

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MARATHON COUNTY,	:	
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	:	
Complainant,	:	
	:	Case 189
vs.	:	No. 45433 MP-2462
	:	Decision No. 26915-A
MARATHON COUNTY HIGHWAY DEPARTMENT	:	
EMPLOYEES UNION LOCAL 326, AFSCME,	:	
AFL-CIO,	:	
	:	
Respondent.	:	
	:	

Appearances:

Mr. Dean R. Dietrich, Ruder, Ware & Michler, S.C., Attorneys at Law,
500 Third Street, P.O. Box 8050, Wausau, WI 54402-8050, appearing
on behalf of the Complainant.

Mr. Phil Salamone, Staff Representative, Wisconsin Council 40,
AFSCME, AFL-CIO, P.O. Box 1981, Wausau, WI 54402-1981, appearing
on behalf of the Respondent.

FINDINGS OF FACT,
CONCLUSION OF LAW AND ORDER

Complainant Marathon County filed a complaint with the Wisconsin Employment Relations Commission on March 6, 1991, alleging that Respondent Marathon County Highway Department Employees Union Local 326, AFSCME, AFL-CIO, violated Sec. 111.70(3)(b)3 by refusing to bargain collectively with the duly authorized agent of the Complainant and by failing to properly negotiate with the duly authorized and designated representative for the Complainant. The Commission appointed Karen J. Mawhinney to make and issue Findings of Fact, Conclusions of Law and Order as provided in Sec. 111.07(5), stats. A hearing was held in Wausau, Wisconsin, on September 17, 1991, and the parties filed briefs by October 22, 1991. The Examiner has considered the evidence and the arguments of the parties, and now makes and issues the following Findings of Fact, Conclusion of Law and Order.

FINDINGS OF FACT

1. Complainant Marathon County, called the County after this, is a municipal employer with offices at the Marathon County Courthouse, Wausau, Wisconsin. The County Board of Supervisors has designated representatives for negotiations of collective bargaining agreements. Those representatives are the County Personnel Director Brad Karger and Dean R. Dietrich, Attorney at Law, of the law firm of Ruder, Ware and Michler.

2. Respondent Marathon County Highway Department Employees Union Local 326, AFSCME, AFL-CIO, called the Union after this, is a labor organization affiliated with Wisconsin Council 40, AFSCME, AFL-CIO. The principal representative for the Union is Phil Salamone, Staff Representative for Wisconsin Council 40. The Union President is Steve Schlund, an employe of the County Highway Department.

3. The County and the Union had a collective bargaining agreement for 1989-1990, and pursuant to that agreement, initial proposals for a successor agreement were submitted by the Union on July 22, 1990. The County submitted

its proposal on August 9, 1990. The parties held an initial bargaining session on October 23, 1990, where the parties exchanged proposals and discussed ground rules for negotiations. The parties agreed as part of the ground rules that Salamone and Dietrich were the chief spokesmen for the Union and the County respectively. The parties had the authority to enter into tentative agreements, which were subject to ratification. Each party would initial any tentative agreement reached and no press releases would be made during negotiations. In the event that an impasse was reached in negotiations, either party would have the right to issue press releases and would advise the other party or forward a copy of any press release to the other party. Salamone and Dietrich have used these ground rules in negotiations for the past four to six years.

4. The parties held additional bargaining sessions on November 13, 1990, December 11, 1990, December 18, 1990, and January 14, 1991. At the conclusion of the January 14, 1991, meeting, the parties indicated that no further negotiations were to be held. The County filed a petition for interest arbitration with the Commission on January 25, 1991, and at the date of the hearing in this matter, the parties were engaged in exchanges of final offers under the direction of an investigator assigned by the Commission.

5. Schlund has been president of the Union for the past two years. He was present for all bargaining sessions between the Union and the County, including the initial session where the parties agreed to the ground rules. On February 26, 1991, Schlund sent the following letter to all County Board members:

As most of you know, we are in contract negotiations with Marathon County. The issue of health insurance has many of us deeply concerned. The proposed cost increases that have been presented to us, we feel, have been exaggerated.

