STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

LOCAL 2430, AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO, Complainant,

vs.

KENOSHA CITY AND COUNTY JOINT SERVICES BOARD, Respondent.

Case 24
No. 59270
MP-3685

Decision No. 30043-A

Appearances:

Shneidman, Myers, Dowling, Blumenfield, Ehlke, Hawks & Domer, by **Attorney Aaron N. Halstead**, 217 South Hamilton Street, Suite 400, P.O. Box 2155, Madison, Wisconsin 53701-2155, appearing on behalf of Local 2430, American Federation of State, County and Municipal Employees, AFL-CIO.

Davis & Kuelthau, S.C., by **Attorney Nancy L. Pirkey**, 111 East Kilbourn, Suite 1400, Milwaukee, Wisconsin 53202-6613, appearing on behalf of Kenosha City and County Joint Services Board.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER DEFERRING COMPLAINT TO GRIEVANCE ARBITRATION

On October 4, 2000, Local 2430, American Federation of State, County and Municipal Employees, AFL-CIO (the Union), filed a complaint with the Wisconsin Employment Relations Commission (the Commission) alleging that Kenosha City and County Joint Services Board (the Board) had committed prohibited practices within the meaning of Secs. 111.70(3)(a)1 and 4, Stats. On October 23, 2000, the Board filed a "Motion To Dismiss

And/Or Defer To Grievance Arbitration" (the Motion). On February 1, 2001, the WERC appointed Richard B. McLaughlin, a member of its staff, to act as Examiner. The parties agreed to a briefing schedule to address the motion. No hearing has been conducted in the matter. The parties completed the briefing schedule on March 1, 2001.

FINDINGS OF FACT

1. On October 4, 2000, the Union filed a complaint of prohibited practices against the Board. The complaint states the following:

. . .

> 1. Complainant, Local 2430, AFSCME, AFL-CIO, is a labor organization within the meaning of Wis. Stat. Sec. 111.70(1)(h), and is the certified bargaining representative of all regular full-time and regular part-time clerical and related and technical employees of the Kenosha City and County Joint Services Board (the Board). The President of said Local is Jeff Lovell, whose mailing address is 8630 113th Avenue, Kenosha, Wisconsin, 53142.
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> 2. The Board is a municipal employer within the meaning of Wis. Stat. Sec. 111.70(1)(j). The Director of said employer is Sue Marcinkus, whose mailing address is 1000 55th Street, Kenosha, Wisconsin, 53140.
>
> 3. Local 2430 and the Board are parties to a labor agreement effective January 1, 1998 through December 31, 2000, which automatically renews itself for one year periods thereafter unless one of the parties gives written notice of its intent to modify or terminate the agreement. A copy of that agreement is attached hereto as Exhibit 1.
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> 4. Section 5.5 of the parties' agreement states, "For pay purposes only, each pay period shall consist of 80 hours plus any applicable overtime and/or premium subject to Article IX [Overtime]. However, any unpaid time off or tardiness shall be deducted from said 80 hours."
>
> 5. Article 5.2 of the parties agreement states, in part, "To compensate for the longer-than-normal workweek, each employee on a 'six-two' work schedule will be scheduled for one (1) unpaid 'Kelly Day' per month, on a day mutually agreed between the employee and his/her immediate supervisor."

6. Up to and including January 31, 2000, Local 2430 employees were regularly assigned to take one "Kelly Day" each month.

7. Up to and including January 31, 2000, the parties never treated said "Kelly Day" as "unpaid time off" within the meaning of Article 5.2 of the parties' agreement and, consequently, the Board paid said employees for 80 hours each week regardless of whether they were absent during a two-week pay period because of the assigned "Kelly Day."

8. On January 31, 2000, Local 2430 filed a grievance in which it contended that the Board had erred in calculating the pay of the employees in question. A copy of that grievance is attached hereto as Exhibit 2.

9. In response to said grievance, the Board unilaterally, and without any bargaining with representatives of Local 2430, changed its practice of providing said employees with 80 hours of pay for every two week period and, instead, implemented a new practice whereby it deems each "Kelly Day" to fall within the meaning of the phrase "unpaid time off" under the agreement.

10. The Board's unilateral action, as described above, has caused harm to Local 2430 employees and constitutes a prohibited practice within the meaning of Wis. Stats. Sec. 111.70(l)(m).

WHEREFORE, it is prayed that the Wisconsin Employment Relations Commission determine and declare that the conduct of the Kenosha City and County Joint Services Board, as described in this Complaint, constituted prohibited practices in violation of Secs. 111. 70(3)(a) 1. and (3)(a)4. of the Wisconsin Employment Relations Act; order the Board to cease and desist from such conduct, immediately and forthwith; and grant such other and further relief as may be appropriate.

