

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

	:	
OUTAGAMIE COUNTY PROFESSIONAL	:	
POLICE ASSOCIATION,	:	
	:	
	:	Case 224
Complainant,	:	No. 49691 MP-2776
	:	Decision No. 27861-B
vs.	:	
	:	
OUTAGAMIE COUNTY,	:	
	:	
Respondent.	:	
	:	

Appearances:

Mr. Frederick J. Mohr, Attorney at Law, 414 East Walnut Street, Suite 261, P.O. Box 1015, Green Bay, Wisconsin 54305, appearing on behalf of Davis & Kuelthau, S.C., Attorneys at Law, by Mr. Roger E. Walsh, 111 East Kilbourn Avenue, Suite 1400, Milwaukee, Wisconsin 53202-6613,

the As
appear

ORDER AFFIRMING AND MODIFYING EXAMINER'S FINDINGS OF FACT
AND CONCLUSION OF LAW AND AFFIRMING EXAMINER'S ORDER

On March 22, 1994, Examiner Lionel L. Crowley issued Findings of Fact, Conclusion of Law and Order in the above matter wherein he concluded that Outagamie County had not altered the status quo as to holiday benefits for certain employes represented by the Outagamie County Professional Police Association. He therefore dismissed the Association's complaint that the County had thereby violated Secs. 111.70(3)(a)4 and 1, Stats.

On April 8, 1994, the Association timely filed a petition with the Wisconsin Employment Relations Commission seeking review of the Examiner's decision pursuant to Secs. 111.07(5) and 111.70(4)(a), Stats. The parties thereafter filed written argument in support of and in opposition to the petition, the last of which was received May 26, 1994.

Having considered the matter and being fully advised in the premises, the Commission makes and issues the following

ORDER 1/

A. Examiner's Findings of Fact 1-3 are affirmed.

B. Examiner's Findings of Fact 4-8 are set aside and the following Findings are made:

4. During 1990 (the first year of the parties' three-year 1990-1992 contract) Investigators worked a 5-2, 5-2, 6-2, 4-2 schedule. Pursuant to Article 11.02 of the 1990-1992 contract, if Investigators worked a holiday which fell during their regular work schedule of 5-2, 5-2, 6-4, 4-2, they received two and one-half time their regular pay for hours worked. Pursuant to Article 11.02, Investigators also received two floating holidays.

Effective January 1, 1991, pursuant to Article 8.01 of the 1990-1992 contract, Investigators received an additional two floating holidays beyond those received pursuant to Article 11.02.

Sometime in 1991, the County asked and the Investigators agreed to begin working a straight 5-2, Monday through Friday, schedule. There was no discussion between the County and the Association as to the impact the work schedule change would or would not have on holiday benefits.

Article 11.03 of the 1990-1992 contract clearly provides that employes working a 5-2 schedule receive time off with straight pay for the holidays enumerated in Article 11.01. Despite the clear contract language of Article 11.03, for the duration of the 1990-1992 contract, Investigators continued to work holidays which fell within their 5-2 schedule and receive two and one-half time pay.

Although they were now working a Monday through Friday 5-2 schedule, in 1992 the Investigators also continued to receive the additional two floating holidays which Article 11.02 clearly provided were only available to permanent employes who were not working a 5-2 Monday through Friday schedule.

5. Pursuant to Sec. 111.77(1)(a), Stats. on June 17, 1992, the Association filed a notice with the Wisconsin Employment Relations Commission indicating the Association had

advised the County of its desire to bargain a successor to the 1990-1992 contract. On November 23, 1992, pursuant to Sec. 111.77(3), Stats., the Association filed a petition for final and binding arbitration of the successor contract.

6. The parties' 1990-1992 contract expired on December 31, 1992. On January 1, 1993, Investigators worked the holiday and received two and one-half time pay. Sometime prior to February 9, 1993, Investigators were advised by their supervisor that effective with Good Friday (the next holiday established by the terms of the expired 1990-1992 contract) they would no longer work holidays and would receive straight time holiday pay pursuant to terms of Article 11.03 of the expired 1990-1992 contract.

The Investigators were also advised they would receive the one floating holiday referenced in Article 11.03 instead of the two floating holidays referenced in Article 11.02 and were further advised they would not receive the five or six additional floating holidays which Article 8.02 of the expired 1990-1992 contract provided would become available to 5-2, 5-2, 6-2, 4-2 employes in 1993.

On February 9, 1993, the Association grieved the County's action and thereafter also discussed the issue with the County at the bargaining table during the parties' ongoing efforts to reach agreement on a successor to the 1990-1992 contract.

Investigators ultimately did receive the five or six floating holidays referenced in Article 8.02 but received only the one floating holiday referenced in Article 11.03.

