

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

BARRON COUNTY HIGHWAY	:	
DEPARTMENT, EMPLOYEES LOCAL	:	
518, WCCME, AFSCME, AFL-CIO,	:	Case XXXVII
	:	No. 28730 MP-1262
Complainant,	:	Decision No. 19514-A
	:	
vs.	:	
	:	
BARRON COUNTY	:	
(HIGHWAY DEPARTMENT),	:	
	:	
Respondent.	:	
	:	

Appearances:

Mr. David Ahrens, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 5 Odana Court, Madison, Wisconsin 53719, appearing on behalf of Complainant.

Mulcahy & Wherry, S.C., Attorneys at Law, 815 East Mason St., Suite 1600, Milwaukee, Wisconsin 53202, by Mr. Mark Olson, appearing on behalf of Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On October 20, 1981 Barron County Highway Department Employees Local 518, WCCME, AFSCME, AFL-CIO filed a complaint of prohibited practices against Barron County. The Wisconsin Employment Relations Commission appointed Sherwood Malamud, a member of the Commission's staff, to serve as Examiner to make and issue Findings of Fact, Conclusions of Law and Orders in the above captioned matter pursuant to Section 111.07(5), Wis. Stats., as said provision is made applicable to municipal employment by Section 111.70(4)(a) of the Municipal Employment Relations Act. Complainant and Respondent agreed to submit the entire record to the Examiner by stipulation. Briefs were submitted by the parties and exchanged through the Examiner. Based upon the stipulated record and briefs of the parties, the Examiner makes and issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. Barron County Highway Department Employees Local 518, WCCME, AFSCME, AFL-CIO, hereinafter the Union, is a labor organization and at all times pertinent hereto, it maintained offices at 600 Colan Boulevard, No. 5, Rice Lake, Wisconsin and at 5 Odana Court, Madison, Wisconsin.
2. Barron County, hereinafter the County, is a municipal employer and it maintains its offices in the Barron County Courthouse in Barron, Wisconsin.
3. The Union is the certified exclusive collective bargaining representative of employes of the County employed in a collective bargaining unit described as follows:

All full-time employes, regular seasonal employes and student employes, but excluding the Highway Commission, Patrol Superintendent and confidential employes for the purpose of collective bargaining with respect to wages, hours and conditions of employment.

4. The Union and the County have an established collective bargaining relationship. In the past, they have negotiated and executed a number of collective bargaining agreements, the one most proximate to the filing of the within complaint was in effect for the period from January 1, 1979 through December 31, 1980. Said agreement contains a grievance procedure wherein, at the first step, the employe and/or union representatives orally present the grievance to the employe's immediate supervisor; at the second step, the grievance is reduced to writing and presented to the Highway Commissioner; at the third step, the grievance may be appealed to the Highway Committee; and the procedure culminates in final and binding arbitration.

5. In their bargaining for a successor to the 1979-1980 agreement, the parties were unable to reach an accord and they employed the impasse procedures established pursuant to Section 111.70(4)(cm) of the Municipal Employment Relations Act. On July 30, 1981, after an impasse had been declared by the Wisconsin Employment Relations Commission and a Mediator/Arbitrator appointed, they participated in mediation/arbitration before Arbitrator Sharon Imes.

6. During the hiatus period, after the expiration of the 1979-1980 agreement but prior to the issuance of an award by Mediator/Arbitrator Sharon Imes, specifically, on August 18, 1981, the Union filed a grievance which arose during the hiatus on behalf of LeRoy Whitman, an employe in the Highway Department bargaining unit described in paragraph 3 above, concerning the charge of certain absences of grievant to vacation rather than to sick leave. District Representative David Ahrens and Shop Steward Ervin Frie requested a meeting with the Barron County Highway Commission concerning the above grievance.

7. On August 25, 1981 Walter S. Knutson responded by letter to the Union's request to meet on the Whitman grievance. Said letter states in material part that:

Considering that Local 518 AFSCME has no ratified contract in effect I do not feel it is appropriate to consider any grievances at this time.

8. The Union appealed the grievances to the Barron County Highway Committee by an undated letter. On September 11, 1981 the Union received a letter signed by all members of the Barron County Highway Committee which in pertinent part states as follows:

Considering that Local 518 AFSCME has no ratified contract in effect we do not feel it is appropriate to consider any grievances at this time.