The study that has been presented by FRANK HAACK & ASSOCIATES bears out these erroneous figures. The insurance premiums have risen from \$317.89 for a family plan in 1990 to \$460.90 in 1991. This represents a 31% increase. At contract negotiations, we have been told that premiums are increasing 47% in 1991. Yet figures taken from FRANK HAACK & ASSOCIATES study and those supplied to us by Nick Evgenides, Risk Manager, point to a 26.9% increase from 1989 to 1990 per insured. This is only a few percentage points higher than the national average of 22%.

Granted, money paid out in claims has increased substantially in Marathon County. But one only has to look at the number of insureds in the Marathon County health insurance program and it becomes clear why these costs have gone up. Total number of insureds have increased from 1309 in 1987 to approximately 1850 in 1990. The more people you have in the program, the more money that you will be paying in claims. But the average percentage cost per insured is very close to the national average.

There is another issue that bears looking into, and that is the cost of Marathon County's health insurance in comparison to the City of Wausau. The City of Wausau has recently contracted with Wausau Insurance Company. Their premiums for 1991 are approximately

\$350.00 per month for the family plan; in comparison to Marathon County's \$460.90 per month. You might ask; Why does Marathon County have to pay \$110.00 more per month per person than the City of Wausau? Well, we did. More than once. As a matter of fact, quite a number of times. We never did get an answer in negotiations!

But we did find out that in the bidding process, Wausau Insurance Company was eliminated because their pre-qualification questionnaire was delivered 53 minutes late. The refusal of the Risk Manager to disregard that 53 minutes may well cost the county a lot of money. As a matter of fact, if Marathon County employees health experience is similar to that of the City of Wausau; which it should be; Marathon County could be spending close to half a million dollars more for their health insurance in 1991 with their present carrier than what Wausau Insurance Company might have charged. As it appears right now, that is going to be an awfully expensive 53 minutes. Plus, their health policy has better coverage than what we presently have in ours and they have not raised their deductibles from what they were last year. But we are being told that for 1992, our deductibles will be TRIPLED.

Our suggestion to you, the members of the Marathon County Board, is to re-bid the health insurance. We do not feel that it is fair to the employees of this county or to the taxpayer's. The dollars saved plus the added health benefits is definitely a WIN-WIN situation for everyone concerned.

We would ask that you would please consider these important issues at your earliest possible convenience.

Schlund did not send the above letter to Dietrich or Karger but only to County Board members. County Board members did not attend the bargaining sessions between the Union and the County. The report from Frank Haack & Associates was discussed at the second and third bargaining sessions between the Union and the County, and Union representatives were given a report from Frank Haack & Associates. The figure of \$460.90 for family premiums was provided by the representatives of the County, including the risk manager.

6. Schlund did not consider his letter to County Board members to be a bargaining proposal and did not expect a counter proposal from the County Board. The Union did not refuse to meet and bargain with the County with respect to wages, hours and conditions of employment.

CONCLUSION OF LAW

The Respondent did not refuse to bargain collectively with the duly authorized officer or agent of the Complainant or engage in conduct tantamount to a refusal to bargain when the Union President sent a letter directly to County Board members regarding health insurance and did not send a copy of the letter to the County's duly authorized agent for bargaining, and accordingly, the Respondent did not violate Sec. 111.70(3)(b)3, Stats.

ORDER 1/

IT IS ORDERED that the Complaint filed in the matter be, and it hereby is, dismissed in its entirety.

Dated at Madison, Wisconsin this 4th day of December, 1991.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Karen J. Mawhinney, Examiner

(See Footnote 1/ on Page 5)

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.

MARATHON COUNTY

MEMORANDUM ACCOMPANYING
FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

THE PARTIES' POSITIONS:

The County:

The County asserts that the conduct of the local Union President constitutes a deliberate and intentional act of bad faith contrary to Sec. 111.70(3)(b)3, Stats. The language of the statute places a specific duty on the Union or a municipal employe to bargain collectively with a duly authorized officer or agent of a municipal employer. The Commission has previously stated that the provisions of MERA contemplate that municipal employers may choose to engage the services of a labor negotiator to represent them, and it is a prohibited practice to refuse to bargain collectively with the duly authorized officer or agent of the municipal employer. Schlund's conduct violated that duty and refused to bargain collectively with the duly authorized officer or agent for the County, the properly designated bargaining representative being Dean Dietrich. By failing to provide even a copy of the February 26, 1991, correspondence to Dietrich, Schlund's conduct is squarely in violation of Sec. 111.70(3)(b)3.

