

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

ASSOCIATION OF MENTAL HEALTH SPECIALISTS, Complainant,

vs.

ROCK COUNTY and JAMES WAGMAN, Respondents.

Case 303
No. 55463
MP-3328

Decision No. 29219-A

Appearances:

Mr. John S. Williamson, Jr., Attorney at Law, 103 West College Avenue, Suite 1203, Appleton, Wisconsin 54911, appearing on behalf of the Association of Mental Health Specialists.

Mr. Thomas A. Schroeder, Corporation Counsel, Rock County, 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 April 13, 1997, alleging that Rock County and James Wagman committed prohibited practices in violation of Secs. 111.70(3)(a)1, 3, 4, 5 and 6, Stats., by interfering with employes' rights, by discouraging membership in the Association and by discriminating in regard to the hiring and terms and conditions of employment, by refusing to bargain collectively with the Association, by violating the parties' agreement, and by failing to deduct union dues, all as a result of the Respondents' creation of the Human Services Worker position.

On October 17, 1997, the Commission appointed Dennis P. McGilligan, 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. On November 7, 1997, Respondents filed a

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Motion to Dismiss the complaint “on the grounds that the Commission is without jurisdiction because of the Complainant’s failure to comply with Section ERC 12.02(1), Wis. Adm. Code” which requires a complaint to “be in writing upon a form provided by the commission, or a facsimile thereof; the original being signed and sworn to before any person authorized to administer oaths or acknowledgments.” On November 19, 1997, the Association of Mental Health Specialists filed an amended complaint on a form provided by the Commission. On November 24, 1997, the Association filed a notarized copy of the amended complaint. On December 16, 1997, Respondents filed an answer to the amended complaint. Hearing on the amended complaint was held on December 18, 1997, and January 7, 1998, in Janesville, Wisconsin. At hearing on December 18, 1997, Respondents withdrew their Motion to Dismiss the complaint because the Complainant by and large “complied with the form provided for by the Wisconsin Administrative Code” and because “Mr. Williamson did sign the complaint and the verification.” The hearing was transcribed, and the parties completed their briefing schedule on March 5, 1998. Respondent Exhibit Nos. 4-6 and Jim Bryant’s affidavit were received on April 16, 1998, and the record was closed at that time.

To maximize the ability of the parties we serve to utilize the Internet and computer software to research decisions and arbitration awards issued by the Commission and its staff, footnote text is found in the body of this decision.

The Examiner, having considered the evidence and argument of the parties and being fully advised in the premises, makes and files the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. Association of Mental Health Specialists, hereinafter “Complainant” or “Association,” is a labor organization within the meaning of Sec. 111.70(1)(h), Stats., and maintains its offices c/o Ron Krueger, Rock County Health Care Center, Highway 57, North Parker Drive, Janesville, Wisconsin 53545.

2. Rock County, hereinafter “Respondent County” or “County,” is a municipal employer within the meaning of Sec. 111.70(1)(j), Stats., and maintains its offices at the Rock County Courthouse, 51 South Main Street, Janesville, Wisconsin 53545.

3. James Wagman, hereinafter “Respondent Wagman” or “Wagman,” is a municipal employer within the meaning of Sec. 111.70(1)(j), Stats., and maintains his principal office is located at the Rock County Health Care Center, Highway 57, North Parker Drive, Janesville, Wisconsin 53545. He is a Health System Services Division Manager in the Human Services Department of the County.

4. The Association has, at all time material herein, been the exclusive bargaining representative for a bargaining unit at the Rock County Health Care Center which included the Psycho-Social Workers employed in the Human Services Department of the County.

5. The Association and the County were parties to a collective bargaining agreement which covered the period of January 1, 1994 through December 31, 1995. Said agreement contained, in relevant part, the following provisions:

ARTICLE II - MANAGEMENT RIGHTS

2.01 Except as otherwise specifically provided herein, the management of the County of Rock and the direction of the workforce is vested exclusively in the County, including, but not limited to the right to hire, the right to promote, demote, the right to discipline or discharge for proper cause, the right to transfer or lay-off (sic) because of lack of work, discontinuance of services, or other legitimate reasons, the right to abolish and/or create positions, the right to create job descriptions and determine the composition thereof, the right to plan and schedule work, the right to make reasonable work rules and regulations governing conduct and safety, the right to subcontract work (when it is not feasible or economical for County employees to perform such work), together with the right to determine the methods and processes and manner of performing work are vested exclusively in the management. In exercising these functions management will not discriminate against any employee because of his/her membership in the Association.

