

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

**DUNN COUNTY HIGHWAY DEPARTMENT EMPLOYEES,
LOCAL 727, WISCONSIN COUNCIL 40, AFSCME, AFL-CIO, Complainant,**

vs.

DUNN COUNTY, Respondent.

Case 102
No. 56995
MP-3474

Decision No. 29523-A

Appearances:

Mr. Steve Day, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 318 Hampton Court, Altoona, Wisconsin 54720, appearing on behalf of Dunn County Highway Department Employees, Local 727, Wisconsin Council 40, AFSCME, AFL-CIO.

Mr. Scott L. Cox, Corporation Counsel, Dunn County, 800 Wilson Avenue, Menomonie, Wisconsin 54751, appearing on behalf of Dunn County.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Dunn County Highway Department Employees, Local 727, Wisconsin Council 40, AFSCME, AFL-CIO filed a complaint with the Wisconsin Employment Relations Commission on November 13, 1998, which it amended on February 8, 1999, alleging that Dunn County had committed prohibited practices in violation of Secs. 111.70(3)(a)1, 2 and 5, Stats. On December 30, 1998, 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 as amended was held on February 9, 1999, in Menomonie, Wisconsin. The parties filed post-hearing briefs which were exchanged on April 6, 1999. The Examiner, having considered the evidence and arguments of counsel, makes and issues the following Findings of Fact, Conclusions of Law and Order.

29523-A

FINDINGS OF FACT

1. Dunn County Highway Department Employees, Local 727, Wisconsin Council 40, AFSCME, AFL-CIO, hereinafter referred to as the Union, is a labor organization within the meaning of Sec. 111.70(1)(h), Stats., and at all times material herein, is the exclusive bargaining representative of all regular full-time and regular part-time employees in the Dunn County Highway Department, excluding limited-term substitute employees, confidential, supervisory and managerial employees. Its principal offices are located at 318 Hampton Court, Altoona, Wisconsin 54720.

2. Dunn County, hereinafter referred to as the County, is a municipal employer within the meaning of Sec. 111.70(1)(j), Stats., and maintains its principal offices at the Courthouse, 800 Wilson Avenue, Menomonie, Wisconsin 54751. Marlyn Brenden is the County's Highway Commissioner and Patrick Thompson is the County's Administrative Coordinator and they have acted on behalf of the County.

3. At all times material herein, the Union and County have been parties to a collective bargaining agreement which contains a grievance procedure which provides for the final and binding arbitration of disputes arising thereunder.

The parties' collective bargaining agreement also contains the following provisions:

APPENDIX A – COMPENSATION

Article A-1: Vacation

. . .

Section 2. Scheduling.

To maintain efficient operations and harmony, requests for vacations should be made as far in advance as possible. Earned vacations may be taken at any time that will not jeopardize efficient county operation during the anniversary year following its accrual.

Employees shall request vacation dates from their department supervisor in writing at least 20 days prior to the vacation dates requested. Employees shall be allowed to take an aggregate of three (3) earned vacation days per year upon twenty-four (24) hour notice to their supervisor when the work load will allow it.

The department supervisor must let the employee know if the request for vacation is approved or denied at least fifteen (15) days following the date of request. The department supervisor may approve vacation on a shorter notice on a non-precedent case by case setting basis.

Scheduled and approved vacation shall not be canceled by exercise of greater seniority rights.

Vacations may be taken in one-half (1/2) hour increments. The granting of less than ½ day increments shall not disturb normal operations of the department or cause the need for overtime or substitutions.

. . .

Article A-6: Leave of Absence

Section 1. Application and Approval Procedure.

Applications for leaves of absence shall be made to the Union in writing. The request will then be presented to the supervisor by the Union. The supervisor and department head will review the request and present it to the County Administrative Coordinator with his/her recommendation. The Union and the employee shall be notified by the County Administrative Coordinator regarding the granting or denial of such leave.

All leaves of absence under this article shall be without pay.

. . .

Section 5. Union Leave.

The County agrees to grant twenty (20) days off per year to duly elected employee representatives. An aggregate of six (6) months per year will also be granted to duly elected union representatives provided the County is advised ten (10) days in advance of said leave.