9. None of the impasse issues in the Mediation/Arbitration process concern any of the issues raised in the August 18, 1981 Whitman grievance; vacation and sick leave provisions are included in the 1979-1980 agreement and constitute part of the status quo in existence at the time the grievance arose and at the time it was filed.

10. The County continues to refuse to process the Whitman grievance through the grievance procedure.

Based upon the above and foregoing Findings of Fact, the Examiner makes and issues the following

CONCLUSIONS OF LAW

1. By its refusal to meet and process the Whitman grievance, Barron County has unilaterally altered the status quo in existence at the expiration of the 1979-1980 collective bargaining agreement, and it has thereby breached its duty to bargain in violation of Section 111.70(3)(a)4 of the Municipal Employment Relations Act; and

2. By its refusal to meet and process the Whitman grievance, Barron County has interfered with the Union's right and the right of the employes it represents granted by Section 111.70(1)d and Section 111.70(2) of MERA, and thereby Respondent violated Section 111.70(3)(a) 1 of the Municipal Employment Relations Act.

3. By its refusal to process the grievance which arose under the expired agreement, Respondent did not violate Section 111.70(3)(a)5 of the Municipal Employment Relations Act.

Based upon the above and foregoing Findings of Fact and Conclusions of Law, the Examiner makes and issues the following

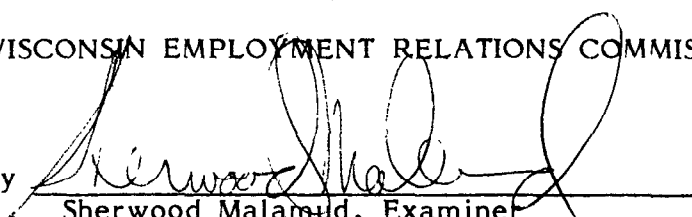
ORDER

1. The allegation of the complaint claiming that Respondent violated a collective bargaining agreement be, and the same hereby is, dismissed.
2. Respondent Barron County, its agents, officers and officials shall cease and desist from refusing to process the LeRoy Whitman grievance, and Respondent, its agents, officers and officials shall cease and desist from refusing to process grievances which arise during the hiatus period between the expiration of a collective bargaining agreement and the execution of a successor agreement with Complainant Union.
3. Respondent Barron County, its agents, officers and officials shall take the following affirmative action which the Examiner finds will effectuate the policies and purposes of the Municipal Employment Relations Act:
 - a) Immediately process the LeRoy Whitman grievance through the several steps of the grievance procedure.
 - b) Duplicate the Notice appended hereto in a manner such that the print is no smaller than the print in the attached Notice, and post said Notice marked as Appendix A in all places where employe notices are normally posted for a period of thirty (30) days, and Respondent shall take steps to insure that no other matter covers said Notice and that said Notice is not altered or defaced in any way.
 - c) Notify the Wisconsin Employment Relations Commission within twenty (20) days of the date of this decision as to the steps taken to comply herewith. 1/

Dated at Madison, Wisconsin this 20th day of October, 1982.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By


Sherwood Malamud, Examiner

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- 1/ Any party may file a petition for review with the Commission by following the procedures set forth in Sec. 111.07(5), Stats.

Section 111.07(5), Stats.

(5) The commission may authorize a commissioner or examiner to make findings and orders. Any party in interest who is dissatisfied with the findings or order of a commissioner or examiner may file a written petition with the commission as a body to review the findings or order. If no petition is filed within 20 days from the date that a copy of the findings or order of the commissioner or examiner was mailed to the last known address of the parties in interest, such findings or order shall be considered the findings or order of the commission as a body unless set aside, reversed or modified by such commissioner or examiner within such time. If the findings or order are set aside by the commissioner or examiner the status shall be the same as prior to the findings or order set aside. If the findings or order are reversed or modified by the commissioner or examiner the time for filing petition with the commission shall run from the time that notice of such reversal or modification is mailed to the last known address of the parties in interest. Within 45 days after the filing of such petition with the commission, the commission shall either affirm, reverse, set aside or modify such findings or order, in whole or in part, or direct the taking of additional testimony. Such action shall be based on a review of the evidence submitted. If the commission is satisfied that a party in interest has been prejudiced because of exceptional delay in the receipt of a copy of any findings or order it may extend the time another 20 days for filing a petition with the commission.

