STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

ASSOCIATION OF MENTAL HEALTH SPECIALISTS, Complainant,

vs.

ROCK COUNTY, Respondent.

Case 331
No. 58760
MP-3636

Decision No. 29970-B

Appearances:

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

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

ORDER AFFIRMING IN PART AND MODIFYING IN PART EXAMINER'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On January 24, 2001, Examiner Raleigh Jones issued Findings of Fact, Conclusions of Law and Order with Accompanying Memorandum in the above matter wherein he concluded that Respondent Rock County had not committed prohibited practices within the meaning of Secs. 111.70(3)(a) 4, 5 or 1, Stats., and therefore dismissed the complaint.

Complainant timely filed a petition with the Wisconsin Employment Relations Commission seeking review of the Examiner's decision pursuant to Secs. 111.07(5) and 111.70(4)(a), Stats.

The parties thereafter filed briefs in support of and in opposition to the petition -- the last of which was received April 2, 2001.

Having reviewed the record and being fully advised in the premises, the Commission makes and issues the following

ORDER

A. Examiner Findings of Fact 1-3 are affirmed.

B. Examiner Finding of Fact 4 is modified to add the following:

Both 1998-1999 collective bargaining agreements contain the following language:

Unless either party desires to alter, amend or otherwise change this Agreement upon written notice to the other party to be received no later than September 1, 1999, or the first day of September in any year thereafter, this Agreement shall be automatically renewed from year to year. In the event one of the parties desires to alter, amend, or otherwise change this Agreement and proper notice is given, but agreement between the parties to the proposed alteration, amendment or other change is not reached prior to the expiration of this Agreement, and unless other terms are agreed to, this Agreement shall be continued in full force and effect until the parties shall agree to the proposed alterations, amendments, or other changes. It is expressly understood between the parties that time is of the essence in the submission and receipt, if any, of the aforementioned notice.

C. Examiner Findings of Fact 5-17 are affirmed.

D. Examiner Conclusion of Law 1 is affirmed.

E. Examiner Conclusion of Law 2 is modified to read:

2. It is permissible and appropriate to defer to the parties' contractual grievance arbitration procedure for resolution of the alleged violation of Sec. 111.70(3)(a) 4, Stats.

F. The Examiner's Order is modified to read:

1. The portion of the complaint alleging violations of Secs. 111.70(3)(a)5 and 1, Stats., is dismissed.

2. The alleged violation of Sec. 111.70(3)(a)4, Stats., is hereby deferred to the parties' contractual grievance arbitration procedure and further Commission action with respect to that

claim is hereby held in abeyance. The Commission will dismiss this allegation on motion of either party upon a showing that the subject matter of the alleged violation of Sec. 111.70(3)(a)4, Stats., has been resolved in a manner not clearly repugnant to the underlying purposes of the Municipal Employment Relations Act. The Commission will proceed to review the Examiner's Conclusion of Law and Order regarding this allegation on motion of either party upon a showing that the allegation has not and will not be resolved through the contractual grievance arbitration procedure or was resolved in a manner clearly repugnant to the underlying purposes of the Municipal Employment Relations Act.

Given under our hands and seal at the City of Madison, Wisconsin this 23rd day of July, 2001.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Meier /s/
James R. Meier, Chairperson

A. Henry Hempe /s/
A. Henry Hempe, Commissioner

Paul A. Hahn /s/
Paul A. Hahn, Commissioner

Rock County

MEMORANDUM ACCOMPANYING ORDER AFFIRMING IN PART AND MODIFYING IN PART EXAMINER'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The Pleadings

In its complaint, the Association alleges that the Respondent violated Secs. 111.70(3)(a)4 and 5, Stats., when it stopped paying Judy Schultz's wages while she attended Health Care Center bargaining sessions during her regular hours of work. The Respondent admits that it stopped paying such wages but contends that its actions were consistent with collective bargaining agreements in effect at the time it acted.

The Examiner's Decision

The Examiner dismissed the alleged violation of Sec. 111.70(3)(a)5, Stats., because the collective bargaining agreements in question contained grievance arbitration clauses that are presumed to be the exclusive mechanism for resolving violation of contract claims.

The Examiner reached the merits of the alleged violation of Sec. 111.70(3)(a)4, Stats., and, based on evidence of past practice, concluded that Respondent had not modified the status quo as to payment of wages for bargaining. In reaching the merits, the Examiner concluded that deferral of the dispute to grievance arbitration was not appropriate and stated the following:

11/ While the Commission has in some cases deferred Sec. 11.170(3)(a)4 unilateral change/refusal to bargain claims to the parties' contractual arbitration procedure where the Respondent objects to Commission exercise of jurisdiction of the matter (See, BROWN COUNTY, DEC. NO. 19314-B (WERC, 6/83)), it is apparent from the above discussion that this Examiner considers deferral of these claims inappropriate here. The reason the Examiner has reached the merits of the unilateral change/refusal to bargain claims, rather than deferring them to arbitration, is because the Commission is responsible for ensuring that claims of statutory violations receive a determination on the merits in a manner not repugnant to MERA. Additionally, the Examiner believes that sufficient questions exist concerning whether the three criteria which the Commission has set forth for deferring (3)(a)4 claims to arbitration exist here. The three criteria need not be listed here, but are identified in SCHOOL DISTRICT OF CADOTT, DEC. NO. 27775-C (WERC, 6/94).

