STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

LOCAL 80, DISTRICT COUNCIL 48, AFSCME, AFL-CIO,	:	
Complainant,	:	Case 52 No. 36910 MP-1847
vs.	:	Decision No. 23805-C
WEST ALLIS-WEST MILWAUKEE SCHOOL DISTRICT,	:	
Respondent.	:	

Appearances:

Podell, Ugent & Cross, S.C., Attorneys at Law, Suite 315, 207 East Michigan Street, Milwaukee, Wisconsin 53202, by Mr. Alvin R. Ugent and Mr. Michael E. Hirsch, appearing on behalf of the Complainant.

Foley & Lardner, Attorneys at Law, Suite 3800, 777 East Wisconsin Avenue, Milwaukee, Wisconsin 53202-5367, by Mr. Herbert P. Wiedemann, appearing on behalf of the Respondent.

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

Examiner Jane B. Buffett having, on June 5, 1987, issued Findings of Fact, Conclusions of Law and Order with Accompanying Memorandum in the above-entitled matter, wherein she concluded inter alia that the Respondent had committed prohibited practices within the meaning of Sec. 111.70(3)(a)1, Stats., by threatening to transfer an employe if he did not give up his role as union steward; and Respondent having, on June 25, 1987, timely filed a petition with the Commission pursuant to Sec. 111.07(5), Stats., seeking review of the Examiner's decision; and Respondent and Complainant having filed briefs the last of which was received on August 21, 1987; and the Commission having reviewed the record in the matter including the Examiner's decision, the petition for review and the briefs filed in support and in opposition thereto, and being satisfied that the Examiner's Findings of Fact, Conclusions of Law and Order should be affirmed;

NOW, THEREFORE, it is

ORDERED 1/

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

Given under our hands and seal at the City of Madison, Wisconsin this 24th day of November, 1987.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Stephen Schoenfeld
Stephen Schoenfeld, Chairman

Herman Torosian, Commissioner

Danae Davis Gordon, Commissioner

1/ Pursuant to Sec. 227.48(2), Stats., the Commission hereby notifies the parties that a petition for rehearing may be filed with the Commission by following the procedures set forth in Sec. 227.49 and that a petition for (Footnote 1/ continued on page 2)

1/ Continued

judicial review naming the Commission as Respondent, may be filed by following the procedures set forth in Sec. 227.53, Stats.

227.49 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.

227.53 Parties and proceedings for review. (1) Except as otherwise specifically provided by law, any person aggrieved by a decision specified in s. 227.52 shall be entitled to judicial review thereof as provided in this chapter.

(a) Proceedings for review shall be instituted by serving a petition therefore 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. 227.49, 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. 227.48. If a rehearing is requested under s. 227.49, 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. 77.59(6)(b), 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.

(b) The petition shall state the nature of the petitioner's interest, the facts showing that petitioner is a person aggrieved by the decision, and the grounds specified in s. 227.57 upon which petitioner contends that the decision should be reversed or modified.

. . .

(c) Copies of the petition shall be served, personally or by certified mail, or, when service is timely admitted in writing, by first class mail, not later than 30 days after the institution of the proceeding, upon all parties who appeared before the agency in the proceeding in which the order sought to be reviewed was made.

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.

WEST ALLIS-WEST MILWAUKEE SCHOOL DISTRICT

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

BACKGROUND

The complaint alleges that the Respondent committed prohibited practices within the meaning of Secs. 111.70(3)(a)1, 2, 3, 4 and 5, Stats., by attempting to coerce and intimidate steward Greg Radtke into resigning his position as steward when, in June, 1985, he sought to transfer to a different position, and subsequently threatening to transfer him back to his original position if he did not resign as steward. The answer admits conversations between the Respondent and the Union concerning Radtke's continued service as steward after his transfer, but denies that any threat was made or that any other coercion was involved.

THE EXAMINER'S DECISION

The Examiner rejected the Respondent's arguments that long-standing practice constituted a binding agreement that one steward would be chosen from each of three sub-groups within the bargaining unit and that, therefore, Radtke's transfer from one group to another meant a new steward had to be selected. The Examiner found that there was no clear evidence of such an agreement and that the collective bargaining agreement was silent with respect to such an issue. The Examiner found, accordingly, that Radtke had a protected right to be a steward which was not relinquished through collective bargaining. The Examiner rejected the Complainant's contention that several discussions held between Respondent and Union officials involved coercive threats made in support of the Respondent's position on Radtke's stewardship, but credited Radtke in his testimony that on one occasion he was threatened that if he did not resign his stewardship he would be transferred back to his original position. The Examiner found, on this basis, that on that occasion, the Respondent had unlawfully interfered with Radtke's exercise of his MERA rights. The Examiner found no support in the record for the allegations of violation of Secs. 111.70(3)(a)2, 3, and 4, Stats., and dismissed those allegations. The Examiner also dismissed the allegation that Sec. 111.70(3)(a)5, Stats., was violated on the grounds that: this subsection prohibits violation of a collective bargaining agreement; the Commission has held that generally a party must exhaust grievance and arbitration procedures in the collective bargaining agreement as a condition precedent to the Commission asserting jurisdiction; and that there was no evidence to the effect that such exhaustion had been accomplished. The Examiner therefore declined to assert the Commission's jurisdiction to determine that portion of the complaint.

