STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

LOCAL 2484, AFSCME, AFL-CIO, Complainant,

vs.

LA CROSSE COUNTY, Respondent.

Case 157
No. 54296
MP-3195

Decision No. 28990-A

Appearances:
Mr. Daniel R. Pfeifer, Staff Representative, Wisconsin Council 40, Route 1, Box 333, Sparta, Wisconsin 54656-0333, appearing on behalf of Local 2484, AFSCME, AFL-CIO

Mr. Robert B. Taunt, Personnel Director, LaCrosse County Courthouse, 400 North Fourth Street, Room B-04, LaCrosse, Wisconsin 54601-3200, appearing on behalf of LaCrosse County.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Local 2484, AFSCME, AFL-CIO filed a complaint with the Wisconsin Employment Relations Commission on July 19, 1996, alleging that LaCrosse County had committed prohibited practices in violation of Secs. 111.70(3)(a)1, 2 and 5, Stats., by violating an August 31, 1995 agreement to create and fill by January 1, 1996, six part-time bargaining unit positions at the County's Juvenile Detention Center. On January 28, 1997, the Commission appointed Coleen A. Burns, a member of its staff, to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and Order as provided in Sec. 111.07(5), Stats. Hearing was held on March 5, 1997, in LaCrosse, Wisconsin. The parties filed post-hearing briefs which were exchanged on April 29, 1997. The parties reserved the right to file reply briefs but decided not to file any and the record was closed on May 23, 1997. The Examiner, having considered the evidence and arguments of counsel, makes and issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. Local 2484, AFSCME, AFL-CIO, hereinafter referred to as the Union, is a labor organization within the meaning of Sec. 111.70(1)(h), Stats., and its offices are c/o Daniel R.

Pfeifer, Route 1, Box 333, Sparta, Wisconsin 54656-0333. The Union is the exclusive bargaining representative of a bargaining unit consisting of all regular full-time and all regular part-time employes of La Crosse County, including Youth Care Workers, but excluding elected officials, department heads, professional employes, supervisors, confidential employes, law enforcement personnel, employes employed at Hillview Health Care Center and Lakeview Health Center, all field, shop and maintenance personnel of the Highway and Parks Department, all Nutrition Program Workers and supportive and personal care workers under Title XIX and XX programs.

2. LaCrosse County, hereinafter referred to as the County, is a municipal employer within the meaning of Sec. 111.70(1)(j), Stats., and its offices are located at 400 North Fourth Street, LaCrosse, Wisconsin 54601-3200.

3. On or about May 31, 1995, the Union filed a Petition to Clarify Bargaining Unit which sought to include approximately fifteen (15) employes of the Youth Detention Center, which the County considered to be casual employes, in the collective bargaining unit represented by the Union. On or about August 31, 1995, a Commission staff member conducted a prehearing conference with respect to this petition, as well as to another unit clarification petition which had been filed by the Union.

4. At the prehearing conference of August 31, 1995, County Personnel Director Robert Taunt provided Union representatives, including Union President Sue Pfeifer, with a copy of the following document:

UNIT CLARIFICATION
COUNTY POSITION
PREHEARING CONFERENCE
8/31/95

Youth Care Supervisors

Jill Dunne	Supervisory
Scott Plondke	Supervisory
Kevin Griffin	Supervisory
Mark Wermer	Supervisory
Dave Steinberg	Supervisory

Casual Employees of Juvenile Detention Center	Will be replaced by Union PT employees effective 1/1/96

Clinical Psychologists

Maxwell Cubbage	Supervisory

Tina Wood Supervisory

Administrative Assistants

Sue Anderson Confidential
Bizz Meier --
Helen Burkum Supervisory

At the prehearing conference the Hearing Examiner acted as mediator and facilitated discussions which clarified and/or modified the County's written position statement. Following mediation, the parties met in joint session and the Hearing Examiner recapped the settlement which had been reached by the parties. The parties did not reduce this settlement to writing. County Personnel Director Robert Taunt took notes of the joint session which were typed up and state as follows:

ACCRETION PETITION

8/31/95 Raleigh 3:55 Joint Session
Recap of Negot. Settlement

- Petitions withdrawn
  1. Youth Care Worker Supervisor
  2. Casual JDC Employees
  3. Clinical Psychologists
  4. Sue Anderson Administrative Assistant II

- Administrative Assistant I Meier & Burkum included in bargaining unit - effective date October 1, 1995. Clerk, Adv. Ethel Boardman also

- Meier & Burkum keep same pay
  Boardman same pay & normal contract Clerk pay progression (CU-04)

- Admin Asst put in at CU-14

- RBT NOTE: Both parties understand the employer will evaluate jobs when vacant and set rate at that time commensurate with duties (i.e. reduce position to lower pay grade, i.e. account clerk)

- All 3 employees will be credited with seniority from date of hire (Boardman PT)

- Employer agrees to let Burkum and Meier keep current accumulated sick leave days, however, no further accumulation until accumulation drops below 102 days.

Hearing Tues. Sept. 19 <u>canceled</u>

Union President Pfeifer has notes of the August 31, 1995 meeting, but the Union did not produce these notes at hearing.

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

CONCLUSIONS OF LAW

1. The Union has failed to establish by a clear and satisfactory preponderance of the evidence that the settlement of August 31, 1995, included an agreement to create and fill by January 1, 1996, six part-time bargaining unit positions at the County's Juvenile Detention Center.

2. The Union has failed to establish by a clear and satisfactory preponderance of the evidence that the County has violated Secs. 111.70(3)(a)1, 2, and 5, Stats.

Upon the basis of the above and foregoing Findings of Fact and Conclusions of Law, the Examiner makes and issues the following

ORDER

IT IS ORDERED that the complaint be, and the same hereby is, dismissed.

Dated at Madison, Wisconsin, this 16th day of October, 1997.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Coleen A. Burns /s/
Coleen A. Burns, Examiner

LaCROSSE COUNTY

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

In its complaint initiating these proceedings, the Union alleged that the County violated Secs. 111.70(3)(a)1, 2 and 5, Stats., by violating an August 31, 1995 agreement to create and fill by January 1, 1996, six part-time bargaining unit positions at the County's Juvenile Detention Center. The County denies such an agreement and further denies that it has violated any provision of Sec. 111.70(3), Stats.

UNION'S POSITION

The Union claims that the County made a settlement offer to create and fill by January 1, 1996, six part-time bargaining unit positions at the County's Juvenile Detention Center; that this settlement offer was accepted by the Union; that the Union withdrew its petition for unit clarification based upon this settlement; and that the County violated this settlement agreement in violation of Sec. 111.70(3)(a)1, 2 and 5, Stats. In support of its position the Union points out that six positions were posted on November 27, 1995; that when the six positions were not filled by January 1, 1996, the Union wrote the County stating that the County had not complied with the prehearing conference agreement; that, at no time prior to hearing, had the County claimed that there was not such an agreement between the parties; that the Order of Dismissal of the petition memorializes that there was a settlement agreement; and that, if the Union did not have such an agreement, why would it withdraw its petition. The Union admits that there was no signed settlement agreement.

The Union claims that the County's budget arguments are irrelevant. Denying that the County made a reasonable effort to fill the six positions in a timely manner, the Union points out that the positions were not posted until November 27, 1995; that casual employes Olson and Kuehl were not offered a part-time position initially, but were subsequently hired on September 23, 1996, and October 21, 1996, respectively; that there were no differences in duties between the casual and part-time employes so there was a pool of 15 employes to fill six positions; the County's claim that employes not accepted at first had to go through the whole hiring procedure is rebutted by the fact that Mr. Kuehl was hired without repeating the procedure; that, at the time the complaint was filed, eight months after the settlement, the County never had more than two part-time employes at the same time, but that within two months after the complaint was filed, the County had filled all six positions.

The Union seeks make-whole remedies for Olson, Kuehl and Weiznicker, as well as monthly Union dues that would have been received had employes been hired on January 1, 1996. It also seeks a cease and desist order, a posting and any other relief deemed appropriate by the

Examiner.

