STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

AFSCME, AFL-CIO, LOCAL 3679, Complainant

vs.

TAYLOR COUNTY, Respondent

Case 68
No. 54797
MP-3262

Decision No. 29046-A

Appearances:

Mr. Phil Salamone, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 7111 Wall Street, Schofield, Wisconsin 54476, on behalf of AFSCME, AFL-CIO, Local 3679.

Mr. Charles Rude, Personnel Director, Taylor County, Taylor County Courthouse, 224 South Second Street, Medford, Wisconsin 54451, on behalf of Taylor County.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On January 13, 1997, AFSCME, AFL-CIO, Local 3679 filed a complaint of prohibited practices with the Wisconsin Employment Relations Commission, hereinafter the Commission, wherein it alleged that Taylor County had unilaterally set the wage rate and refused to bargain collectively regarding the wages, hours and conditions of employment for a position that is properly included in the bargaining unit represented by Local 3679, in violation of Sec. 111.70(3)(a)4, Stats. On April 10, 1997, Taylor County filed its answer in the matter wherein it denied it had refused to bargain and that it had committed a prohibited practice. The Commission appointed a member of its staff, David E. Shaw, to act as Examiner in the matter. Hearing was held before the Examiner on April 22, 1997 in Medford, Wisconsin. At hearing, Complainant Local 3679 amended its complaint to allege that the position in issue had been accreted into the bargaining unit in October of 1996. A stenographic transcript was made of the hearing and the parties submitted post-hearing briefs by July 24, 1997. By letter of October 17, 1997, the Examiner requested that the parties enter into a stipulation regarding certain facts. The parties responded to the Examiner's request by October 24, 1997.

Having considered the evidence and the arguments of the parties, the Examiner now makes and issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. Taylor County Courthouse and Human Services Department Employees Local 3679, AFSCME, AFL-CIO ("the Union") is a labor organization with offices at 7111 Wall Street, Schofield, Wisconsin. At all times relevant herein, Phil Salamone, an employe of Wisconsin Council 40, AFSCME, AFL-CIO, has been the Union's staff representative. The Union is the recognized exclusive bargaining representative for "regular full-time and regular part-time nonprofessional employees of Taylor County employed in the courthouse, courthouse annex, highway, airport, USDA service center, nonsworn employees in the sheriff's department and human services department. This excludes professional, confidential, supervisory, managerial, elected officials, craft, and all other employees, including those in existing bargaining units."

2. Taylor County ("the County") is a municipal employer with offices at 224 South Second Street, Medford, Wisconsin. At all times relevant, Charles Rude has been the County's Personnel Director.

3. In approximately 1990, the County began employing a part-time, seasonal employe, Arlene Strama, to help maintain the fuel assistance program for the County's Human Services Department from October through the following spring. The position remained outside any bargaining unit covered by a collective bargaining agreement. Over time, the hours in the position increased so that in 1992 and thereafter Strama has annually worked over 600 hours in the position and in 1995 and 1996 worked from October to the following mid-May.

4. On January 21, 1993, the County's Personnel Committee voted to "slot" Strama's position into pay grade 1 in the collective bargaining agreement the County had with the Union. Said Agreement contained the following provision:

Article 15 – Part-Time Employees

> DEFINITION: A part-time employee shall be defined as an employee working less than full time, but six hundred (600) hours or more per year.
>
> ELIGIBILITY FOR BENEFITS: Part-time employees shall receive the following prorated fringe benefits on the basis of their regularly scheduled hours per year: Holidays, Vacation, Health & Life Insurance, Funeral Leave, Sick Leave

5. On April 12, 1993, the Union's then-President, Sharon Virnig, sent Rude a letter which read, in part, as follows:

Dear Charlie:

This letter is to request clarification regarding the County's intentions with respect to the following positions:

1. Energy Assistance (Human Services) Judging from the January 21, 1993 Personnel Committee minutes, it would appear the County is making this position a union position: "The position is slotted into Grade 1 of the Non-Professional union contract." If that is indeed the case, it would appear the wage rate of that position should be negotiated. The Union was not, to my knowledge, approached whatsoever regarding this position.