7. The past practice of having Investigators work holidays at two and one-half time pay despite their 5-2 Monday through Friday work schedule is inconsistent with the clear language of Articles 11.01, 11.02 and 11.03 of the expired agreement.

8. The past practice of granting Investigators two floating holidays despite their 5-2 Monday through Friday work schedule is

inconsistent with the clear language of Articles 11.01, 11.02 and 11.03 of the expired agreement.

9. The status quo as to holiday benefits applicable to the contract hiatus following expiration of the 1990-1992 contract entitled the County to renounce the past practices set forth in Findings of Fact 7 and 8 and to adhere to the clear language of Articles 11.01, 11.02 and 11.03.

C. Examiner's Conclusion of Law is affirmed and modified to read:

Outagamie County did not violate Secs. 111.70(3)(a)4 or 1, Stats., by adhering to the clear language of Articles 11.01, 11.02 and 11.03 of the expired 1990-1992 agreement during the contract hiatus.

D. The Examiner's Order is affirmed.

Given under our hands and seal at the City of Madison, Wisconsin this 5th day of August,

1994.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By A. Henry Hempe /s/
A. Henry Hempe, Chairperson

Herman Torosian /s/
Herman Torosian, Commissioner

William K. Strycker /s/
William K. Strycker, 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 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.

(Footnote 1/ continues on the next page.)

(Footnote 1/ continues from previous page.)

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.

OUTAGAMIE COUNTY

MEMORANDUM ACCOMPANYING ORDER AFFIRMING AND MODIFYING EXAMINER'S FINDINGS OF FACT AND CONCLUSION OF LAW AND AFFIRMING EXAMINER'S ORDER

DISCUSSION

We affirm the Examiner's dismissal of the complaint because we are satisfied the County's conduct did not breach its obligation to maintain the status quo as to holiday benefits during the contract hiatus.

As correctly noted by the Examiner and acknowledged by the parties, when we determine the status quo in the context of a contract hiatus, we consider relevant language from the expired contract as historically applied or as clarified by bargaining history, if any. 2/

Articles 11.01, 11.02 and 11.03 of the 1991-1992 contract 3/ set forth

2/ Racine Unified School District, Dec. Nos. 26816-C, 26817-C (WERC, 3/93); Mayville School District, Dec. No. 25144-D (WERC, 5/92) and School District of Wisconsin Rapids, Dec. No. 19084-C (WERC, 3/85).

3/ **ARTICLE XI - PAID HOLIDAYS**

11.01 - Paid holidays included in this Agreement are:

New Year's Day	Labor day (sic)
Good Friday	Thanksgiving
Decoration Day	Christmas Day
Independence Day	Afternoon of December 31

11.02 - All permanent employees, except those working on a 5-2 work schedule, Monday through Friday, will receive one (1) day's pay for each of the above described holidays that are not worked as part of such employee's regular work schedule in addition to the employee's regular pay. Any such employee working any of the above described holidays as part of the employee's regular work schedule shall receive time and one-half for the holidays worked in addition to the employee's regular pay. Payment as herein described shall be paid on the first pay period following the holiday and shall be paid in addition to the regular monthly salary. Such employees, except those working in the Jail, Huber and Radio, shall in addition to the above described holidays receive two (2) floating holidays per calendar

year, such holidays to be scheduled as time off at a time mutually agreed upon between the department head and the employee. Such employees working in the Jail, Huber and Radio will have full day holidays on December 24, December 31, and Easter Sunday.

Employees hired on or after July 1 of a calendar year are not eligible for the two (2) floating holidays during the remainder of that first calendar year of employment. In the event any employee terminates employment without having taken a floating holiday(s) during the calendar year, such floating holiday(s) shall be canceled and may not be reinstated or paid for. An employee will not be allowed to use a floating holiday(s) after having been given a notice of termination.

11.03 - Employees working a 5-2 work schedule, Monday through Friday, shall receive time off with pay for the above holidays, provided however, that for such employees December 24th and December 31st will be full day holidays. In the event any of such holidays falls on a Saturday, the preceding Friday shall be considered the holiday and in the event any of the above holidays falls on a Sunday, the following Monday will be considered the holiday provided, however, that if December 24th or 31st falls on a Friday or Sunday, an additional day off for each holiday will be granted such employees at a time mutually agreed upon between the department head and the employee. In the event a holiday occurs on a floating deputy's day off, another day off will be granted at a time mutually agreed upon between the employee and the Division Head, provided, however, that it will not be granted on the 11:00 p.m. to 7:00 a.m. shift nor on a day which would result in the payment of overtime to cover the granting of the day off. Such employee shall, in addition to the above described holidays, receive one (1) floating holiday per calendar year, such holiday to be scheduled as time off at a time mutually agreed upon between the department head and the employee, provided, however, that for a floating deputy, the floating holiday will not be granted on the 11:00 P.M. to 7:00 A.M. shift, nor on a day which would result in the payment of overtime to cover the granting of the day off. Employees hired on or after July 1 of a calendar year are not eligible for the floating holiday during the remainder of that first calendar year of employment. In the event any employee terminates employment without having taken the floating holiday during the calendar year, such floating holiday shall be canceled and may not be reinstated or paid for. An employee will not be

