

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-C

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

On April 11, 2000, Complainant Association of Mental Health Specialists (AMHS) filed a complaint with the Wisconsin Employment Relations Commission alleging that Respondent Rock County had committed certain prohibited practices within the meaning of the Municipal Employment Relations Act. Among other matters, AMHS alleged that by ceasing to pay AMHS President Judy Schultz for her attendance at collective bargaining sessions, Respondent County had unilaterally modified a mandatory subject of bargaining during the term of a contract and thereby violated Sec. 111.70(3)(a)4, Stats.

On January 24, 2001, Commission Examiner Raleigh Jones issued a decision resolving the issues raised by the April 11, 2000 complaint. As to the above-noted alleged violation of Sec. 111.70(3)(a)4, Stats., the Examiner concluded that Respondent had not committed a prohibited practice.

Complainant AMHS sought review of the Examiner's decision and on July 23, 2001, we issued an Order Affirming in Part and Modifying in Part Examiner's Findings of Fact, Conclusions of Law and Order with Accompanying Memorandum wherein we deferred to grievance arbitration Complainant's Sec. 111.70(3)(a)4, Stats., allegation. We ordered:

Dec. No. 29970-C

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.

On August 3, 2001, Complainant AMHS filed a Motion to Proceed, asserting that Respondent was not willing to waive a timeliness defense in the matter the Commission had deferred to grievance arbitration.

On August 20, 2001, Respondent filed a response to Complainant's Motion admitting that it was not willing to waive its timeliness defense and further arguing that the Commission should affirm the Examiner's dismissal of this allegation.

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.

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

ORDER

- A. The Findings of Fact in the Commission's July 23, 2001 decision are reaffirmed.
- B. Conclusion of Law 2 in the Commission's July 23, 2001 decision is set aside and the following Conclusion of Law is made:
 - 2. Respondent Rock County did not commit a prohibited practice within the meaning of Sec. 111.70(3)(a)4, Stats., by refusing to pay a Human Services Department employee for work

time spent serving on the bargaining team for the Health Care Center contract between Respondent Rock County and Complainant Association of Mental Health Specialists.

C. Paragraph 2 of the Order in the Commission's July 23, 2001 decision is set aside and the following Order is made:

2. The portion of the complaint alleging a violation of Sec. 111.70(3)(a) 4, Stats., is dismissed.

Given under our hands and seal at the City of Madison, Wisconsin, this 22nd day of March, 2002.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

A. Henry Hempe /s/

A. Henry Hempe, Commissioner

Paul A. Hahn /s/

Paul A. Hahn, Commissioner

Rock County

MEMORANDUM ACCOMPANYING ORDER

As reflected in the preface to this Order, on July 23, 2001, we deferred to grievance arbitration the allegation that Respondent Rock County had unilaterally ceased to pay one of the four authorized AMHS bargaining representatives for her time spent in collective bargaining during regular hours of work, contrary to the provisions of Sec. 111.70(3)(a)4, Stats. 1/ Our deferral was premised on a determination that the grievance arbitration process could resolve this issue.

1/ Section 111.70(3)(a)4, Stats., describes as a prohibited practice a refusal by a municipal employer “. . . to bargain collectively with a representative of a majority of its employees in an appropriate collective bargaining unit.” Unilateral modification of a mandatory subject of bargaining during the term of an existing contract is included under the scope of this statutory provision, and formed the specific basis of the AMHS allegation in this matter.

That issue is whether an employee of the **Human Services Department**, duly designated by AMHS as one of its four contractually-authorized Association bargaining representatives, had a contractual right to be paid for serving on the AMHS bargaining team that was negotiating a labor contract on behalf of the **Health Care Center** bargaining unit. The underlying facts indicate that AMHS represents two bargaining units in Rock County: (1) professional employees of the **Human Services Department**; and (2) professional employees of the **Health Care Center**. The **Human Services Department** is a separate County department from the **Health Care Center**. AMHS and the County have separate labor agreements covering each of said bargaining units. The **Human Services Department** employee designated by AMHS to serve on its **Health Care Center** bargaining unit negotiating team also served as the President of AMHS.

As indicated above, the County was unwilling to waive its timeliness defense to the matter we referred to grievance arbitration. This unwillingness raises the possibility that the grievance arbitration process would not resolve the issue of whether the contractual right asserted by AMHS did or did not exist. Under these circumstances, Complainant AMHS has requested us to consider the merits of the refusal to bargain claim raised in its complaint. Consistent with the terms of our Order of July 23, 2001, we proceed to do so.

AMHS argues that Article 21.02 of the 1998-99 labor agreement between the County and the **Human Services Department** bargaining unit entitles the designated employee of that department to paid bargaining time even when she assists in bargaining a labor agreement with the **Health Care Center** bargaining unit. AMHS places primary reliance on the contrast between the language of Article 21.02 and 21.01.

Contrary to that view, the County contends that consideration of Articles 21.01 and 21.02 in the context of the parties' bargaining and litigation history leads to the opposite conclusion, i.e., the employee in question is not entitled to the paid bargaining time she seeks.

Articles 21.01 and 21.02 of the AMHS-Rock County labor contract that covers the **Human Services Department** bargaining unit state:

21.01 Representation. One Association steward and/or officer (bargaining unit member) shall be permitted to investigate the process a grievance during working hours without pay.

21.02 Association representatives shall be permitted to participate in collective bargaining sessions, provided that if bargaining sessions are conducted during the regular and normal schedule of working hours for such persons, the County shall continue to pay wages for time spent in such sessions to only four Association representatives, to be designated by the Association.