POSITIONS OF THE PARTIES ON REVIEW

The Association asserts that the Examiner erred by concluding that Respondent did not violate Sec. 111.70(3)(a)4, Stats., when it ceased to pay Schultz. The Association argues that the Examiner should have but wrongfully failed to consider applicable contractual language when ruling on the merits of this allegation. If the relevant contractual language is considered, the Association contends that it is clear that Respondent unilaterally modified the status quo in violation of Sec. 111.70(3)(a)4, Stats. Therefore, the Association asks that the Examiner be reversed as to this issue.

The Respondent contends that the Examiner properly resolved the matters before him and urges affirmance.

DISCUSSION

As reflected by our modification of Finding of Fact 4, collective bargaining agreements were in effect at all pertinent times during this dispute. Those collective bargaining agreements contained grievance arbitration provisions for resolution of disputes over alleged violations of the agreements. Because these contractual grievance arbitration provisions are presumed to be the exclusive mechanisms for resolution of alleged violations of the contracts, SEE MONONA GROVE SCHOOL DISTRICT, DEC. NO. 22414 (WERC, 3/85), the Examiner correctly refused to assert the Commission's jurisdiction to decide whether Respondent had violated a collective bargaining agreement in violation of Sec. 111.70(3)(a)5, Stats.

Where, as here, it is also alleged that an employer's conduct during the term of a contract constitutes a unilateral change in a mandatory subject of bargaining in violation of Sec. 111.70(3)(a)4, Stats., the issue arises as to whether such a dispute should be deferred to grievance arbitration. In BROWN COUNTY, DEC. NO. 19314-B (WERC, 6/83), the Commission stated the following:

> With regard to the appropriateness of the Examiner's disposition of the disputed claim (and the implicit denial of Respondents' Motion to that extent) we conclude that the Examiner erred in not deferring this particular claim of unlawful unilateral change to the parties' contractual grievance arbitration procedure.
>
> We so conclude because there is a high probability that a grievance arbitration would fully resolve the unlawful unilateral change claim and because the Respondents have, as noted above, objected to WERC exercise of prohibited practice jurisdiction of this essentially contractual issue. More specifically, the

analysis and the remedies (if any) in a grievance arbitration of the dispute are quite likely to fully determine the Sec. 111.70(3)(a)4 issue and to satisfactorily remedy any unlawful unilateral change in overtime assignment procedure involved. The disputed existence of the alleged status quo (an established practice of giving off-duty officers a right of first refusal of assignments before special deputies are assigned the work) would be a necessary element in resolving a contractual claim that the change violated, for example, Articles 1 and 9. Similarly, the arbitrator will be squarely faced with whether the County, in fact, deviated from that status quo and, if so, whether it was authorized to do so by the terms of the agreement. Conventional arbitral remedies would also appear likely to suffice in resolving the dispute in a manner not clearly repugnant to the underlying purposes of MERA.

The Commission has previously stated that Sec. 111.70(3)(a)4 refusal to bargain allegations will be deferred to the contract grievance arbitration forum in appropriate cases in which the Respondent objects to Commission exercise of jurisdiction in the matter. Such deferral advances the statutory purpose of encouraging voluntary agreements by not undercutting the method of dispute resolution agreed upon by the parties in their collective bargaining agreement. Indeed, if the Commission were to indiscriminately hear and decide every claim that a party's alleged deviation from a contractually specified standard is an unlawful unilateral change refusal to bargain, it would undermine the Commission's longstanding policy of ordinarily refusing to exercise its Sec. 111.70(3)(a)5, Stats., jurisdiction absent exhaustion of contractual grievance procedures.

In sum, because Respondent has consistently urged WERC deferral of the disputed claim of unlawful unilateral change in overtime assignment procedures to the contract grievance arbitration procedure and because there is a substantial probability that submission of the merits of that dispute to that arbitral forum will resolve the claim in a manner not repugnant to MERA, deferral is appropriate in this aspect of the case.

Obviously, if Respondent County raises a procedural defense before the arbitrator, such as untimely grievance filing, the merits of the dispute would remain unresolved and subject to subsequent Commission review of the Examiner's decision on the merits. For, the Commission's discretionary decision to defer – for probable resolution via contractual procedures – alleged non-contractual violations of the Statutes it enforces ought not and does not preclude the Commission from fully adjudicating such claims if they are not resolved on the merits in a fair and timely fashion and in a manner not repugnant to the Act. (footnotes omitted)

The teachings of BROWN COUNTY have been distilled to the following three criteria to be applied when determining whether to defer to grievance arbitration a duty to bargain dispute that arises during the term of a contract.

(1) Is the employer willing to arbitrate the merits of dispute?;
(2) Is it clear the collective bargaining agreement addresses the dispute?; and
(3) Does the dispute involve important issues of law or policy?

If the employer is willing to arbitrate the dispute and it is clear that the bargaining agreement addresses the dispute and the dispute does not involve important issues of law or policy, then deferral of the dispute to arbitration is appropriate.

Here, the Examiner correctly found in Finding of Fact 17 that the Respondent has never refused to arbitrate the question of the contractual entitlement to pay during bargaining and it is clear that the bargaining agreements address the dispute. Further, we think it clear that this dispute does not involve important issues of law or policy. It is not a dispute over who can represent a union at the bargaining table but rather is a dispute over whether an employee will remain in regular pay status when bargaining for another unit during regular work hours or will have to use leave time.

Therefore, we are satisfied that all three criteria for deferral are present and we have deferred the dispute to the parties' grievance arbitration process under the terms specified in our Order.

Dated at Madison, Wisconsin this 23rd day of July, 2001.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Meier /s/
James R. Meier, Chairperson

A. Henry Hempe /s/
A. Henry Hempe, Commissioner

Paul A. Hahn /s/
Paul A. Hahn, Commissioner

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