   In addition, information available to me indicates this particular position warrants over 600 hours per year. Indeed, the person serving in that position did work over 600 hours last year. In addition, this position has existed at Human Services for several years, and it now appears as though it should be considered permanent.

   . . .

   Several of our members have expressed concern regarding these "new" positions. I would appreciate your prompt response to this inquiry so that our members may be informed, as well as allowing us to make a decision as to whether a filing for unit clarification should be made. Thank you for your cooperation.

• • •

Virnig provided a copy of her letter to Salamone.

6. On April 22, 1993, Rude replied to Virnig, in part, as follows:

1.) Energy Assistance - Human Services

This seasonal position (October through March) has existed in Human Services for some time, but until 1992, had not required 600 hours of work. It appears that the program may continue to exceed 600 hours, and the Personnel Committee was in agreement that, if the position does continue to require hours in excess of 600, it would be subject to the terms and conditions of Local 3679's contract, and further approved placement of the position in Grade 1 of the non-professional's contract. The Grade placement is, of course, negotiable, should the Union choose to do so. The County has placed it in Grade 1; if the Union wants to counter propose placement in another Grade, it certainly has the right to do so, and the parties then have to negotiate from their various positions, until agreement, or an impasse, is reached.

Rude did not provide a copy of his letter to Salamone.

7. On September 10, 1993, the Union submitted proposals for the terms of a 1994-1995 collective bargaining agreement. Said proposals did not include any provisions relating to the position of Fuel Assistance Worker. On March 10, 1994, the Union ratified an agreement with the County covering the period 1994-1995. The agreement, as ratified, contained a listing of all positions and their respective pay grades, but did not include any reference to the Fuel Assistance Worker position.

8. During negotiations for a successor agreement to the 1994-95 agreement, neither party raised an issue or made any proposal that specifically referenced or otherwise noted the existence of the Fuel Assistance Worker position as being within the bargaining unit. The parties ratified their 1996-1998 Agreement by March 27, 1996.

9. Sometime in May of 1996, local Union officials notified Strama that the number of hours she had worked annually in her position placed her within the bargaining unit represented by the Union and made her subject to dues or fair share deduction. The Union also notified the County to make such deductions, but because Strama did not work over the spring and summer, the first deduction was to be in October, 1996. This was the first time anyone had informed Strama that her position was in the bargaining unit represented by the Union.

Also sometime in May, 1996, Union officials showed Strama a draft version of the already ratified agreement, which she noted did not include her position. Subsequently, the final, signature copy of the Agreement did include the Fuel Assistance Worker position, at Grade 1, the lowest ranking pay grade, and which reflected the rate Strama was receiving.

10. In September of 1996, the Union held a membership meeting. At said meeting, Strama asked why her position had been placed in the lowest pay grade. This was the first that Salamone was made aware of the Fuel Assistance Worker position being in the bargaining unit. On September 13, 1996, Salamone sent a letter to Rude regarding four separate positions, including that of Fuel Assistance Worker, which letter read, in relevant part, as follows:

> RE: Status of Land Information Specialist, Museum Curator, WIC Secretary, Fuel Assistance position (Human Services)
>
> Dear Mr. Rude:
>
> I have recently met with leadership and members of Local 3679. They asked me to investigate the status of the above referenced positions.
>
> They believe these positions are within Taylor County employment and currently are not part of any of the established bargaining units.
>
> Please confirm this fact. In the event this is the case, please allow this letter to serve as the Union's formal request to accrete these positions into the Courthouse

bargaining unit represented by Local 3679, AFSCME, AFL-CIO.

In the event the County refuses to do so, or does not respond to this request within ten working days, the Union will take appropriate legal action to secure representation of the positions.

11. By letter of September 20, 1996, Rude replied to Salamone, in relevant part, as follows:

Fuel Assistance Position (Human Services) - This is normally staffed from October through March, and in its early days, required staffing for less than 600 hours. A letter to me, dated April 12, 1993, from Sharon Virnig, then-President of Local 3679, inquired about the status of this position, and others. My April 22, 1993 reply indicated that the Personnel Committee approved placement of the position in Grade 1 of the non-professional contract, and the position, when active, is paid at the proper step rate in that grade. No reply, or protestations to the contrary, were ever received from Ms. Virnig or anyone else in Local 3679. Copies of the April, 1993, letters are attached.

