STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

AFSCME DISTRICT COUNCIL 48, LOCAL 882, Complainant,

vs.

MILWAUKEE COUNTY, Respondent.

Case 483
No. 57946
MP-3549

Decision No. 30127-A

Appearances:

Gene Holt, Attorney at Law, Law Offices of Mark A. Sweet, LLC, 705 East Silver Spring Drive, Milwaukee, Wisconsin 53217, appearing on behalf of the Union.

Timothy R. Schoewe, Deputy Corporation Counsel, Milwaukee County, Milwaukee County Courthouse, Room 303, 901 North Ninth Street, Milwaukee, Wisconsin 53233, appearing on behalf of the County.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On September 3, 1999, the Complainant filed a complaint with the Wisconsin Employment Relations Commission alleging that the Respondent committed a prohibited practice and violated Secs. 111.70(3)(a)1, 4 and 5, Wis. Stats., by subcontracting out bus passenger service at the airport. The Commission appointed Karen J. Mawhinney, a member of its staff, to act as Examiner, to make and issue Findings of Fact, Conclusions of Law and Order as provided in Sec. 111.07(5), Stats. A hearing was held on August 11, 2004, in Milwaukee, Wisconsin, and the parties completed filing briefs on November 1, 2004.

FINDINGS OF FACT

1. The Complainant is a labor organization (herein called the Union) with its offices at 3427 West St. Paul Avenue, Milwaukee, WI 53208.

2. The Respondent is a municipal employer (herein called the County or Employer) with its offices at 901 North Ninth Street, Milwaukee, WI 53233.

3. The County and the Union are parties to a collective bargaining agreement that provides the following relevant provisions:

1.05 MANAGEMENT RIGHTS

> The County of Milwaukee retains and reserves the sole right to manage its affairs in accordance with all applicable laws, ordinances, regulations and executive orders. Included in this responsibility, but not limited thereto, is the right to determine the number structure and location of departments and divisions; the kinds and number of services to be performed; the right to determine the number of positions and the classifications thereof to perform such service; the right to direct the work force; the right to establish qualifications for hire, to test and to hire, promote and retain employes; the right to transfer and assign employes, subject to existing practices and the terms of this Agreement; the right, subject to civil service procedures and the terms of this Agreement related thereto, to suspend, discharge, demote or take other disciplinary actions and the right to release employes from duties because of lack of work or lack of funds; the right to maintain efficiency of operations by determining the method, the means and the personnel by which such operations are conducted and to take whatever actions are reasonable and necessary to carry out the duties of the various departments and divisions.
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> . . .
>
> The County does have the right to contract or subcontract work which cannot be performed or is uneconomical to be performed by bargaining unit employes. The County is genuinely interested in maintaining maximum employment for all employes covered by this Agreement consistent with the needs of the County. In planning to contract or subcontract work, the County shall give due consideration to the interest of County employes by making every effort to insure that employes with seniority will not be laid off or demoted as a result of work being performed by an outside contract.
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> . . .

4.02 GRIEVANCE PROCEDURE

> The County recognizes the right of an employee to file a grievance, and will not discriminate against any employee for having exercised their rights under this section.

. . .

(9) INTERPRETATION OF THE MEMORANDUM OF AGREEMENT Any disputes arising between the parties out of the interpretation of the provisions of this Memorandum of Agreement shall be discussed by the Union and the Director of Labor Relations. If such dispute cannot be resolved between the parties in this manner, either party shall have the right to refer the dispute to the permanent arbitrator, who shall proceed in the manner prescribed in subsection (8) above. The parties may stipulate to the issues submitted to the permanent arbitrator or shall present to the permanent arbitrator, either in writing or orally, their respective positions with regard to the issue in dispute. The permanent arbitrator shall be limited in his/her deliberations to the issues so defined. The decision of the permanent arbitrator shall be filed with the Union and the Director of Labor Relations.