4. Martha Brandly is employed at the Dunn County Highway Department as a Parts Room Employee, a classification in the bargaining unit represented by the Union. Brandly's hours of work are from 6:30 a.m. to 3:00 p.m. Brandly is the Secretary/Treasurer of the Union. At a local Union meeting, it was decided that someone should attend meetings of the County Highway Committee. The Highway Committee does not negotiate with employees on behalf of the County and does not routinely make any decisions regarding personnel issues. Brandly volunteered to attend these meetings which are public meetings. On March 24, 1998,

Brandly requested vacation to attend the Highway Committee meeting on March 25, 1998 (Union Exhibit 6). This vacation request was approved on April 1, 1998. Brandly requested vacation on April 8 and 24, 1998, to attend the Highway Committee meetings (Union Exhibit 7). The vacation was approved. On April 30, 1998, Brandly requested vacation for two hours on May 13, 1998, to attend a Highway Committee meeting which vacation request was approved (Union Exhibit 8). On June 3, 1998, Brandly requested two hours of vacation for June 17, 1998, which was denied because six other employees were already scheduled for vacation that day (Union Exhibit 9). On June 9, 1998, Brandly requested Union leave for two hours on June 17, 1998, to attend the Highway Committee meeting (Union Exhibit 9). The Highway Commissioner and the County's Administrative Coordinator denied the leave stating that attending Highway Committee meetings did not qualify as Union business (Union Exhibit 9). After discussion between Council 40's Staff Representative and the Administrative Coordinator, Brandly was allowed to take two (2) hours of vacation to attend the Highway Committee meeting on June 17, 1998 (Union Exhibit 9). On June 23, 1998, Brandly requested and was granted three (3) hours of vacation to attend the July 8, 1998 Highway Committee meeting (Union Exhibit 10). On or about July 13, 1999, Brandly requested two (2) hours of Union leave (Union Exhibit 11). The request was denied on the basis that sufficient reason for the leave was not given (Union Exhibit 11). On August 5, 1998, the request was renewed stating it was for leave to attend the Highway Committee meeting and the leave was approved (Union Exhibit 11). On August 12, Brandly requested two hours of Union leave to attend the September 9, 1998 Highway Committee meeting and the leave was approved (Union Exhibit 12). On August 10, 1998, Brandly requested two hours of Union leave to attend the October 14, 1998 Highway Committee meeting (Union Exhibit 13). The request was approved with a note from the Administrative Coordinator stating: "Would prefer Martha take leave in ½ or full day increments to minimize disruption that rescheduling a replacement in the parts room can cause." (Union Exhibit 13) On October 16, 1998, Brandly requested Union leave for October 28 and November 9, 1998, to attend the Highway Committee meetings on those dates (Union Exhibits 14). On October 26, 1998, the Administrative Coordinator denied the request stating that leave must be taken in one-half or full-day increments (Union Exhibit 14). Brandly did not receive the denial until the afternoon of October 27, 1998, and decided there was not enough time to get approval for four hours of leave time so Brandly did not attend the October 28, 1998 Highway Committee meeting. Thereafter, Brandly requested Union leave in four-hour increments to attend Highway Committee meetings which were approved (Union Exhibit 14, County Exhibit 6).

5. The County in the past has approved Union leave for employees who made such requests which listed "union business," or in one case, no reason for the request (Union Exhibits 17, 18 and 19). These requests were for a full day or for two full days (Union Exhibits 17, 18 and 19).

6. The County has the right to determine the number of employees that will be on vacation at the same time, otherwise all employees could take vacation at the same time essentially shutting down the County's operations. The denial of Brandly's request for

vacation for June 17, 1998, was denied because six other employees were already scheduled for vacation. This denial was made by the Patrol Superintendent, Robert Falk (Union Exhibit 9). This denial was a proper exercise of the County's management rights. The County has the right to request sufficient information for a leave for Union business to insure that the leave would be for Union business (Tr. 17-18). The County could require enough information to satisfy itself that the leave has some kind of connection with Union activity. Brandly in her request of July 13, 1998, for leave for Union business was properly asked to supply sufficient information that would indicate it was for Union business and when she did, the leave was granted (Union Exhibit 11).