...

ARTICLE VII - GRIEVANCE PROCEDURE

7.01 Definition. Any dispute which may arise from an employer 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 Nursing Home Administrator/Director of Social Services & Community Programs. The Nursing Home Administrator/Director of Social Services & Community Programs 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 Nursing Home Administrator/Director of Social Services & Community Programs. No decision within such ten day period shall be deemed a denial of the grievance.

7.05 Step 3. If the grievance is not satisfactorily settled in Step 2 of the grievance procedure, it may be appealed in writing to the County Administrator. The County Administrator and/or his/her authorized representative(s) shall meet with the employee and his/her authorized representative(s) and attempt to resolve the matter. A written decision shall be placed on the grievance and returned to the employee within fourteen work days from its presentation to the County Administrator.

7.06 Step 4. If a satisfactory settlement is not reached in Step 3 within fourteen days after the County Administrator's decision the Association or the County may serve written notice upon the other that the difference of opinion or misunderstanding shall be arbitrated. Within seven days thereafter, the parties shall meet and attempt to agree upon an arbitrator. If the parties fail to agree upon an arbitrator within ten days following said notice of arbitration the parties shall request the Wisconsin Employment Relations Commission to submit a panel of five arbitrators. In the event the parties do not agree on one of the five, the parties shall meet and alternatively strike names from the panel until one name is left, such person being the arbitrator. The party having the first strike is to be the moving part. (sic) The decision of the arbitrator shall be final and binding upon the parties. The cost of arbitration shall be borne equally by

the parties, except that each party shall be responsible for the cost of any witnesses testifying on its behalf. Upon the mutual consent of the parties, more than one grievance may be heard before one arbitrator.

The arbitrator shall have jurisdiction and authority only to interpret the specific provision grieved and shall not amend, delete or modify any of the express provisions of this Agreement.

Said agreement also contained the following relevant provisions: Article I - Recognition; Article IV - Fair Share Agreement; Article XV - Hours of Work, Classification, Premium Pay; and Article XVII - Salary.

6. The County by letter dated April 21, 1995, filed two petitions for election that sought to establish two bargaining units, with one unit consisting of all regular employees in the position of registered nurse in the County Human Services Department and the County Health Care Center, and with the other unit consisting of all other professional employees of those two departments. The County later suggested that the Commission consider an alternative set of bargaining units following departmental lines as perhaps better meeting the purposes and intent of the Municipal Employment Relations Act. At the time of the petitions, the affected employees were represented by four separate bargaining units, with three different unions certified as representatives.

In its April 21, 1995 cover letter to the petitions noted above, the County stated:

The basis for the Petitions stems from the County's reorganization of certain functions under the Department of Human Services as authorized by SB147-1993 of the Wisconsin Legislature 1993-94 (Wis. Stat. 46.23(3)(b)(1) copy attached). The result of the reorganization is the merger of the former Department of Social Services with the social work functions authorized under Wis. Stat. 51.42 and the juvenile probation function.

7. The above-mentioned petitions were the subject of protracted proceedings which, as detailed in Finding of Fact Nos. 18 and 20, infra, resulted in the certification of the Association as the bargaining representative of the aforesaid employees.

8. Wagman initially requested the creation of the Human Services Worker position as part of his budget request in May or June of 1995. County Personnel Director James Bryant III informed Wagman at that time that the County was authorized to create the position of Human Services Worker as a legitimate exercise of management rights allowing management the right to abolish and/or create positions, as well as the right to create job

descriptions. Bryant also advised Wagman that the aforesaid position should be created as “Unilateral,” i.e. non-represented position because of the proceedings pending before the Commission relating to the above petitions.

9. It was the County’s intent at that time to negotiate with the appropriate collective bargaining representative for the appropriate unit concerning wages, hours and conditions of employment at such time as the aforementioned election proceedings were completed. The County felt at the time that assigning the position of Human Services Worker to any one of the three unions involved in said election proceeding could, and likely would, further protract the proceedings, as well as bring allegations of “favoritism.”

