STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MILWAUKEE DISTRICT COUNCIL 48, AFSCME, AFL-CIO
and its affiliated LOCALS 170, 567, 594, 645, 882, 1055, 1654, 1656, Complainant,

vs.

MILWAUKEE COUNTY, Respondent.

Case 551
No. 63952
MP-4046

Decision No. 30970-A

Appearances:

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

Timothy 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 April 20, 2004, the Complainant filed a complaint with the Wisconsin Employment Relations Commission alleging that the Respondent committed a prohibited practice and violated Sections 111.70(3)(a)1, 3, 4 and 5, Wis. Stats., by failing to apply a two percent bonus to certain employees. The Commission appointed Karen J. Mawhinney, a member of its staff, to act as Examiner, to make an issue Findings of Fact, Conclusions of Law and Order as provided in Sec. 111.07(5), Stats. A hearing was held on September 29, 2004, in Milwaukee, Wisconsin, and the parties completed filing briefs on January 13, 2005.

FINDINGS OF FACT

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

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

3. The Union and the County are parties to a 2001-2004 collective bargaining agreement that provides for wage rates for employees. It also provides for a grievance and arbitration procedure for disputes arising out of the interpretation, application or enforcement of the bargaining agreement. Part 4 of the bargaining agreement states in relevant part:

. . .

> 4:02 **GRIEVANCE PROCEDURE**
>
> The County recognizes the right of an employe to file a grievance, and will not discriminate against any employe for having exercised their rights under this section.
>
> (1) APPLICATION The grievance procedure shall not be used to change existing wage schedules, hours of work, working conditions, fringe benefits and position classifications established by ordinances and rules which are matters processed under existing procedures. Only matters involving the interpretation, application or enforcement of the terms of this Agreement shall constitute a grievance.
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> . . .
>
> (5) SETTLEMENT OF GRIEVANCES It is further agreed that the County and the Union shall make every reasonable effort to resolve employe grievances at the lowest possible level of the procedure. Any grievance shall be considered settled at the completion of any step in the procedure if all parties concerned are mutually satisfied. Dissatisfaction is implied in recourse from one step to the next.
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> . . .
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> (7) STEPS IN THE PROCEDURE
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> . . .
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> (b) STEP 2
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> 1. The Director of Labor Relations or his/her designee shall attempt to resolve all grievances timely appealed to the second step. The Director of Labor Relations or his/her designee shall respond in writing to the Union within thirty (30) working days from the date of receipt by the Director of Labor Relations of the step 1 appeal.

> 2. In the event the Director of Labor Relations or his/her designee and the appropriate Union Representative mutually agree to a resolve of the dispute, it shall be reduced to writing and binding upon all parties and shall serve as a bar to further appeal.
>
> . . .
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> (c) STEP 3
> 1. If the grievance is not resolved at the second step as provided, the Union may appeal such grievance to the permanent arbitrator. Such appeal shall be in writing with notification to the Director of Labor Relations, or his/her designee, within 45 days of the second step hearing decision.
>
> . . .

4. A clerical study for the non-represented employees was implemented after it went to the County's Personnel Committee as an informational item on July 14, 2000. The majority of the County's represented clerical employees (approximately 940) are members of Local 1654, but there are some in Local 594 and also some in Local 882. Gerty Purifoy was a staff representative with District Council 48 until October 31, 2003, and she represented Locals 594 and 1654 in negotiations when the Union proposed a clerical study after its members saw the implementation of the reclassification of non-represented clericals in 2000. The parties discussed the two percent performance awards during the bargaining. On October 3, 2000, the parties agreed to a clerical study. The agreement (which is also referred to as the collateral agreement) states the following:

> 1. The parties agree to work cooperatively to complete a classification study of all clerical positions represented by Locals 1654 and 594.
> 2. The study shall be conducted in 2001. The study shall commence in January 2001 and the result shall be available for implementation no later than the first pay period of 2002.
> 3. All employees who hold positions included in the study shall cooperate and complete all questionnaires and related material distributed by the Department of Human Resources to review the position classification no later than March 1, 2001.
> 4. No employee shall suffer a reduction in pay due to this project. A filled position which is determined to be in a lower pay range shall be red-circled until the position becomes vacant.
> 5. A work group consisting of two members of each local and four members of the Department of Human Resources shall oversee the project. DC-48 staff shall provide assistance.

> 6. The independent consultant who assisted in the review of clerical positions completed in mid 2000 shall also assist with this project and shall have the final decision with respect to the classification of any position which cannot be determined by the work group.
> 7. The results of the project shall be implemented via an informational report to the Personnel Committee as included in 17.05 of the CGO.