4. The complaint in this case was filed on September 3, 1999. On September 9, 1999, WERC General Counsel Peter Davis notified the parties by letter that a member of the Commission's staff, William Houlihan, would contact them to see if they were willing to participate in settlement discussions. This letter also notified the parties of their right to a hearing within 40 days of the filing of the complaint. Another member of the Commission's staff, Karen Mawhinney, notified the parties on November 4, 1999, of her assignment to the case and offered hearing dates for January of 2000. In March of 2001, Examiner Mawhinney wrote the parties asking them to inform her of the status of the case. A hearing was scheduled for July 13, 2001, which was rescheduled for October 18, 2001. On October 2, 2001, Commission Staff Attorney Marshall Gratz notified the parties that the October 18, 2001 hearing was being canceled due to Examiner Mawhinney's recuperation from surgery. The hearing was rescheduled for January 16, 2002, and the County's Labor Relations Director left his employment on that date. The January 16, 2002 hearing was postponed to April 18, 2002. The hearing was convened on that date but before the hearing opened, the parties entered into settlement discussions. On October 23, 2003, Examiner Mawhinney asked the parties in a letter about the status of the case. On January 6, 2004, the Examiner wrote the parties notifying them that the Union had indicated it wanted the case to proceed to a hearing and offered dates in February of 2004. The hearing was eventually held on August 11, 2004.

5. There are separate buildings at Mitchell International Airport for the main terminal and the international arrivals terminal. The County maintained a bus that ran between the two terminals from the time the international terminal was built until 1998 when the bus service was contracted out to the parking operator. The County bus used in the 1980's was a 1963 model transferred to the airport from the transit system. It was replaced in 1995 with another bus which was also used but newer than the 1963 model. The bus was primarily used to take passengers from international arrivals to the main terminal. It was also used in emergency situations to get passengers off of a stranded plane on the air field or to give tours of the airport. Airport maintenance workers who were members of Local 882 drove the bus. During the middle of the 1990's, federal regulations required commercial driver's licenses

(CDL's) with "P" or passenger endorsements to drive a vehicle carrying more than 12 people. Charles Staszewski, an airport maintenance worker, is a Union shop steward and executive board member. He was the shop steward in 1998 when this case began. Staszewski had a "P" endorsement on his CDL, and about 10 or 11 others out of 35 had that endorsement. On July 29, 1998, the Assistant Airport Maintenance Manager, Scott Kreiter, sent a memorandum to airport maintenance workers notifying them that the "P" endorsement would be required to be promoted to the airport maintenance worker II level, and that those without the "P" endorsement would have six months to upgrade their licenses to fulfill job description requirements. Before 1998, there were airport maintenance workers I, II and III classifications. Those classifications were grouped together in one classification in December of 1998 in an airport collateral agreement.

6. The Union filed two grievances in August of 1998, protesting the requirement of the "P" endorsement, calling it a unilateral change of position requirements and upsetting a long standing past practice of optional "P" endorsements. The Union sought as a remedy to revoke the requirement of the "P" endorsement for promotion to the airport maintenance worker II position. A grievance meeting was held on September 4, 1998, with the Human Resources Manager-DPW, Doris Harmon, presiding. Staszewski was present, along with Mark Winkelmann, the airport maintenance manager. Winkelmann stated that the County would contract the passenger bus service to AMPCO Parking Services and no one would need the endorsement. Harmon asked which classifications would be affected, and Winkelmann said - all of them, it's done, it's out of here. Staszewski felt Winkelmann was talking loudly, leaning over his desk and speaking directly to him. Harmon wrote up the meeting with a note that effective September 4, 1998, the operation of the bus would be contracted out to AMPCO Parking, and that such action would not reduce the work force nor supplant any workers. Three days after the grievance meeting noted above, the bus was hauled away with a wrecker. The work went to a private company that operates and manages the parking structure and facilities at the airport. There have been three private companies that have been contracted out to do the work – AMPCO, APCOA and CPS, not necessarily in that order.

