

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

LOCAL 300, INTERNATIONAL UNION OF
OPERATING ENGINEERS, AFL-CIO,

Complainant,

vs.

MARINETTE COUNTY (HIGHWAY
DEPARTMENT),

Respondent.

Case 160
No. 54440 MP-3216
Decision No. 28910-A

Appearances:

Mr. Stephen J. Berman, President, Local 300, International Union of Operating Engineers, AFL-CIO, 107 North Raymand Street, Marinette, Wisconsin 54143, appearing on behalf of Complainant.

Mr. Chester C. Stauffacher, Corporation Counsel, Marinette County Courthouse, 1926 Hall Avenue, P.O. Box 320, Marinette, Wisconsin 54143-0320, appearing on behalf of Respondent.

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

On September 20, 1996, Local 300, International Union of Operating Engineers filed a complaint with the Wisconsin Employment Relations Commission alleging that the Marinette County Highway Commission had refused to process two grievances in violation of Section 111.70(3)(a)5 and (3)(b)4, Stats. The Commission appointed Christopher Honeyman, a member of its staff, to act as Examiner in this matter and to make and issue Findings of Fact, Conclusion of Law and Order, as provided in Section 111.07, Stats. The Examiner conducted a hearing on January 6, 1997 in Marinette, Wisconsin, at which time the parties were given full opportunity to present their evidence and arguments. A transcript was made, both parties filed briefs, and the record was closed on April 29, 1997. The Examiner, having considered the evidence and arguments and being fully advised in the premises, makes and files the following Findings of Fact, Conclusion of Law and Order.

FINDINGS OF FACT

1. Local 300, International Union of Operating Engineers, AFL-CIO is a labor organization within the meaning of Section 111.70(1)(h), Stats., and has its principal office at 107 North Raymand Street, Marinette, Wisconsin 54143.

2. Marinette County is a municipal employer within the meaning of Section 111.70(1)(j), Stats., and has its principal offices at Marinette County Courthouse, 1926 Hall Avenue, Marinette, Wisconsin 54143-0320.

3. At all times material to this proceeding, Complainant Union has been the exclusive bargaining representative of all employees of the Highway Department, excluding the Highway Commissioner, Patrol Superintendents, Stock Clerk, five non-working foremen, and the office employees.

4. Complainant and Respondent are parties to a 1995-96 collective bargaining agreement which includes the following provisions among others:

ARTICLE 1

RECOGNITION AND MANAGEMENT RIGHTS

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1.02 Management Rights. The Employer possesses the sole right to operate County government and all management rights repose in it, subject only to the provisions of this agreement and the employees' right of adjusting grievances or differences as hereinafter stated, and applicable law. These rights include, but are not limited to the following:

- A) To direct all operations of the County; to maintain the efficiency of County operations; to determine the table of organization; to establish and enforce reasonable uniform work rules, conduct, safety and schedules of work;
- B) To manage and direct the work force, to make assignments of jobs; to determine the size and composition of the work force, to determine the work to be performed by Employees, and to determine the qualifications of Employees;
- C) To uniformly enforce reasonable minimum standards of performance; to establish procedures and controls for the performance of work; to hire, promote, transfer, assign or retain Employees (subject to existing practices and terms of this agreement related thereto); to suspend, discharge, or take other appropriate disciplinary action against the Employees for just cause; to lay-off Employees in the event of

lack of work or funds;

- D) To introduce new or improved methods or facilities; or to change existing methods or facilities; to terminate or modify existing positions, operations or work practices, giving due regard to the obligations imposed by this agreement, and to consolidate existing positions, departments or operations;
- E) To determine the kinds and amounts of services to be performed as pertains to County operations, and the number and kinds of classifications to perform such services.
- F) Such authority shall not be exercised in a manner which will be used for the discrimination against an employee, the Union or circumvent the terms and provisions of this Agreement;

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ARTICLE 5

CONDITIONS AND EXISTING PRACTICES

5.02 Existing Practices. Existing practices primarily related to wages, hours and working conditions, which are mandatory subjects of bargaining, shall be continued unless changed by mutual agreement, or through the exercise of management prerogatives as restricted by the terms of this collective bargaining agreement. Nothing shall be construed as a practice unless it meets each of the following tests: It must be a) long continued; b) certain and uniform; c) consistently followed; d) generally known by the parties hereto; and e) must not be in opposition to the terms and conditions of this collective bargaining agreement.

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ARTICLE 10

GRIEVANCE PROCEDURE AND DISCIPLINARY PROCEDURE

10.01 Grievance Procedure.

- A) Grievance Defined. A grievance shall mean a dispute

or complaint between an Employee(s) of the Union and the Employer regarding the interpretation or application of a specific provision(s) of this contract, past practice and working conditions.