THE PETITON FOR REVIEW

In its Petition for Review, Respondent contends that the Examiner erroneously found as fact that there had never been contract negotiations over steward selection; that neither the collective bargaining agreement nor any other contractual document limited the Union's right to appoint stewards; and that no binding practice of the parties limited such union rights. Respondent also contended that the Examiner's finding that the Employer had made a threat of reprisal if Radtke did not resign his stewardship was clearly erroneous. Respondent therefore contends that the Conclusion of Law flowing from the Examiner's Findings of Fact raises a substantial question of law or administrative policy.

RESPONDENT'S POSITION

Respondent notes that it is undisputed in the record, that over a long period of time, no steward was ever elected or appointed from other than the group in which he or she worked. Respondent notes that the collective bargaining agreement contains language in Article II B. which states:

> The Union shall furnish the names of stewards to their respective superiors. Stewards shall be permitted reasonable time to investigate and process grievances during regular working hours, provided other work operations are not stopped, or unduly slowed or hampered, and provided further that such

stewards have notified their immediate department or division head or their representative in advance of such investigation or processing.

Respondent contends that this clause is not explicit as to the number of stewards or their jurisdiction, but that it can only be read as providing for continuation of the "pattern of representation" in effect at the time the agreement was negotiated. Respondent argues that the language on its face does not provide for either continuation of past practice or free rights of selection by the Union, but that it contains a gap which may appropriately be filled by the decision-maker, citing arbitration awards to the effect that past practice can be legitimately used to this effect. Respondent contends that this practice is acknowledged by the Examiner, but that the Examiner failed to draw the logical conclusion that it is an understood, agreed and binding past practice, erroneously finding instead that it was "happenstance" which could have arisen spontaneously.

Respondent further contends that under School District of Wisconsin Rapids, 2/ a unilateral change in a mandatory subject of bargaining is a per se violation of the duty to bargain. Citing School District of Shullsburg 3/ and School District of Janesville, 4/ Respondent contends that all matters relating to a union's ability to meet its responsibilities and fulfill its function as bargaining agent are mandatory subjects of bargaining. Respondent further asserts that in City of Eau Claire, 5/ the Commission stated that unilateral action is permissible only after negotiating to impasse (absent waiver or necessity) during a collective bargaining agreement. Respondent argues that taken together, these cases establish that the Complainant seeks here to make a unilateral change in the prior pattern of representation, and that the Respondent is entitled to defend itself against such unilateral changes. Respondent argues that it is clear that there was a collective bargaining agreement in effect and also that there was no negotiation to impasse or otherwise concerning a change in the prior representational pattern. Respondent notes that had such an impasse occurred, both parties would be privileged to take unilateral action, arguing that under those circumstances the Complainant could insist that Radtke remain steward, but the Respondent could insist on transferring him back to his custodian's position.

Respondent also argues that the collective bargaining agreement contains a clause requiring that working conditions "in effect as of the date of this agreement shall remain in effect unless changed by mutual agreement in writing." This clause, Respondent contends, serves to freeze the representational pattern, including the distribution of stewards at one for the custodian group, one for the cleaner group and one for the maintenance group, with each steward chosen from among that group, as was in effect at the signing of the agreement. Respondent cites various National Labor Relations Board decisions describing the manner in which employes will be represented as "conditions of employment." Respondent therefore alleges that the representational pattern is a working condition within the meaning of Article XXIV A. of the collective bargaining agreement, and cannot be changed unilaterally by either party. In its reply brief, Respondent argues that Complainant ignores in its brief the language cited above and further ignores the past practice of the representational pattern alleged by Respondent. Respondent also contends that the Complainant wrongly contends in its brief that the stewards' election is a permissive subject of bargaining, as being related only to internal union affairs, and argues that instead the election of stewards relates to how the Complainant fulfills its function as bargaining agent and is therefore a mandatory subject of bargaining. Respondent requests that the Commission dismiss the complaint in its entirety.

COMPLAINANT'S POSITION

Complainant contends that the central issue for review is whether or not the selection of a steward is solely a matter of union concern and therefore not a

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2/ Dec. No. 19084-C (WERC, 3/85).

3/ Dec. No. 20120-A (WERC, 4/84).

4/ Dec. No. 21466 (WERC, 3/84).

