STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MILWAUKEE DISTRICT COUNCIL 48, AFSCME, AFL-CIO AND ITS AFFILIATED LOCAL 594, Complainants, vs. MILWAUKEE COUNTY (SOCIAL SERVICES), Respondent.	Case 406 No. 52525 MP-3020 Decision No. 28540-A

Appearances:

Mr. Timothy R. Schoewe, Deputy Corporation Counsel, Milwaukee County, Milwaukee County Courthouse, Room 303, 901 North 9th Street, Milwaukee, WI 53233, appearing on behalf of Respondent.

Mr. Alvin R. Ugent, Podell, Ugent, Haney & Delery, S.C., 611 North Broadway Street, Suite 200, Milwaukee, WI 53202-5004, on behalf of District Council 48 and Local 594.

ORDER GRANTING MOTION TO DISMISS

On April 20, 1995, Complainants filed a prohibited practice complaint with the Wisconsin Employment Relations Commission alleging that the Respondent had violated Section 111.70(3)(a)1, 2, 3 and 5, Stats. 1/ by the following conduct:

> On or about January 6, 1995, Candace Richards, Human Resource Manager of Respondent Milwaukee County's Department of Human Services, informed Complainant Local 594's President, José Cábàn, that he would no longer report to his supervisor, Paul Radomski, but would instead report directly to her; that José Cábàn would have to relocate his place of work; that José Cábàn would have to change from 4/40 hours status to 5/40 hours status; and that all Local 594 mail was to be routed through a location of the County's choice. . . .

On September 26, 1995 Sharon Gallagher was appointed by the Commission to act as Examiner in this case and a Notice of Hearing was sent out indicating the case would be heard on December 18, 1995. On October 19, 1995 then-Union Attorney Nola Hitchcock-Cross called the Examiner and asked that the case be held in abeyance indefinitely pending the parties' full

1/ Notably, there was no allegation in the instant complaint that Respondent violated Sec. 111.70(3)(a)4, Stats.

settlement. Thereafter, on December 6, 1995, October 28, 1996 and December 6, 1996 the Examiner sent letters, and also made four telephone calls to the parties' representatives inquiring regarding the status of the case. The Examiner was repeatedly advised to continue holding the case in abeyance pending settlement.

As a result of the Examiner's calls to the parties in January and February, 1997, the Examiner spoke with the parties in a conference call on February 7, 1997 at which time it was determined that a pre-hearing/settlement conference should be held in this case to determine whether any issues remained to be litigated following a June 13, 1996 grievance arbitration award issued by Umpire Sherwood Malamud regarding José Cábàn's grievance involving essentially the same matters as were alleged in the Complaint. On March 12, 1997 the pre-hearing settlement conference was held in Milwaukee, Wisconsin. Thereafter, the parties submitted their briefs by May 14, 1997 in which they argued regarding Respondent's Motions to Dismiss or Defer -- on the ground that the Award issued by Umpire Malamud addressed all the issues alleged in the Complaint, making the complaint allegations moot or requiring deferral to the Umpire's award.

ORDER 2/

Respondent's Motion to Dismiss the Complaint as Moot is hereby granted. Respondent's other Motions are denied.

Dated at Oshkosh, Wisconsin this 16th day of July, 1997.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Sharon A. Gallagher /s/

2/ Complainant's request for attorney's fees is denied. I have found that the allegations/motions made by the County have merit. Hence, they are not frivolous. See, e.g., Wisconsin Dells School District, Dec. No. 25997-C (WERC, 8/90); Madison Metropolitan School District, Dec. No. 16471-B (WERC, 5/81). I note that Respondent made no request for fees herein.

Sharon A. Gallagher, Examiner

MEMORANDUM ACCOMPANYING
ORDER GRANTING MOTION TO DISMISS

Background:

On February 27, 1995 José Cábàn filed a grievance on his own behalf. Cábàn's grievance recounted the facts as follows:

> On 1/6/95 I was called in to Candace Richard's office regarding my work schedule and ordered to come to work on Mondays effective 1/1/95. It was followed by a memo from Cliff O'Connors (sic) interim director on January 12th which I received 1/16/95 informing me that I would no longer have 4/40 and that I was to report at 12th and Vliet St. effective 1/3/95. And that my 4/40 was changed to 5/40. That I was to report to Candace Richards and that my primary office would be 12th and Vliet St.

Cábàn's grievance also specifically sought the following remedy:

> To be paid by management for all overtime ordered to be in office on Mondays. To be made whole 4/40 reinstated, returned to appropriate supervision and County to cease & desist harassment & undermining of Union.