7. A second grievance meeting was held on September 15, 1998. Winkelmann said that the bus was contracted out and there was nothing to talk about. Harmon attended again as the hearing officer for the County, and her notes conclude by stating that the "P" endorsement was no longer required, that the operation of the bus had been contracted out to AMPCO Parking, and the issue of the endorsement was settled. Deputy Airport Director James Kerr told Staszewski after the meeting that he (Staszewski) would not be telling him how many people would have to have "P" endorsements, that the bus was out of there, it was history, and there was nothing he could do about it because the economics of the matter were evident. The grievances were not appealed to higher steps of the grievance process. The County and the Union have agreed to 48 dates for cases to be heard by the permanent arbitrator, and the Union decides which cases to move to arbitration in almost all cases. If a case is appealed to arbitration, it must be scheduled within 12 months of the date of appeal or it is rendered moot.

8 No one from the bargaining unit lost his or her job; no one was laid off as a result of the contracting out of the bus service. Bargaining unit members lost overtime opportunities by not driving the bus. A majority of international arrivals were on weekends or evenings when no one was scheduled to work, so the employee called in for a bus run was paid a minimum of three hours of time regardless of how long he or she actually worked.

9. The airport operates without any taxes on the County's levy, and all of the operating costs, capital costs and debt service comes from user fees. The biggest source of revenue is from parking. The airlines are the second largest source of revenue, and airlines are concerned about costs at the airport. When the international traffic grew, the County bus was not sufficient to provide service and the County used the parking operator to assist in bus service. Both the County bus and the parking operator's buses were used at the same time before 1998 when the County bus was eliminated, and the County was aware of the difference in costs and level of service before the grievance meetings noted above. The private sector employees' wage rates were much less than the County employees' wage rates – about $7.25 an hour compared to a range of $13 to $20 an hour for the airport maintenance workers. And since the parking operator had multiple buses, passengers were getting a better level of service by not waiting for the County bus to return to the arrivals building.

Based on the foregoing Findings of Fact, the Examiner makes the following

CONCLUSIONS OF LAW

1. The Union was engaged in protected, concerted activity by processing two grievances in August and September of 1998 regarding the requirement for "P" endorsements on employees' commercial drivers' licenses.

2. The County violated Sec. 111.70(3)(a)1, Stats., by stating in a grievance meeting that the passenger bus service would be contracted out and no one would need a "P" endorsement and by subsequently contracting out the bus service to the parking contractor.

3. Inasmuch as the collective bargaining agreement between the Complainant and the Respondent provides for arbitration of disputes and that contractual procedure has not been exhausted, the Examiner will not assert the jurisdiction of the Commission to determine whether or not Respondent violated the terms of the parties' bargaining agreement and thereby committed a prohibited practice within the meaning of Sec. 111.70(3)(a)5, Stats.

4. The Respondent did not commit a prohibited practice within the meaning of Sec. 111.70(3)(a)4, Stats., by contracting out the passenger bus service.

Based on the foregoing Findings of Fact and Conclusions of Law, the Examiner makes the following

ORDER

That Respondent Milwaukee County, its officers and agents, shall immediately:

(a) Cease and desist from interfering with, restraining or coercing employees in the exercise of their rights guaranteed in Sec. 111.70(2), Stats.

(b) Take the following affirmative action which the Examiner finds will effectuate the purposes of the Municipal Employment Relations Act:

(1) Immediately notify all its employees at the airport by posting in conspicuous places where employees are employed copies of the notice attached hereto and marked Appendix A. That notice shall be signed by the airport director or deputy airport director and shall be posted immediately upon receipt of a copy of this Order and shall remain posted for thirty (30) days thereafter. Reasonable steps shall by taken by the County that said notices are not altered, defaced, or covered by other material.

(2) Notify the Wisconsin Employment Relations Commission, in writing, within twenty (20) days following the date of this Order, as to what steps have been taken to comply with this Order.

