STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of

CITY OF MILWAUKEE

Involving Certain Employees of the

CITY OF MILWAUKEE

Case 230
No. 62556
ME-1076

Decision No. 18996-D
Decision No. 24602-A

Appearances:

Thomas J. Beamish, Assistant City Attorney, 800 City Hall, 200 East Wells Street, Milwaukee, Wisconsin 53202-3551, appearing on behalf of the City of Milwaukee.

M. Nicol Padway, Padway & Padway, Attorneys at Law, 633 West Wisconsin Avenue, Suite 1900, Milwaukee, Wisconsin 53203, appearing on behalf of Public Employees' Union #61, Laborers' International Union of North America, AFL-CIO, CLC.

Gene A. Holt and **Mark Sweet**, Law Offices of Mark Sweet, 705 East Silver Spring Road, Milwaukee, Wisconsin 53217, appearing on behalf of Milwaukee District Council 48, AFSCME, AFL-CIO.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER DISMISSING PETITION FOR UNIT CLARIFICATION

On June 30, 2003, the City of Milwaukee (City) filed a petition with the Wisconsin Employment Relations Commission seeking clarification of a two City employee bargaining units represented respectively by Milwaukee District Council 48, AFSCME, AFL-CIO (AFSCME) and Public Employees' Union #61, Laborers' International Union of North America, AFL-CIO, CLC (Laborers).

On November 7, 2003, Laborers filed a motion to dismiss the petition. AFSCME supported and the City opposed the motion.

The parties thereafter agreed to hold the petition in abeyance pending further discussions between them.

By letter dated March 22, 2007, the City asked that the petition proceed to hearing.

A pre-hearing telephone conference was held by Examiner Peter G. Davis on June 5, 2007. Thereafter, hearing on the motion to dismiss was held before Examiner Davis in Milwaukee, Wisconsin on July 27, 2007 in Milwaukee, Wisconsin. The parties then filed post-hearing briefs-the last of which was received May 1, 2008.

Having reviewed the record and being fully advised in the premises, the Commission makes and issues the following

FINDINGS OF FACT

1. The City of Milwaukee, herein the City, is a municipal employer that provides various services through its employees.

2. Milwaukee District Council 48, AFSCME, AFL-CIO, and its Locals 423 and 33, herein AFSCME, and Public Employees' Union #61, Laborers' International Union of North America, AFL-CIO,CLC, herein Laborers, separately serve as the collective bargaining representative of certain employees in the City's Department of Public Works.

3. In 2001, the City decided to reorganize the Department of Public Works in an effort to lower the cost of providing existing services. During 2001 and early 2002, the City, AFSCME and Laborers bargained and ratified a Memorandum of Understanding as to the impact of the proposed reorganization on the affected employees and the methods by which City services would now be delivered. The Memorandum stated in part:

> 1. Each Union maintains its jurisdiction over its existing positions and job responsibilities.
>
> . . .
>
> 4. a new Operations Driver/Worker classification shall be created . . .
>
> . . .

General Salting Operation

21. 45 positions to Local 423 designated positions

22. 30 positions to Local 61 designated positions

23. 15 positions to Local 33 designated positions

. . .

26. Bridge runs will remain with Local 423.

4. The City's petition for unit clarification filed June 30, 2003 seeks to change the bargaining unit status of Laborers and AFSCME represented employees based on circumstances arising out of the reorganization that the City knew or could reasonably have anticipated at the time the reorganization Memorandum was being bargained.

Based on the above and foregoing Findings of Fact, the Commission makes and issues the following

CONCLUSIONS OF LAW

1. The Memorandum of Understanding referenced in Finding of Fact 3 includes a clear agreement by the City, Laborers and AFSCME to maintain the composition of the existing Laborers and AFSCME bargaining units in the context of the reorganization of the Department of Public Works.

2. Absent a change in material circumstances unrelated to the Department of Public Works reorganization, the Wisconsin Employment Relations Commission will not assert its jurisdiction to resolve any disputes between the City, Laborers and AFSCME over the composition of the affected bargaining units.

3. No material changes in circumstances within the meaning of Conclusion of Law 2 have been asserted by the City.

Based on the above and foregoing Findings of Fact and Conclusions of Law, the Commission makes and issues the following

ORDER

The City of Milwaukee's petition for unit clarification is dismissed.

Given under our hands and seal at the City of Madison, Wisconsin, this 18th day of August, 2008.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/
Judith Neumann, Chair

Paul Gordon /s/
Paul Gordon, Commissioner

Susan J. M. Bauman /s/
Susan J. M. Bauman, Commissioner

CITY OF MILWAUKEE

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER DISMISSING PETITION FOR UNIT CLARIFICATION

All parties acknowledge that where a clear agreement exists as to the composition of a bargaining unit, the Commission will not allow a party to use a unit clarification petition to seek to modify that agreement (i.e. "a deal is a deal") unless: (1) the positions in dispute were created after the agreement was reached and are not covered by the pre-existing agreement; (2) the agreement was premised on an agreement that the positions were or were not held by supervisors, confidential, managerial, executive, craft, professional or law enforcement employees; (3) the positions have been impacted by changed circumstances which materially affect their unit status; or (4) the agreement is repugnant to law. MILWAUKEE AREA TECHNICAL COLLEGE, DEC. NO. 10882-B (WERC, 11/06); NORTHERN OZAUKEE SCHOOL DISTRICT, DEC. NO. 14211-C (WERC, 9/05).

