

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

**INTERNATIONAL BROTHERHOOD OF ELECTRICAL
WORKERS, LOCAL 494**, Complainant,

vs.

CITY OF MILWAUKEE, Respondent.

Case 450
No. 56261
MP-3404

Decision No. 29524-A

Appearances:

Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., by **Attorney Andrea F. Hoeschen**, 1555 North RiverCenter Drive, Suite 202, P.O. Box 12993, Milwaukee, Wisconsin 53212, appearing on behalf of the International Brotherhood of Electrical Workers, Local 494.

Attorney Thomas J. Beamish, Assistant City Attorney, 800 City Hall, 200 East Wells Street, Milwaukee, Wisconsin 53202-3551, appearing on behalf of the City of Milwaukee.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

International Brotherhood of Electrical Workers, Local 494 filed a complaint with the Wisconsin Employment Relations Commission on March 13, 1998 alleging that the City of Milwaukee had committed prohibited practices in violation of Secs. 111.70(3)(a)1, 3 and 4, 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 was held on March 4, 1999 in Milwaukee, Wisconsin. The parties filed post-hearing briefs. The City, by letter dated May 13, 1999, advised that it would not file a reply brief and the Union filed a reply brief on May 20, 1999. The Examiner, having considered the evidence and arguments of counsel, makes and issues the following Findings of Fact, Conclusions of Law and Order.

No. 29524-A

FINDINGS OF FACT

1. International Brotherhood of Electrical Workers, Local 494, hereinafter referred to as the Union, is a labor organization within the meaning of Sec. 111.70(1)(h), Stats., and is the exclusive collective bargaining representative of certain employees of the City of Milwaukee and its principal offices are located at 3303 South 103rd Street, Milwaukee, Wisconsin, 53227.

2. The City of Milwaukee, hereinafter referred to as the City, is a municipal employer within the meaning of Sec. 111.70(1)(j), Stats., and maintains its principal offices at 200 East Wells Street, Milwaukee, Wisconsin, 53202-3551.

3. The Union and the City have been parties to a series of collective bargaining agreements, the most recent of which, by its terms, covered the period June 1, 1994 through May 31, 1997. The agreement contains a provision on health insurance which provided that employees enrolled in the Basic Plan would contribute \$7.50 per month for single enrollment and \$15.00 per month for family enrollment. For employees enrolled in a Health Maintenance Organization Plan (HMO), the City contributed 105% of the HMO with the lowest single enrollment subscriber cost or the lowest family enrollment subscriber cost to the City for single enrollment or family enrollment, respectively.

4. The parties commenced negotiations for a successor agreement to that expiring on May 31, 1997, in approximately April, 1997. The parties had approximately 15 negotiating sessions in 1997 and in December, 1997 had not reached agreement on a successor collective bargaining agreement. The City in negotiations proposed changes in the health insurance provision which among other things provided that employees enrolled in the Basic Plan would contribute \$25.00 per month for single enrollment and \$50.00 per month for family enrollment. For employees enrolled in an HMO, the City's contribution would equal 100% of the HMO with the lowest single or family subscriber cost, respectively. The Union did not take issue with the City's proposal on health insurance but focused on other issues. During negotiations the Union had indicated it would agree to the City's health insurance proposals although the effective date was at issue. At no time prior to January 1, 1998 had the Union and the City reached an agreement on a successor agreement and there was no separate or side agreement that the Union agreed that the City could implement the health insurance changes.

5. From mid-October through mid-November each year, the City notifies employees of the health plans available for the following calendar year with the rates for the various health plans and employees select from these various plans. The City sent employees in the bargaining unit represented by the Union the rates based on the \$25/\$50 for the basic plan and 100% of the lowest cost HMO for HMO's.

6. The parties did not reach agreement on a successor collective bargaining agreement and effective with the first pay period of 1998, the City withheld amounts from employees' paychecks according to the City's proposal rather than continuing the premium contributions as set forth in the expired agreement.