The County required Brandly to take leave for Union business in one-half day increments commencing August 26, 1998. The collective bargaining agreement under Article A-1 – Vacation states as follows: “The granting of less than ½ day increments shall not disturb normal operations of the department or cause the need for overtime or substitutions.” Although the language is not applicable to a leave for Union business, it indicates that the County has concerns for absences of less than a one-half day. The County demonstrated that granting Brandly time off of less than one-half day resulted in a loss of productivity (Tr. 90-94, 116-117). Requiring more time off than needed for the Union business may constitute interference absence legitimate concerns on the part of the County; however, on balance, the County's consideration of legitimate operational requirements as indicated by the vacation scheduling language and the testimony of the Patrol Superintendent and the Highway Commissioner establish that the County has valid business reasons for its one-half day increment requirement.

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

CONCLUSIONS OF LAW

1. The County has not interfered with, restrained or coerced Martha Brandly in the exercise of her rights under Sec. 111.70(2), Stats., and therefore, has not committed a prohibited practice under Sec. 111.70(3)(a)1, Stats.

2. The Union has failed to establish by a clear and satisfactory preponderance of the evidence any violation of Sec. 111.70(3)(a)2, Stats.

3. Inasmuch as the parties' collective bargaining agreement contains a grievance procedure which culminates in final and binding arbitration and that procedure has not been exhausted, the Examiner will not assert the Commission's jurisdiction over the allegation that the County violated the contract and thereby committed a prohibited practice within the meaning 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 the following

ORDER

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

Dated at Madison, Wisconsin, this 7th day of May, 1999.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Lionel L. Crowley /s/

Lionel L. Crowley, Examiner

DUNN COUNTY

MEMORANDUM ACCOMPANYING
FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

In its complaint initiating these proceedings, the Union alleged that the County violated Secs. 111.70(3)(a)1 and 5, Stats., by the Highway Commissioner's and/or County Administrative Coordinator's making numerous attempts in various ways to prevent Martha Brandly from attending County Highway Committee meetings. The County denied committing any prohibited practices and alleged that Martha Brandly attended nine committee meetings between March 26, 1998 and October 14, 1998, and she did not attend the October 28, 1998 meeting. Prior to the hearing, the Union amended its complaint to allege a violation of Sec. 111.70(3)(a)2, Stats., which allegation the County also denied.

UNION'S POSITION

The Union contends that by attempting to prevent, and finally preventing, Union Officer Martha Brandly from attending Highway Committee meetings, the County has and is committing a prohibited practice in violation of Sec. 111.70(3)(a)1, Stats. It asserts that Sec. 111.70(2) guarantees certain rights and protections to workers. It submits that the evidence established that Martha Brandly has been Secretary/Treasurer of the Union for ten years and the Union had long considered sending a Union member to Highway Committee meetings to get more information as to what was happening in the Department and Brandly volunteered to attend the meetings. It points out that Brandly took copious notes at the Highway Committee meetings and reported the information gathered at every local Union meeting and the information was useful and important to the membership; such as Department budget information, truck and equipment purchases, contracts for road work within the County and legislation.

The Union takes the position that the County has no carte blanche right to deny Union leave and it must be granted unless it can be shown that the leave has absolutely nothing to do with Union business. It observes that Brandly used vacation to attend the first four meetings in 1998 so she could be paid and starting in June, 1998, it claims the County concocted ways to prevent her from attending further meetings. It notes that her June 3, 1998 vacation request was denied stating that six others were already gone. It states that it is interesting that Patrol Superintendent Bob Falk posted a notice stating that further vacation requests would not be granted on certain dates including June 17, 1998, because five or more workers were already scheduled off. It refers to the testimony of Brandly and Union President Christianson that this was the first such notice ever posted and it was not unusual for six or seven workers to be off during the construction season. The Union asserts that after Brandly was denied vacation, she

requested Union leave which also was denied on the basis that attending Committee meetings did not qualify as Union business and only after discussions between the Union's Staff Representative and Thompson was Brandy allowed to use vacation to attend the meeting.