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10.03 Discipline. The purpose of discipline is to correct job behavior and performance problems of Employees. Disciplinary rules and regulations shall be applied in equitable and consistent manner, commensurate with the Employee action. No Employee shall be disciplined, suspended, or discharged except for just cause. Whenever an Employee commits an offense warranting disciplinary action, the Highway Commissioner, the Supervisor or designee may take such action as deemed appropriate to the seriousness of the offense committed, though in general, the concept of progressive discipline shall be followed by management.

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B) Disciplinary Progression. The progression of disciplinary action will be:

- 1) Written reprimand.
- 2) Suspension, not to exceed five (5) working days.
- 3) Dismissal.

An Employee shall not be subject to disciplinary suspension, unless he had been given a written reprimand on a prior occasion, and no Employee shall be subject to discharge from employment unless for cause. The Employee shall have the right to have any matter under this paragraph arbitrated as set forth in Section A. Any disciplinary action taken by the Employer against an individual Employee shall be reduced to writing, stating therein the reason for the disciplinary action. The individual Employee and the Union shall be given copies of the said writing and a copy shall be placed in the Employee's personnel file. All disciplinary action taken under this paragraph shall be removed from the individual Employee's personnel file after passage of two (2) years.

The Union retains the right to utilize the grievance procedure in the dispute of any disciplinary measure. An Employee is entitled to have a Union Representative present during any conference regarding disciplinary action, if he or she requests it.

5. On April 3, 1996, a verbal altercation took place between employees James Asplund and Mike King. Following the altercation, Patrol Superintendent Steve Porfilio on April 4, 1996 issued a letter to Asplund which stated in pertinent part as follows:

This will be your verbal, written warning on your conduct and your conversation with Mr. King on the morning of April 3, 1996 at 8:15 a.m., over the radio while at the job site at Mattrisch' Pit.

This type of conduct and abusive language towards one another results in non-productive time and is not cost effective to the Highway Department.

If this continues in the work area, the next warning will be a written reprimand, leading to dismissal.

It is undisputed that the Union sought to process a grievance on Asplund's behalf and that the County refused to process the grievance. The County, contrary to the Union, contends that no discipline has taken place within the meaning of the contract's discipline clause, and that there is therefore no right on the grievant's or Union's behalf to process a grievance. Both Patrol Superintendent Porfilio and Highway Commissioner Jack Gerlach, as well as County Administrator Steve Fredericks, testified to the effect that all three did not consider the letter dated April 4 to be an act of discipline. Asplund testified that he believed himself to have been given discipline by that letter.

6. On or about August 6, 1996, Gerlach decided to change a procedure for distribution of employees' paychecks in the Highway Department. Gerlach testified that following this date he began distributing paychecks by hand via supervisors, where previously the department had distributed paychecks to individual employees in envelopes. It is undisputed that on or about August 16, the Union filed a grievance contending that on August 8 the County had changed a practice unilaterally and had left paychecks on a desk in view of others. It is undisputed also that the County has refused to process the grievance. The County, contrary to the Union, contends that the manner of distribution of paychecks is a management right and is not covered by the collective bargaining agreement. It is undisputed that despite the County's refusal to process the grievances formally, both the Asplund and paycheck grievances were discussed informally before they were filed.

7. In his testimony, Porfilio stated that while the April 4, 1996 letter to Asplund was not a disciplinary act, it was a "verbal and written" warning. On its face, the April 4 letter states that it is a "verbal, written warning", and makes reference to "the next warning will be a written reprimand, leading to dismissal." The collective bargaining agreement's Article 10.03(b) makes no explicit reference to a "verbal, written" warning, but provides that "any disciplinary action taken by the employer against an individual employee shall be reduced to writing, stating therein the reason for the disciplinary action." The same provision provides that "the Union retains the right to utilize

the grievance procedure in the dispute of any disciplinary measure." Whether or not the April 4, 1996 letter constitutes "any disciplinary measure" is an issue of fact and of contractual interpretation. The grievance clause is therefore susceptible of an interpretation which covers the grievance filed by Steven Asplund.

8. The agreement's Article 5.02, reprinted above, states in pertinent part that "existing practices primarily relating to wages, hours and working conditions, which are mandatory subjects of bargaining, shall be continued unless changed by mutual agreement, or through the exercise of management prerogatives as restricted by the terms of this collective bargaining agreement." The contract on its face does not reveal whether this clause is intended to read as if only "existing practices . . . which are mandatory subjects of bargaining . . . shall be continued" or if it is intended to read such that the reference to "mandatory subjects of bargaining" is a description of "primarily related to wages, hours and working conditions". The collective bargaining agreement therefore fails explicitly to reserve to legal processes the initial determination as to whether an alleged working condition is covered by this clause. The collective bargaining agreement contains no clause explicitly restricting the manner of payment of paychecks from coverage by the grievance and arbitration provisions. The question of whether the distribution of paychecks without envelopes is a management right or a working condition is therefore a question which requires an interpretation of the contract. The grievance clause is therefore susceptible of an interpretation which covers the grievance filed by Steven Berman protesting the Employer's refusal to continue distributing paychecks in envelopes.

