaining.

THE EXAMINER'S DECISION

The Examiner found that the Respondent began a study of the application of an automated system to the Library more than a year prior to the filing of the election petition on March 26, 1981 and made a final decision in December, 1980, to convert to the automated system. As a result of these actions, employes were aware that after conversion, fewer staff would be required in the Library and the duties of the remaining staff would be altered. Prior to the filing of the election petition, the Respondent learned that two employes, Kelpin and Laatsch, were leaving their employment at the Library and the Library Director recommended that two other employes, Collins and Ihn, be promoted to their positions. The Respondent decided to discontinue the two positions and not to promote these employes during the conversion process. Also, before any petition for election was filed, the employes were aware that no promotions would occur. After the petition was filed, the physical conversion began and the assignments of all employes were altered to some extent. At this same time, Kelpin and Laatsch left and certain of their duties were then assigned to Collins and Ihn respectively, as well as to other employes of the Library. The Examiner determined that while these changes occurred during the pendency of the election petition, these were part of a course of action established prior to the Complainant's arrival on the scene and did not constitute interference because these actions did not contain an express or implied threat of reprisal or promise of benefit that tended to interfere with rights guaranteed to employes.

The Examiner found no evidence either that Respondent made any effort to create or assist a union so as to be able to dominate it or that it had interfered with the internal administration of any union.

The Examiner decided that the Respondent had not discriminated against Collins and Ihn on the basis of their concerted activities as there was no showing that Collins and Ihn had engaged in any protected activity, and that most of the Respondent's actions had taken place prior to the filing of the election petition, and were for a legitimate business purpose.

basis to reverse or modify the Examiner's Findings of Fact and Conclusion of Law on this issue. Generally, during the pendency of a question of representation, an employer that withholds benefits normally given or previously promised raises an inference that this action is connected to the presence of the union and the upcoming election so as to interfere with, restrain, or coerce employes in the exercise of their rights. 2/ Similarly, an employer cannot grant new benefits to employes during the pendency of an election as this raises an inference that the employer is trying to influence employes in the election. 3/ In essence, the employer must maintain the "status quo" in the granting or not granting of benefits. Hence, an employer that grants benefits in accordance with an established past practice maintains the "status quo" and does not commit a prohibited practice. The Complainant alleges that the Respondent had an established past practice of promoting employes to vacancies and that its refusal to grant this benefit in the instant case constituted interference in accordance with the principles set out above. As indicated, such action creates an inference and this inference may be enforced, for example, where the employer blames the union's presence for denial of the benefit, or may be rebutted, where, for example, the employer has taken action for a legitimate business reason. In other words, if the union was not present and no election was pending, would the employer have denied these benefits? Assuming arguendo that there was an established past practice of promotion, and further assuming that these employes were assigned the duties of the higher position, did the Respondent have a legitimate basis for not granting them a promotion with corresponding higher pay? The Examiner found and the evidence supports the conclusion that there was a legitimate basis for the Respondent's actions. Prior to the election petition being filed, the Respondent had determined to automate the Library which ultimately would result in reduction in the number of positions and a change in duties of the remaining positions. The reduction in positions was to be, insofar as possible, by attrition, and job duty changes would occur during the transition and after completion of the automation, at which point, ultimate job duties would be determined. Employes were aware of these results prior to the election petition being filed. Additionally, the Library Director had recommended the promotion of Collins and Ihn and these recommendations were denied. Essentially the employes also knew prior to the filing of the petition that the vacancies would not be filled and they would not be promoted. The Respondent's actions, on May 8, 1981, after the petition had been filed, were in accordance with its prior announced decisions. Had the Respondent granted promotions after previously indicating that none would be given, interference could be inferred. The Respondent's adherence to its prior decisions does not establish that its actions were an attempt to influence the employes in the exercise of their rights as to gain or support a union. The result is that Respondent's actions did not constitute a threat of reprisal or a promise of a benefit. Therefore, the Commission concludes that the Examiner properly applied the law to the facts in determining that the allegation of interference be dismissed. 4/

The Complainant also contends that the Examiner erred by finding that the Respondent did not refuse to bargain in good faith in violation of Sec. 111.70(3)(a)4, Stats. The Complainant argues that the Respondent's refusal to promote the employes, while maintaining the same high level of duties and responsibilities as prior to the vacancies, in effect, unilaterally changed the status quo of the wages for the bargaining unit, thereby requiring Complainant to bargain from a lower level of wages to maintain pre-petition wage levels. The Complainant's argument is novel but it is not persuasive for the same reasons set out above with respect to the interference charge. Additionally, the mere reduction of the total wage level of the bargaining unit does not necessarily constitute a mandatory subject of bargaining. One instance of such reduction, which the Complainant in its brief conceded to be proper, is where vacancies occur and the duties of the vacant positions are not reassigned to remaining employes. Moreover, the Respondent could decide to reorganize the structure of the work

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2/ City of Sparta, 12778-A (12/74); New Richmond Jt. School District No. 1, 15172-A (6/77).

