

STATE OF WISCONSIN  
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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**AFSCME DISTRICT COUNCIL 48, LOCAL 882**, Complainant,

vs.

**MILWAUKEE COUNTY**, Respondent.

Case 487  
No. 58205  
MP-3578

**Decision No. 30599-A**

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**Appearances:**

**Gene Holt**, Attorney at Law, appearing on behalf of the Union.

**Timothy Schoewe**, Deputy Corporation Counsel, Milwaukee County, appearing on behalf of the County.

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

On November 18, 1999, the Complainant filed a complaint with the Wisconsin Employment Relations Commission alleging that the Respondent committed a prohibited practice and violated Sec. 111.70(3)(a)5 and 1, Wis. Stats., by refusing to provide coveralls each year to HVAC employees 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 June 30, 2004, in Milwaukee, Wisconsin, and the parties completed filing briefs on October 5, 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.

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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:

## **2.12 UNIFORM ALLOWANCE**

. . .

(7) Airport management will provide coveralls at no cost to the employees in the classification of Heating and Ventilating Mechanic I while working on the ducts.

. . .

## **4.01 RESOLUTION OF DISPUTES**

The disputes between the parties arising out of the interpretation, application or enforcement of this Memorandum of Agreement, including employee grievances, shall be resolved in the manner set forth in the ensuing sections.

## **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. In 1982, the Union filed a grievance over uniforms on behalf of Boiler Operators I and II at the Airport. Boiler operators are now called Heating, Ventilating and Air Conditioning (HVAC) Mechanics. The grievance was settled when the County agreed to provide two coveralls per year to the grievants. The grievance disposition form was dated April 12, 1982.

5. In 1986, Boiler Operators I and II's at the Airport brought a grievance, alleging that they had been denied their two sets of coveralls. The parties agreed orally to follow the 1982 settlement. John Scholtz, a HVAC Mechanic at the Airport for 30 years, received two pair of coveralls after the filing of that grievance up until sometime around 1998. Edward Oertell, a HVAC Mechanic at the Airport since 1992, received two pair of coveralls each year until about 1998. Sometime near the end of 1998, employees were told by Claire Kimmel, a supervisor, that they were no longer going to get coveralls.

6. On January 26, 1999, another grievance over the denial of coveralls was filed which was denied by the County's Hearing Officer Doris Harmon. The Assistant Director of Labor Relations, Thomas Taylor, later offered to settle the grievance by giving the grievant a pair of coveralls. The Union Staff Representative, William Mollenhauer, did not agree with that settlement and noted on June 22, 1999, that it was appealed to arbitration. However, the Union did not move it to arbitration but instead filed the instant prohibited practice on November 18, 1999. Under the parties' labor agreement, a grievance must be heard within 12 months after it has been appealed to arbitration, and this matter was not heard by an arbitrator.

7. The Airport has contracted out the heavy cleaning of the duct work to an outside vendor. Christopher Lukas, the acting Airport Maintenance Manager, instructed the acting supervisor for the HVAC Department to purchase coveralls for the HVAC Mechanics if he received requests for them. Lukas gave that instruction about a couple a months before the hearing in this matter. Lukas has no personal objections to living with the 1982 grievance settlement providing two pairs of coveralls per year.

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

### **CONCLUSIONS OF LAW**

1. 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.

2. The Respondent did not commit a prohibited practice within the meaning of Sec. 111.70(3)(a)4, Stats., by not giving HVAC Mechanics two pair of coveralls per year.

3. The Respondent has not been shown to have committed prohibited practices within the meaning of Sec. 111.70(3)(a)1, Stats.

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

**ORDER**

The complaint is dismissed in its entirety.

Dated at Elkhorn, Wisconsin, this 2<sup>nd</sup> day of November, 2004.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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

MILWAUKEE COUNTY

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

**THE PARTIES' POSITIONS**

**The Union**

The Union asserts that the County must bargain with the Union during the term of a contract on all mandatory subjects of bargaining except those covered by the contract or as to which the Union has waived its right to bargain through bargaining history or specific contract language. The County may not normally make a unilateral change during the term of a contract to existing wages, hours or conditions of employment without first bargaining on the proposed change. Absent a valid defense by the County, a unilateral change in existing wages, hours or conditions of employment is a per se violation of the MERA duty to bargain.

The first line of inquiry is whether the subject involved here is a mandatory subject of bargaining. Employees working at the Airport were required to perform dirty work that would damage or destroy their own clothing. There is a clear economic benefit that workers enjoy by having the County supply them with coveralls to perform that dirty duct work. The County admitted that it could afford to continue purchasing coveralls. However, the County argued that the circumstances changed because the cleaning of the ducts has been contracted out. However, the work performed by employees involved in this case is still required. The Union has not waived its right to bargain over the coverall issues, and has grieved three times to restore the benefit after management tried to remove this benefit. There was a unilateral change when in 1998, Kimmel advised employees that they would no longer get two pair of coveralls per year. The County has no valid defense to make such a unilateral change.