12. By letter of October 30, 1996, Salamone replied to Rude, in part, as follows:

You indicate in your letter dated September 20, 1996 that the Personnel Committee approved placement of the Fuel Assistance Position into a Grade 1 of the contract and that there were no "protestations to the contrary" or replies from the Union as to it. It seems evident that was (sic) no concurrence by the Union either.

In any event, I believe that we need to negotiate the rates for (this position). If you agree, we have a meeting scheduled for November 19 to discuss the wage rate for the Lead Custodian/Maintenance position. I would suggest that we use this time to also discuss the wage rates for the Fuel Assistance and Erosion Technician positions.

13. By letter of November 6, 1996, Rude replied to Salamone, in part, as follows:

. . .

You also indicate the Union wants to bargain a pay rate for the Fuel Assistance position. This should be done when the 1999 contract is negotiated, absent any significant changes in the position's duties and responsibilities between now and then. The County did assign a wage rate to the position in 1993, advised the Union president in writing what it had done, and pointed out that the rate was a negotiable matter. Since then, two separate contracts (1994-95 and 1996-97-98) have been negotiated without any discussion, request or proposal by the Union to make any change, and the County sees no reason to do so in "midstream".

14. Both the County and the Union recognize that the Fuel Assistance Worker (now known as the Energy Assistance Worker) position is properly included in the bargaining unit represented by the Union. The County has continued to refuse to bargain with the Union regarding the wages, hours and conditions of employment of the Fuel Assistance Worker position until the current Agreement expires.

15. By its actions in the period between the expiration of the parties' 1994-1995 Agreement and the ratification of the 1996-98 agreement in March, 1996, the Union did not waive in a clear and unmistakable manner its right to bargain collectively over the hours, wages and conditions of employment of the Fuel Assistance Worker position.

16. By its actions subsequent to Salamone's letter of October 30, 1996, the County has refused to bargain collectively with the Union with respect to the wages, hours and conditions of employment of the Fuel Assistance Worker position.

Based on the above and foregoing Findings of Fact, the Examiner issues the following

CONCLUSIONS OF LAW

1. That Local 3679's failure to make proposals or demand to bargain regarding the wages, hours and conditions of employment for the Fuel Assistance Worker position during negotiations for the parties' 1996-1998 Agreement did not constitute a waiver of its right to bargain during the term of that Agreement in that regard.

2. That Taylor County, its officers and agents, by refusing to bargain collectively with the Union over the wages, hours and conditions of employment of the Fuel Assistance position upon the Union's October 30, 1996 demand and thereafter, violated Sec. 111.70(3)(a)4, and derivatively, Sec. 111.70(3)(a)1, Stats.

Based on the above and foregoing Findings of Fact and Conclusions of Law, the Examiner issues the following

ORDER

Taylor County, its officers and agents, shall immediately:

(a) Cease and desist from refusing to bargain collectively with Local 3679, AFSCME, AFL-CIO, regarding the wages, hours and conditions of employment of the Energy Assistance Worker (a/k/a Fuel Assistance Worker) position.

(b) Take the following affirmative action which the Examiner finds will effectuate the purposes of the Municipal Employment Relations Act:

1. Immediately enter into negotiations with Local 3679, AFSCME, AFL-CIO, regarding the wages, hours and conditions of employment of the Energy Assistance Worker (a/k/a Fuel Assistance Worker) position.

2. Notify all employes represented by Local 3679, AFSCME, AFL-CIO, by posting in conspicuous places where notices to employes are posted in its places of business, where such employes are employed, copies of the Notice attached hereto and marked Appendix "A". That Notice shall be signed by the Chair of the County's Personnel Committee and shall be posted immediately upon receipt of a copy of this Order and shall remain posted for thirty (30) days thereafter. Reasonable steps shall be taken by the Respondent County to ensure that said notices are not altered, defaced or covered by other materials.

