

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

ASSOCIATION OF MENTAL HEALTH SPECIALISTS, Complainant,

vs.

ROCK COUNTY, Respondent.

Case 304
No. 55533
MP-3345

Decision No. 29211-A

Appearances:

Attorney John S. Williamson, Jr., 103 West College Avenue, Suite 611, Appleton, Wisconsin 54911, appearing on behalf of the Association of Mental Health Specialists.

Mr. Eugene R. Dumas, Deputy Corporation Counsel, 51 South Main Street, Janesville, Wisconsin 53545, appearing on behalf of Rock County.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The Association of Mental Health Specialists filed a complaint with the Wisconsin Employment Relations Commission on September 22, 1997, alleging that Rock County had committed prohibited practices in violation of Secs. 111.70(3)(a)1, 4 and 5, Stats., by unilaterally refusing to allow employees in one bargaining unit time off from their duties to represent employees in another bargaining unit represented by the Association of Mental Health Specialists. On October 9, 1997, the Commission appointed Lionel L. Crowley, 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 on the complaint was held on January 7, 1998, in Janesville, Wisconsin. The parties filed post-hearing briefs and the Association filed a reply to the County's brief and the County indicated that it would not file a reply brief on February 25, 1998 and the record was then closed. 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

Association of Mental Health Specialists, hereinafter referred to as the Association, is a labor organization within the meaning of Sec. 111.70(1)(h), Stats., and has its offices c/o Ron Krueger, Rock County Health Care Center, Hwy. 57, North Parker Drive, Janesville, Wisconsin 53545.

2. Rock 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 the Rock County Courthouse, 51 South Main Street, Janesville, Wisconsin 53545.

3. On April 21, 1997 the Association was certified as the exclusive collective bargaining representative of all regular full-time and regular part-time professional employes of the Rock County Health Care Center, excluding managerial, confidential and supervisory employes. On June 6, 1997, the Association was certified as the exclusive collective bargaining representative of a bargaining unit consisting of all regular full-time and regular part-time professional employes of the Rock County Human Services Department excluding managerial, confidential and supervisory employes.

4. Prior to 1997, the Association was the exclusive bargaining representative of certain employes at the Rock County Health Care Center and the Association and the County were parties to a collective bargaining agreement which by its terms expired on December 31, 1995.

5. On June 10, 1997, the Association and the County signed a collective bargaining agreement covering the Rock County Health Care Center unit set forth in Findings of Fact 3. The terms of said agreement provided, in pertinent part, as follows:

ARTICLE VII - GRIEVANCE PROCEDURE

7.01 Definition. Any dispute which may arise from an employee or Association complaint with respect to the effect, interpretation or application of the terms and conditions of this Agreement, shall be subject to the following grievance procedure, unless expressly excluded from such procedure by the terms of this Agreement.

Time limits stated herein, may be waived by the mutual agreement of the parties. Saturdays, Sundays and holidays are excluded in computing the time limits specified in this section as is the day in which the act or acts (or omission) being grieved allegedly occurred.

7.02 A member of the Association Grievance Committee and the aggrieved shall be permitted to spend the necessary amount of time during their scheduled working hours in handling grievances under the outlined grievance procedure.

7.03 Procedure.

Step 1. Grievances shall be filed within fourteen days of the occurrence leading to the grievance or within fourteen days of such time as the aggrieved should reasonably have been expected to be aware of the occurrence. An earnest effort should be made to settle the matter informally between the employee, the appropriate Association representative and the appropriate managerial representative. If the matter is not resolved within five days the aggrieved and/or the authorized Association representative shall

present the grievance in writing to the appropriate managerial representative.

7.04 Step 2. If the grievance is not satisfactorily settled in Step 1 of the grievance procedure, it may be appealed in writing to the Health Care Center Administrator. The Health Care Center Administrator will meet with the employee and his/her authorized Association representative(s) and attempt to resolve the matter. A written decision will be placed on the grievance and returned to the employee within ten work days from its presentation to the Health Care Center Administrator.

As of the date of the hearing in this matter, the County and the Association were negotiating an initial collective bargaining agreement for the Human Services Department bargaining unit set forth in Finding of Fact 3.

In response to a letter dated August 11, 1997 from the Association to the County, the County responded in a letter dated September 2, 1997, which stated, in part, as follows:

Rock County does not believe it has any obligation to allow employees in the Health Care Center professional employees bargaining unit to have time off from their duties to represent employees in the Human Services Department. As far as Rock County is concerned, AMHS can arrange to have AMHS Health Care Center officers or Teamsters Local officers or whoever they want to be their representatives for purposes of the AMHS Human Services Department professional employees bargaining unit. However, we are not aware of any obligation Rock County has to allow its employees to take time from their duties to represent employees in another bargaining unit.