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

CONCLUSIONS OF LAW

1. The City, by implementing the change in insurance deductions from employees' paychecks commencing the first pay period in 1998 prior to reaching an agreement with the Union on a successor agreement, unilaterally modified the wages and terms of employment of represented employees and committed a refusal to bargain in violation of Sec. 111.70(3)(a)4, Stats., and derivatively interfered with the Sec. 111.70(2) rights of bargaining unit employees in violation of 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)3, 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

1. The alleged violation of Section 111.70(3)(a)3, Stats., is dismissed.
2. The City of Milwaukee, its officers and agents, shall immediately:
 - a. Cease and desist from unilaterally violating the status quo by changing health insurance premium deductions from unit employees represented by the Union.
 - b. Take the following affirmative action which the Examiner finds will effectuate the policies of the Municipal Employment Relations Act:
 1. Immediately restore the status quo and reinstate the amount of deductions to be \$7.50/mo. for single and \$15.00/mo. for family for the Basic Plan and 105% of the lowest HMO contribution and make employees whole, with interest at 12% per year for out of pocket losses caused by the City's unilateral change in premium deductions, until the parties reach agreement on a successor agreement or an interest arbitration award over a successor collective bargaining agreement.

2. Notify all bargaining unit employees, by posting in conspicuous places where employees work, copies of the Notice attached hereto and marked "Appendix A." The notice shall be signed by a responsible representative of the City and shall be posted immediately upon receipt of a copy of the Order and shall remain posted for thirty (30) days thereafter. Reasonable steps shall be taken by the City to ensure said Notice is not altered, defaced or covered by other material.
3. Notify the Wisconsin Employment Relations Commission in writing within twenty (20) days from the date of this Order as to what steps have been taken to comply herewith.

Dated at Madison, Wisconsin this 14th day of June, 1999.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Lionel L. Crowley /s/

Lionel L. Crowley, Examiner

APPENDIX A

NOTICE TO ALL EMPLOYEES

1. WE WILL immediately cease and desist from refusing to bargain with International Brotherhood of Electrical Workers, Local 494 concerning contributions toward health insurance premiums and will not make any change in the status quo until the parties reach an unconditional agreement regarding premiums or receipt of an interest arbitration award over the terms of a successor agreement.
2. WE WILL repay to all employees with interest the excess deductions from employees for the 1998 increase in employee contributions beyond the \$7.50/mo. and \$15.00/mo. on the Basic and 105% of the lowest HMO.
3. WE WILL NOT in any other or related manner interfere with the rights of employees pursuant to the provisions of the Municipal Employment Relations Act.

Dated at Milwaukee, Wisconsin this _____ day of _____, 1999.

By _____
For the City of Milwaukee

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

CITY OF MILWAUKEE

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

In its complaint initiating this proceeding, the Union alleged that the City violated Secs. 111.70(3)(a)1, 3 and 4, Stats., by unilaterally implementing a new health insurance program which increased employee contributions and altered benefit packages prior to reaching agreement on a successor collective bargaining agreement. The City answered the complaint admitting it had implemented changes in health insurance employee contributions but denied any violation of Sec. 111.70(3)(a), Stats.

Union's Position

The Union contends that the City's implementation of a change in health insurance is a per se prohibited practice. It submits that a municipal employer must maintain the status quo during a contract hiatus and the unilateral implementation of proposals during contract negotiations is a per se prohibited practice, citing RACINE UNIFIED SCHOOL DISTRICT, DEC. NO. 28614-A (WERC, 6/96). It contends that the duty to bargain would be meaningless if an employer could unilaterally implement proposals it believed would ultimately be included in the contract. It asserts that employers would implement those proposals favorable to the employer but wait for a ratified agreement to implement the union's proposals. It points out that in the instant case the City implemented the increased health insurance contribution but not the \$100 bonus which is the quid pro quo for the increased contribution. It also notes the City has not implemented a new early retirement benefit. It observes that an employer cannot pick and choose when it will honor the status quo and when it will not, citing CHEQUAMEGON UNITED TEACHERS, DEC. NO. 28194-B (WERC, 6/98). The Union points out that the City's unilateral implementation of the health insurance changes caused tangible damages to employees as it raised their contributions prematurely and forced them into an irreversible choice between health care providers.