Dated at Elkhorn, Wisconsin, this 18th day of January, 2005.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Karen J. Mawhinney /s/
Karen J. Mawhinney, Examiner

APPENDIX A

NOTICE TO ALL EMPLOYEES AT GENERAL MITCHELL INTERNATIONAL AIRPORT

Pursuant to an Order of the Wisconsin Employment Relations Commission, and in order to effectuate the policies of the Municipal Employment Relations Act, we hereby notify employees that:

1. WE WILL NOT interfere with, restrain or coerce employees in the exercise of their rights pursuant to the Municipal Employment Relations Act by threatening reprisals for the processing of grievances, such as threatening to contract out work which is part of the discussion of a grievance, or by contracting out such work as a reprisal for processing a grievance.

Dated this _____ day of _____, 2005.

MILWAUKEE COUNTY

_____

Title:

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

MILWAUKEE COUNTY

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

THE PARTIES' POSITIONS

The Union

The Union states that the issues are whether the County violated Sec. 111.70(3)(a)1, 4 and 5, Stats., when it removed the bus service work from the Union and whether it violated Sec. 111.70(3)(a)3, Stats., by retaliating against the Union for grieving the "P" endorsement. The facts are undisputed – during a grievance hearing, management suddenly announced the end of the bus work for bargaining unit members at a time when management was being asked how to resolve a grievance involving the continued operation of the bus. The only facts in dispute are whether Winkelmann's announcement was a mere coincidence and the real reason for the change was economics.

The Union submits that the County's action of unilaterally removing the bus service from the jurisdiction of the Union violated the contract and past practice, and thus Sec. 111.70(3)(a)1, 4 and 5. The action also rose to the level of retaliation. The bargaining unit employees were engaged in protected lawful concerted activity, the County was aware of it and was hostile to it, and the County eliminated the bus service because of said hostility. Winkelmann's statements to Staszewski in the middle of a grievance hearing show the hostility. The comments made by Winkelmann were not part of the usual give and take of negotiations. His comments and actions were meant to create fear and chill any thoughts about challenging management's authority.

The Union asserts that the timing is the critical issue here. The grievance challenged management's right to require a "P" endorsement for all employees in the II classification, a newly enacted rule of July 29, 1998. The hearing officer was trying to work out a resolution, and the Union offered a resolution. Instead of offering a resolution, Winkelmann made his stunning announcement in a loud and angry voice. The County's claim that subcontracting was motivated by economics is disingenuous. Kerr called it a coincidence that Winkelmann announced it during the grievance hearing. But Kerr had no proof of when the economic decision was made. There were no studies, memos, meetings or any activity to show how economics had driven this decision. There was no advance notice to the Union. Winkelmann wielded his power in a formidable way.

The Union also contends that the decision to subcontract had a reasonable tendency to interfere with the exercise of rights under Sec. 111.70(2), Stats., thereby violating Sec. 111.70(3)(a)1, Stats. The Union asks as a remedy that the bus service within the Union's jurisdiction be reinstated and employees be made whole for lost wages and benefits.

The County

The County states that the complaint was filed in 1999, and the County asserted in its affirmative defense that the Union was guilty of laches. The Union merely tried to present excuses of why it took six years to bring the matter to hearing. Sec. 111.70(2)(a), Stats., propels complaints toward a hearing of not less than 10 nor more than 40 days after the filing. Although this is a waivable right, it points the Commission toward prompt hearings. The Union delayed the hearing, and now key management figures have retired and moved out of state, including Winkelmann. Kerr could not remember during cross examination what was on his desk six years ago. Any inferences should be drawn adversely to the Union, given the delay and no good reason having been put forth to explain the many years away.

The County further asserts that the grievances were settled and binding on the parties. Such settlements become bargaining agreements. A violation of Sec. 111.70(3)(a)1 is not found because an adverse action could be perceived as retaliatory, if lawfully motivated. Conduct which may well have a reasonable tendency to interfere with employees' rights will not violate Sec. 111.70(3)(a)1, Stats., if the employer had a valid business reason. Kerr testified as to the economics of the decision to contract out the bus service and that operational efficiencies were achieved. The bus was now available all the time at a lower cost without maintenance and capital costs, and there was no loss of jobs in the bargaining unit. Further, the collective bargaining agreement allows contracting out, especially in the event of achieving economies. The County asks that the complaint be dismissed and the Union be ordered to abide by its contract.