The County further stated its position in a letter dated September 16, 1997 which stated, in part, as follows:

I have received your letter dated September 12, 1997. Despite your harsh rhetoric, I assume you did understand my letter of September 7th to simply indicate that insofar as we are aware of no legal obligation to do so, we will not pay or release employees covered by the "Agreement Between Rock County and the Health Care Center Professions" to represent employees of the Rock County Human Services Department Professional Employees Bargaining Unit. Rock County will continue to attempt to work with the duly designated representatives of the Human Services Department Professional Employees Bargaining Unit in a manner consistent with the rights of the members of that unit. But, Rock County will not ignore the plain meaning of the recent unit certification.

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

CONCLUSIONS OF LAW

The County's refusal to allow employees in the Health Care Center bargaining unit time off to represent employees in the Human Services Department bargaining unit did not interfere with, restrain or coerce employees in the exercise of their rights guaranteed in Sec. 111.70(2), Stats., and the County has not committed a prohibited practice within the meaning of Sec. 111.70(3)(a)1, Stats.

The evidence failed to demonstrate that there was any demand to bargain or a refusal to bargain over the issue of release time with or without pay for members of the Human Services

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Department bargaining unit to represent members of the Human Services Department bargaining unit in negotiations or grievances, and therefore, there is no evidence of a failure to bargain in violation of Sec. 111.70(3)(a)4, Stats.

The evidence fails to establish that any grievance was filed under the parties' Health Care Center bargaining unit's collective bargaining unit with respect to the interpretation of the language of the grievance procedure and as there is no collective bargaining agreement for the Human Services Department bargaining unit, the Examiner declines to exercise the Commission's jurisdiction to determine any violation of Sec. 111.70(3)(a)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 6th day of April, 1998.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Lionel L. Crowley, Examiner

Rock County

**MEMORANDUM ACCOMPANYING FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER**

In its complaint, the Association alleged that the County violated Secs. 111.70(3)(a)1, 4 and 5, Stats., by its refusal to allow authorized representatives in one bargaining unit time off with or without pay to represent employes in another bargaining unit. The County denied that it had committed any prohibited practice and alleged that the complaint failed to state a claim upon which relief can be granted.

Association's Position

The Association contends that the County's action discriminates between Association representatives based on their unit and prevents the Association from representing employes in both units in the manner it deems best. It claims that the County may not legally restrict the persons whom the Association may select to handle grievances. It observes that the County is willing to meet the designated representative but only if the County has designated the representative appropriate and this interferes with the Association's right to freely select their own representatives.

It points out that the Association's constitution provides that the Association's President shall be a member of the negotiating team for each unit and if the County's position is sustained, it nullifies that provision, allows the County to substitute its judgment as to how the Association will represent its members and is a significant intrusion into the Association's internal affairs.

The Association observes that Sec. 111.70, Stats., does not require a municipal employer to pay union representatives to process grievances but where the employer has agreed to do so, it cannot unilaterally abrogate the payment. It submits that this is a mandatory subject of bargaining and cannot be unilaterally discontinued. It argues that there is no evidence that an Association representative in one unit representing employes in a different unit will have any adverse impact on the County. It asserts the only impact is that the Association not the County will determine who should represent its members.

The Association claims that the County's actions violate the terms of the collective bargaining agreement which provides pay for processing grievances. It asserts that the County knew its conduct was unlawful because it so clearly violates the Association's and members' rights.

It insists that the County took the action it did to split the Association into two ineffective parts and to weaken the Association to gain an advantage at the bargaining table. It asks that the County be found guilty of violating Secs. 111.70(3)(a)1, 4 and 5, Stats., and the appropriate relief be granted.

County's Position

The County contends that there is no evidence to support a finding of any violation of Sec. 111.70(3)(a), Stats. It submits that it has not violated Sec. 111.70(3)(a)1, Stats., and has tried to encourage communications and negotiations on any differences between the parties on cross-unit

representation while on County paid time. It claims that no allegation was made that employees previously represented by other unions subsumed under the Human Services unit were treated more favorably than Association representatives. It insists that there has been no change in the way it interpreted the language of the current contract in the Health Care Center unit. It

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asserts that bargaining unit members, designated by the Association, have been allowed to investigate and process grievances without loss of pay but there was no evidence presented that such members ever received pay for representing employees in a different bargaining unit than that in which their position was covered. It maintains that it never violated any practice or understanding, following certification of the Association, that employees within either unit were entitled, while on County pay, to engage in activity related to representation of employees in any bargaining unit other than their own. The evidence failed to establish that the Association negotiated or discussed this issue.

The County argues that it has not altered the terms and conditions of employment in the Human Services Department unit, rather the Association seeks to shift the costs of its preferred manner of doing business onto the County instead of bargaining that result. It submits that there was no evidence that the County altered the status quo or changed any clearly established and consistent past practice.