10. Wagman testified that he had a number of reasons for recommending creation of the Human Services Worker positions which included the following. One, the County had difficulty filling a vacant Recreational Therapist position so the County obtained a waiver from the State which allowed it not to fill said position. Some of the Recreational Therapist duties were then assigned to the new position. Two, the responsibility of leading patient groups in craft activities was previously assigned to Psychiatric Technicians while Nursing Assistants filled out financial forms on patients. The County thought that professional social workers would have a problem performing these kinds of non-professional duties. Consequently, the County decided there was a need for a position that would fit somewhere between the traditional Psychiatric Technician position and that of the professional social worker. Three, the County did not think that the duties in question at the psychiatric hospital (fifth floor of Health Care Center) needed to be performed by professional social workers. The County arrived at this decision, in part, based on the new State certification requirements which prohibited the title of “social worker” unless that person was certified as a social worker under Chapter 457. Based on the foregoing, and other factors, the County decided that it could provide better services for the hospital’s patients by creating the aforesaid position.

11. After Wagman proposed creating the Human Services Worker position, there was discussion regarding the matter first within the Human Services Department and then before the Human Services Committee. As part of the budget process, a position description was developed for the Human Services Worker and funding to create 1.2 FTE positions of the Human Services Worker was generated by the elimination of two Psychiatric Technician positions represented by AFSCME Local No. 1258. Said Union, which represents certain non-professional employes at the Health Care Center, was notified of the elimination of the aforesaid positions and the creation of the Human Services Worker position. However, the Association was not informed of same.

12. Both the Human Services Board and the County Board of Supervisors held public hearings which included the proposal to eliminate the aforesaid positions and create the new Human Services Worker position. The County Board of Supervisors approved the 1996 budget on November 14, 1995, which included the creation of two (.6 FTE) positions in the classification of Human Services Worker.

13. Thereafter, a Resolution to create the classification of Human Services Worker was introduced to the County Board of Supervisors by the Human Services Committee and the County Board Staff Committee. Attached to this Resolution was a copy of the position description for the Human Services Worker. This Resolution was approved by the County Board of Supervisors at its second meeting in January of 1996. Prior to this approval, there was an agenda published and a public meeting by the County Board of Supervisors.

14. On January 30, 1996, a posting for County employees only was posted indicating that a Human Services Worker position was vacant. The posting contained relevant job information including hours of work, rates of pay, number of positions and minimum requirements necessary for the position. The posting deadline was February 5, 1996. The posting was sent to all unions in the County including the Association for posting on their bulletin boards or in appropriate places.

15. The County on or about March 8, 1996, hired Maggie O'Brien-Kern and Roseanne Tremain as .6 Human Services Workers. Said employees were previously employed by the County as Psychiatric Technicians, but they did not occupy the two positions that were eliminated as a result of the creation of the Human Services Worker position. O'Brien-Kern's position went to .8 FTE in the next budget in order to provide for better services and coverage. Before O'Brien-Kern and Tremain took the positions, Wagman informed them that these were unilateral or non-Union positions but that there was a good possibility that the positions would end up as a union position since all of the positions in the hospital (Health Care Center) were Union positions. Later, at the time of the election, they had some questions for Wagman regarding their eligibility to vote and Wagman referred them "to the union as it was inappropriate questions for myself."

16. The Human Services Workers' hours have remained the same since the positions were created. One works 8:00 a.m. to 4:30 p.m., and the other one works 11:30 a.m. to 8:00 p.m. These two shifts are alternated between Human Services Workers and an Activity Therapy Assistant, two people working every day, except weekends, when only one works. They have to work every third weekend. Wagman unilaterally established the hours and conditions of employment for these employees. When said employees work on weekends, they do not receive premium pay. Nor do they receive shift differential. They do not work in excess of their FTE equivalency.

17. Human Services Workers do some of the duties previously performed by the Recreation Therapist although this is a minor portion of their job. When the Human Services Worker works on weekends, they prepare certain financial information; they do some utilization review work which involves contacting insurance companies about payment; and they lead some patient groups in certain activities including crafts, and issues dealing with mental illness and patients' symptoms. They also perform certain "legwork" type duties for Social Workers, including getting information from families on a patient so a Social Worker can follow up with a complete psychosocial evaluation. On weekends they may obtain more of this information and file certain information when patients are admitted or discharged.

Previously, Psychiatric Technicians did this type of legwork for Social Workers. They also fill in for crisis intervention. Finally, they also perform duties that are performed by Psychiatric Social Workers when they are absent or assist them in their job duties.

