

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

ROGER D. FARNSWORTH, RICHARD C.
GAUGER, THOMAS A. HAUSNER,
LARRY D. HILBELINK, WALTER PLOTE,
TIMOTHY SCHIEFELBEIN, ROBERT
WIERENGA and WALWORTH COUNTY
DEPUTY SHERIFFS' ASSOCIATION,

Complainants,

vs.

WALWORTH COUNTY,

Respondent.

Case 133
No. 53876 MP-3144
Decision No. 28681-A

Appearances:

Gimbel, Reilly, Guerin & Brown, by Ms. Kathryn A. Keppel, and Mr. Richard E. Reilly, on behalf of the Union.

vonBriesen, Purtell & Roper, S.C., by Mr. James R. Korom, on behalf of the County.

FINDINGS OF FACT,
CONCLUSION OF LAW AND ORDER

Amedeo Greco, Examiner: Roger D. Farnsworth, Richard C. Gauger, Thomas A. Hausner, Larry D. Hilbelink, Walter Plote, Timothy Schiefelbein, Robert Wierenga and Walworth County Deputy Sheriffs' Association, ("Union"), filed a prohibited practices complaint with the Wisconsin Employment Relations Commission, ("Commission"), on February 23, 1996, alleging that Walworth County, ("County"), had committed a prohibited practice within the meaning of the Municipal Employment Relations Act, ("MERA"), by refusing to pay off-duty employees subpoenaed by the Union in a unit clarification proceeding conducted by the Commission. The Commission on March 21, 1996, appointed the undersigned as Examiner to make and issue Findings of Fact, Conclusion of Law, and Order as provided for in Section 111.07(5), Wis. Stats. The County filed its answer on May 28, 1996, and hearing was held in Elkhorn, Wisconsin, on June 12, 1996. The parties thereafter filed post-hearing briefs and a reply brief which were received by July 25, 1996.

No. 28681-A

Having considered the arguments and the record, I make and file the following Findings of Fact, Conclusion of Law, and Order.

FINDINGS OF FACT

1. The Union, a labor organization, represents certain law enforcement personnel employed in the County's Sheriff's Department.

2. The County, a municipal employer, operates a Sheriff's Department which is housed in Elkhorn, Wisconsin.

3. The parties are privy to a 1994-1995 collective bargaining agreement which, inter alia, states:

7.02 Call-In and Reporting Pay (Including Court Time). All employees shall receive a minimum of two (2) hours at time and one-half (1-1/2) when requested to report outside their regularly scheduled hours, or when they report for work as scheduled and are sent home. If within one (1) hour after the regularly scheduled end of an Officer's shift he is asked to stay over, but the total amount of additional time is less than one (1) hour, it will be considered continuous overtime. If the Officer is required to stay a total of more than one (1) hour past the end of his shift, he will receive the two (2) hours minimum call-in pay. A continuation of regular work hours does not constitute a call-in.

4. The contract in Article XV provides for a grievance procedure culminating in final and binding arbitration. Said contract in Section 15.06 states:

15.06 Association Grievance Committee. Members of the Association's regular grievance committee shall not exceed four (4) employees. Said employees, or their substitutes, shall receive pay at their regular straight-time rate of pay for all hours they attend grievance meetings, including grievance arbitration, as set forth above during said employees' scheduled work hours.

5. Hearing Examiner Karen J. Mawhinney of the Commission's staff conducted a unit clarification proceeding on or about October 25, 1995, December 4, 1995, and February 6, 1996, to determine whether nine (9) Sergeants in the Sheriff's Department should be removed from the recognized collective bargaining unit pursuant to the County's request and over the Union's

objection.

6. The Union subpoenaed all nine (9) Sergeants to attend and testify at said proceeding in order to answer the County's claim that they were supervisors and that they should be excluded from the bargaining unit and to also support the Union's contrary legal position, and all so testified. The County did not call any of the nine (9) Sergeants to testify on its own behalf.

7. The County paid a full day's pay to all Sergeants who were on duty throughout those days and it made partial payments to those Sergeants who were only scheduled to work part of those days. The County refused to pay any Sergeants who were not scheduled to work on those days and it also refused to pay any Sergeants who were not scheduled to work during the time that they attended the hearing. No Sergeants suffered any loss of pay or incurred any out-of-pocket expenses as a result of appearing and testifying at said proceeding pursuant to the Union's subpoena.

8. There is no past practice showing that the County has ever paid off-duty personnel to attend administrative proceedings when they have been subpoenaed by the Union.

9. Two (2) Sergeants filed separate grievances protesting the County's failure to pay them for all of their attendance at the unit clarification hearing. Those grievances were denied and were never appealed to arbitration.