The Union contends that the 1982 and 1986 grievance settlements are part of the collective bargaining agreement and serve to define the term "coveralls" or expand the benefit. The 1982 settlement provided that each grievant is to be allowed two coveralls per year. In 1986, the parties reached an oral agreement to restore the two pair coveralls per year benefit. From 1982 to 1998, employees working at the Airport has always received two pair of coveralls per year. The practice was accepted by both parties and there is no reason for the practice to end.

The Union concludes by stating that the unilateral change of grievance settlements violates Sec. 111.70(3)(a)4 and derivatively Sec. 111.70(3)(a)1, Stats.

### **The County**

The County notes that no Union witness ever testified that employees were not provided coveralls while working in the ducts. The Union never used the exclusive dispute resolution mechanism of the collective bargaining agreement. Union Representative Mollenhauer admitted that the issue underpinning this complaint was introduced into the grievance process but that the grievance is dead pursuant to the contract's "12 month rule." Failure to advance the grievance becomes a grievance resolution under the contract. The application of any past practice doctrine is expressly limited by the terms of the collective bargaining agreement.

The County asserts that the Commission has had a long-standing policy of refusing to assert jurisdiction to determine the merits of breach of contract allegations where the parties' labor contract provides for final and binding arbitration of such disputes and where that arbitration procedure has not been exhausted. The Union initiated and processed the underlying grievance and appealed the matter to arbitration. The Union chose the forum. The County never objected or refused to follow the terms of the labor contract. The contract in Section 4.01 provides for the exclusive mechanism for resolve disputes. To allow the Union to use that mechanism, only as long and when it sees fit, deprives the County of the benefit of its bargain. It is a contract breach by the Union and is itself a violation of Sec. 111.70(3)(b)(4), Stats.

### **In Reply, The Union**

While the County argues that the Union's failure to advance the 1999 grievance to arbitration constitutes a settlement, there is no evidence of a mutual settlement. The evidence shows that the Union did not agree to the County's proposed resolution and Mollenhauer's response indicated that the Union sought to arbitrate the issue. Instead of arbitration, the Union pursued the matter through this case. The County appears to argue that deferral should have occurred. However, the County fails to admit that it contested the grievance as untimely. The County failed to acknowledge the fact that the arbitration procedure has been exhausted when the matter was not advanced to an arbitration hearing within 12 months. Deferral is not appropriate in this case.

## **DISCUSSION**

Section 111.70(3)(a)5 makes it a prohibited practice for a municipal employer to violate a collective bargaining agreement. Section 111.70(3)(b)4 makes it a prohibited practice for a labor organization to violate the bargaining agreement. However, 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 hearing 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. This is a rebuttable presumption and the Commission will assert its jurisdiction to hear contract claims where the parties waive reliance on the grievance procedure, or where there is clear and satisfactory evidence that the grievance and arbitration procedure cannot be relied on to dispose of the grievance. KENOSHA (FIRE DEPT.) & KENOSHA FIREFIGHTERS, LOCAL 414, IAFF, AFL-CIO, DEC. NO. 29715-B (NIELSEN, 5/00), AFF'D DEC. NO. 29715-C (WERC, 8/00).

The parties' collective bargaining agreement contains a grievance procedure including arbitration in Section 4.01 of the contract. The Union used the grievance procedure up to arbitration, then indicated that it was going to arbitration, but inexplicably, never moved it to arbitration and filed this complaint instead. The Union correctly recognized that the proper forum for the dispute over coveralls was in the grievance procedure and arbitration. It had taken the same dispute there three times. This kind of dispute is grist for the arbitration mill. It was satisfactorily resolved on two other occasions, with the 1982 grievance settlement still in existence. The record does not show that the Union has a valid excuse to failing to exhaust the contractual grievance procedure. Accordingly, there is no reason for the Examiner to assert jurisdiction over the Sec. 111.70(3)(a)5, Stats., claim.

In its brief, the Union claims a violation of Sec. 111.70(3)(a)4, which makes it a prohibited practice to refuse to bargain. However, the parties had bargained over the provision for coveralls, the matter was covered by the contract. The Union cannot characterize an alleged contractual breach as a unilateral change, thereby hoping to escape from the exhaustion of remedies doctrine. In theory, many if not most alleged contract breaches could be viewed as unilateral changes, at least in one party's view. Therefore, this claim is dismissed as not valid and the Union still has to follow the contract's provision for arbitration as its remedy.

There is no separate claim of a violation of Sec. 111.70(3)(a)1, Stats., of interference, only a derivative claim. Since there are no violations of Secs. 111.70(3)(a)4 or 5, Stats., there is no violation of Sec. 111.70(3)(a)1, Stats.

Dated at Elkhorn, Wisconsin, this 2<sup>nd</sup> day of November, 2004.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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

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