The County contends that Schlund's conduct was a deliberate act to circumvent the collective bargaining process and violates all tenets of good faith negotiations. Neither Dietrich nor Karger were advised that the letter was being sent to the County Supervisors. Schlund deliberately chose to circumvent the County bargaining committee in order to communicate directly with the County Board Supervisors. The practical effect of the letter was to negotiate directly with the County Board of Supervisors. Schlund's action was taken before the parties participated in the mediation phase of the interest arbitration process. The ground rules for negotiations provided that Dietrich would be the chief spokesman for the County. Schlund's conduct in circumventing the chief spokesman and communicating directly with the County Board is a direct violation of the duty to bargain in good faith as required by statute.

The County anticipates that the Union will argue that the Schlund's letter was merely a communication by a private citizen with his local elected representatives about an important issue. The letter was signed by Schlund as Union President, Local 326, AFSCME, not as an individual. The letter also addresses the status of negotiations on the issue of health insurance and discusses figures presented by County representatives during negotiations on the issue of health insurance increases.

The County states that Schlund's letter is designed to communicate with County Supervisors on the status of negotiations and issues discussed in negotiations, and it is not a letter designed to complain about a matter of concern to Schlund as a private individual. The letter objects to the proposal from the County to change health insurance benefit levels and suggests that the County Board investigate alternate insurance carriers, specifically Wausau Insurance Companies. The obvious intent of the letter is to influence the course of negotiations between the Union and the County. By this conduct, the Union has deliberately breached its duty of good faith negotiations with the County.

The Union:

The Union asserts that Schlund never refused to meet and confer with the County with respect to wages, hours and conditions of employment. Schlund did not intend his letter to County Board members to be a bargaining proposal. Although he made a reference to contract negotiations and issues therein, the letter is not framed as a bargaining proposal. The letter is an informational correspondence and does not purport to be a settlement offer. No specific wages, hours or conditions of employment are referenced. The costs and carrier of health insurance are discussed in a generic manner, suggesting possible savings the County could realize if certain actions were taken. This was public information available to County Board members or other citizens upon request.

Even if, for the sake of argument, the letter were a proposal, the Union contends that its direct conveyance to County Board members would not violate Sec. 111.70(3)(b)3. Dietrich and Salamone were identified as chief spokesmen for the County and the Union, but there is no evidence that they were the only collective bargaining representatives through whom all proposals must pass.

The Union points out that case law shows that the Commission and the courts are reluctant to inhibit the free flow of information between employers and employees. Where an employer had circumvented the Union bargaining team by giving all employes a copy of a school board's most recent contract proposal as well as setting forth its financial impact on individual teachers, the Commission found the employer's conduct to be lawful. That case, Ashwaubenon Education Association, Dec. No. 14774-A, (WERC, 10/77), as well as the instant one, exhibit a circumvention of the respective bargaining committees to the political constituency of the other party. In another case, an individual teacher spoke at a public meeting of the school board, and while the Commission initially found a violation of Sec. 111.70, the U.S. Supreme Court ruled in City of Madison Joint School District No. 8 v. WERC, 429 U.S. 167 (1976), that the circumstances did not present such a danger to labor-management relations as to justify curtailing speech in the manner ordered by the WERC. The information transmitted here was public information involving the operation of the County, and the views expressed in Schlund's letter relate directly to the cost of health insurance and its impact on the County taxpayers. Additionally, Schlund has a constitutionally protected right to freely express his views to elected officials, and he is a taxpayer and citizen of the County.

The Union believes that the legislature did not intend to limit communications between employes and employers with the duty to bargain requirement, but that the legislature intended that the parties be required to meet and confer with respect to wages, hours and conditions of employment. It did not intend to prohibit them from open discussions with might resolve disputes.

DISCUSSION:

Sec. 111.70(5), Stats., provides that municipal employers may hire a labor negotiator to represent them in negotiations. Under Sec. 111.70(3)(b)3, Stats., it is a prohibited practice to refuse to bargain collectively with the duly authorized officer or agent of the municipal employer.