In Reply, The Union

The Union responds to the delay by noting that it was not the sole cause for the delay in scheduling this matter for hearing. The County fails to argue how it was disadvantaged by a delay. The Union also objects to the County's contention that the failure to move the case to arbitration constitutes a grievance settlement. There was no meeting of the minds.

The Union also objects to the County's argument that Winkelmann's conduct should be considered within the employer's free speech rights as long as it does not contain implicit or express threats or promises of benefits. Union members were protecting the jurisdiction of their Union, and in response to those legally protected activities, Winkelmann decided punishment was in order rather than mere threats. While the County argued that the presence of a valid business reason was sufficient to defeat otherwise retaliatory conduct, there was no valid business reason at the time Winkelmann removed the work from the bargaining unit. The County never argued whether the Union established hostility, only that Winkelmann's hostility was permissible. It was only well after the fact that the County decided to argue the valid business reason doctrine.

DISCUSSION

Sec. 111.70(3)(a)1, Stats., provides that it is a prohibited practice for a municipal employer individually or in concert with others:

> 1. To interfere with, restrain or coerce municipal employees in the exercise of their rights guaranteed in sub. (2).

Sec. 111.70(2), Stats., referred to above, in relevant part, states:

> Municipal employees shall have the right of self-organization, and the right to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection, . . .

In order to establish a violation of Sec. 111.70(3)(a)1, Stats, a complainant must show by a clear and satisfactory preponderance of the evidence that the conduct complained of contained either some threat of reprisal or promise of benefit which would tend to interfere with, restrain or coerce employees in the exercise o their rights guaranteed in Section 2. See BEAVER DAM UNIFIED SCHOOL DISTRICT, DEC. NO. 20283-B (WERC, 5/84). It is not necessary to show that the employer intended its conduct to have such an effect or that there was actual interference. Interference may be proven by showing that the conduct had a reasonable tendency to interfere with the exercise of protected rights. See WERC V. EVANSVILLE, 69 WIS.2D 140 (1975). Public sector employers enjoy a protected right of free speech, and labor relations policy is best served by uninhibited, robust and wide-open debate. The test is whether an employer's statements, construed in the light of surrounding circumstances, express or imply threats or reprisal or promises of benefits which would reasonably tend to interfere with, restrain, or coerce municipal employees in the exercise of their Section 2 rights. However, employer conduct which may well have a reasonable tendency to interfere with an employee's exercise of Section 2 rights will generally not be found to violate Sec. 111.70(3)(a)1, Stats., if the employer had valid business reasons for its actions. See CEDAR GROVE-BELGIUM AREA SCHOOL DISTRICT, DEC. NO. 25849-A (BURNS, 12/89).

In this case, the Union was involved in protected activity – processing a grievance. The Union was grieving the new requirement for all employees to have the "P" endorsement on their CDL's. When Winkelmann said that the County would contract the passenger bus service to AMPCO Parking Services and no one would need the endorsement, he made a statement that was a threat of a reprisal. Taking away the passenger bus service from the bargaining unit meant a loss of overtime opportunities. This was not the resolution that the Union was seeking and left the Union members attending the hearing in shock. The threat of reprisal is further shown by Kerr's statement to Staszewski after the second grievance meeting,

that Staszewski would not be telling him how many people would have to have "P" endorsements, and that the bus was out of there, it was history, and there was nothing he could do about it because the economics of the matter were evidence. Then, about three days later, the bus was hauled away and the private company handled all the passenger service. The Employer not only made the threat of reprisal but carried it out by subcontracting all of the bus service to the private contractor. It should be noted that the private contractor had been doing some of the work concurrently with Union members – the passenger bus service was not exclusively the Union's work.