18. On February 25, 1997, the Commission issued a decision which included Findings of Fact, Conclusions of Law and Direction of Elections in response to the petitions filed by the County noted in Finding of Fact No. 6. The Commission directed that an election by secret ballot be conducted under its direction within 45 days from the date of the Direction among employees of the County in the following bargaining units:

1. All regular full-time and regular part-time professional employees of the Rock County Human Services Department excluding managerial, confidential and supervisory employees;

and

2. All regular full-time and regular part-time professional employees of the Rock County Health Care Center excluding managerial, confidential and supervisory employees

The Commission further provided in its Direction that:

As to bargaining unit 1, the purpose of the election shall be to determine whether a majority of the employees who vote in said election desire to be represented by Association of Mental Health Specialists, International Association of Machinists Lodge 1266, or Teamsters Local Union No. 579 for the purposes of collective bargaining with Rock County with respect to wages, hours and conditions of employment or desire no representation.

As to bargaining unit 2, the purpose of the election shall be to determine whether a majority of the employees who vote in said election desire to be represented by Association of Mental Health Specialists for the purposes of collective bargaining with Rock County with respect to wages, hours and conditions of employment or desire no representation.

19. By letter dated March 19, 1997, from County Personnel Director James Bryant III to Douglas V. Knudson, Coordinator of Elections for the Commission, the County provided a list of the employees involved in the elections as requested. On page 4 of the aforesaid communication was an indication from the County that Human Service Workers Roseanne Tremain and Margaret O'Brien-Kern at the Health Care Center, Fifth Floor, were eligible to vote in said elections.

20. By letter dated June 6, 1997, from the Commission to Eugene Dumas, Assistant Corporation Counsel for the County, John S. Williamson, Jr., Attorney at Law, representing the Association, and Marianne Goldstein Robbins, the Commission enclosed a copy of the Order Dismissing Objections to Conduct of Election and Certification of Representative issued by the Commission in the aforesaid election proceeding. In said decision, the Commission certified the Association as the exclusive collective bargaining representative of the professional employees (nurses and social workers) in the County Human Services Department.

21. On or about June 28, 1997, the County made the initial dues deductions for Association dues from the salaries of Roseanne Tremain and Margaret O'Brien-Kern, the two Human Services Workers.

22. Association representatives Judy Schultz and Ron Krueger testified that they first learned of the creation of the two Human Services Worker positions during bargaining for a 1996-1997 agreement between the Association and the County which occurred in June of 1997. In July of 1997, the County made a wage proposal on behalf of the Human Services Worker position; the County revised this proposal in September, 1997. At all times material herein, the County has always included the Human Services Worker position in the County's wage proposal although always at the lowest wage rate. The Association has always taken the position during this collective bargaining that they would not negotiate over the aforesaid position as long as the County continued to have the unilaterally created positions in existence. At all times material herein, the Association's wage proposals did not contain a proposal with respect to the wage rate for the Human Services Worker position.

23. At all times material herein, the County has taken the position that the bargaining table was the appropriate place for the parties to resolve their difference over the Human Services Worker position and the wage rate paid said position. At all time material herein, the Association has refused to bargain over the same because of the Association's position that the position had been illegally created and because the instant prohibited practice complaint had been filed to address the issue.

24. The actions of the Respondents with respect to the newly created position of Human Services Worker were not done with an intent to inflict economic damage on the Association, or motivated by union animus or hostility toward the Association.

Based upon the foregoing Findings of Fact, the Examiner makes the following

CONCLUSIONS OF LAW

1. Respondents, by their actions in creating and filling the Human Services Worker position, did not refuse to bargain collectively with the Association, and thus the Respondents did not commit prohibited practices within the meaning of Sec. 111.70(3)(a)4, Stats., or derivatively, Sec. 111.70(3)(a)1, Stats.

2. Inasmuch as the 1994-1995 collective bargaining agreement between the Association and the County provides for final and binding arbitration of disputes over alleged violations of said agreement, the Commission will not assert jurisdiction over the Association's allegation that the Respondents violated the 1994-1995 agreement by the actions complained of and thereby committed prohibited practices within the meaning of Secs. 111.70(3)(a)5 or 1, Stats.

3. Respondents' actions, as complained of herein, were not motivated in whole or in part by hostility toward the exercise of Complainant's protected rights, and therefore, Respondents have not committed any prohibited practices within the meaning of Sec. 111.70(3)(a)3, or derivatively of (3)(a)1, Stats.

4. Respondents have not interfered with, restrained or coerced the Complainant in the exercise of its rights under Sec. 111.70(2), Stats., and therefore, have not committed an independent prohibited practice under Sec. 111.70(3)(a)1, Stats.