It is acknowledged that Dietrich is the duly authorized agent of the County and that Union President Schlund did not send Dietrich a copy of the February 26, 1991, letter that Schlund send directly to all County Board members. However, neither Schlund nor the Union was refusing to bargain collectively with the County's duly authorized agent or engaging in conduct that is tantamount to a refusal to bargain.

Schlund's letter does not seek to bargain directly with the County Board. The letter first complains that proposed cost increases of health insurance presented at the bargaining table have been exaggerated, in his opinion. The other portion of Schlund's letter deals with the issue of the insurance carrier, and why the County has not obtained a more competitive insurance rate. The letter goes on to complain about the bidding process, noting that one company was eliminated in the bidding process because it was 53 minutes late in submitting a questionnaire. The letter concludes by asking the County Board members to re-bid the health insurance and consider the issues raised in the letter.

The complaint that the Union was told that premiums were increasing at 47 percent is critical of the County's bargaining representatives. However, as the Commission has stated, ". . .if we were to eliminate remarks critical of employe and of employer representatives from the bargaining process as prohibited practices, the process might collapse, perhaps from shock alone." 2/

The County argues that the obvious intent of the letter is to influence the course of negotiations between the Union and the County and that the letter communicates directly with the County Board Supervisors on the status of negotiations and issues discussed in negotiations. The request that the County re-bid the health insurance is not a request to bargain directly with the County Board members and to thereby circumvent the County's bargaining representative.

Employers have the right to tell their employes what they have offered to unions in the course of collective bargaining, 3/ just as employes have a protected right to express their opinions to their employers. 4/ Both types of communications are likely to have the intent to influence the course of negotiations between the unions and the employers. However, the intent to influence the course of negotiations is not the conduct proscribed by Sec. 111.70(3)(b)3, Stats.

2/ Janesville Board of Education, Dec. No. 8791-A (WERC, 3/69).

3/ Ashwaubenon School District No. 1, Dec. No. 14774-A (WERC, 10/77).

4/ City of Madison Joint School District No. 8 et al. v. WERC, et al., 429 U.S. 167 (1976).

The County has cited Racine Unified School District, Dec. Nos. 13696-C, 13876-B (4/78), where the Union was found to have violated its duty to bargain under Sec. 111.70(3)(b)3, Stats. In that case, the Union attempted to force board members to come to the bargaining table by refusing to meet with the School District's duly authorized labor negotiator unless board members were present. In the instant case, the Union did not insist that it be allowed to bargain with the County Board members or that County Board Supervisors be present at bargaining sessions. There is no allegation that the Union refused to meet or bargain with Dietrich, only that it did not send Dietrich a copy of the letter mailed directly to the County Board members.

The statements in the letter did not constitute bargaining or make an offer to enter into bargaining with the County Board members rather than Dietrich. While critical of the figures used in negotiations, the main thrust of the letter is informative and seeks to inform the County Board about the Union's displeasure of the bidding process for obtaining insurance carriers as well as the amounts of the increase in the premiums. The Union did not seek to bargain over the issue of insurance directly with the County Board; it sought to have the County Board re-bid insurance in order to obtain a more competitive premium rate. While the Union could be placed in a more favorable bargaining position if the County were able to obtain cheaper insurance premiums, the Union made no demand that the County Board members negotiate the issue of insurance with the Union. The attempt to inform the public employer about facts pertaining to negotiations does not constitute bargaining.

Whether Schlund was communicating to the County Board as a citizen, an employe, or a Union representative, is not dispositive in this case, as in any event, the communication with the County Board does not violate Sec. 111.70(3)(b)3, Stats., because the letter does not seek to bargain or offer to enter into bargaining or a settlement. 5/ The fact that Schlund did not send a copy of the letter to the County's designated representatives does not rise to the level of conduct which is tantamount to a refusal to bargain.

Accordingly, the Examiner has found no violation of Sec. 111.70(3)(b)3, Stats., and has ordered that the Complaint be dismissed.

Dated at Madison, Wisconsin this 4th day of December, 1991.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Karen J. Mawhinney, Examiner

5/ Id.