Permanent Umpire Sherwood Malamud held a hearing in Milwaukee, Wisconsin on October 18, 1995 regarding Cábàn's grievance, at which the Complainants were represented by their attorney (then Nola Hitchcock-Cross). Also present for the County were the Grievant and representatives of both District Council 48 and Local 645. Respondent was represented by Deputy Corporation Counsel Timothy Schoewe, also present for the County were the Assistant Director of the Department of Labor Relations for Respondent, Thomas Taylor and Human Resources Manager Candace Richards. Umpire Malamud addressed the following substantive issues which he framed for the parties:

1. Is the grievance moot? . . .

2. By its action in January 1995, did the Employer involuntarily transfer Grievant in violation of the Memorandum of Agreement and/or Settlement Agreement reached in Umpire Case No. 1265? . . .

3. Did the Employer violate the Memorandum of Agreement when it unilaterally changed José Cábàn's flex 4/40 schedule to five day/week eight hour/day for the period from January 13 through May 7, 1995? And, is the payment of overtime for the hours worked by grievant on Mondays, previously his

off day, an appropriate remedy in this case? If not, what is the appropriate remedy?

Umpire Malamud considered the following provisions of the Settlement Agreement in Umpire Case No. 1265 which read in material part as follows:

> And by this settlement the parties further agree:
>
> . . .
>
> 2. The president of Local 594 shall be released from County work. To the extent other officers need to be released, the Collective Bargaining Agreement shall apply.
>
> 3. This Agreement shall become effective October 1, 1990.
>
> 4. This settlement applies only to Local 594.
>
> . . .

Umpire Malamud considered the following provisions of the parties' collective bargaining agreement in reaching his Award:

> 1.05 **MANAGEMENT RIGHTS**
>
> . . .
>
> In addition to the foregoing, the County reserves the right to make reasonable rules and regulations relating to personnel policy procedures and practices and matters relating to working conditions, giving due regard to the obligations imposed by this Agreement. However the County reserves total discretion with respect to the function or mission of the various departments and divisions, the budget, organization, or the technology of performing the work. These rights shall not be abridged or modified except as specifically provided for by the terms of this Agreement, nor shall they be exercised for the purpose of frustrating or modifying the terms of this Agreement. But these rights shall not be used for the purpose of discrediting or weakening the Union.
>
> . . .
>
> 2.04 **OVERTIME**

. . .

(6) The County agrees to study the utilization of alternative work schedules in County service. Before any such program is implemented, it shall be discussed with the President and Chief Steward of the appropriate affiliated Local. Recommendations made by the Union during the term of this Agreement shall be given due consideration.

. . .

2.26 **WORK WEEK** In departments where there are different off days for employes in the same classification, the employe with the greater bargaining unit seniority consistent with 2.25 shall have first selection of scheduled days off when a vacancy occurs, except in those areas where off days are rotated.

2.27 **SHIFT SELECTION**

(1) Subject to existing practices vacancies shall be filled by the employe with the greatest bargaining unit seniority consistent with 2.25 having a request on file for said shift and/or hours.

(2) Existing practices for selection of shifts and starting times shall remain in effect unless changed by collateral agreement.

. . .

2.36 **TRANSFER POLICY**

(1) For purposes of this section, transfer shall mean the relocation of an employe from one position to another within the same classification or to another classification in the identical pay range.

. . .

(5) INVOLUNTARY TRANSFERS When it becomes necessary that an employee be transferred from an area, section, or department, the least senior employee in the affected classification in the area, section or department, who has completed orientation, shall be transferred first. In no event shall orientation for the purposes of this paragraph extend beyond the number eight weeks. An employee transferred by the County from an area, section, or department shall return to a position in the same classification in his/her original department when a vacancy occurs if he/she so requests. When two or more employees are transferred, the most senior employe shall return to his/her department and classification first, if he/she so

> requests. The County may transfer employees temporarily by seniority within classification from one department, which is over staffed, to another department which is experiencing excessive work load which it cannot meet with its existing staffing.

Umpire Malamud ruled on the merits of the grievance and found that Cábàn had not been "transferred" pursuant to the labor agreement, but that he had been relieved of his county duties so that he could perform Union business while continuing to receive County pay and benefits pursuant to the above-quoted Settlement Agreement. The Umpire specifically addressed Complainant's assertions that Respondent changed Cábàn's work schedule because he became Union President and/or because of his protected concerted activity (Cábàn's position on a prohibited practice complaint case involving employe Kropp), as follows:

> The Employer changed Grievant's schedule during his term as President of Local 594 because, at the time of the schedule change, he was the Local Union President. The question remains what is the purpose and intent of the change. . . . The Union failed to establish a causal link between Grievant's position on the Kropp prohibited practice complaint and the Employer's decision to change Grievant's schedule.
>
> The Arbitrator now turns to address the more difficult issue, the determination of the correlative rights and responsibilities of the parties under the Settlement. If Grievant, the released Local Union President is unavailable to perform or to meet with management personnel, then under the terms of the settlement agreement those duties fall to other officers who need to be released or whose right to be released is governed by the collective bargaining agreement. The unavailability of Grievant on Mondays and Grievant's availability at times when management personnel are unavailable, may result in the need to release other Union officers to address Union/Employer business. This may result in an increase in the number of Local 594 officers released to perform Union business. Human Resources Manger Richards testified that managers of the Department of Human Services complained to her regarding Grievant's unavailability for Employer/Union meetings. This factual setting establishes a legitimate business purpose for the Employer's decision to change Grievant's schedule to five days/week eight hours/day.
>
> The Union argues that the Employer's action tends to discredit or weaken the Union. The Employer has demonstrated by a preponderance of the evidence that there is a legitimate business reason for the Employer's decision. It changed Grievant's hours to facilitate meetings between the Employer's managers and Grievant for the purpose of conducting Employer/Union business.

Umpire Malamud also held:

. . .

> It is the unilateral action of the Employer relative to the schedule of a Local President, without any Union input, that serves to discredit and undermine the authority of the Union in the eyes of the membership. The Union is a party to the Settlement Agreement. It has an important interest to protect. By unilaterally changing the schedule of the President of Local 594, the Employer failed to provide the Union with: a) notice of the Employer's intended action; b) the reasons for changing the President's schedule; and c) an opportunity to meet and confer with the Employer to discuss the Employer's intended change prior to the implementation of that change. Without notice, the reasons for the change in schedule and the opportunity to meet and confer about the change, the Employer's unilateral action discredits the Union and thereby violated Sec. 1.05 of the Memorandum of Agreement.

. . .

The Umpire also specifically found that overtime pay was an inappropriate remedy in Cábàn's grievance case, and issued the following Award:

> 1. This grievance is not moot.
>
> 2. The Employer did not transfer Grievant as that term is defined in Sec. 2.36(1) of the Agreement.
>
> 3. The Employer's unilateral decision to change Grievant's flex time 4/40 schedule to 5 days/week 8 hours/day without first notifying the Union of the Employer's legitimate business concerns and providing the Union with an opportunity to meet and confer over those concerns during the term of the 1994-96 Agreement tends to discredit the Union in violation of Sec. 1.05 of the Memorandum of Agreement.

The Umpire then directed Respondent to post the following notice on ". . . bulletin boards of the various work locations of Local 594 members . . .":

NOTICE

> Milwaukee County shall notify Local 594, if and when it intends to change the schedule of the President of Local 594 while the President of Local 594 is released from the performance of County work. Milwaukee County shall provide the Union, in writing, with

the legitimate business reasons for the proposed change. Milwaukee County shall provide Local 594 the opportunity to meet, confer and discuss the proposed changes in the schedule of the President of Local 594 prior to the implementation of such schedule changes.

Date: _____ _____

For Milwaukee County

Positions of the Parties:

Complainant's Brief:

Complainant argued that the issue before the Examiner is whether the decision of Umpire Malamud makes the issues before the WERC moot because they have already been determined. The Complainants admitted in their brief that Complainant did not appeal the Umpire's decision and that the Umpire had jurisdiction to interpret the contract. The Complainants argued, however, that the WERC must rule based upon the Umpire's determination that Respondent violated the labor agreement by its acts toward José Cábàn, and that Respondent by those same actions committed prohibited practices. The Complainants asserted that the Examiner should review a copy of the transcript of the Arbitration hearing and in that event there would be no need for any additional hearings in the captioned case.

The Complainants urged that because Respondent has already been found guilty of violating the contract by the Umpire, the Examiner should find that that violation of contract is also a prohibited practice and order Respondent to post a notice admitting their prohibited practices, return José Cábàn to his prior reporting relationship, reimburse Complainant for its reasonable attorneys fees and pay José Cábàn overtime pay for the Mondays he worked after Respondent involuntarily changed his work schedule (a make whole remedy).

Respondent's Brief:

Respondent noted that the instant case had been held in abeyance pending the outcome of the arbitration of Cábàn's grievance. Umpire Malamud's Award was issued on June 13, 1996 and Respondent noted that neither party sought to vacate that Award. Respondent argued that the issues of the Complaint were fully and fairly litigated before the Umpire; and that both parties had the opportunity to present evidence and witnesses and argue the merits of their respective positions before the Umpire. Therefore, Respondent argued that the Umpire's Award should stand as a bar to relitigation of the issues and claims alleged in the Complaint under the doctrine of issue and claim preclusion, as the complaint allegations are now moot.