5. Respondents, by deducting Union dues for the persons in the Human Services Worker position immediately upon notification from the Commission of the results of the election, did not commit a prohibited practice within the meaning of Sec. 111.70(3)(a)6, 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 28th day of May, 1998.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Dennis P. McGilligan /s/

Dennis P. McGilligan, Examiner

ROCK COUNTY (HEALTH CARE CENTER)

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

POSITIONS OF THE PARTIES

Complainant's Position

Complainant primarily argues that Respondents violated their duty to bargain by creating the Human Services Worker position without first bargaining with the Association over its wages, hours and working conditions. Complainant also argues that by such action Respondents interfered with employe rights guaranteed by Sec. 111.70(2), Stats., including their right to union representation. Complainant further argues that Respondents discouraged the incumbents in said positions from membership in the Association and discriminated against them in regard to their hiring and terms and conditions of employment. In addition, Complainant maintains that Respondents' actions violated the agreement. Finally, Complainant argues that the Respondents failed to deduct union dues in violation of the agreement and the Municipal Employment Relations Act. Complainant cites several federal cases and articles in support thereof.

For a remedy, Complainant seeks an order restoring the status quo ante (require that the County have the positions' professional duties performed and paid according to the contract's terms and reassign the positions' non-professional duties to non-professional employes) in order to promote meaningful bargaining, to level the playing field in bargaining, to prevent repetition of conduct which deprives employes of the protection of a bargaining representative regarding such items as wages and weekend work hours and to promote the policies of the Municipal Employment Relations Act. Complainant claims that the Commission has the authority to order such a remedy citing FIBREBOARD PAPER PRODUCTS CORPORATION V. LABOR BOARD, 379 US 203, 97 LRRM 2489 (1997) and UNIFIED SCHOOL DISTRICT NO. 1 OF RACINE COUNTY V. WERC, 259 NW2D 724, 97 LRRM 2489 (1977) in support thereof.

Also, Complainant requests certain make whole remedies.

Respondents' Position

Respondents initially argue that they did not "deliberately" conceal the creation of the Human Services Worker position from the Association or the Commission. Respondents add that the County has a management right to create the position as it did, and that there were well thought-out policy and administrative reasons for creating and filling the position.

Respondents next argue that the County has been willing to bargain with the Association at all times material herein with respect to wages, hours and working conditions for said position, but that the Association has refused to negotiate concerning the Human Services Worker position.

Respondents also reject any allegation that they interfered with the protected rights of employees within the meaning of Sec. 111.70(3)(a)1, Stats. In this regard, Respondents point out that the employees filling the disputed positions were not encouraged to be hostile to the Association; were told their positions might be represented in the future; and directed to follow up with any questions to the Association. Likewise, Respondents deny allegations that they violated Sec. 111.70(3)(a)3, Stats., because there is no evidence that they acted in a discriminatory manner or that their actions were in part motivated by hostility toward the Association.

In addition, Respondents argue that they did not violate the parties' agreement by their actions and claim that the contractual grievance/arbitration procedure is the proper forum to resolve these kinds of disputes.

Finally, Respondents point out that the County, upon notification from the Commission of the results of the election, immediately began deducting union dues for the persons in the Human Services Worker position and, therefore, there is no violation of Sec. 111.70(3)(a)6, Stats.

Based on all of the foregoing, Respondents request that the complaint be denied and the matter dismissed.

Refusal to Bargain

Section 111.70(3)(a)4, Stats., requires Respondents to bargain collectively with the Association. The Association's main argument is that the County violated this statutory provision when it made unilateral changes in the wages, hours and working conditions of the Human Services Worker position. The Association also claims that Wagman's unilateral dealing with the employees in said position are per se violations of the duty to bargain in good faith.

As pointed out by Respondents, however, Sec. 111.70(3)(a)4, Stats., provides:

An employer shall not be deemed to have refused to bargain until an election has been held and the results certified to the employer by the Commission.

The record indicates that the County was involved in proceedings before the Commission relative to its petitions for election at the time the aforesaid position was created. Following the Association's certification as the bargaining representative for a bargaining unit which included the position, the County attempted to bargain the wages, hours and working conditions for the position. The County has continued to be willing to bargain the wages, hours and working conditions for the position at all times material herein. The Association, however, refused to bargain over same.

The Association argues that it should not be forced to bargain wages, hours and working conditions for the aforesaid position until the County abolishes the position, and restores the status quo. Otherwise, according to the Association, the County enjoys an unfair advantage in negotiations.