the holiday benefits for employees working a 5-2 schedule. It is apparent from the record that beginning sometime in 1991 and at all times during the contract hiatus, the Investigators were working a 5-2 schedule. However, notwithstanding the clear language of Article 11, it is undisputed that for the entire duration of the 1990-1992 contract and the first day of the contract hiatus, the County continued to provide the Investigators with holiday benefits they had received during 1990 and part of 1991 under Article 11.02 when they were 5-2, 5-2, 6-2, 4-2 employees.

The Examiner resolved this conflict between language and practice by holding that "the plain language of the contract applies over a contrary past practice." Complainant contends this analysis is erroneous and argues, in effect, that the contract language must be ambiguous if the County continued to pay 5-2, 5-2, 6-2, 4-2 schedule benefits until early 1993 despite the Investigators' 5-2 schedule and ultimately agreed to allow Investigators to retain the five or six floating holidays provided by Article 11.02.

The record does not provide any clear indication as to why the County continued to provide the 5-2, 5-2, 6-2, 4-2 benefits. However, because there is no evidence of the issue having been discussed by the parties when the Investigators' work schedule changed in 1991, we are satisfied there was no side agreement to that effect reached by the parties. Further, the ultimate retention of the five or six floating holidays apparently resulted from bargaining between the parties following the holiday grievance. In any event, we are not persuaded that the County's conduct transforms clear language into ambiguous language. Rather, as correctly found by the Examiner, this is a situation in which an employer conducted itself in a manner contrary to clear contract language. The question for the purposes of the status quo analysis is whether the employer can end the practice and begin to rely on the clear language.

In City of Stevens Point, Dec. No. 21646-A (Rubin, 2/85) aff'd Dec. No. 21646-B (WERC, 8/85), the Commission concluded that where the employer possessed a clear contractual right, it was entitled to exercise that right and abrogate a contrary past practice. 4/ Although the abrogation in Stevens Point did not occur during a contract hiatus, we find Stevens Point generally applicable here.

We find no persuasive basis for holding that the ability to renounce a past practice which is at odds with clear language can only be exercised during the term of a contract but not during a hiatus. As we have previously held, the status quo is a dynamic rather than a static concept and can allow or

allowed to use a floating holiday after having given a notice of termination.

4/ It is generally accepted that an employer may abrogate a past practice during the term of a contract if the practice is at odds with clear contract language. For instance, see Elkouri and Elkouri, How Arbitration Works, (4th Ed., 1985, pp. 454-55).

mandate change. 5/ Where a party has previously bargained a clear right, it is consistent with the dynamic nature of the status quo to conclude said party is entitled to exercise that right during a contract hiatus and repudiate a contrary practice. In reaching this result, we have considered and rejected the Complainant's argument that such an outcome is bad public policy because it allows employers to exert improper pressures at the bargain table. 6/ The exercise of rights under the status quo is inherently consistent with the duty to bargain. After all, it is the duty to bargain from which the obligation to honor the status quo flows. Thus, exercise of status quo rights to influence bargaining is consistent with good faith bargaining itself.

Thus, we conclude that the County was entitled to begin applying the clear language of Article 11 to the Investigators and did not thereby alter the status quo applicable to their 5-2 work schedule.

5/ For instance, in Mayville Schools and Racine Schools, supra., footnote 2, we concluded that employers were entitled to change insurance providers and benefits during a contract hiatus where they had a right under the expired contract to take such action.

6/ This record provides no specific evidence as to the County's motivation in abrogating the past practice. Thus, we have no basis for determining what the County's motives were in this instance.

Given all of the foregoing, we have dismissed the complaint. 7/

Dated at Madison, Wisconsin this 5th day of August, 1994.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By A. Henry Hempe /s/
A. Henry Hempe, Chairperson

Herman Torosian /s/
Herman Torosian, Commissioner

William K. Strycker /s/
William K. Strycker, Commissioner

7/ Although not specifically argued on review, we also concur with the Examiner's conclusion that the County's conduct was not in conflict with Sec. 111.77, Stats.