The County states that the Association failed to meet its burden of proof and the complaint should be dismissed. It alleges that the grievance procedure is the preferred method to resolve disputes over contract violations. As to the status quo, the County takes the position that it must maintain the wages, hours and conditions of employment during contract negotiations but it need not maintain matters primarily related to the benefit of the labor organization such as contractual union security or grievance arbitration procedures. It notes that the Association has not alleged any attempt to discuss much less negotiate its dissatisfaction with the County's policy. It concludes that there is insufficient evidence to support any of the three alleged violations and requests that the complaint be dismissed.

Association's Reply

The Association contends that neither party is required to submit to grievance arbitration a dispute arising after the contract's termination date so the Commission has jurisdiction to determine that the County's conduct violates commitments premised on language of the expired contract.

DISCUSSION

Section 111.70(3)(a)1, Stats., provides that it is a prohibited practice for a municipal employer:

To interfere with, restrain or coerce employees in the exercise of their rights guaranteed in Sub. (2).

The referenced Subsection provides:

RIGHTS OF MUNICIPAL EMPLOYEES. 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, and such employes shall have the right to refrain from any and all such activities except that employes may be required to pay dues in the manner provided in a fair-share agreement.

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The Association has asserted that the County is interfering with its right to select who will represent it in negotiations and grievance handling in the Human Services Department. A review of the letters sent to the Association by the County states no objection to whom the Association chooses to represent it. All that the letters do is object to a Health Care Center unit employe taking off work to represent Human Services Department unit employes. The Association is free to designate whomever it wishes and there is no objection to representation during non-working hours. Section 111.70(3)(a)2, Stats., provides that a municipal employer may reimburse employes at their prevailing rate for time spent conferring with the employes, officers or agents. Thus, the County can pay employes only if it agreed to do so. In this case, the Association is asserting that agreement in one unit permits pay for employes to meet employes of a different bargaining unit. However, if there is no agreement to pay to meet in the second unit, the Association could circumvent this by using representatives of a unit where the County has agreed to pay. The Association would then have a benefit it could not bargain in the bargaining unit and the County would be required to pay even where it had not agreed to do so. Clearly, this is not a requirement under Sec. 111.70(3)(a)2, Stats. The language of the Health Care Center collective bargaining agreement which allows a member of the Grievance Committee to meet with the grievant applies only to the grievance procedure under the Health Care Center contract and this language cannot be extended to a separate and distinct unit. The evidence failed to establish that the County interfered with the Association's right to select its representatives. It simply limited the right of representatives to conduct business during work times. Whether representatives can have time off with or without pay is a mandatory subject of bargaining especially when the representative is not a member of the bargaining unit. Thus, it is concluded that there is no violation of Sec. 111.70(3)(a)1, Stats.

Section 111.70(3)(a)4, Stats., requires the County to bargain in good faith with the Association and such obligation includes the duty to maintain the status quo and not make any changes in wages, hours or conditions of employment of employes after a unit has been certified. The Association claims that by refusing time off and pay to Association representatives, the County is not bargaining in good faith. The obligation of the County to pay representatives' time spent for negotiations or in grievance handling is a mandatory subject of bargaining. It is undisputed that the parties are negotiating the initial contract for the Human Services Department bargaining unit so there is no agreement nor past practice with respect to this unit. The Association is relying on the language of the Health Care Center contract (Ex. 2) which is not applicable to the Human Services Department bargaining unit. The Association is advocating the language of a collective bargaining agreement to provide benefits to an entirely different bargaining unit. Carried to its logical conclusion, a county employe under this contract could represent a city employe or an employe of a different County represented by the Association in pay status on County time,. There is no basis for the Association's argument that the County violated its duty to bargain in good faith and no violation of Sec. 111.70(3)(a)4, Stats., has been demonstrated.

As to the alleged violation of Sec. 111.70(3)(a)5, Stats., it is undisputed there is no contract

between the County and the Human Services Department bargaining unit. Furthermore, whether the County and Association agreed under the Health Care Center agreement that employes could represent employes in another unit involves an interpretation of that contract. The Commission has held that, generally, a party must exhaust any grievance and arbitration procedure in the parties' collective bargaining agreement as a condition precedent to the Commission's assertion of jurisdiction to determine the merits of an alleged contract violation. WINTER JT. SCHOOL DISTRICT NO. 1, DEC. NO. 17867-C (WERC, 5/81). In this case, the collective bargaining agreement contains both a grievance procedure and provision for final and binding arbitration. However, neither party presented evidence or argument relating to the utilization and exhaustion of that procedure, and the Examiner declines to assert the Commission

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jurisdiction to determine that portion of the complaint, and hereby dismisses it. STATE OF WISCONSIN, DEC. NO. 17218-A (PIERONI, 3/81), AFF'D BY OPERATION OF LAW DEC. NO. 17218-B (WERC, 4/81).

Inasmuch as the evidence failed to establish any violation of Secs. 111.70(3)(a)1, 4 and 5, Stats., the complaint has been dismissed in its entirety.

Dated at Madison, Wisconsin this 6th day of April, 1998.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Lionel L. Crowley, Examiner

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