Upon the basis of the above and foregoing Findings of Fact, I make the following

CONCLUSION OF LAW

Respondent Walworth County has not violated Section 111.70(3)(a)1, 2, 4 or 5 of the Municipal Employment Relations Act when it paid its employees the way it did for their attendance at the unit clarification proceeding.

Upon the basis of the above and foregoing Findings of Fact and Conclusion of Law, I make and issue the following

ORDER 1/

IT IS ORDERED that the complaint filed herein is hereby dismissed in its entirety.

Dated at Madison, Wisconsin, this 18th day of September, 1996.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Amedeo Greco /s/
Amedeo Greco, Examiner

(Footnote 1/ appears on the next page.)

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.

This decision was placed in the mail on the date of issuance (i.e. the date appearing immediately above the Examiner's signature).

WALWORTH COUNTY (SHERIFF)

MEMORANDUM ACCOMPANYING FINDINGS OF FACT,
CONCLUSION OF LAW, AND ORDER

POSITIONS OF THE PARTIES

The Union argues that the County committed a prohibited practice within the meaning of Sections 111.70(3)(a)1, 2, 4 and 5 of the Municipal Employment Relations Act when it refused to pay the Sergeants for their attendance at the unit clarification hearing which centered on whether they should be included or excluded from the collective bargaining unit. The Union admits that it has not found any legal authority to support its position, but it argues that the absence of any legal authority is immaterial because the County also has failed to cite any legal authority in support of its contrary position. The Union also contends that "An employer's refusal to pay unit members for time spent defending the collective bargaining organization against the County's attack is in itself a subtle attack upon the organization"; that "Union members dealing with the County should not have to sacrifice their off-duty time to preserve their conditions of employment. . ." and jobs; and that "By seeking to limit [MERA] to its express terms, the County attempts to take the teeth out of the statute which serves to protect Union members from the abuses of an employer." As a remedy, it requests a make-whole order directing the County to pay the Sergeants for the time they were not paid.

The County, in turn, basically maintains that the Union's "claims are frivolous" because they represent "a clear abuse of the prohibited practice complaint process. . ."; that the Union therefore should be required to pay attorneys' fees and costs, be ordered to cease and desist from such conduct, and to post an appropriate remedy; that the contract expressly covers "the specific types of union activities" that will be paid by the County; and that the County has fulfilled its obligation here.

DISCUSSION

In order to clearly focus on the issue here, it is necessary to point out what this case does not involve: It does not center on what obligations, if any, an employer has when employes have been subpoenaed by a union for an administrative or other proceeding conducted during their normal working hours. That issue is not present here because the Union agrees -- and the record establishes -- that the County did pay all the Sergeants for their attendance during their normal working hours. That is why none of them lost a cent as a result of being subpoenaed by the Union for the unit clarification proceeding.

The Union therefore seeks something else: i.e., extra pay for their attendance during non-working hours.

This claim ignores, however, that there is no language providing for this benefit in the contract. Rather, and as set forth in Finding of Fact No. 4, ante, the contract only provides that the County will pay for limited Union attendance in the grievance arbitration process. Thus, the County is responsible under Section 15.06 of the contract to only pay up to four (4) union grievance committee members. Period.

There is nothing in the contract to support the Union's claim that the County is also required to pay for the non-working time of whatever number of witnesses it chooses to subpoena in a unit clarification proceeding. Since the Union did not obtain contractual language supporting this additional request for extra payment, there is no basis to grant such a benefit here.

Furthermore, there is no legal authority for such extra payment under MERA. It is true that the nine (9) Sergeants were not compensated for their non-working time at the unit clarification proceeding. But, that is the price for belonging to a union and that is the price that unionized employees must pay for engaging in union activities during their off-duty time absent any agreement to the contrary from their employer.

That does not represent interference, coercion, or any other unlawful conduct as asserted by the Union. It simply represents a rather fundamental rule of collective bargaining: parties at some point must bear their own costs in a collective bargaining relationship. That, after all, is what sacrifice is all about and that, after all, is the price regularly paid by union members for protecting their rights from time immemorial.

Employees themselves therefore must bear such costs during their own non-working time when they have been subpoenaed by a union. Any rule to the contrary would in effect mean that employees can engage in additional money-making activities outside their regular working hours merely because their union has accorded them that opportunity. MERA has never provided for that and it should not now.

The complaint is therefore dismissed. 2/

Dated at Madison, Wisconsin, this 18th day of September, 1996.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Amedeo Greco /s/

2/ The County's request for attorney's fees and a cease and desist order aimed at the Union for filing the instant complaint is hereby denied, as the Commission normally does not grant such a remedy to a prevailing party.

Amedeo Greco, Examiner