3. Notify the Wisconsin Employment Relations Commission, in writing, within twenty (20) days following the date of this Order, as to what steps have been taken to comply herewith.

Dated at Madison, Wisconsin, this 3rd of November, 1997.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

David E. Shaw /s/
David E. Shaw, Examiner

APPENDIX "A"

NOTICE TO ALL EMPLOYES

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

1. WE WILL immediately enter into negotiations with Local 3679, AFSCME, AFL-CIO, regarding the wages, hours and conditions of employment of the Energy Assistance Worker (a/k/a Fuel Assistance Worker) position.

2. WE WILL NOT refuse to bargain collectively with Local 3679, AFSCME, AFL-CIO regarding the wages, hours and conditions of employment of the Energy Assistance position.

By _____
Chair, Taylor County Personnel Committee

THIS NOTICE MUST REMAIN POSTED FOR THIRTY (30) DAYS FROM THE DATE HEREOF, AND MUST NOT BE ALTERED, DEFACED OR COVERED BY ANY OTHER MATERIAL.

TAYLOR COUNTY

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

POSITIONS OF THE PARTIES

Union

In support of its complaint, the Union states that the principal question is whether it waived its right to bargain the wages, hours and conditions of employment of the Fuel Assistance position by its actions in 1993, and that the answer is that it had not. Noting that the position had existed for years outside the bargaining unit as a casual/temporary position, the Union asserted the arrangement did not fundamentally change in 1993 except that the hours were sufficiently increased to make it eligible for representation. The County, however, failed to properly notify the Union, but instead acted unilaterally in establishing all the terms of the position. The County did not even notify the incumbent of the change in her status or her rights to representation, nor did the County apply the contractual fair share language until 1996. The County's conduct therefore supports the Union's argument that the subject position was not fully understood to be represented until then. For all practical intents and purposes, the position was not formally included in the bargaining unit until late 1996, after the conclusion of the 1996-98 contract negotiations.

Any waiver of the right to bargain must be clear and unmistakable. Here, there certainly was no such evidence of the Union's intent or decision to waive its right to bargain the terms of employment for the Fuel Assistance Worker position. Accordingly, the County should be directed to immediately enter into negotiations as to the proper terms of employment, with adjustments retroactive to the date of the Union's first demand to bargain, plus interest at the rate of twelve percent (12%) *per annum*.

County

The County asserts that, in view of the fact that the Union was notified in early 1993 that the position had been placed in contract Grade 1; the Union had taken no action to request or propose any other pay range in the intervening 3 1/2 years; and the Union had not broached the subject in contract negotiations for either the 1994-95 or 1996-97-98 agreements, the County believes the appropriate time to negotiate changes in the position's pay grade is when negotiations commence for the successor to the current agreement. Negotiations for two agreements and the passage of 3 1/2 years since the position came under the Union's jurisdiction, is more than enough time for the Union to assemble its collective wits and propose a change in the pay grade. The Union must have, to some extent, felt the same way, since, when it prepared the 1996-98 agreement (signed by both parties), it included the position at Grade 1. A few months later, for reasons best known to itself, the Union decided to file what the County considers to be an unwarranted prohibited practice charge. Accordingly, the complaint should be dismissed.

DISCUSSION

Section 111.70(3)(a)4, Stats., states that it is a prohibited practice for a municipal employer, individually or in concert with others:

> To refuse to bargain collectively with a representative of a majority of its employees in an appropriate collective bargaining unit. Such refusal shall include action by the employer to issue or seek to obtain contracts, including those provided for by statute, with individuals in the collective bargaining unit while collective bargaining, mediation or fact-finding concerning the terms and conditions of a new collective bargaining agreement is in progress, unless such individual contracts contain express language providing that the contract is subject to amendment by a subsequent collective bargaining agreement. Where the employer has a good faith doubt as to whether a labor organization claiming the support of a majority of its employes in an appropriate bargaining unit does in fact have that support, it may file with the commission a petition requesting an election to that claim. An employer shall not be deemed to have refused to bargain until an election has been held and the results thereof certified to the employer by the commission. The violation shall include, though not be limited thereby, to the refusal to execute a collective bargaining agreement previously agreed upon. The term of any collective bargaining agreement shall not exceed three (3) years.