. . .

2. The Board filed the Motion on October 23, 2000. The Motion states the following:

. . .

1. The Complainant, Local 2430, Wisconsin Council 40, AFSCME, AFL-CIO, is a labor organization within the meaning of Section 111.70(l)(h), Wis. Stats. The Complainant's principal representative is John P. Maglio, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, whose address is P.O. Box 624, Racine, Wl 53401-0624 and whose telephone number is (414) 681-2895.

2. The Respondent, Kenosha City and County Joint Services, is a municipal employer within the meaning of Section 111.70(1)(j), Wis. Stats., and its principal office is located at 1000 55th Street, Kenosha, WI 53140. The Respondent's principal representative is Attorney Nancy L, Pirkey, whose address is Davis & Kuelthau, S.C., 111 E. Kilbourn Avenue, Suite 1400, Milwaukee, WI 53202, and whose phone number is (414) 225-1404.

3. At all material times hereto, the Complainant has been the exclusive bargaining representative for a bargaining unit that is described as follows:

> "Section 1. 1. Bargaining Unit. The Employer hereby recognizes the Union as the exclusive bargaining agent for all regular full-time and regular part-time clerical and related and technical employees of Kenosha City and County Joint Services Board excluding managerial, supervisory, confidential and journeyman mechanic employees, for the purpose of bargaining on all matters pertaining to wages, hours and all other conditions of employment as certified by the Wisconsin Employment Relations Commission on June 2, 1983 (Case I No. 31285, ME-2193, Decision 20609)."

4. The above bargaining unit is a collective bargaining unit within the definition of Section 111.70(l)(b), Wis. Stats.

5. The Complainant and the Respondent have been parties to a series of collective bargaining agreements establishing the wages, hours and conditions of employment for the above bargaining unit, the most recent of which took effect on January 1, 1998 and continues through December 31, 2000. (See attached Exhibit 1).

6. The 1998-2000 collective bargaining agreement between the Complainant and the Respondent contains the following contract language on the work schedules of certain employees of the Respondent:

> "Section 5.2. 6/2 Joint Services Clerks. Joint Services Clerks shall work a so-called "six-two" ("6/2") workweek, consisting of six (6) consecutive days of work followed by two (2) days off. To compensate for the longer-than-normal workweek, each employee on a "six-two" work schedule will be scheduled for one (1) unpaid "Kelly Day" per month, on a day mutually agreed between the employee and his/her immediate supervisor."

7. The 1998-2000 collective bargaining agreement between the Complainant and Respondent contains the following contract language on pay periods for employees working a 6/2 work schedule:

> "Section 5.5. Pay Period. For pay purposes only, each pay period shall consist of 80 hours plus any applicable overtime and/or premium subject to Article IX. However, any unpaid time off or tardiness shall be deducted from said 80 hours."

8. The 1998-2000 collective bargaining agreement between the Complainant and the Respondent also contains a grievance procedure in Article III - Grievance Procedure which contains the following definition of a grievance:

> "Section 3. 1. Procedure. Any difference or misunderstanding involving the interpretation or application of this agreement shall be handled and settled in accordance with the following procedure: …"

The grievance procedure set forth in Article III culminates in final and binding arbitration of all unresolved grievances.

9. On January 31, 2000, the President of the Complainant filed a policy grievance objecting to the Respondent's calculation of the wages owed to employees working a 6-2 schedule. (See attached Exhibit 2). Specifically, the grievance alleged the following violation of the collective bargaining agreement:

> "Joint Services has erred in calculating pay for hours worked and for hours paid which also includes unpaid contributions to the WRS (Wisconsin Retirement System). Management violated Article 8, Sec. 8.1, 8.2, Sec. 11.7, Sec. 5.2, and Article IX."

As a remedy, the Complainant requested that "[a]ll Joint Services employees past and present be made whole with all wages due and that their WRS account be made whole for all contributions due, and that this adjustment be retroactive to date of hire, and any other adjustments entitled to said employees." (See attached Exhibit 2).

10. As a result of the police grievance filed by the Union on January 31, 2000, Joint Services determined that it needed to change its payroll practices to conform to the contract language set forth in Section 5.5. Therefore, Joint Services notified all employees working a 6/2 schedule that it would be modifying its payroll practices and would now enforce the language of Section 5.5 of the collective bargaining agreement. (See attached Exhibit 3). In effect, this payroll change was taken to ensure that employees are paid a minimum of 80 hours each pay period, less any "unpaid" time off, in accordance with Section 5.5 of the collective bargaining agreement.