The problem with this approach, as pointed out by Respondents, is that Section 2.01 of the parties' collective bargaining agreement gives the County the right to abolish and/or create positions, as well as the right to create job descriptions. In addition, the Commission has held that the decision to establish or abolish positions need not be bargained where such a decision primarily relates to policy and organization structure determinations. RACINE UNIFIED SCHOOL DISTRICT, DEC. NO. 25283-B (WERC, 5/89); MILWAUKEE BOARD OF SCHOOL DIRECTORS, DEC. NO. 20093-A (WERC, 2/83); OAK CREEK-FRANKLIN SCHOOL DISTRICT, DEC. NO. 11827-D (WERC, 9/74). As noted in Finding of Fact No. 10, the County's decision to create the Human Services Worker position primarily related to policy and organization structure determinations. In particular, the Examiner notes the County's determination that the new position could better meet its needs to provide necessary services to the psychiatric hospital's patients. Therefore, the Examiner finds that the County did not have a duty to bargain with the Association over the elimination of two psychiatric technician positions and the creation of two Human Services Worker positions. Since the County did not have a duty to bargain as noted above, it did not have an obligation to abolish the Human Services Worker position prior to bargaining with the Association over the wages, hours and working conditions for said position.

The Association also argues that Respondents introduced no evidence to explain why it did not know that the disputed positions were part of the existing Association unit. However, as noted above, at the time the position was created the County was involved in an election proceeding before the Commission. These proceedings were protracted. Therefore, the County had a legitimate concern, in the opinion of the Examiner, that if the positions were assigned to any one union, it would be accused of favoritism and attempting to unduly influence the pending Commission election proceedings. Respondents point out that the County had already been accused of such conduct once before when it attempted to fill a CHIPS Case Manager position. ROCK COUNTY, DEC. NO. 28494-B (JONES, 1/96) ORDER DENYING MOTION TO INTERVENE AND DISMISSING PETITION FOR REVIEW, DEC. NO. 29494-B (WERC, 11/96) In addition, the Examiner notes that since an election was pending the County certainly had a good faith question as to who the appropriate bargaining representative would be.

The Association argues, however, that the County should have known that the position

was within the aforesaid unit because all professionals in the psychiatric hospital (Health Care Center) were in the then-existing Association unit and the professional tasks the employees were assigned were those previously performed by the Recreational Therapist or the Crisis Intervention Workers. However, the Association offered no persuasive evidence or argument that the County acted improperly by creating these positions as unrepresented positions. If the Association felt these positions should have been in the unit, it could have filed for a unit clarification. In addition, the Association did not establish that the duties assigned to the new position from positions within the unit were professional in nature. Nor did the Association establish that the new position is performing duties that require the person performing them to meet the statutory definition of a professional employe. Acceptance of the Association's position noted above would require a finding, not supported by the record, that all of the duties performed by the aforesaid unit positions had been professional in nature. Based on same, and all of the foregoing, as well as the fact that the new position performs duties that were previously performed by the non-professional Psychiatric Technician position, the Examiner rejects the above argument of the Association.

The Association further argues that it could not take any action to enforce its rights regarding the Human Services Worker position because it was not notified of the creation of same. The trade off for the Human Services Workers was the deletion of two Psychiatric Technician positions represented by AFSCME. AFSCME was notified of that fact. In addition, as noted above, the positions were created as non-union. Based on the foregoing, the Examiner does not believe that the County had any obligation to inform the Association of the creation of the Human Services Worker position.

In any event, the disputed positions were created as part of the County's budgetary process with public hearings and notification. The positions were also included by the County on the list of employes eligible to vote in the aforesaid election. The Examiner is of the opinion that based on same the Association knew or should have known of the positions' existence prior to June of 1997. Based on all of the foregoing, the Examiner also rejects the above argument of the Association.

In addition, the Association argues that Wagman's unilateral dealings with the employes are per se violations of the duty to bargain in good faith. However, as noted above, the Association did not prove that the County failed to bargain in good faith with respect to the creation and filling of the Human Services Worker position. Since the County did not violate the duty to bargain in good faith as alleged, it follows that for the same conduct Wagman did not violate said duty. Nor did the Association offer any other persuasive evidence or argument in support of this allegation.

Finally, the Examiner believes that the record supports a finding that the Association did not want to bargain with the County over the wages, hours and working conditions for the Human Services Worker position except on its own terms. The law and the record facts, however, do not support such an approach.

Based on all of the above, the Examiner finds that by their conduct Respondents did not

violate their duty to bargain as provided in Sec. 111.70(3)(a)4, Stats., or derivatively Sec. 111.70(3)(a)1, Stats.