The Union notes that on July 13 Brandy requested Union leave and it was denied on the basis that sufficient reason was not given and after Brandy reapplied with the notation indicating attendance at the Committee meeting was the leave granted. The Union argues that the County continues the threat of denial for insufficient reasons, yet in the past, the County has granted Union leave to others and has never asked for a more specific reason and granted such leave and no questions were asked.

The Union suggests that the County had a pattern of delaying approval until very near the meeting date and mandated four hours of leave for the meeting on October 28, 1998, which notice was eleven days after her request and did not allow sufficient time to reapply, so she could not and did not attend. The Union argues that the four-hour minimum rule is just another attempt to discourage Ms. Brandy from attending Highway Committee meetings. It insists that her absence of one or two hours did not cause a disruption in the parts room. It points out that from early 1995 to early 1998, Brandy served on a County Wellness Committee which met once a month for one to two hours and there was no complaint that her absence caused a disruption in the parts room and no complaints were made. It states "so much for the 'disruption' argument" and the rule is solely to discourage or to punish Brandy and not because of any staffing problem.

In conclusion, the Union contends that it is obvious that Brenden and Thompson did not like Brandy's attending Committee meetings and they tried to discourage and prevent her attendance by denying vacation, then Union leave and finally, the four hours minimum rule. It contends that by said conduct the County violated Sec. 111.70(3)(a)1, Stats. It seeks a cease and desist order, a posting and any other remedy the Commission deems appropriate.

COUNTY'S POSITION

The County observes that the complaint alleges that it violated Secs. 111.70(3)(a)1, 2 and 5, Stats. It contends that the Commission should refuse to assert its jurisdiction to consider the alleged contractual violation because the parties' agreement provides for final and binding arbitration. It insists that any dispute with Article A-6 or any other contractual provision must be resolved through the grievance procedure and not the complaint forum, and it submits that the Examiner should not determine the merits of any alleged contract violation.

The County claims that the alleged violation of Sec. 111.70(3)(a)2, Stats., is not supported by the evidence. It maintains there is no evidence to suggest that the County dominated or interfered with the Union's organization.

The County argues that it did not interfere with, restrain or coerce Brandly or any other Union employee in the exercise of their rights under Sec. 111.70(2), Stats. The County insists that the entire complaint is a breach of contract dispute and should be dismissed in its entirety. The County states the law with respect to a violation of Sec. 111.70(3)(a)1, Stats., and questions whether Brandly was engaged in protected activity. It asserts that Brandly's motivation to attend meetings was personal. It observes that County Highway Committee meetings are open to the public and whether Brandly can attend during her work hours is solely within the province of the parties' agreement. It asserts that attendance at public meetings is not a special right under Sec. 111.70(2), Stats., but assuming arguendo that it is, there is no evidence that Brendan's or Thompson's conduct had a reasonable tendency to interfere with, restrain or coerce Brandly in the exercise of her protected rights. It points out that there were no hostile statements made by them or any other County official and although they had doubts about the appropriateness of Union leave under the contract, they gave Brandly the benefit of the doubt. It observes that Thompson allowed her vacation to attend the June 17, 1998 meeting, and after establishing the one-half day requirement in October, gave Brandly the opportunity to reapply. Brandly, according to the County, was never prevented from attending Highway Committee meetings and she is unhappy with the rules set by Thompson which is a matter to be resolved under the contractual dispute resolution mechanism.

The County asserts that even if it interfered with Brandly by the minimum half-day rule, it was clearly justified by the scheduling disruption and doubling up in the parts room. It insists that her continual leave requests had the effect of altering operations in the Highway Department and the County had a valid business reason to structure Union leave as it did and therefore no Sec. 111.70(3)(a)1 violation should be found.

It concludes that the evidence demonstrates that the County did not commit any prohibited practices and the entire complaint should be dismissed.

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 municipal employees 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 EMPLOYEES. Municipal employees 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 employee(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 employee 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).

A review of the evidence presented in this case fails to establish any conduct on the part of the County that would have a reasonable tendency to interfere with Brandly's exercise of Sec. 111.70(2) rights. Furthermore, even if there were such conduct, the record supports a conclusion that the County had valid business reasons for its actions.