11. On April 29, 2000, the Complainant filed a grievance on behalf of all records clerks alleging that Joint Services violated the collective bargaining agreement when it changed its payroll practice regarding the payment of kelly days. (See attached Exhibit 3). More specifically, the grievance alleges the following:

> "Management violated Sections 1.2, 3.1, 3.6, 5.2, 12.5 and 5.5 of Contract and past practices by withholding kelly day pay from Joint Services clerks (see attached list of specific names). This is an ongoing violation and all JS clerks will be affected. Management also violated Wis. Stats. 111.84(l)(e) by withholding wages before and until an arbitrated award was deemed final and binding upon the parties.

As a remedy, the Complainant requested that all employees be made whole and this violation "cease and desist immediate[ly] so that no other Joint Services employee be subjected to this violation. (See attached Exhibit 3).

12. The grievances described in Paragraphs 9 and 10, above, have been processed through the various steps of the grievance procedure set forth in Article III of the parties' collective bargaining agreement. The Joint Services Board denied these grievances at a meeting held on May 23, 2000. Thereafter, the Complainant notified Joint Services that it intended to proceed to arbitration of these grievances, but then requested that the grievances be held in abeyance pending settlement negotiations. (See attached Exhibit 4). The parties met on

June 27, 2000 to discuss possible settlement of the two grievances described in Paragraphs 9 and 10, above. The Complainant has since rejected the settlement offer made by Joint Services, but has asked that these two grievances continue to be held in abeyance.

13. Complainant alleges in Paragraphs 6 through 10 of its Prohibited Practice Complaint that Respondent has violated Section 111.70(3)(a) 1 and 4, Wis. Stats. These are the same allegations that are raised in the grievances filed by the Complainant . . . Union on January 31, 2000 and April 29, 2000. Paragraph 8 of the Prohibited Practice Complaint references the fact that the Complainant filed a grievance over the pay practices of Joint Services for those employees on a 6/2 work schedule. However, the Prohibited Practice Complaint fails to mention that the Complainant filed a second grievance on April 29, 2000 (see Exhibit 3) which alleges the same facts and issues as that set forth in Paragraphs 8 through 10 of the Prohibited Practice Complaint.

WHEREFORE, because the Prohibited Practice Complaint at issue herein raises the same claims that are the subject of two pending grievances which are being processed to grievance arbitration, the Respondent respectfully requests that this Prohibited Practice Complaint be dismissed in its entirety. In the alternative, the Respondent respectfully requests that the allegations set forth in the Prohibited Practice Complaint to the effect that Joint Services has committed prohibited practices within the meaning of Section 111.70(3)(a) 1 and 4, Wis. Stats., be deferred to grievance arbitration under Article III of the parties' collective bargaining agreement, with the Commission retaining jurisdiction over this matter to ensure that the allegations are resolved and, if applicable, adequately remedied by the grievance arbitration process.

3. Included with the complaint and the Motion was a copy of the 1998-2000 labor agreement referred to in Paragraph 3 of the complaint and in Paragraph 5 of the Motion. The January 31 and April 29 grievances cite a number of contract provisions, including those set forth above and the following:

ARTICLE I - RECOGNITION

. . .

Section 1.2. Management Rights. Except as otherwise provided in this Agreement, the Employer retains all the normal rights and functions of management and those that it has by law. Without limiting the generality of the foregoing, this includes the right to hire, promote, transfer, demote or suspend

or otherwise discharge or discipline for just cause; the right to decide the work to be done and location of work; to contract for work; services or materials; to schedule overtime work; to establish or abolish a job classification; to establish qualifications for various job classifications. The Employer shall have the right to adopt reasonable rules and regulations. Such authority will not be applied in a discriminatory manner. The Employer will not contract out for bargaining unit work where such contracting out will result in the layoff of employees or the reduction of regular, straight time hours worked by bargaining unit employees.

. . .

ARTICLE III - GRIEVANCE PROCEDURE

Section 3.1. Procedure. Any difference or misunderstanding involving the interpretation or application of this agreement shall be handled and settled in accordance with the following procedure:

Step 1. Any employee who has a grievance shall first discuss it with his/her immediate supervisor with or without the presence of the steward at his/her option. If the grievance is not resolved between the employee with or without the steward and the immediate supervisor, the grievance shall be reduced to writing, in triplicate, on a form provided by the Union and the Union shall request a meeting with the department head within fourteen (14) calendar days after the supervisor's answer to the employee. If the grievance is resolved between the employee and the supervisor, the Union shall be notified of the settlement.