APPENDIX "A"

NOTICE

Pursuant to an order issued by an Examiner of the Wisconsin Employment Relations Commission, upon the complaint of Barron County Highway Department Employees Local 518, WCCME, AFSCME, AFL-CIO, Barron County was found to have committed prohibited practices under the Municipal Employment Relations Act, and Barron County does hereby notify its employees employed in the Barron County Highway Department who are represented by Local 518, that Barron County:

1. Shall process the LeRoy Whitman grievance through the steps of the grievance procedure up to but not including arbitration.
2. Shall hereinafter process grievances which arise during the hiatus, between an expired agreement and the execution of a successor agreement, through the steps of the grievance procedure up to but not including arbitration.

Dated at Barron, Wisconsin this day of , 1982.

By _____
Barron County Highway Commissioner

THIS NOTICE MUST BE POSTED FOR THIRTY (30) DAYS FROM THE DATE HEREOF AND MUST NOT BE ALTERED, DEFACED OR COVERED BY ANY MATERIAL.

MEMORANDUM ACCOMPANYING FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

Barron County Highway Department Employees Local 518, WCCME, AFSCME, AFL-CIO filed a complaint in which it alleges Barron County interfered with employe rights, refused to bargain with the Union, and violated a collective bargaining agreement in violation of Section 111.70(3)(a)1, 4, and 5 of the Municipal Employment Relations Act. The County denied it violated any provision of the Municipal Employment Relations Act. The Union and the County stipulated to the facts and argued the matter in written briefs.

Positions of the Parties:

The Union contends, citing Greenfield Schools (14026-B) 11/77 and Gateway Vocational, Technical and Adult Education District, (14142-B) 3/78, that the County is obligated to process grievances which arise during a hiatus period between agreements through the steps of the grievance procedure. The grievance procedure is part of the status quo which may not be altered. The Union cites Bethlehem Steel Co., 136 NLRB 1500 (9962) as private sector precedent for the same principle, that mandatory subjects of bargaining may not be unilaterally altered during a hiatus period.

The Employer, citing NLRB authority, 2/ contends that with the expiration of the agreement, it is not obligated to process grievances which arise during the hiatus through the several steps of the grievance procedure. The Employer's argument is premised on the notion that there can be no violation of a collective bargaining agreement in the absence of an agreement. Genesco, Inc. v. Joint Council 13 cite 230 F. Supp. 923 (D.C.S.D.N.Y., 1964) 56 LRRM 2487. The Employer notes that it has not substituted one grievance procedure for another. The County has refused to process a grievance through the grievance procedure to arbitration because it is under no duty to do so where the agreement has expired. The County asserts that legal precedent proscribes the substitution of an employer grievance procedure for one appearing in the expired agreement; it does not require compliance with a procedure contained in that expired agreement. The County argues it should not be required to arbitrate a dispute where the contract contains no agreement to submit the dispute to arbitration. Steelworkers v. Warrior Gulf Navigator Co. 363 U.S. 574 (1960). The County concludes that it was under no legal duty to process the grievance through arbitration, since the parties' agreement expired.

Discussion:

At the outset, it is necessary to clarify what is at issue. There is no evidence in this record that the Union asked the County to participate in the arbitration of the Whitman grievance. The Union demanded that this grievance be processed through the grievance procedure up to arbitration. Therefore, the County's reliance on Proctor & Gamble, supra is misplaced. In that case, the Union attempted to compel the Employer to arbitrate a grievance. The Employer's reliance on Genesco, Inc., supra is misplaced as well. In Genesco, the issue before the Court was whether a successor agreement had been achieved.

Here the question is simply, whether or not the County is obligated to process grievances through the established grievance procedure up to arbitration, during the hiatus period between agreements.