Viewed solely on its face, the contrast between Articles 21.01 and 21.02 offers some support for the AMHS interpretation. As the AMHS argues, although the presence of the parenthetical phrase "bargaining unit member" in Article 21.01 creates an obvious restriction, no such restriction is created in Article 21.02 because the restricting phrase is absent.

However, when the Articles are examined in the light of the bargaining and litigation history of the parties, we are persuaded this AMHS interpretation is incorrect.

In 1997, while the parties herein were bargaining the *initial* labor contract between the County and the **Human Services Department** bargaining unit, a dispute arose as to the right of **Health Care Center** bargaining unit employees to use work time to bargain collectively and process grievances for employees in the **Human Services Department** unit. 2/ Germane to this dispute were the following Articles 22.01 and 22.02 of the labor agreement between the **Health Care Center** bargaining unit and the County:

22.01 Representation. One Association steward and/or officer shall be permitted to investigate and process a grievance during working hours without pay.

22.02 Association representatives shall be permitted to participate in collective bargaining sessions, provided that if bargaining sessions are conducted during the regular and normal schedule of working hours for such persons, the County shall continue to pay wages for time spent in such sessions to only four Association representatives, to be designated by the Association.

2/ See *ROCK COUNTY, DEC. NO. 29211-A (CROWLEY, 4/98), AFF'D BY OPERATION OF LAW, DEC. NO. 29211-B (WERC, 4/98)*.

The parties litigated his dispute before WERC Examiner Crowley in a prohibited practice proceeding. While the outcome of the litigation was pending, the County and AMHS also entered into a Memorandum of Understanding. The Memorandum of Understanding set forth the impact that the Crowley decision (or the result of any appeal) would have on the initial labor contract between the **Human Services Department** bargaining unit and the County. The Memorandum reads as follows:

The parties to (sic) hereby agree that a portion of Article 21.01 remains in dispute and is the subject of a prohibited practices complaint filed by the Association with the Wisconsin Employment Relations Commission (WERC). The parties further agree that the final status of Article 21.01 will be determined by the ruling of the WERC Examiner, until such time that ruling is reversed upon appeal of either party. If the County prevails in this dispute, the working of Article will remain in subsequent contracts as it is in the 1996-97 contract, until such time as it is changed through negotiations or interest arbitration pursuant to State Statute 11.170. If the Union prevails in this dispute, the phrase "(bargaining unit member)" will be removed from the contract and will remain as such, until such time as it is changed through negotiations or interest arbitration pursuant to State Statute 111.70. The Union also retains the right to seek a declaratory ruling regarding the arbitrability of this issue if the WERC decision is not issued prior to filing for the declaratory ruling.

The County ultimately prevailed in the litigation before Examiner Crowley. In dismissing the AMHS claim, Crowley stated the following as to Article 22.01 of the **Health Care Center** bargaining unit contract:

The language of the Health Care Center collective bargaining agreement which allows a member of the Grievance Committee to meet with the grievant applies only to the grievance procedure under the Health Care Center contract and this language cannot be extended to a separate and distinct unit.

With the litigation resolved, the parties proceeded to implement the terms of the Memorandum of Understanding described above. Article 21.01 of the 1998-99 labor contract between the County and the **Human Services Department** bargaining unit (the first between the parties) ultimately included the parenthetical phrase “(bargaining unit member)” as the parties had agreed in their Memorandum of Understanding. Thus the wording of the Article took the form in which it presently exists.

Given this litigation/bargaining history, even though the **Health Care Center** bargaining unit labor contract does not include this parenthetical phrase, it is clear that under both the **Health Care Center** labor contract and the **Human Services Department** labor contract, the right of the AMHS representative to be paid while investigating and processing grievances is limited to grievances arising in the bargaining unit in which such representative is employed. In the case of the **Health Care Center** bargaining unit contract, the limitation has arisen by virtue of the Crowley decision; in the case of the **Human Services Department** bargaining unit contract, the limitation is imposed by explicit contractual language, added by agreement of the parties as a result of the Crowley decision.

Based on this bargaining and litigation history, we reject the interpretation urged by AMHS as to Article 21.02 of the **Human Services Department** bargaining unit contract. In our opinion the presence of the phrase “(bargaining unit member)” in Article 21.01 but not in Article 21.02 of the **Human Services Department** bargaining unit contract does *not* produce two different results. We believe the meaning of Articles 21.01 and 21.02 in the **Human Services Department** bargaining unit contract is the same as the meaning of Articles 22.01 and 22.02 of the **Health Care Center** bargaining unit contract. This is because the language contrast cited by AMHS resulted from a County victory in litigation over the **Health Care Center** contract and an agreement between the parties to have that victory reflected in the **Human Services Department** contract. In this context, we find incongruous the notion that the parties intended the County’s interpretation of the **Health Care Center** bargaining unit

labor contract that prevailed in the Crowley decision to produce nonetheless the AMHS sought interpretation of the **Human Services Department** bargaining unit contract.

We have considered the AMHS argument that on four occasions the County did pay a **Human Services Department** employee for bargaining time spent on behalf of the **Health Care Center** bargaining unit. However, it is also undisputed that the County then refused to pay the **Human Services Department** employee for subsequent bargaining time spent on behalf of the **Health Care Center** bargaining unit and advised the AMHS that the four previous payments had been made in error. Given what is a mixed practice at best, we remain persuaded that the intent of the parties is best reflected by their bargaining and litigation history.

Based on the foregoing and the entire record herein, we find no violation of Sec. 111.70(3)(a)4, Stats., and have accordingly dismissed this allegation of the complaint.

Dated at Madison, Wisconsin, this 22nd day of March, 2002.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

A. Henry Hempe /s/

A. Henry Hempe, Commissioner

Paul A. Hahn /s/

Paul A. Hahn, Commissioner