Step 2. In the event the grievance is not resolved between the Manager and the employee, the employee may appeal the grievance, within fourteen (14) calendar days after the manager's answer to the employee, to the Director of Joint Services for a hearing. The hearing shall consist of a meeting with the Director of Joint Services and the steward and aggrieved and other representatives of the Union. However, only two (2) members of the Union, other than the grievant, will be allowed to leave their posts. The Director of Joint Services shall give his answer in writing to the Union Representative who signed such grievance within fourteen (14) calendar days of this meeting.

Step 3. In the event the grievance is not satisfactorily adjusted in Step 2, the Union may appeal the grievance to Step 3 by notifying within fourteen (14) calendar days of the completion of Step 2, the chairman of the Joint Services Board in writing. This appeal shall state the name of the aggrieved, the date of the grievance, the subject and the relief requested. The Joint Services Board and the Union shall meet to discuss the grievance within fourteen (14) calendar days of the written appeal.

Step 4. All grievances which cannot be adjusted in accord with the above procedure may be submitted for decision to an impartial arbitrator within fourteen (14) calendar days following receipt of the Employer's answer in Step 3 above. For the duration of this Agreement, the parties have entered into a side letter that allows for mediation of disputes prior to commencing arbitration and as a consequence, the time deadlines provided herein are waived until after completion of the mediation process. The arbitrator shall be selected by mutual agreement of the parties; or, if no such agreement can be reached within five (5) days after notice of appeal to arbitration, the Union or the employer may request the Wisconsin Employment Relations Commission to appoint a member of its staff to serve as arbitrator. The costs, if any, of the arbitrator and the cost of a transcript of the hearing if requested by either party shall be shared equally by the parties.

The authority of the arbitrator shall be limited to the construction and application of the terms of this Agreement and limited to the grievance referred to him for arbitration; he shall have no power or authority to add to, subtract from, alter or modify any of the terms of this Agreement. The decision of the arbitrator shall be final and binding upon the Union and the Employer.

Section 3.2. Time Limits - Appeal and Settlement. The parties agree to follow each of the foregoing steps in processing the grievance and if, in any step, the Employer's representative fails to give his answer within the time limit therein set forth, the grievance is automatically appealed to the next step at the expiration of such time limit. Any grievance which is not appealed to the next step within the time limits provided herein shall be considered settled on the basis of the Employer's last answer.

. . .

Section 3.6. Pay for Grievance Handling. Grievance matters shall be handled through Step 4 during the daily schedule of hours with no loss in wages for up to two (2) stewards, officers or employees involved in handling said matter in addition to the grievant. The Local shall be allowed to have Union representatives deemed necessary at any or all grievance meetings. Employees shall have the right to present their grievances without fear of any penalty.

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ARTICLE V – HOURS

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Section 5.2. 6 / 2 Joint services Clerks. . . .

The daily schedule of shifts shall be eight (8) hours per day as follows:

Joint Services Clerks
First Shift: 7:00 a.m. to 3:00 p.m.
Second Shift: 3:00 p.m. to 11:00 p.m.
Third Shift: 11:00 p.m. to 7:00 a.m.
Fourth Shift: 11:00 a.m. to 7:00 p.m.

All the above daily work shifts include a paid twenty (20) minute lunch break scheduled as near to the middle of the shift as is practical.

Any employee called in to work four hours prior to their scheduled starting time may, by mutual agreement between the employer and the employee, leave at the completion of eight hours of work. In such event, employees who only work eight hours in a day shall not be eligible for overtime payment.

. . .

ARTICLE VIII - WAGES

Section 8.1.

(a) Wages for employees hired prior to mutual ratification of this Agreement shall be as stated in Appendix C of the parties' 1995-1997 Agreement but with the following general increases added:

3.25% effective retro to January 1, 1998
3.0% effective January 1, 1999
0.25% effective April 1, 1999
3.0% effective January 1, 2000

(b) Wages for employees hired after mutual ratification of this Agreement shall be as provided on the attached "Job Classification and Rate Schedules" consisting of Appendix "A" effective retro to January 1, 1998; Appendix "B" effective January 1, 1999 and April 1, 1999; and Appendix "C" effective January 1, 2000.

Section 8.2. Retirement Fund Contribution. The Employer agrees to pay the employee's share to the Wisconsin Retirement System. This contribution is in addition to the Employer's normal contributions.

. . .

ARTICLE IX – OVERTIME

Section 9.1. Employees Working a 5/2 Weekly Schedule.

Section 9.1.a. Work outside Regular Shift. Except as provided below, all hours worked outside an employee's regular work shift or work week shall be paid at the rate of one and one-half (1 1/2) times the employee's regular rate of pay.

Section 9.1.b. Work on a Paid Holiday. Employees who work on a designated paid holiday shall receive one and one-half (1 1/2) times their regular rate of pay for such holiday work, plus the straight time pay for the holiday.