Upon the basis of the above and foregoing Findings of Fact, the Examiner makes and files the following

CONCLUSION OF LAW

Marinette County violated Section 111.70(3)(a)1 and 5, Stats., when it refused to process the Asplund and paycheck grievances, because said grievances allege violations of the terms of the 1995-96 collective bargaining agreement and it cannot be said with positive assurance that said agreement does not cover the asserted violations or that the grievance procedure excludes them from consideration.

Upon the basis of the foregoing Findings of Fact and Conclusion of Law, the Examiner makes and renders the following

ORDER 1/

Respondent Marinette County, and its officers and agents, shall immediately:

1/ Footnote found on page 8.

- a. Cease and desist from refusing to submit the grievances identified in Findings of Fact 7 and 8 above to the grievance procedure, including if necessary final and binding arbitration.
- b. Take the following affirmative action, which the Examiner finds will effectuate the purposes and policies of Section 111.70 of the Municipal Employment Relations Act:
 1. Comply with the grievance and arbitration provisions of the 1995-96 collective bargaining agreement between Respondent and Local 300, International Union of Operating Engineers, AFL-CIO, with respect to the grievances identified in Findings of Fact 7 and 8 above.
 2. Notify Local 300, IUOE, AFL-CIO, that it will proceed to process said grievances.
 3. Participate with Local 300, IUOE, AFL-CIO in grievance proceedings including if necessary arbitration, concerning the grievances identified in Findings of Fact 7 and 8 above, as set forth in the parties' 1995-96 collective bargaining agreement.
 4. Notify all employees of its Highway Department, by posting in conspicuous places where said employees are employed, copies of the Notice attached hereto and marked Appendix A. Said notice shall be signed by a duly authorized officer or agent of Respondent, shall be posted immediately upon receipt of a copy of this Order, and shall remain posted for a period of thirty (30) days thereafter. Respondent shall take reasonable steps to ensure that said notices are not altered, defaced, or covered by other material.
 5. Notify the Wisconsin Employment Relations Commission in writing within twenty (20) days from the date of this order as to what steps it has taken to comply herewith.

Dated at Madison, Wisconsin this 5th day of June, 1997.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Christopher Honeyman /s/
Christopher Honeyman, Examiner

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- 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).

APPENDIX A

NOTICE TO ALL EMPLOYEES

Pursuant to an Order of the Wisconsin Employment Relations Commission, and in order to effectuate the policies of the Municipal Employment Relations Act, we hereby notify our employees that:

1. WE WILL immediately cease and desist from refusing to submit the James Asplund and paycheck grievances to the grievance procedure, including if necessary arbitration.
2. WE WILL comply with the grievance procedure provisions of the collective bargaining agreement with Local 300, IUOE, AFL-CIO.
3. WE WILL participate with Local 300, IUOE, AFL-CIO in grievance proceedings as set forth in the parties' collective bargaining agreement, including if necessary final and binding arbitration, concerning the grievances referred to above.

By _____
Marinette County

THIS NOTICE MUST BE POSTED FOR THIRTY (30) DAYS FROM THE DATE HEREOF

AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL.

Marinette County (Highway Commission)

MEMORANDUM ACCOMPANYING FINDINGS OF FACT,
CONCLUSION OF LAW AND ORDER

Background:

The complaint alleges that the City violated Sections 111.70(3)(a)5 and 3(b)4, Stats., by refusing to process through the grievance procedure two grievances, one concerning discipline and the other concerning a working condition. The County contends that the first grievance does not concern discipline and the second does not concern a working condition. In other respects, the facts are largely not controverted, are contained in the Findings, and need not be repeated here. I note, however, that the alleged violation of Section 111.70(3)(b)4 is a violation which cannot be committed by an employer, because the statutory section involved is directed to conduct by municipal employees, individually or in concert with others. The Order above does not include that statutory section.

Discussion:

The standard applicable in Wisconsin as to whether a grievance should be processed through a grievance procedure, and if necessary to arbitration, is that specified by the Wisconsin Supreme Court in Joint School District No. 10 vs. Jefferson Education Association 2/

An order to arbitrate the particular grievance should not be denied unless it can be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage. 3/

With respect to the Asplund grievance, the County contends that there has not been any progressive discipline administered, citing testimony by the County Administrator that there is no discipline on record in the grievant's master personnel file. The County contends that under Section 1.02 of the collective bargaining agreement, management has the right to require of employees a certain level of proper etiquette in two-way radio transmissions which prohibits screaming, name calling and rendering of verbal abuse in radio transmissions which can be heard by outsiders. The County argues that this management right also includes the right to chastise verbally an employee for violating radio etiquette, and to retain a written record of the incident for future reference, when a formal letter of reprimand may be appropriate as the first step in progressive discipline.