COUNTY'S POSITION

The County contends that the Union offered no evidence that the County violated Secs. 111.70(3)(a)1 or 2, Stats. The County submits that the Union has failed in its burden of proving that the County violated Sec. 111.70(3)(a)5, Stats.

The County insists that the agreement of August 31, 1995, was to convert casual positions into part-time positions, effective January 1, 1996. The County denies that there was any agreement to fill six part-time positions by January 1, 1996.

In arguing that the record fails to demonstrate that there was an agreement to fill the six positions by January 1, 1996, the County maintains that Union witness Susan Pfeifer could not recall the final resolution of issues and that the Union did not produce any notes of this meeting. The County points out that the County produced handwritten notes of the meeting, as well as a typewritten summary, which recap the settlement and that these documents do not mention the six workers, much less a binding agreement to fill six positions by January 1, 1996.

The County asserts that the testimony of its witnesses established that the hiring process is lengthy and complex, involving background checks, drug testing, fingerprinting and multiple interviews. Thus, it would not be reasonable for the County to agree to hire six people within such a short period of time.

The County asserts that six positions were posted in November, 1995, and that the County made reasonable attempts to fill these positions. The County denies that the delay in filling the six positions was due to any malicious intent on the part of the County. The County maintains that unforeseen problems with hiring, including applicants refusing offers of employment; applicants quitting shortly after accepting positions; and the need to revise position requirements, prolonged the hiring process. The County requests that the complaint be dismissed.

DISCUSSION

In its complaint, the Union alleged a violation of Sec. 111.70(3)(a)1, Stats. A violation of this section may be derivative or independent.

As far as an independent violation, Sec. 111.70(3)(a)1, Stats., makes it a prohibited practice for a municipal employer:

> 1. To interfere with, restrain or coerce municipal employes in the exercise of their rights guaranteed in sub. (2).

Section 111.70(2), Stats., describes the rights protected by Sec. 111.70(3)(a)1, Stats., as

being:

> (2) RIGHTS OF MUNICIPAL EMPLOYES. Municipal employes shall have the right of self-organization, and the right to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection . . .

Violations of Sec. 111.70(3)(a)1, Stats., occur when employer conduct has a reasonable tendency to interfere with, restrain or coerce employes in the exercise of their Sec. 111.70(2) rights. WERC V. EVANSVILLE, 69 WIS.2D 140 (1975) If after evaluating the conduct in question under all the circumstances, it is concluded that the conduct had a reasonable tendency to interfere with the exercise of Sec. 111.70(2) rights, a violation will be found even if the employer did not intend to interfere and even if the employe(s) did not feel coerced or was not in fact deterred from exercising Sec. 111.70(2) rights. BEAVER DAM UNIFIED SCHOOL DISTRICT, DEC. NO. 20283-B (WERC, 5/84); CITY OF BROOKFIELD, DEC. NO. 20691-A (WERC, 2/84); JUNEAU COUNTY, DEC. NO. 12593-B (WERC, 1/77)

Section 111.07(3), Stats., provides that the burden of proof required in a complaint proceeding is a clear and satisfactory preponderance of the evidence. In the instant case, the evidence failed to establish any conduct on the part of the County that interfered with the Sec. 111.70(2) rights of employes. The Union made no arguments in support of such an alleged violation. This charge has not been proven and therefore has been dismissed.

Similarly, the Union alleged a violation of Sec. 111.70(3)(a)2, Stats., but offered no arguments in its brief in support of this charge. Section 111.70(3)(a)2, Stats., requires the County to initiate, create, dominate or interfere with the formation or administration of the Union. It requires conduct that is of such magnitude that it threatens the independence of the Union as the representative of employes. The evidence does not disclose any conduct on the part of the County that would establish a violation of Sec. 111.70(3)(a)2, Stats., and this charge has been dismissed.