3/ Dunn County, 17035-B, 17049-B (2/81); Town of Mercer, 14783-A (3/77).

4/ See Menomonie Jt. School District No. 1, 14811-C (3/78), where the alteration of work assignments during the pendency of an election proceeding as part of a pre-petition decision to reorganize administration in the District was found not to constitute interference.

force such that the overall wage level of the bargaining unit may be decreased, 5/ or the Respondent could decide to assign duties within the scope of employment of existing employes and such decision would not be a mandatory subject of bargaining. 6/ The Complainant further asserts that the Examiner's determination, that the change in duties of Collins and Ihn were within the scope of their employment, is erroneous. A review of the evidence presented supports the Examiner's conclusion that the assigned duties were within the scope of their employment. 7/ Of course, the impact of the Respondent's actions is a mandatory subject of bargaining, however, a decision which is a permissive subject of bargaining, may be implemented prior to bargaining the impact of such decision. 8/

The Complainant alleged in its complaint that after it was certified as the collective bargaining representative, the Respondent refused to bargain on the reinstatement of wages and working conditions. The Examiner concluded that the evidence failed to demonstrate any refusal to bargain by the Respondent after the Complainant was certified. In its brief in support of its petition for review, the Complainant argues that the Respondent's commission of a prohibited practice would not be released by subsequent collective bargaining. That is not an issue in dispute. The Examiner concluded that there was no prohibited practice committed by the Respondent, prior to certification, and he further concluded that the Respondent did not refuse to bargain on demands submitted by the Complainant after it was certified. The Complainant does not deny that subsequent collective bargaining was engaged in by Respondent, nor does it refute the Examiner's finding that there was not an independent refusal to bargain after certification. Therefore, we find no basis to conclude that the Respondent refused to bargain in violation of Section 111.70(3)(a)4, and we find that the Examiner correctly dismissed the complaint in its entirety.

Dated at Madison, Wisconsin this 15th day of December, 1983.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Herman Torosian /s/
Herman Torosian, Chairman

Gary L. Covelli /s/
Gary L. Covelli, Commissioner

Marshall L. Gratz /s/
Marshall L. Gratz, Commissioner

5/ Brown County, 19025 (5/81).

6/ City of Milwaukee Sewerage District, 17025 (5/79).

7/ The Examiner's Findings of Fact 9 and 11, are amply supported by the record and provide a sufficient basis for finding that these duties were fairly within the scope of their employment.

8/ City of Madison, 17300-C (7/83).

With respect to the allegation that Respondent had refused to bargain collectively with the Complainant by unilaterally changing the job duties of Collins and Ihn, the Examiner concluded that Respondent had not refused to bargain collectively. The Examiner pointed out that the status quo must be viewed dynamically, and while the ongoing change in the Respondent's operation, which began before the arrival of Complainant, was a change in the status quo during the pendency of an election, there was no evidence that such change was motivated by anti-union animus and was not likely to interfere with the protected rights of employes. The Examiner held that the Respondent was not obligated to bargain with the Complainant until after it was certified as the exclusive collective bargaining representative. The Examiner also determined that the Respondent had no obligation to bargain the assignment of work to Collins and Ihn after certification because this assignment of duties was fairly within the scope of the duties they had been performing, and therefore, was a permissive subject of bargaining. The Examiner found that the Respondent recognized its duty to bargain the impact of its assignments and that Respondent did not refuse to bargain on impact. Consequently, the Examiner dismissed the complaint in its entirety.

PETITION FOR REVIEW

In its petition for review, the Complainant asserts that the Examiner's "Findings of Fact are clearly erroneous" and "that substantial questions of law and administrative policy are involved." It does not specify which Findings of Fact was in error. It argues that the Examiner ignored the Respondent's past practice of promoting employes internally and granting them an appropriate promotional wage increase. It contends that after the election petition had been filed, Collins and Ihn were assigned the duties of Kelpin and Laatsch, respectively, but they were not given the pay commensurate with the new positions. The Complainant infers that the Respondent's denial of promotions during the pendency of the election, which had always been given in accord with the established past practice, constituted interference.