In addition, Respondent asserted that the Wisconsin Employment Relations Commission should adopt a policy of deferral similar to that employed by the National Labor Relations Board

under its Speilberg 3/ doctrine because the proceeding before Umpire Malamud was fair and regular, the parties had agreed to be bound thereby and the Award was not clearly repugnant to the purposes and policies of MERA. Respondent also noted that neither party has complained that the arbitration proceeding was improper in any way; that the parties had mutually agreed to the final and binding nature of the Award which Umpire Malamud issued; and that Umpire Malamud, given his experience in both the private and public sectors, certainly rendered an Award that is appropriate under MERA. For all of these reasons, Respondent urged that no further proceedings should be necessary herein.

Discussion:

As a general matter, a labor organization which is the exclusive representative of employes has standing to file a complaint with the Commission alleging that an employer has violated the parties' labor contract under Sec. 111.70(3)(a)5, Stats., as a Sec. 111.07(2)(a), Stats., "party in interest." General Drivers and Helpers Union Local 662 vs. WERC, 21 Wis.2d 242, 261 (1963); Melrose-Mindoro Joint School District No. 2, Dec. No. 11627 (WERC, 2/73). However, the Commission will not normally assert complaint jurisdiction over breach of contract claims where the parties' labor contract contains a procedure for final, binding and impartial resolution of disputes over contract violations. This approach is based, in part, upon the Commission's policy to encourage the parties to collective bargaining agreements to resolve their disputes through the use of voluntarily established dispute resolution mechanisms. 4/ In addition, such an approach fosters administrative economy and reinforces the notion that in fairness, unhappy litigants should not be given two opportunities to attempt to gain a favorable remedy based upon essentially the same factual situation.

In this case, I note that the parties freely utilized the voluntarily agreed upon final and binding arbitration mechanism of their contract to resolve their dispute. It is significant that no evidence was proffered that Respondent refused to arbitrate any questions arising as to the meaning and application of the terms of the collective bargaining agreement and/or settlement agreement to Cábàn's situation. It is also significant that the parties' master agreement and the settlement agreement in Umpire Case 1265 contained provisions which allowed Umpire Malamud to address the entire dispute between the parties, not only issues of contract/settlement agreement interpretation but also allegations of discrimination/retaliation alleged as Sec. 111.70(3)(a)1, 2 and 3, Stats. violations herein. Finally, it is undisputed that Respondent accepted, fully implemented and complied with the Umpire's Award, and that neither Complainant nor Respondent has filed an appeal questioning the Award. Thus, there is no evidence that Respondent has violated Sec. 111.70(3)(a)5, Stats., as alleged in the complaint. In addition, the Commission is without jurisdiction to determine whether Respondent violated the terms of the master agreement or the settlement in Umpire Case 1265 in these circumstances. See, Madison Teachers, Inc., Dec.

3/ Speilberg Mfg. Co., 112 NLRB 1080 (1955).

4/ See, Monona Grove School District, Dec. No. 22414 (WERC, 3/85) and Waupun School District, Dec. No. 22409 (WERC, 3/85).

No. 14867 (Fleischli, 8/76).

In regard to Complainant's assertions that a hearing should occur and a formal decision should issue herein finding that Respondent violated MERA, I note that Umpire Malamud fully considered and rejected Complainant's argument that under the contract, Respondent had discriminated against and/or retaliated against Cábàn because of his status as Union President and/or his stance as Union President in the Kropp prohibited practice case. The Umpire also did not find that Respondent harbored any animus against Cábàn or that Respondent intended to discriminate or retaliate against Cábàn due to his activities as President. Rather, the Umpire found that Respondent had acted as it did toward Cábàn based upon its legitimate business needs.

In my view, the Umpire addressed and dealt with all of the issues in the instant case before me. Furthermore, there were no significant issues of law or policy raised herein and Umpire Malamud's decision is not repugnant to MERA. The Umpire also addressed and dealt with issues involving contract and settlement agreement interpretation and application which, under our deferral policy could not be considered or determined in this case. 5/ To give Complainant a second opportunity to litigate its claims and to attempt to obtain remedies that the Umpire refused to grant in his Award of June 13, 1996, would waste administrative resources and violate the Commission's long-standing policy to encourage parties to collective agreements to resolve their disputes through the use of voluntarily established dispute resolution mechanisms. See, e.g. Racine Unified School District, Dec. No. 18443-B (Houlihan, 3/81).

Based upon the above analysis and in light of the fact that Umpire Malamud fully considered and determined all contractual statutory claims at the base of this dispute and that there were no important issues of law or policy involved herein such that no further remedy would be warranted, this complaint shall be dismissed in its entirety as moot.

Dated at Oshkosh, Wisconsin this 16th day of July, 1997.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Sharon A. Gallagher, Examiner

5/ However, WERC has neither recognized nor followed the NLRB's doctrines and rulings in this area. See Milwaukee Elks, Dec. No. 7753 (WERC, 10/66); Universal Foods Corp., Dec. No. 26197-B (WERC, 8/90).