Section 111.07(3), Stats., requires the party on whom the burden of proof rests to sustain such burden by a clear and satisfactory preponderance of the evidence. Thus, the Union had the burden of proof to show that the County violated Sec. 111.70(3)(a)1, Stats. The Union asserts a pattern of conduct, the first instance being the denial of vacation for June 17, 1998, due to the fact that six other employees were already off that day. Brandly had been granted vacation prior to that and it is recognized that summer involves greater road construction as well as greater vacation usage. There was no proof offered that the limit on the number of employees on vacation at the same time was unreasonable or not uniformly enforced. It is reasonable for an employer to have such limits to meet its work requirements and this is specifically protected by the County's management rights as well as Article A-1, Section 2. The evidence simply failed to demonstrate the denial was a ruse or an attempt to prevent Brandly from attending the Highway Committee meeting; rather, it was based on legitimate reasons. The Union's assertion that denial of Union leave for June 17, 1998, on the basis that attending Highway Committee meetings did not qualify as Union business, involves an interpretation of the parties' collective bargaining agreement which is for an arbitrator to

decide. The mere fact that the County questioned whether such attendance was for Union business fails to establish interference when ultimately vacation was granted and it is up to the arbitrator to determine the contractual meaning the parties ascribed to leave for Union business.

The Union argued that requiring Brandly to make her request for Union leave more specific constituted another part of the pattern of interference. It was admitted that the County has the right to discover sufficient information to ensure that an absence will be used for Union business so this requirement appears legitimate and is not a hardship on Brandly and once she complied, the leaves were granted. As far as delays in approval, a simple phone call would have determined whether the request had been granted. Although the cause of some delays was not explained in the record, this does not rise to the level of interference.

The minimum of a one-half day leave was not required until October, 1998. The contractual language on vacation usage which is more specific than the Union business leave language supports the County's position that providing a replacement for a short period can result in the replacement losing a half day elsewhere and require a doubling up when only one employee is needed. On the other hand, requiring more time off than needed to attend a meeting may be an attempt to discourage the use of Union leave. Whether it is reasonable or not involves an interpretation of contractual language and is grist for the arbitrator's mill. Here the evidence fails to establish that the County's assertion of valid business reasons was merely a pretext to prevent Brandly from attending Highway Committee meetings.

A review of the events and the evidence for and against interference on balance results in the conclusion that there is not sufficient clear and convincing proof that the County's conduct, taken as a whole, constituted interference in violation of Sec. 111.70(3)(a)1, Stats.

The Union alleged a violation of Sec. 111.70(3)(a)2, Stats., but offered no arguments in its brief in support of this charge. That section makes it a prohibited practice for a municipal employer to "initiate, create, dominate or interfere with the formation or administration of any labor or employee organization . . ." Domination requires the actual subjugation of the labor organization to the employer's will. To establish a violation of this section, a complainant must demonstrate that a respondent's conduct threatened the independence of the union as an entity devoted to the employees' interests as opposed to the employer's interest. In this case, there is no evidence whatsoever that the County's actions impaired the Union's independence as an entity devoted to the employees' interests. As a result, there is no basis in the record for concluding that the County violated this section by its conduct herein. Accordingly, no violation of Sec. 111.70(3)(a)2, Stats., has been found.

The Union also alleged a violation of Sec. 111.70(3)(a)5, Stats. 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. The rationale for

this is to give full effect to the parties' agreed-upon procedures for resolving disputes arising under their contract. 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. Here, the parties' collective bargaining agreement provides for final and binding arbitration and contains no express language that it is not the exclusive remedy. The Union cannot sustain a violation of Sec. 111.70(3)(a)5, Stats., when the contractual grievance procedure is the exclusive remedy and that exclusive remedy is in the process of being exercised. Thus, the undersigned declines to exercise the Commission's jurisdiction over the Sec. 111.70(3)(a)5, Stats., allegation and that issue has been dismissed. ROCK COUNTY, DEC. No. 29219-B (WERC, 10/98).

In summary, it is concluded that the County actions were lawful and it did not violate Secs. 111.70(3)(a)1, 2 or 5, Stats. The complaint has therefore been dismissed.

Dated at Madison, Wisconsin, this 7th day of May, 1999.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Lionel L. Crowley /s/

Lionel L. Crowley, Examiner