Section 9.2. Employees Working a 6/2 Weekly Schedule.

Section 9.2.a. Work Outside Regular Shift. Except as provided below, all hours worked outside an employee's regular work shift or work week shall be paid at the rate of one and one-half (1-1/2) times the employee's regular rate of pay.

Section 9.2.b. Seventh and Eighth Day Definition. Employees working a "six-on/two-off" workweek schedule shall be paid two (2) times their regular rate for all work performed on the eighth (8th) day in the eight-day workweek cycle. Example: an employee's six (6) days of work begins with Tuesday and ends the following Sunday; the employee will have the following Monday and Tuesday scheduled off; if he/she works that Monday, Section 9.1. above will apply; if he/she works that Tuesday, double time will be paid for all work performed. The seventh (7th) day shall be defined as the first twenty-four (24) hours after the beginning of the sixth (6th) consecutive work day and the eighth (8th) day shall be defined as the second twenty-four (24) hours period following the beginning of the sixth (6th) consecutive day of work. However, double time pay for voluntary overtime shall be excluded.

Section 9.3. Employees Working a 4/2, 4/2, 5/2 Schedule.

Section 9.3.a. Work Outside Regular Shift. All hours worked outside an employee's regular work shift or work week shall be paid at the rate of one and one-half (1-1/2) times the employee's regular rate of pay.

Section 9.4. Overtime Distribution. Overtime shall be divided as equally as possible among employees in each classification desiring to work available overtime.

Section 9.5. Call-in Pay. An employee called to work outside of his/her regular work schedule shall receive a minimum of two (2) hours work or pay at the required overtime rate.

Section 9.6. No Pyramiding. There shall be no pyramiding of any overtime pay and/or premium pay.

Section 9.7. Requirements for Overtime to be Mandatory. If overtime work in a particular classification is available, it shall be offered to employees within that classification consistent with Section 9.4. above. If no employees within a particular classification are voluntarily willing to work the available overtime, such necessary work shall be made mandatory for the least senior employee(s) within the affected classification; however, no overtime shall be

considered mandatory unless at least twenty-four (24) hours prior notice is provided to the employee (s) except in case of an emergency. No employee, regardless of their seniority, shall be forced to work two consecutive calendar days of forced overtime except in an emergency situation which shall be defined as a civil disorder, an act of God, or a situation beyond the employer's control where a good faith effort has been made by the employer to adhere to this Article.

Section 9.8. Mandatory job-related schooling or training shall be paid at the appropriate overtime rate of pay if the schooling or training is provided during hours outside of an employee's shift. Employees shall receive all wages and benefits provided in this Agreement for time spent at such training or schooling, mileage at the current IRS rate and meals. The provisions of this Agreement shall also be payable for all travel time required. The Carol Larsen grievance of 9/l/91 is withdrawn and considered settled in accordance with the above language. (and all subsequent cases post 9/l/91)

. . .

ARTICLE XI – HOLIDAYS

. . .

Section 11.7. Paid Holidays for Employees Working a Six/Two Schedule. Employees who work a six-on/two-off work schedule shall receive twelve (12) paid holidays per year, earned and taken at the rate of one (1) per month. Monthly paid holidays shall be scheduled by mutual agreement between the employee and his/her immediate supervisor, consistent with established practice. Payment for holidays will not be included in severance pay if the employee terminates prior to the 16th day of the month. Payment for holidays will be included in severance pay if the employee terminates the 16th day of month or thereafter.

ARTICLE XII – SICK LEAVE

. . .

Section 12.5. An employee who exhausts his sick leave and annual leave credits and is still unable to return to work due to illness or injury shall be granted a leave of absence without pay provided that a doctor's certificate is submitted indicating the extent of the employee's illness or injury and the length

> of time the employee will be unable to work. Notwithstanding the provisions of this paragraph, such leave shall not extend for more than one (1) year without mutual agreement of the Employer and the Union. Upon return to work from an extended leave due to illness or injury, an employee shall submit a doctor's certificate indicating he can resume normal work duties.

4. There is a substantial probability that submission of the merits of the January 31 and the April 29, 2000 grievances will resolve the alleged Board violations of Secs. 111.70(3)(a)1 and 4, Stats., in a manner not repugnant to MERA. The Board has renounced technical objections which would prevent a decision on the merits of the grievances by an arbitrator; the collective bargaining agreement noted in Paragraph 3 of the complaint and in Paragraph 5 of the Motion addresses itself to the dispute sufficiently clearly to warrant grievance arbitration; and the dispute does not involve sufficiently important issues of law or policy to warrant immediate assertion of the Commission's jurisdiction to address the alleged violations of Secs. 111.70(3)(a)1 and 4, Stats.