Contract Violation

The complaint also alleges a violation of Sec. 111.70(3)(a)5, Stats., and presumably a derivative violation of Sec. 111.70(3)(a)1, Stats. Section 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 County argues that the parties' contractual grievance/arbitration procedure is the proper forum to resolve these disputes. The Association offers no rebuttal argument. For the reasons discussed below, the Examiner agrees with the County's position.

Generally, the Commission will not exercise its jurisdiction to determine the merits of breach of contract allegations in violation of Sec. 111.70(3)(a)5, Stats., where the parties' collective bargaining agreement provides a grievance procedure with final and binding arbitration. ROCK COUNTY, DEC. NO. 28494-A (JONES, 1/96); JOINT SCHOOL DISTRICT NO. 1, CITY OF GREEN BAY, ET AL., DEC. NO. 16753-A, B (WERC, 12/79); BOARD OF SCHOOL DIRECTORS OF MILWAUKEE, DEC. NO. 15825-B (WERC, 6/79); OOSTBURG JOINT SCHOOL DISTRICT, DEC. NO. 11196-A, B (WERC, 12/79). The rationale for this is to give full effect to the parties' agreed-upon procedures for resolving disputes arising under their contract. CITY OF MADISON, DEC. NO. 28864-A, P. 17 (CROWLEY, 1/97), AFF'D EXAMINER'S FINDINGS OF FACT, MODIFIED EXAMINER'S CONCLUSION OF LAW AND AFFIRMED EXAMINER'S ORDER, DEC. NO. 28864-B (WERC, 10/97). A grievance arbitration procedure is presumed to constitute a grievant's exclusive remedy unless the parties to the agreement have express language which provides it is not. MAHNKE V. WERC, 66 WIS.2D 524, 529, 225 N.W.2D 617, 621 (1975). Here, the parties' collective bargaining agreement provides for final and binding arbitration and contains no express language that it is not the exclusive remedy. It is undisputed that no grievances were filed in this matter. Thus, it must be concluded that the Association has failed to exhaust the contractual grievance procedures.

While the Commission recognizes certain exceptions to this general policy, no such exception exists here. See WONDER REST CORP., 275 WIS. 273 (1957) - the employe alleges

denial of fair representation; ALLIS CHALMERS MFG. CO., DEC. NO. 8227 (WERB, 10/67) - the parties have waived the arbitration provision; and MEWS READY MIX CORP., 29 WIS.2D 44 (1965) - a party ignores and rejects the arbitration provisions in the contract.. The Association offered no persuasive reason for not filing a grievance in the matter and pursuing a resolution of the dispute to arbitration. The County has specifically stated that the arbitral forum is the proper place to resolve any contractual disputes and has not raised any arbitrability objections regarding same.

The parties have a contract which contains a grievance procedure which culminates in final and binding arbitration. The parties have agreed to have an arbitrator determine whether there has been a violation of the contract. This agreement must be given effect and as noted above, no exceptions apply. It is therefore the arbitrator that should decide the merits of the Association's claim. This is the parties' exclusive remedy and the Examiner will not assert the Commission's jurisdiction to determine whether or not Respondents violated the parties' contract. Thus, the alleged violation of Sec. 111.70(3)(a)5, Stats., as well as the derivative violation of Sec. 111.70(3)(a)1, Stats., are dismissed in their entirety.

Discrimination and Interference

Complainant further asks that the Examiner find that Respondents violated Sec. 111.70(3)(a)1 and 3, Stats.

Section 111.70(3)(a)3, Stats., makes it a prohibited practice for a municipal employer to "encourage or discourage a membership in any labor organization by discrimination in regard to . . . tenure or other terms or conditions of employment." To prove a violation of this section the Complainant must, by a clear and satisfactory preponderance of the evidence, establish that:

1. Complainant was engaged in protected activities; and
2. Respondents were aware of those activities; and
3. Respondents were hostile to those activities; and
4. Respondents' conduct was motivated, in whole or in part, by hostility toward the protected activities. 1/

1/ The "in-part" test was applied by the Wisconsin Supreme Court to MERA cases in MUSKEGO-NORWAY C.S.J.S.D. NO. 9 V. WERB, 35 WIS.2D 540 (1967) and is discussed at length in EMPLOYMENT RELATIONS DEPT. V. WERC, 122 WIS.2D 132 (1985).