The complainant has the burden of proving, by a clear and satisfactory preponderance of the evidence, that respondent has violated Sec. 111.70(3)(a)4, Stats. A municipal employer who violates Sec. 111.70(3)(a)4, Stats., derivatively interferes with employes' rights under Sec. 111.70(2), Stats., in violation of Sec. 111.70(3)(a)1, Stats. 1/

Generally speaking, a municipal employer has a duty to bargain collectively with the representative of its employes with respect to mandatory subjects of bargaining that arise during the term of an existing collective bargaining agreement, except as to those matters which are embodied in the provisions of said agreement, or where bargaining on such matters has been clearly and unmistakably waived. 2/

The County asserts that the Union waived its rights to bargain collectively regarding the Fuel Assistance Worker position by the length of time it let pass between the position's inclusion in the unit in early 1993 and the request for bargaining in October, 1996, and by agreeing to the 1996-1998 Agreement without mentioning the Fuel Assistance Worker position or proposing changes regarding the position during negotiations. Determinations as to whether or not a waiver exists are to be made by the Commission on a case-by-case basis. 3/ It has been said that, "waiver is the intentional relinquishment of a known right." 4/ The Commission applies a rigorous standard to the question of determining whether the right to bargain has been waived, requiring that the waiver be clear and unmistakable. For the following reasons, the Examiner concludes that for the relevant period waiver is not present in this case.

The record indicates that in January of 1993 the County's Personnel Committee voted to "slot" the Fuel Assistance Worker position into the Grade 1 pay grade in the Collective Bargaining Agreement the County then had with the Union. There is no evidence that, beyond that action, the County began treating the position as being covered by the parties' Agreement or represented by the Union. The County did not begin deducting Union dues or fair-share payments from Strama's pay, nor did it inform her of her rights or responsibilities under the Collective Bargaining Agreement or that she was represented by the Union. The Union's then-President, Virnig, sent Rude a letter in April of 1993, demanding to bargain about the position. Rude responded to that letter, and although it offered to negotiate the position's pay grade, Rude's response of April 22, 1993 left it unclear as to whether the County considered the position to be in the unit:

> "It appears that the program may continue to exceed 600 hours, and the Personnel Committee was in agreement that, if the position does continue to require hours in excess of 600, it would be subject to the terms and conditions of Local 3679's contract, and further approved placement of the position in Grade 1 of the non-professional's contract."

It is also noted that while Virnig copied Salamone on her letter to Rude, Rude did not provide Salamone with a copy of his April 22nd response. Sometime thereafter, the record does not indicate when, the Union's local leadership changed and Salamone was not made aware of Rude's response. In the fall of 1993, the parties began negotiations for their 1994-1995 Agreement and in March of 1994, ratified that Agreement. Neither party raised an issue or made any proposals regarding the Fuel Assistance Worker position during those negotiations and the position was not listed in the parties' 1994-1995 Agreement.

Even assuming *arguendo*, that the facts set forth above established waiver by inaction on the Union's part, such a waiver would not continue in perpetuity. It appears that, for whatever reason, perhaps the change in the Union's local leadership, the Union lost track of the Fuel Assistance Worker position and Rude's April 22, 1993 letter to Virnig. Given the Union's failure to include the position in negotiations for the 1994-95 Agreement, that had to be apparent to the County; however, the County was content to "let sleeping dogs lie", and did not raise the matter on its own. The County's silence on the matter, as did the Union's, continued through the parties' negotiation and ratification of their 1996-1998 Agreement. Unlike the Union, however, the County cannot claim ignorance as to the position's existence or its bargaining unit status. Management controls the position and the records of its hours and Rude remained as the County's Personnel Director throughout the period in question.