The Union argues that that City's prohibited practice is not excused by convenience or inevitability. It maintains that the City does not quite make a necessity argument but the City argues that it would have been administratively inconvenient to change the contribution rates mid-year. The Union alleges that compliance with the duty to bargain is not discretionary. It notes that the City asserts that the parties would have agreed to the changes eventually, so there was "no harm, no foul" but the Commission rejected an analogous argument in CITY OF MAUSTON, DEC. NO. 28534-C (WERC, 3/98). It points out that the parties still have not reached agreement, yet the City's argument belies the assertion that the parties nearly agreed on an agreement at the time of implementation.

The Union takes the position that the City's prohibited practice is not excused by its agreements with other bargaining units. The Union argues that these agreements are irrelevant

because this is not an interest arbitration and merely because one unit agrees to an employer's proposal does not give the employer the right to foist it on another bargaining unit. It observes that a municipality cannot opt out of interest arbitration merely because it expects to prevail.

The Union concludes that by unilaterally implementing an increase in employee contributions during a hiatus, the City engaged in a per se prohibited practice and it requests a cease and desist order and the City be directed to make the employees whole.

City's Position

The City acknowledges that those facts that the Union presumably considers solely necessary for a determination as to the allegations set forth in its complaint are not disputed. The City submits that the context in which the City made the change needs to be examined. It points out that when the parties negotiated the prior contract it was known that the successor contract would require changes in the health insurance plan. It also notes that by the time the parties conducted extensive negotiations in 1997, the overwhelming number of City bargaining units had agreed to these modifications. The City insists that it was justified in expecting the Union would not refuse to participate in the health insurance plans on the same terms as all other City employees. It submits that in the fall of 1997, the City needed to notify all employees of the insurance plans available for 1998, the rates charged employees and the need to enter into contracts with the health insurance providers. It argues that the totality of circumstances including the City's need to effectuate the changes coupled with its reasonable expectation that such plan modifications were acceptable to the Union that the instant case does not involve unilateral action motivated by some type of anti-union animus. It contends that the Union has failed to meet its burden of proof that the City violated Sec. 111.70(3)(a)3, Stats., as the record fails to support a finding that the City was hostile to any protected activities and that portion of the Union's complaint must be dismissed.

With respect to the allegation the City violated Sec. 111.70(3)(a)4, Stats., the City notes that the Commission has recognized that a necessity defense is available to a charge of unilateral implementation in violation of Sec. 111.70(3)(a)4, Stats. The City stresses that it is important to view the events at the very time the City took its actions. It states that the Union had conceptually agreed to the changes in health insurance plans, the open enrollment period required the City to notify employees including those represented by the Union of the expected employee contributions for 1998 and the City's reasonable expectation that the Union would memorialize its acceptance of the insurance modifications, so the City's actions in December, 1997 are understandable. It argues that the passage of time works to the Union's benefit but the City should be judged by the circumstances existing in December, 1997. It asks that the complaint be dismissed.

Union's Reply

In response to the City's assertion that the implementation of the health insurance proposal was justified by necessity because of the annual enrollment which is the only time

employees are notified of the cost of insurance for the following calendar year, the Union states that it was not necessary for the City to begin charging the increased rates on January 1, 1998. It suggests that the City could have sent rate change sheets with a note that the City was proposing the change and employees would then know the potential costs in premiums and act accordingly. It maintains that the increase on January 1, 1998 was only a potential increase as the parties had not reached agreement and necessity certainly did not demand that the City begin charging a potential increase on January 1, 1998. It concludes that the City's unilateral implementation of its health insurance plan during a contract hiatus and in the course of negotiations violates Secs. 111.70(3)(a)1 and 4, Stats.

DISCUSSION

Although the Union alleged a violation of Sec. 111.70(3)(a)3, Stats., it failed to offer proof of the necessary elements to support this charge and it made no arguments in its brief or reply brief, and thus this charge has not been proved and has been dismissed.