5/ Dec. No. 22795-B (WERC, 3/86).

mandatory subject of bargaining. Complainant argues that the cases cited under the rubric of "representational pattern" by Respondent are cases dealing with grievance processing and procedures, and that these are inapplicable to the present subject. Complainant argues that the selection of stewards has little if any effect on the "basic working conditions," and that it is not a mandatory subject of bargaining. Complainant further alleges that as there is no bargaining history on the subject, the status quo doctrine would not apply and there is no prohibition against a "unilateral change." With respect to Respondent's argument that past practice should be considered in interpreting the collective bargaining agreement, Complainant contends that two past practices are involved, only one of which the Respondent wishes considered: Complainant argues that there is also a past practice of the parties not negotiating concerning the appointment of stewards, and that this cancels any effect that might be given the past practice argued for by Respondent. Complainant requests that the Examiner's decision be affirmed.

DISCUSSION

We affirm the Examiner's decision that Respondent acted unlawfully by threatening to return Radtke to his former job unless he resigned his steward position.

Section 111.70(2), Stats., states on its face that among the rights of municipal employes are "the right of self-organization, and the right to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, . . ." In our view, the right to determine the identity of stewards, the shop-floor level of union representation, is clearly encompassed within those rights. That is not to say that such rights may not be voluntarily waived. However, waiver of a statutory right must be clear and unmistakable. 6/ Thus, the provisions in the collective bargaining agreement and related evidence of past practice relied on by Respondent must establish a clear and unmistakable waiver of the statutory right in question for Respondent's position to prevail.

Respondent relies first on a contract clause specifying that only "reasonable" work time can be used for processing union business. As Respondent itself admits, however, this clause fails to specify who the stewards shall be and there is no evidence in the record of any specific discussion of the distribution of stewards in contract negotiations. Respondent alleges that filling of this "gap" in the contractual language is best accomplished on the basis of a consistent past practice. Respondent's contention relies exclusively on the fact that stewards have been elected consistently within the three sub-groups of the unit, and on the inference that Respondent would not have agreed to allow work time to be used by stewards if the then existent distribution of stewards were subject to change. We find that the inference arising from the agreement that work time may be used by stewards is insufficient to support a clear and unmistakable waiver. Respondent entered into such an agreement without any discussion with Complainant over the limitation on the Complainant's right to determine a steward's identity. We note that the contractual language also contains certain restrictions on use of working hours by stewards which protect Respondent against wasted time resulting from a distant steward spending much time away from his or her workplace. Under these circumstances, the Examiner's conclusion that election of stewards within sub-groups of the unit would be just as likely to have arisen in the nature of things is both logical and sufficient to preclude the finding of a clear and unmistakable waiver.

Respondent also points to Article XXIV of the parties' agreement and argues that the language therein regarding "working conditions" remaining "in effect" should be equated with a limitation on the Complainant's right to identify stewards. Respondent asserts that: (1) as the issue of "steward identity" is part of the general subject area of union representation; and (2) as the Commission has found issues of union representation to be mandatory subjects of bargaining as a "condition of employment"; and (3) as the phrase "working conditions" can most reasonably be found to be synonomous with "conditions of employment"; then Article XXIV is an agreement inter alia by the Complainant

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6/ City of Wauwatosa, Dec. No. 19310-C, 19311-C, 19312-C, (WERC, 4/84); Faust v. Ladysmith-Hawkins School Systems, 88 Wis.2d 525 (1979).

to limit the identity of stewards in a manner consistent with practice. We initially note again that there is insufficient evidence of bargaining history to support Respondent's contention. Furthermore, the identity of a parties' representative in the collective bargaining process or grievance handling is not a mandatory subject of bargaining 7/ and none of the cases cited by Respondent provide a contrary conclusion. Thus, Respondent's "condition of employment" analogy is not persuasive. Given the foregoing, we are satisfied that Article XXIV does not warrant the finding of a waiver.

Lastly, Respondent argues that it did not violate the law herein because it was only resisting Complainant's illegal alteration of the status quo as to the mandatory subject of steward identity. This innovative argument fails if for no other reason than its premise (that the issue of steward identity is a mandatory subject of bargaining) is erroneous as noted above.

Since the record does not support a finding of waiver and since the record does support the Examiner's finding 8/ and conclusion that Harvancik's statement to Radtke interfered with Radtke's Sec. 111.70(2), Stats., rights, we have affirmed the Examiner. In essence, Harvancik's remarks, which were not based on union animus and were based upon his knowledge of how stewards had been identified in the past, are nonetheless sufficient to establish an interference violation.

Dated at Madison, Wisconsin this 24th day of November, 1987.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Stephen Schoenfeld
Stephen Schoenfeld, Chairman

Herman Torosian, Commissioner

Danae Davis Gordon, Commissioner

7/ Racine Unified School District, Dec. No. 20652-A (WERC, 1/84).

8/ We note that although the Examiner erroneously referred to employe Suter instead of Radtke in Finding of Fact 13, it is apparent from the record, Finding of Fact 11, her conclusions and her memorandum that she intended to reference Radtke therein.