CONCLUSIONS OF LAW

1. The Union is a "Labor organization" within the meaning of Sec. 111.70(1)(h), Stats.

2. The Board is a "Municipal employer" within the meaning of Sec. 111.70(1)(j), Stats.

3. Because there is a substantial probability that submission to arbitration of the merits of the January 31 and the April 29, 2000 grievances will resolve the alleged Board violations of Sec. 111.70(3)(a)1 and 4, Stats., in a manner not repugnant to MERA, further processing of this complaint is deferred pending the outcome of their arbitration.

ORDER

The complaint is deferred to grievance arbitration with the Examiner retaining jurisdiction over the matter to ensure that any statutory issues raised by the complaint are resolved.

Dated at Madison, Wisconsin this 16th day of April, 2001.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Richard B. McLaughlin /s/

Richard B. McLaughlin, Examiner

KENOSHA CITY AND COUNTY JOINT SERVICES BOARD

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER DEFERRING COMPLAINT TO GRIEVANCE ARBITRATION

BACKGROUND

The complaint and the Motion contain a series of factual allegations, which are set forth above. No hearing has been conducted, and the allegations of the complaint and Motion are treated as fact for the purpose of addressing the Motion. The factual allegations contained in the complaint and the Motion establish that the parties do not dispute that the governing labor agreement provides for final and binding arbitration. The Motion, unlike the complaint, addresses a second grievance questioning the Board's change of payroll calculation.

THE PARTIES' POSITIONS

The Union's Brief In Opposition To The Motion

After a review of the allegations of the complaint and of the Motion, the Union contends that Commission case law permits it "to hear duty to bargain prohibited practice complaints regardless of the existence of contractual grievance procedures", citing MANITOWOC COUNTY, DEC. NO. 26665-A (LEVITAN, 4/91) AFF'D BY OPERATION OF LAW, DEC. NO. 26665-B (WERC, 5/91). Commission case law does permit the deferral of Sec. 111.70(3)(a)4, Stats., allegations "under certain circumstances." More specifically, the Union argues that the Commission defers such allegations only where "the dispute does not involve important issues of law or policy," or "where the contract clearly addresses the dispute."

Noting that the "payment of wages is at the explicit core of the duty to bargain," as well as other statutes, the Union concludes that the wage payment issue questioned by its complaint "presents an issue of overriding importance which the Commission should address directly." This result is supported by federal precedent, see ALFRED M. LEWIS, INC. V. NLRB, 587 F.2D 403 (9th Cir. 1978).

Beyond this, the Union contends that the contract fails to clearly address the dispute. More specifically, the Union notes that the labor agreement is silent regarding "what should happen when the Employer unilaterally implements a change in a mandatory subject of any kind, much less a unilateral implementation of a new wage practice." Further, the labor agreement is silent regarding "the issue of remedy." At a minimum, it is apparent that the Union "would be entitled to an order from the Commission directing the Employer to restore

the previously existing status quo . . . (and) a posting signed by the Employer acknowledging its violation of Wisconsin law" if it prevailed in its complaint. Neither remedy is specified in the labor agreement. It follows, according to the Union, that the Commission's standards for deferral have not been met and that the Motion should be denied.

The Board's Response To The Union's Brief

After a review of the factual background to the complaint and the Motion, the Board argues that the Union's contention of a Board prohibited practice "is patently absurd." The Commission "has a longstanding policy of not asserting jurisdiction over matters covered by the collective bargaining agreement." In cases such as this, Commission case law calls for deferral if: (1) the parties renounce technical objections which would prevent a decision on the merits by the arbitrator; (2) the collective bargaining agreement clearly addresses the dispute; and (3) the dispute does not involve important issues of law or policy.

The Board contends that "(t)hese three conditions have all been satisfied in the present case." More specifically, the Board notes that it has not posed "procedural or technical objections" or "any jurisdictional issues which would prevent an arbitrator from ruling on the merits of the two grievances." Since the only reason the grievances "have not proceeded to arbitration is because the Union requested that the grievances be held in abeyance," the Board concludes arbitration could effectively be ordered by the Commission.

More critical to the application of Commission case law is that the "collective bargaining agreement clearly and unambiguously addresses itself to this dispute." The Board notes that "there is no duty to bargain because the parties have negotiated language on the subject of pay periods, and payment for kelly days," and concludes that relevant "contract language will determine the parties' respective rights during the term of the agreement." An arbitrator's decision on the pending grievances "will fully resolve the question of whether (the Board) had the lawful authority to not pay employees for kelly days, the issue which is at the heart of the Union's prohibited practice." Since the Board's wrongful action, if any, turns on the contract, not the MERA, it follows that the contractual forum is appropriate.