The complaint alleges a violation of Sec. 111.70(3)(a)5, Stats., and presumably a derivative violation of Sec. 111.70(3)(a)1, Stats. Sec. 111.70(3)(a)5, Stats., makes it a prohibited practice for a municipal employer:

> 5. To violate any collective bargaining agreement previously agreed upon by the parties with respect to wages, hours and conditions of employment affecting municipal employes, including an agreement to arbitrate questions arising as to the meaning or application of the terms of a collective bargaining agreement. . . .

The Commission has expansively defined what constitutes a collective bargaining agreement. It is, for example, well established that the written settlement of a grievance is a

collective bargaining agreement under Sec. 111.70(3)(a)5, Stats., JOINT SCHOOL DISTRICT NO. 1 OF MENOMONIE, ET AL., DEC. NO. 12385-B (GRECO, 7/74), AFF'D DEC. NO. 12385-C (WERC, 9/74), and is enforceable under Sec. 111.70(3)(a)5, Stats., where it is not enforceable through grievance arbitration. STATE OF WISCONSIN, DEC. NO. 25281-C (WERC, 8/91)

It is undisputed that, on August 31, 1995, the parties participated in a prehearing conference on unit clarification petitions which had been filed by the Union. It is also undisputed that, during this prehearing conference, the Union and the County reached a settlement. The Union, contrary to the County, argues that this settlement included an agreement to create and fill by January 1, 1996, six part-time bargaining unit positions at the County's Juvenile Detention Center (JDC).

The record demonstrates, and the parties agree, that there was no written memorandum that memorialized the settlement. In support of its position, the Union relies upon the testimony of Union President Sue Pfeifer, who was present during the prehearing conference of August 31, 1995. Although Union President Pfeifer has notes of the August 31, 1995 meeting, these notes were not produced at hearing.

The testimony of Union President Pfeifer demonstrates that, at the prehearing conference of August 31, 1995, County Personnel Director Robert Taunt provided the Union with a copy of a document entitled "Unit Clarification County Position Prehearing Conference 8/31/95." The Union relies on this document to establish that the County proposed to create and fill six part-time JDC positions by January 1, 1996. However, the document, on its face, is not a proposal, but rather, is a position statement for a prehearing conference on the unit clarification. Moreover, Complainant's Exhibit 1 indicates that this position statement was clarified and/or modified in subsequent discussions.

The testimony of Union President Pfeifer also indicates that there were subsequent discussions which clarified and/or modified the County's written position statement. 1/ Her testimony, however, is vague and fails to establish what was said during these discussions.

It is undisputed that, at the end of the prehearing conference, the parties met in joint session. It is also undisputed that, at this joint session, the Hearing Examiner recapped the parties' settlement. Union President Pfeifer recalls that "statements were made that we would create six Youth Care part-time workers," but does not recall what was specifically stated. 2/

The County produced County Personnel Director Taunt's handwritten notes and typed summary of the recap of the prehearing conference. 3/ These notes reflect that the petition on "Casual JDC Employees" is withdrawn, but does not link this withdrawal to any specific conduct on the part of the County. Nor do these notes reference an agreement to create and fill six part-time JDC positions by January 1, 1996, or by any other time.

In summary, the Union has the burden of proving by a clear and satisfactory preponderance of the evidence that, on August 31, 1995, the County agreed to create and fill by January 1, 1996, six part-time bargaining unit positions at the County's Juvenile Detention

Center. While it is evident that the parties reached a settlement on August 31, 1995, it is not evident that this settlement included an agreement to create and fill by January 1, 1996, six part-time bargaining unit positions at the County's Juvenile Detention Center.

CONCLUSION

The County has not been shown to have violated Secs. 111.70(3)(a)1, 2 and 5, Stats., as alleged by the Union. Accordingly, the Union's complaint is dismissed.

Dated at Madison, Wisconsin, this 16th day of October, 1997.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Coleen A. Burns /s/
Coleen A. Burns, Examiner

ENDNOTES

1/ It appears that these discussions were with the mediator, rather than face-to-face discussions between the parties.

2/ Tr. 43.

3/ Respondent Ex. 4a and 4b.

CAB/mb
28990-A.D