It is well settled that, absent a valid defense, a unilateral change in the status quo wages, hours or conditions of employment during a contractual hiatus is a per se violation of the employer's duty to bargain under the Municipal Employment Relations Act. Such unilateral changes are tantamount to an outright refusal to bargain about a mandatory subject of bargaining because they undercut the integrity of the collective bargaining process in a manner inherently inconsistent with the statutory mandate to bargain in good faith. CITY OF BROOKFIELD, DEC. NO. 19822-C (WERC, 11/84) AT 12; GREEN COUNTY, DEC. NO. 30308-B (WERC, 11/84) AT 18-19; AND SCHOOL DISTRICT OF WISCONSIN RAPIDS, DEC. NO. 19084-C (WERC, 3/85) AT 14. In addition, such an employer unilateral change evidences a disregard for the role and status of the majority representative which is inherently inconsistent with good faith bargaining. SCHOOL DISTRICT OF WISCONSIN RAPIDS, SUPRA AT 14. Implementation of the increase in premiums for employees in the bargaining unit from \$7.50/month for single and \$15.00/month for family for the Basic Plan to \$25.00/month and \$50.00/month respectively and from 105% of the lowest HMO to 100% of the lowest HMO so that employees who did not select the lowest HMO cost had to pay more is clearly a unilateral change in the status quo wages and it occurred during a contractual hiatus and is a per se violation of the duty to bargain and a prohibited practice absent a valid defense.

The City does not dispute the facts or this conclusion but argues that the defense of necessity excused its actions. The Commission has recognized that "necessity" is a valid defense to a modification of the status quo during a contract hiatus. CITY OF BROOKFIELD, DEC. NO. 19822-C (WERC, 11/84). The City claims that the open enrollment period that occurs in mid-October to mid-November required it to notify employees of the increased costs of health insurance for the upcoming year coupled with its good faith reasonable expectation that as the Union had accepted the health insurance modifications and that agreement on a successor agreement was imminent, it implemented the changes even though no successor agreement had been reached. The Commission has recognized certain situations where necessity requires the employer to implement its proposal such as a school calendar which must be implemented if

school starts before a successor agreement is reached or a student evaluation program which had to be implemented before the start of school. BOARD OF SCHOOL DIRECTORS OF MILWAUKEE, DEC. NO. 15829-D, C (1980).

However, these are not applicable to the instant case. As the Union points out, the City could have sent out notice of the new rates according to its last proposal with a note that agreement had not been reached but if the City's proposal is accepted, the higher rates would be paid by the employees and would be retroactive to the first pay period in 1998. The employees would then be able to make an informed choice as to their selection of the insurance plan for 1998. Deduction of higher premiums was solely economic and these could be applied retroactively just as the payment of wages is applied retroactively. The Commission has held that economic savings does not constitute "necessity." In RACINE UNIFIED SCHOOL DISTRICT, DEC. NO. 23904-B (WERC, 9/87), the Commission held that implementation of a wage increase to receive state aids was not a necessity. In WISCONSIN DELLS SCHOOL DISTRICT, DEC. NO. 25997-B (SHAW, 4/90) AFF'D DEC. NO. 25997-C (WERC, 8/90), it was held that the discontinuance of hot lunches did not constitute business necessity. In ST. CROIX FALLS SCHOOL DISTRICT, DEC. NO. 27215-B (BURNS, 1/93) AFF'D DEC. NO. 27215-D (WERC, 7/93) AFF'D 186 WIS.2D 671 (1994), change in sick leave policy did not constitute necessity. In VILLAGE OF SAUKVILLE, DEC. NO. 28032-B (WERC, 3/96), the Commission held that savings realized by subcontracting could not be equated with necessity. The defense of necessity has not been shown by the City. It could have continued to deduct the smaller amounts until agreement was reached on the successor agreement and then recoup the higher amounts by retroactive deductions similar to the reverse of granting retroactive pay. This case is really no different than deducting increased premiums from employees that was found to violate the status quo in WASHBURN PUBLIC SCHOOLS, DEC. NO. 28941-B (WERC, 6/98). Thus, the defense of necessity has not been proved.

Although the City may have acted in good faith, the change in the insurance premiums deducted is a change in the status quo and is a per se violation. The City's failure to maintain the status quo and retain the health insurance deduction in accordance with the expired contract violated Secs. 111.70(3)(a)4 and 1, Stats. The City has been ordered to cease and desist unilaterally changing the status quo, to reinstate the status quo and make employees whole with interest as well as the standard posting and notification requirements.

Dated at Madison, Wisconsin this 14th day of June, 1999.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Lionel L. Crowley /s/

Lionel L. Crowley, Examiner

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