Contrary to the Union's assertion, "the complaint raises simple and straightforward issues of contract interpretation." Whether Kelly Days must be paid as wages "is simply not a case with significant legal or policy implications at stake."

The Board concludes that the Motion should be granted since it has demonstrated that the Commission's criteria for deferral have been met.

The Union's Response To The Board's Brief

After a review of the procedural background, the Union argues that the Board's failure to respond to the authority cited in the Union's brief warrants denial of the Motion. More specifically, the Union argues that "the rationale of MANITOWOC COUNTY compels the conclusion that the motion to dismiss/defer must be denied."

Even though the "parties to this case are in agreement on the framework for analysis," the Union stresses that the Board glosses over the significance of the wage issue posed by the complaint. Wages "are at the center of policy importance and compel the Commission to enforce Sec. 111.70(3)(a)4, Stats." The Board has failed to rebut this because its authority includes cases not involving wages.

That the labor agreement is silent on the impact of unilateral changes in wages underscores that it does not clearly address the issues posed by the complaint. That the Union may "at some undetermined point in the future" gain access to arbitration falls short of remedying the "damage . . . already been done when the employer acts unilaterally on a mandatory subject." Nor can Board cited authority be read to establish that the Union, by contract, waived its right to bargain. The authority cited by the Board turns not on wages, but on work rules. In any event, contractual silence concerning unilateral alteration of wages makes a finding of waiver impossible.

The Union concludes that the Motion must be denied.

DISCUSSION

As the Union notes, the parties do not dispute the analytical framework governing the Motion. This is a case involving deferral to grievance arbitration, since there is no alleged Board violation of Sec. 111.70(3)(a)5, Stats. Thus, the issue is not the reconciliation of an arbitrator's contractual authority to interpret a labor agreement with the Commission's statutory authority to do so. Rather, the issue is whether the alleged Board violation of Secs. 111.70(3)(a)1 and 4, Stats., should be referred to grievance arbitration because a reading of the contract may be determinative of prohibited practice allegations other than breach of contract, see, STATE OF WISCONSIN, DEC. NO. 25281-C (WERC, 8/91) AT FOOTNOTE 3/.

As the Union points out, Examiners and the Commission have stated the considerations governing deferral in a variety of ways. Examiner Mawhinney, in CENTRAL HIGH SCHOOL DISTRICT OF WESTOSHA ET. AL., DEC. NO. 29671-A (8/99) AT 4, stated it thus:

The Commission's criteria for deferral to arbitration are:

(1) The parties must be willing to arbitrate and renounce technical objections which would prevent a decision on the merits by the arbitrator;

(2) The collective bargaining agreement must clearly address itself to the dispute; and

(3) The dispute must not involve important issues of law or policy.

These criteria are rooted in SCHOOL DISTRICT OF CADOTT COMMUNITY, DEC. NO. 27775-C (WERC, 6/94); *aff'd* 197 WIS.2D 46 (CT.APP., 1995).

The Motion and the briefs of the parties establish that the first criterion has been met. The Board has stated its willingness to renounce any technical objections that might prevent an arbitration decision on the merits of the grievances.

The Union places its most forceful arguments on the second and third criteria. More specifically, the Union urges that the labor agreement is silent regarding the issue of a Board unilateral change in wages, and is silent regarding the remedial authority necessary to address such changes. The Union adds that since the dispute centers on wages, the significance of the unilateral action at issue should not be understated.

The Union's arguments focus more on the third criterion than the second. The policies underlying deferral focus on the Commission's long-standing desire to honor the dispute resolution procedure selected by the parties. Deferral, under Commission case law, reflects a respect for grievance arbitration rather than an institutional desire to farm out prohibited practice determinations. See BROWN COUNTY, DEC. NO. 19314-B (WERC, 6/83). The purpose of the deferral is the interpretation of the agreement that can be supplied by the arbitrator, see CADOTT at 12.

The Union does not contest that the labor agreement addresses the general subject matter of the complaint. The January 31 and the April 29 grievances cite an exhaustive set of contract provisions as well as past practice. It is apparent that the labor agreement covers the subject matter of the dispute including the provision of Kelly Days; the scheduling of normal and overtime hours; the payment of normal and overtime hours; the schedule and payment for holidays; and the provision of WRS benefits. The Union's arguments and at least the April grievance make past practice an area of dispute. Past practice is a standard interpretive guide in the interpretation of a labor agreement. Apart from the asserted silence of the labor agreement on the statutory ramifications of the grievances, it is evident that the labor agreement addresses the subject matter of the grievances.