The Complainant also claims that the status quo, as it related to wages, was altered during the pendency of the election proceeding. It points out that the Respondent's refusal to give promoted employes the appropriate wage increase altered the overall wages of the unit while maintaining the same duties and responsibilities of the unit. It argues that as the status quo was thereby significantly altered as to wage rates of individuals as well as the entire bargaining unit, Respondent committed a prohibited practice by violating Sec. 111.70(3)(a)4, Stats. It disagrees with the Examiner's conclusion that the change in status quo was part of an ongoing change of operation by the Respondent, and instead contends that this change was something that would take place in the distant future and did not justify the type of change in status quo which occurred in this case. The Complainant further disagrees with the Examiner's conclusion that the changes in Collins' and Ihn's duties were within the scope of their respective old jobs. It argues that the evidence clearly establishes that these duties were new. It further takes the position that although collective bargaining took place after the Respondent's actions in this matter, that fact does not excuse the Respondent's prior commission of a prohibited practice.

The Respondent contends that the Complainant's arguments are based on two incorrect premises, namely: 1) an employer is required to promote and to fill vacancies during an organizational period, and 2) an employer is obliged to keep total payroll costs at the preorganizational level.

The Respondent contends these are erroneous because if true, a union would have greater rights during an organizational period than after certification, and further, neither premise is a mandatory subject of bargaining. The Respondent contends that its conversion to computerization did not occur instantly but over a period of time with resultant job changes along the way. It also points out that Complainant failed to prove that Collins and Ihn performed job duties after the "so-called promotion" which had not been performed by them before it, i.e., duties outside the scope of their present classification.

DISCUSSION

The first issue raised by Complainant in its petition for review is that the Examiner failed to find that there was a change in status quo constituting interference with the rights of employes. We have reviewed the record and find no

1/ (Continued)

following the procedures set forth in Sec. 227.12(1) and that a petition for judicial review naming the Commission as Respondent, may be filed by following the procedures set forth in Sec. 227.16(1)(a), Stats.

227.12 Petitions for rehearing in contested cases. (1) A petition for rehearing shall not be prerequisite for appeal or review. Any person aggrieved by a final order may, within 20 days after service of the order, file a written petition for rehearing which shall specify in detail the grounds for the relief sought and supporting authorities. An agency may order a rehearing on its own motion within 20 days after service of a final order. This subsection does not apply to s. 17.025 (3)(e). No agency is required to conduct more than one rehearing based on a petition for rehearing filed under this subsection in any contested case.

227.16 Parties and proceedings for review. (1) Except as otherwise specifically provided by law, any person aggrieved by a decision specified in s. 227.15 shall be entitled to judicial review thereof as provided in this chapter.

(a) Proceedings for review shall be instituted by serving a petition therefor personally or by certified mail upon the agency or one of its officials, and filing the petition in the office of the clerk of the circuit court for the county where the judicial review proceedings are to be held. Unless a rehearing is requested under s. 227.12, petitions for review under this paragraph shall be served and filed within 30 days after the service of the decision of the agency upon all parties under s. 227.11. If a rehearing is requested under s. 227.12, any party desiring judicial review shall serve and file a petition for review within 30 days after service of the order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. The 30-day period for serving and filing a petition under this paragraph commences on the day after personal service or mailing of the decision by the agency. If the petitioner is a resident, the proceedings shall be held in the circuit court for the county where the petitioner resides, except that if the petitioner is an agency, the proceedings shall be in the circuit court for the county where the respondent resides and except as provided in ss. 182.70(6) and 182.71(5)(g). The proceedings shall be in the circuit court for Dane county if the petitioner is a nonresident. If all parties stipulate and the court to which the parties desire to transfer the proceedings agrees, the proceedings may be held in the county designated by the parties. If 2 or more petitions for review of the same decision are filed in different counties, the circuit judge for the county in which a petition for review of the decision was first filed shall determine the venue for judicial review of the decision, and shall order transfer or consolidation where appropriate.

Note: For purposes of the above-noted statutory time-limits, the date of Commission service of this decision is the date it is placed in the mail (in this case the date appearing immediately above the signatures); the date of filing of a rehearing petition is the date of actual receipt by the Commission; and the service date of a judicial review petition is the date of actual receipt by the Court and placement in the mail to the Commission.