The Union has shown that the County interfered with, restrained or coerced employees in the exercise of their rights. Certainly the threat, followed by the actual subcontracting, had a reasonable tendency to interfere with protected rights. Management sent a loud message about challenging its ability to decide what qualifications employees needed to do the job.

The next question is whether the County had valid business reasons for its actions. The County certainly was aware before the grievance of the differences in rates of pay between Union employees and the parking contractor's employees. And the County has a legitimate business concern of keeping costs down. The airport is not on the tax levy, and all costs associated with running it are paid for by user fees such as parking, airlines and other endeavors. However, the County fails to show that it was looking at subcontracting the passenger bus service in its entirety at the time that Winkelmann made his statement in the middle of the grievance hearing. Winkelmann was not available to testify and Kerr's testimony is vague on this point. (The County makes a valid point about the great lapse of time in this case. While the County's personnel changes may have caused one cancellation, nothing was going on in the majority of the lapsed time. The Examiner's cancellation of one hearing caused no more than a three-month delay in a case that took six years to get to a hearing. And for much of that time, the Examiner was the only person trying to do something with the case file other than let it collect dust in her office. The delay weakened both parties' ability to litigate this case as they were unable to examine Winkelmann who had retired and moved out of state.)

The County correctly points out that operational efficiencies were achieved because the bus operated by the parking contractor was available all the time at a lower cost without maintenance and capital costs. However, those efficiencies were achieved after the grievance meetings where Winkelmann told the Union that the bus service would be contracted out, that the County bus was gone. The record shows that the parking contractor started providing some passenger bus service before the grievance meetings, but the record is skimpy as to when, how much service or how much the County still used its own bus. Clearly, the County was still using the bus when the grievance meetings took place, or no one would have needed a "P" endorsement on his or her CDL. It was more than a coincidence that the subcontracting was announced in the grievance hearing. It was obvious that no decision to subcontract out the work had been made when the July 29, 1998 memo was issued requiring employees to get a "P" endorsement, and the grievances were filed in August. And despite the fact that Winkelmann had retired and moved out of state, there were other County managers who could

have brought forward solid evidence or information regarding the decision to subcontract, if it had been decided before the grievance meeting. Without any other evidence, the inference is that the decision to contract out the work was a response to the grievance itself. Thus, the valid business excuse fails, mainly because its timing is too suspect.

Accordingly, the County violated Sec. 111.70(3)(a)1. The Union has further argued in its post hearing brief that the County violated Sec. 111.70(3)(a)3, but it never charged or pleaded a Section 3(a)3 violation and never made such an argument until its brief. It had ample time to amend its complaint. The County should not be held to a Section (3)(a)3 violation where the Union never pleaded it or amended its pleading to include it and never argued it until its post hearing brief. The Union made some reference to a 3(a)3 charge in its opening statement, but that is insufficient to put the County on notice that it has to defend such an allegation. Moreover, it would be far beyond the statute of limitations.

Allegations that the County has violated Secs. 111.70(3)(a)4 and 5 are dismissed. Sec. 111.70(3)(a)4 makes it a prohibited practice to refuse to bargain. The parties had bargained over a subcontracting clause. The Union would need to follow the contract's provision for arbitration as its remedy. Sec. 111.70(3)(a)5 makes it a prohibited practice for a municipal employer to violate a collective bargaining agreement. Where the parties have negotiated a labor contract which includes grievance arbitration as the mechanism for enforcing that contract and the grievance procedure has not been exhausted, the Commission will not exercise its discretion to hear claims of Sec. 111.70(3)(a)5 violations, but will honor the parties' contract, and the grievance procedure will be presumed to be the exclusive forum for those claims. See MILWAUKEE COUNTY, DEC. NO. 30599-A (MAWHINNEY, 11/04).

The appropriate remedy for the violation of Sec. 111.70(3)(a)1, Stats., is to order the County to cease and desist from such conduct and to order the County to post an appropriate notice.

Dated at Elkhorn, Wisconsin this 18th day of January, 2005.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Karen J. Mawhinney /s/

Karen J. Mawhinney, Examiner

KJM/mb
30127-A