This focuses the dispute on the third criterion. The alleged prohibited practices are Secs. 111.70(3)(a)1 and 4, Stats. The Union's arguments allege an improper unilateral change in payroll calculations. This makes the alleged violation of Sec. 111.70(3)(a)1, Stats., derivative of the Sec. 111.70(3)(a)4, Stats., allegation. Under MERA, "a municipal employer's duty to bargain during the term of a contract extends to all mandatory subjects of bargaining except those which are covered by the contract or as to which the union has waived its right to bargain through bargaining history or specific contract language" CADOTT at 13. Here, the Board does not assert that the agreement contains specific language stating a Union waiver of bargaining or that the Union has waived in-term bargaining as a function of bargaining history. Thus, the statutory issue turns on the existence of contract provisions covering the subject matter the Union seeks bargaining on. The application of the second criterion for deferral addresses this point. The agreement covers the disputed area in considerable detail. This does not establish a basis to determine whether or not Sec. 111.70(3)(a)1 or 4, Stats., has been violated in this proceeding. Rather, it points to the significant probability that an interpretation of the labor agreement will address the asserted violation of the Board's duty to bargain.

The Union contends that the silence of the labor agreement concerning unilateral Board action, coupled with the centrality of wages to the bargaining process, indicate a sufficiently significant statutory issue to warrant the exercise of Commission jurisdiction. Thus, the Union highlights the presence of Commission remedies not available to an arbitrator. The Commission can, as a statutory matter, restore the "status quo ante" with or without notice posting. The purpose of this remedy is, however, to restore the environment in which bargaining can occur without taint of prohibited practice. The restoration is, therefore, an interim measure to permit bargaining to take place rather than a final determination of a contractual dispute. This remedy has no evident bearing on the dispute the Union poses. As noted above, if the contract covers the disputed area, there is no employer duty to bargain the point and there could be no restoration of the "status quo ante." This makes this aspect of the Commission's remedial authority irrelevant. Beyond this, the parties' dispute is whether the Board has the contractual authority to change the payroll calculation. In this sense, the arbitrator has greater authority than the Commission under Sec. 111.70(3)(a)1 and 4, Stats. If the Board lacks the contractual authority it asserts, the arbitrator could restore the prior practice as a matter of make-whole relief under the contract, not as an interim measure pending bargaining. Beyond this, the complaint does not seek an order to bargain, cf. BROWN COUNTY, DEC. NO. 19314-B (WERC, 6/83). This highlights that the focus of the dispute is whether or not the Board can alter the wage calculation as it did, rather than whether or not the Board should be ordered to the bargaining table.

The parties' dispute is thus primarily a difference over the interpretation of the labor agreement. This supports the purpose of deferral. Acceptance of the Union's contention would undermine the arbitration process. That wages are central to collective bargaining

underscores, rather than undermines, the value of the arbitration process. The labor agreement is the goal of the collective bargaining process. Wages are at the core of the labor agreement. However, the preferred means of resolving disputes under a labor agreement is grievance arbitration, not prohibited practice litigation. If the centrality of wages standing alone supported prohibited practice litigation over arbitration, any dispute in which an employer has arguably mistaken the scope of its contractual authority could be submitted to the Commission through the complaint process. Thus, Commission exercise of jurisdiction that might encroach upon arbitration demands something more. In BROWN COUNTY, *supra*., for example, the Commission determined that unit placement issues implicating the duty to bargain could support Commission assertion of its jurisdiction to apply Sec. 111.70(3)(a)4, Stats., where grievance arbitration might be available. In MANITOWOC COUNTY, *supra*., the parties disputed whether discipline governed by the labor agreement reflected discrimination violating Sec. 111.70(3)(a)3, Stats. In that case, the complaint addressed a dispute at least arguably indicating employer conduct undermining the bargaining process, and arguably not addressed in a prior grievance arbitration.

Summary of the basis for the deferral ordered above is best left to the Commission in BROWN COUNTY, *supra*., at 13 (citations and emphasis omitted):

> 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 . . . 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 . . .

The Order

The complaint and Motion indicate the January 31 and April 29 grievances are currently held in abeyance, apparently by mutual agreement. The Order entered above presumes the Board will renounce any technical objection to an arbitrator's determination of the merits of each grievance, and that the parties will process either or both grievances through the arbitration process.

The Order defers further processing of the complaint pending the arbitration process, but retains jurisdiction over the matter. This follows BROWN COUNTY, *supra*., and is designed to insure that the statutory allegations are resolved in a fashion consistent with MERA.

Dated at Madison, Wisconsin this 16th day of April, 2001.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Richard B. McLaughlin /s/
Richard B. McLaughlin, Examiner

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