In School District No. 6, City of Greenfield, (14026-B) 11/77 the Commission stated the following with regard to the status of a grievance procedure in an expired collective bargaining agreement:

2/ United Steelworkers of America, D.C., 230 F Supp 923 (1964); International Brotherhood of Electrical Workers v. Wadsworth Electrical Manufacturing Co., 240 F. Supp. 292 (E.D. Ky. 1965); Marine Shipbuilding Workers v. NLRB, 320 F. 2d 615 (3rd C.C.A., 1963) Cert. den'd, 375, U.S. 984 (1964); Proctor & Gamble Independent Union of Port Ivory v. Proctor Gamble Co., 312 F. 2d 181 (2nd C.C.A. 1962).

Unlike an arbitration provision, however, the grievance procedure comes within the rule that an employer must maintain the status quo of conditions contained in the expired agreement. Although utilization of the grievance procedure upon expiration of the agreement cannot culminate in final and binding arbitration, for the noted reasons peculiar to the wholly contractual nature of arbitration, the grievance procedure is the established channel for discussing employee dissatisfactions respecting the established terms and conditions of employment about which the employer mandatorily is required to bargain. The grievance procedure, upon expiration, becomes the vehicle for bargaining over employee dissatisfactions. (footnote omitted) After contract expiration, the grievance does not concern the employer's contractual obligations, but rather the employer's duty not to change established terms until it discharges its duty to bargain about those proposed changes, and the grievance procedure itself is the established mechanism for resolving alleged departures from the terms and conditions. A contrary holding that the established mechanism for day-to-day dispute resolution evaporates on contract expiration, would exacerbate tensions in the employment relationship as the parties seek a successor agreement and, the Commission is persuaded, would gravely frustrate the overall legislative objective to secure labor peace.

For the reasons stated in Greenfield, supra, the Examiner concludes that the County's refusal to process the Whitman grievance unilaterally altered the status quo, and thereby breached its duty to bargain.

The Union claims the County's refusal to process the Whitman grievance violated Section 111.70(3)(a)5 of MERA. The Commission in Gateway, supra, touched upon this issue. It noted that:

The grievance procedure, upon expiration of the collective bargaining agreement, ordinarily is part of the status quo which the employer must continue to honor. However, upon such expiration, the grievance procedure is an extension of collective bargaining rather than an extension of a contractual term.

Although the Commission states that the grievance procedure is not the extension of a contractual term during the hiatus, the form and substance of the grievance procedure is structured on the basis of and in conformance with the procedure described in the agreement. Greenfield, supra. Failure to comply with the form and substance of the procedure described in the agreement constitutes a breach of the status quo rather than a breach of a collective bargaining agreement. Accordingly, the statutory provision violated is the employer's duty to bargain, Section 111.70(3)(a)4 rather than Section 111.70(3)(a)5 of MERA.

The Examiner finds the County violated Section 111.70(3)(a)1 of MERA. The right to grieve has long been recognized as a fundamental right protected by Section 111.70(2) of the Municipal Employment Relations Act. 3/ The refusal to process a grievance during the hiatus between agreements could well affect the authority and integrity of the exclusive collective bargaining representative at the bargaining table. Accordingly, the Examiner concludes that the County's refusal to process the Whitman grievance violated Section 111.70(3)(a)1 of MERA, by interfering with employee rights protected by Section 111.70(2) of MERA.

3/ Village of West Milwaukee (9845-B) 10/71.

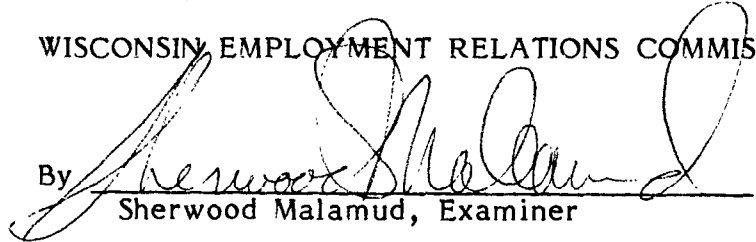
Remedy:

The type of violation alleged herein may occur on each occasion when a hiatus develops between agreements. Since this violation may recur in the future, the Examiner issued a general cease and desist order in addition to a cease and desist order with regard to the Whitman grievance. In addition, the Examiner has ordered the County to post notices. The above, the Examiner believes, will effectuate the purposes of the Municipal Employment Relations Act.

Dated at Madison, Wisconsin this 20th day of October, 1982.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By



Sherwood Malamud, Examiner