It is undisputed that Complainant engages in protected activities when it represents and bargains for unit employees and that Respondents are aware of those activities. The evidence fails to establish that Respondents were hostile to Complainant's protected activities. Complainant has the burden of proving by a clear and satisfactory preponderance of the evidence that there was such hostility. The evidence failed to show that Wagman created the "Human Service Worker" position to encourage the persons he placed in them to be hostile to the Association. Nor does the evidence indicate that Wagman took any other action relative to the aforesaid position out of hostility toward the Association. There is no evidence of any animosity on the part of Wagman or the County toward Complainant's protected activity. Therefore, it must be concluded that there is simply no evidence to support a finding of hostility toward Complainant's protected activity. Since there is no evidence that Wagman was hostile to Complainant's protected activity, the County, by "condoning and defending Respondent Wagman's conduct" noted above, did not act out of hostility toward Complainant's protected activity as alleged by Complainant.

Even if there were hostility, Respondents' conduct would have to be motivated by said hostility. Motive is difficult to determine as usually there is no direct evidence so it must be determined from the total circumstances proved. Here, despite the Complainant's elaborate theories regarding Respondents' misconduct as noted above, the Examiner finds that based on the totality of circumstances, the evidence simply fails to show that Respondents' actions were motivated by hostility. Thus, the allegation of Sec. 111.70(3)(a)3, Stats., violations have been dismissed.

The Complainant has alleged a violation of Sec. 111.70(3)(a)1, Stats. Inasmuch as there is no Sec. 111.70(3)(a)3, Stats., violation, there is no derivative Sec. 111.70(3)(a)1, Stats., violation.

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 employees in the exercise of their Sec. 111.70(2) rights. WERC v. EVANSVILLE, 69 WIS.2D 140 (1995). 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).

Employer conduct which may well have a reasonable tendency to interfere with employe exercise of Sec. 111.70(2) rights will not be found violative of Sec. 111.70(3)(a)1, Stats., if the employer had valid business reasons for its actions. BLACKHAWK TECHNICAL COLLEGE, DEC. NO. 28846-A (CROWLEY, 5/97) AFF'D DEC. NO. 28846-D (WERC, 12/97). Here, based on all of the foregoing, the Examiner finds no conduct by Respondents that would have a reasonable tendency to interfere with employe exercise of Sec. 111.70(2) rights. However, assuming arguendo that there is such conduct, the Examiner finds that the Respondents had valid business reasons for its actions. In this regard, the Examiner points out that valid budgetary, programmatic and policy reasons existed for Respondents' actions. In particular, the County attempted, without success, to fill the position of recreational therapist. Thereafter, the County obtained a waiver from the State to have such a position because it was unable to fill the position and subsequently assigned some of the duties that the recreational therapist had performed to the Human Services Worker position. In addition, prior to the creation of the Human Services Worker position, the County had the job of leading patient groups assigned to Psychiatric Technicians. The County also had Nursing Assistants filling out financial forms on patients. Since the County was unable to fill the Recreational Therapist position, the County "saw a need for a position that would fit somewhere between the traditional psych tech position and that of the professional social worker" to perform the aforesaid functions. (Tr. At 51) The County then decided that it could better provide this service by deleting two Psychiatric Technician positions and using that funding to create a lesser FTE Human Services Worker.

In deciding to create this new position, the County also came to the conclusion that it was not necessary to have an employe with the certification of social worker to perform the functions in question. Another factor in arriving at this course of action was the advent of certification for social workers, i.e. anyone calling themselves a social worker needed that certification. The County wanted to comply with State requirements in this area.

Based on the foregoing and the record as a whole, the Examiner is persuaded that the County took the aforesaid actions in order to better serve its human services customers.

Based on all of the above, the Examiner finds that the evidence failed to prove any violation of Sec. 111.70(3)(a)1, Stats., and, therefore, that charge has also been dismissed.

Alleged Violation of Sec. 111.70(3)(a)6, Stats.

The Association also argues that Respondents violated Sec. 111.70(3)(a)6, Stats., by failing to deduct Union dues upon the creation and filling of the aforesaid positions. However, the Association offered no additional evidence or argument, except as discussed above, in support of this claim. In addition, the record is clear that the County, upon notification from the Commission of the results of the election, immediately began deducting dues for the persons in the position of Human Services Worker. Based on the foregoing, the Examiner finds that there has been no violation of Sec. 11.70(3)(a)6, Stats.

Based on all of the foregoing, and the record as a whole, the Examiner finds that the allegations of prohibited practices by Complainant are without merit, and the Examiner has dismissed the complaint in its entirety.

Dated at Madison, Wisconsin, this 28th day of May, 1998.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Dennis P. McGilligan /s/

Dennis P. McGilligan, Examiner