Laborers and AFSCME assert that the Memorandum of Understanding reached with the City includes an agreement as to composition of the affected bargaining units which the Commission should honor by dismissing the City's unit clarification petition. Laborers and AFSCME acknowledge that there are exceptions to the Commission's willingness to honor such agreements pursuant to the "deal is a deal" policy but contend that no such exceptions are present here.

The City argues that the Memorandum does not include a unit composition agreement; that, in the event the Commission concludes otherwise, the agreement ought not bar the instant petition because it was not clearly understood by the City; and that, in the event the Commission concludes otherwise, the City has asserted material changes in circumstances that warrant processing the petition.

We find the position of Laborers and AFSCME to be more persuasive and thus have dismissed the City's petition for unit clarification.

As reflected most dramatically in the portions of the Memorandum set forth in Finding of Fact 3, it is clear that the Memorandum includes an agreement that the composition of the affected bargaining units will be maintained. The City acknowledges this portion of the Memorandum but asserts that operational rather than unit issues were the focal point of the overall bargaining between the parties and points out that it was Laborers and AFSCME who first raised the issue of the impact of the reorganization on their respective bargaining units. In this context, the City contends that it never understood the Memorandum to preclude future pursuit of a unit clarification petition. Given the context within which the Memorandum was bargained and the clarity of the language of the Memorandum itself, the City's position is not persuasive.

Bargaining over the Memorandum was triggered by the City's reorganization of the Department of Public Works. The record clearly establishes that for Laborers and AFSCME, a critical piece of any Memorandum agreement was preservation of the existing unit structures including the unit ramifications of the new Operations Driver/Worker positions. For the City (and both Unions), the Memorandum was also critical because it resolved many practical issues as to how the reorganization would actually be implemented. The record makes clear that for both Unions, there would be no agreement on implementation unless the bargaining unit ramifications of the reorganization were also resolved in an acceptable manner. The record persuades us that the City knew or should have known of this real world bargaining reality-as evidenced most clearly by the City's agreement to the Unions' unit preservation demand after little if any discussion. When measured against this reality and the language of the agreement ultimately reached, it cannot reasonably be concluded that the Memorandum resolved operational issues necessary for ongoing implementation of the reorganization but left the City free to seek a change in the bargaining unit structures confirmed or established by the same agreement.

In this real-world context, it is to be expected that the Unions would first broach the question of the reorganization's impact on the positions that they represent. For them, it was the most important question that needed to be answered. Thus, contrary to the City's argument, the sequence in which the issue was first raised is of no consequence when determining the meaning of the Memorandum. No matter who raised the issue first or how little time was spent resolving the issue in the context of the overall bargain, the critical question is what agreement, if any, was reached. As noted above, we are satisfied that an ongoing resolution of the unit implications of the reorganization was an essential element of that agreement.

Given the foregoing, it is clear that we have rejected the City's contention that this is not a unit composition agreement that is subject to the "deal is a deal" policy referenced above or that it only represented an interim resolution of the issue. The agreement clearly resolves unit composition issues and, like any other unit composition agreement, has ongoing meaning unless stated otherwise. There is no language in the agreement that would support a conclusion that it is an interim agreement and there is no evidence that the City ever told the Unions that the unit agreement did not prevent the City from revisiting the unit issue in the future. Had this been the City's understanding, the City should have so stated to the Unions at the time the parties were bargaining the agreement. Of course, had the City taken such a position, the record makes clear that agreement on the overall Memorandum would never have been reached.

Given the foregoing, it is also clear that we have rejected the City's argument that the "deal" ought not be enforced because it was not clearly understood by both sides. The prior Commission precedent (WISCONSIN DELLS SCHOOL DISTRICT, DEC. NO. 24604-C (WERC, 10/92)) on which the City relies is applicable to circumstances in which there is ambiguity as to the nature of the agreement in question. Here, there is no ambiguity. The agreement is

clear. In such circumstances, a party cannot persuasively, even if honestly, argue that it should escape the clear deal that it struck because it did not share the other parties' understanding of the agreement.

We turn now to the City's contention that even if an enforceable deal is present, there has been a material change in circumstances that should allow the petition to proceed to a decision on the merits. As the Unions persuasively argue, the "change" premise underlying this exception is that circumstances at the time the petition is filed are materially different from the circumstances present when the unit agreement was reached. No such changes have been asserted here. All of the issues relied upon by the City (new job titles, new supervision, merged workforce, greater eligibility for job assignments, employees floating back and forth between AFSCME and Laborer bargaining units) were known (or should reasonably have been anticipated) before or during bargaining over the reorganization Memorandum. Thus, because the City now relies on the same "circumstances" present at the time the Memorandum unit agreement was reached, there cannot be a "change." Therefore, we reject the City's argument that there is an exception to the "deal is a deal" policy that ought to allow the City's petition to proceed to hearing on the merits.

Given all of the foregoing, we have granted the Laborers' motion to dismiss.

Dated at Madison, Wisconsin, this 18th day of August, 2008.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/
Judith Neumann, Chair

Paul Gordon /s/
Paul Gordon, Commissioner

Susan J. M. Bauman /s/
Susan J. M. Bauman, Commissioner

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