The County acknowledges that, had the position been initially established following ratification of the 1996-1998 Agreement, it would have a duty to bargain the particulars of the position. In effect, that is what happened here when the Union did not become aware of the position's unit status until after the parties had ratified their 1996-1998 Agreement. The parties ratified the 1996-98 agreement in March, 1996 and at the time, neither party treated the Fuel Assistance Worker position as being fully within the bargaining unit. It was not until the issue of dues deduction arose in May, 1996, that it is clear the Union's local leadership was aware

of the position's unit status and that it had not exercised its right to bargain collectively over the terms of employment for the position. The delay in waiting until the Fall of 1996 is explained by the lack of urgency, since Strama did not work between mid-May and October and Salamone's lack of knowledge of the position's existence until the September, 1996 membership meeting. As noted above, a party must be found to have waived a statutory right in a clear and unmistakable manner for the waiver to be held against it. The record here does not support such a finding in this case. While under the circumstances the Union's silence up until Salamone's September 13, 1996, letter, may be deemed to be a lack of a demand to bargain that would have triggered the County's duty to bargain, it cannot be found to constitute a clear and knowing waiver of its right to bargain the matter during the term of the parties' 1996-1998 Agreement.

Waiver also cannot be found on the basis that the subject is already covered by the parties' Agreement. Waiver of that nature assumes that the parties have already bargained over the matter, and at least generally established their rights and responsibilities in that regard in the terms of the Agreement. It is clear from the record that such an assumption cannot be made in this case. Even though the parties' signed 1996-1998 Agreement lists the position in the salary schedule, the evidence establishes that no mention of, or proposal regarding, the Fuel Assistance Worker position was made by either party during negotiations on the 1996-1998 Agreement, and that it was not until after the parties had ratified the Agreement in March of 1996 that it was discovered that Strama's position had not been included. It was sometime between the Union's preparation of a "rough draft" of the new Agreement and its preparation of the final draft that the matter of the position's inclusion arose and it was then listed in the final draft of the Agreement. The Union, through its staff representative, made a timely request to bargain collectively on the wages, hours and conditions of employment of the position pursuant to Salamone's letter of October 30, 1996. The County has a statutory duty to so bargain.

As to remedy, the Union has requested that any negotiated adjustment in the position's rate be made effective as of the Union's first demand to bargain, plus statutory interest on the adjustment from that date. The Examiner has not ordered such relief, as the duty to bargain the position's rate includes bargaining the effective date of any change in that rate and because an award of pre-decision interest is not appropriate in this case. The general rule in this state is that "prejudgment interest is available as a matter of law on fixed and determinable claims, or where there is a reasonably certain standard for measuring damages." WILMOT UNION HIGH SCHOOL DISTRICT, Dec. No. 18820-B (WERC, 12/83); citing, MADISON TEACHERS, INC. V. WISCONSIN EMPLOYMENT RELATIONS COMMISSION, 115 Wis. 2d 623 (Ct.App. 1983) and ANDERSON V. WISCONSIN, LABOR AND INDUSTRY REVIEW COMMISSION, 111 Wis. 2d 245 (1983). The County has not been found to have improperly denied Strama any compensation; rather, it has been found to have refused to bargain regarding her wages, hours, and conditions of employment and ordered to bargain with the Union in that regard. The duty to bargain in

good faith does not include a duty to make concessions and it is possible that the parties' negotiations will not result in additional compensation to Strama. Thus, no interest has been awarded.

Dated at Madison, Wisconsin, this 3rd day of November, 1997.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

David E. Shaw /s/
David E. Shaw, Examiner

FOOTNOTES

1/ GREEN COUNTY, Dec. No. 20308-B (WERC, 11/84).

2/ RACINE COUNTY, Dec. No. 26288-A (Shaw, 1/92).

3/ RACINE UNIFIED SCHOOL DISTRICT, Dec. No. 13957-C (WERC, 1/83); CITY OF RICHLAND CENTER, supra; CADOTT SCHOOL DISTRICT, supra.

4/ CITY OF MONONA, Dec. No. 28405-A (Jones, 3/96).

5/ STATE OF WISCONSIN, Dec. No. 13017-D (WERC, 5/77), cited in CITY OF BELOIT, Dec. No. 28270-B (Buffett, 11/95).

6/ Dec. No. 15095 (WERC, 12/76).

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