2/ 78 Wis.2d 94, 253, NW.2d 536 (1977), page 112.

3/ The Wisconsin Supreme Court cited United Steelworkers of America vs. Warrior and Golf Navigation Company, 363 U.S. 574, 582, 583 (1960).

With respect to the issue of paycheck distribution, the County argues that the collective bargaining agreement clearly authorizes the County to introduce new or improved methods or facilities or to change existing methods or facilities. The County argues that the Highway Commissioner's management decision to conform the Highway Department's method of distribution to that of most other County departments was well within that right. The County argues that Section 5.02 of the agreement specifies that "existing practices" applies to wages, hours and working conditions. The County argues that the method by which paychecks are distributed "is not a feature of any of these topics." The County argues that even if Section 5.02 were considered relevant, there would still be no existing practice because an alleged existing practice cannot be "in opposition to the terms and conditions of this collective bargaining agreement", contending that this would place it in direct opposition to the County's right to manage and "introduce new or improved methods or facilities; or to change existing methods or facilities". The County contends that, therefore, the paycheck issue cannot be considered an existing practice. The County further contends that the method by which it distributes paychecks to employees is not a mandatory subject of bargaining, because it does not deal with wages, hours and working conditions. The County argues that it has the absolute right to determine how paychecks should be distributed to its employees.

The Union contends that the Asplund grievance concerns an act of discipline and that Porfilio's testimony reveals that he thinks of the warning as both verbal and written. The Union contends that its argument on the merits concerns "a dispute . . . regarding the interpretation . . . of a specific provision of the contract" within the meaning of Article 10.01(A). With respect to the paycheck grievance, the Union contends that this grievance meets all of the criteria listed in Article 5.02 as defining an existing practice and that it too concerns a contractual dispute.

I find that the most that can be made of the County's argument is that both grievances raise a doubt as to whether the collective bargaining agreement can fairly be interpreted as providing for processing of these grievances. That doubt is, as the County argues, supported in the Asplund case by the lack of any mention of a verbal warning in the discipline clause. Yet at the same time, it is possible to interpret the discipline clause as providing for discipline other than the three stated kinds listed as the progressive discipline series. Furthermore, the testimony given by Porfilio demonstrates some confusion as to exactly what he had issued, since he described it as a "verbal and written" discipline. Finally, the letter on its face makes reference to its possible future role as an element in the progression series of discipline. This may or may not independently violate a clause which explicitly provides for a progression of discipline which (if the Employer's other argument is accepted) does not include a letter such as that immediately at issue. Whether it does or not, however, can be determined only by interpretation of the collective bargaining agreement. That interpretation is the business of the grievance and arbitration procedure, and if necessary of an arbitrator. Where such interpretation is required, the grievance is clearly subject to the grievance procedure.

Similarly, the County's argument with respect to the paycheck grievance raises a doubt as to whether such a grievance has merit under the collective bargaining agreement. There is, as the County points out, no explicit reference to the manner of distribution of paychecks in the

agreement. Yet the agreement does contain a broad clause governing past practices. The most that can therefore be said of the Employer's contention that this matter should be deemed governed by Section 1.02 of the agreement (the management rights clause) is that that is itself a contractual argument. Meanwhile, the existing practices clause, which the Union argues applies to the paycheck case, cannot by its own terms be clearly found not to apply. The County's contention that if there is an existing practice here, then the County's right to manage "such a mundane detail as paycheck distribution is effectively nullified" may or may not be a meritorious argument, but it is clearly an argument premised on contractual considerations. And the County's contention that the manner of distribution of paychecks is not a mandatory subject of bargaining is not accompanied by any citation of pertinent authority, while the collective bargaining agreement's reference to mandatory subjects of bargaining can itself, as noted in the Findings, be read in either of two ways. Under one of those ways, the reference is merely a description of language earlier in the clause, and does not introduce independently a call for legal determination of what is a fit subject for consideration under that clause. In either event, however, a contractual interpretation is required as to whether that is or is not the meaning intended. This, once again, is the proper business of the grievance procedure, and if necessary arbitration. It cannot be said with positive assurance (the Wisconsin Supreme Court's standard in Jefferson) that either of these grievances is not covered by the provisions of the collective bargaining agreement. The County therefore has an obligation to entertain the discussion sought by the Union.

Dated at Madison, Wisconsin this 5th day of June, 1997.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Christopher Honeyman /s/
Christopher Honeyman, Examiner