5. Purifoy met with the former Director of Human Resources, Gary Dobbert, and others on November 20, 2001, regarding the clerical study. Her notes reflect that Dobbert said that the two percent performance award would not be automatic, that it was contingent upon a performance evaluation being completed and submitted by the employee's supervisor. Dobbert informed the County Board Supervisors on December 5, 2001, that the current labor agreement with the Union included a provision that the classification study of the clerical positions would be ready for implementation by the end of 2001. Dobbert's notice also stated the following:

> In accordance with the provisions of Chapter 17.05 of the County Ordinances, the reclassifications listed in the attached report will be included as an informational item on the agenda for the Personnel Committee scheduled for Friday, December 14, 2001 at 9:00 a.m. In the event there is no action taken by the Personnel Committee at that meeting, all the reclassifications included in the attached report will become effective on December 23, 2001.

The Personnel Committee met on December 14, 2001, and was given an informational report on the clerical study. It took no separate action on the clerical study. The County's resolution for approving the collective bargaining agreement includes the classification study of all clerical positions represented by Locals 1654 and 594. The collateral agreement for the study was not attached to the Memorandum of Agreement. The County ratified one contract for the year 2001 and another for 2002-2004 at the same time.

6. On December 7, 2001, the County and the Union jointly sent a letter to employees that stated that the labor agreement included a provision for a classification study of all clerical positions, and that employees at step nine would be eligible for a sustained performance award equal to two percent of their annual base salary. On December 17, 2001, Purifoy sent a letter to all clerical members of Locals 594 and 1654 about the clerical study results. In that letter, she stated that after completing 2,080 hours at step 9 and receiving a satisfactory performance evaluation, employees would receive an annual lump sum pay equal to two percent of their yearly salary, which is called a sustained performance award. Before sending out this letter, the Deputy Director of Human Resources, Jertha Ramos, reviewed it. Ramos made some changes in the contents of the letter which Purifoy incorporated into her letter. The Department of Human Resources also generated a pay grid with the new annual salary ranges, and it shows a step ten of two percent sustained performance awards as a lump

sum and not added to the base pay. Purifoy corrected her December 17, 2001 letter on December 28, 2001, to note that the lump sum payout is equal to two percent of one's annual base salary (not yearly salary as she previously stated).

7. There were 144 positions that did not get into the study because members did not return their questionnaires. The incumbents in those positions were given another opportunity complete the surveys and be part of the study. Union and management representatives met on January 30, 2003, about those positions. During that meeting, the new Director of Human Resources, Charles McDowell, stated that the two percent performance award was on hold due to a request from a County Board supervisor about the cost of the entire package, including the 144 positions. Purifoy requested a list of non-represented clericals who received a two percent performance award, and Ramos provided it on February 4, 2003. It lists seven people.

8. The County implemented all aspects of the clerical study except for the two percent performance awards. The Department of Human Resources put out a list of pay ranges and rates which show that there is a two percent sustained performance award paid as a lump sum at the top step.

9. On March 20, 2003, the Union filed a grievance on behalf of the clerical employees that states:

> Effective 12-22-02, grievants became eligible for a 2% sustained performance award after completion of 2,080 hours of service at the maximum rate step in the pay range. Milwaukee County Department of Human Resources has not allowed the consideration of these performance awards and subsequent lump sum payment, thereby violating the M.O.A., clerical study collateral agreement, and its own pay rate structure.

This grievance's reference number was 40168, and the named grievant was Anna Gill et al. A similar grievance numbered 40267, with the named grievant being Susan Budnowski, was also filed.

10. On August 26 and September 17, 2003, the County's Director of Labor Relations, Troy Hamblin, resolved two grievances by approving the two percent performance awards for clerical employees. His August 26th letter to Purifoy states:

> Dear Ms. Purifoy:
>
> The disposition for the following grievance, for which an appeal hearing was held May 14, 2003, between Milwaukee County Labor Relations, the Department of Human Services, Local 1654, and Milwaukee District Council 48, AFSCME, AFL-CIO is summarized as follows:

> **Grievant:** Susan Budnowski **Grievance #:** 40267 **Appeal #:** 1654-987
>
> **Subject:** 2% Performance Award
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> **Disposition:** The County entered into an agreement with the Union to provide a 2.0% Lump Sum Sustained Performance Award that is not added to an employee's base salary. For whatever reason, the County chose not to pay the awards to both represented and non-represented employees. Payroll will be instructed to compensate all eligible employees represented by the Union. **Grievance Sustained.**
>
> Please circle your answer to the disposition of the grievance, sign, date, and return the original to our office.
>
> **Approved** **NOT Approved**

Purifoy circled the word "approved" and signed the letter and dated it September 3, 2003. On September 17, 2003, Hamblin sent another letter to Purifoy that stated:

> The disposition for the following grievance, heard July 16, 2003, between Milwaukee County Labor Relations, the Department of Health and Human Services, Local 594, and Milwaukee District Council 48, AFSCME, AFL-CIO is summarized as follows:
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> **Grievant:** Anna Gill, et. al. **Grievance #:** 40168 **Appeal #:** 594-1332
>
> **Subject:** 2% Performance Award
>
> **Disposition:** This grievance will be resolved by the disposition rendered in grievance number 40267 filed by Local 1654. **Grievance Resolved.**
>
> Please circle your answer to the disposition of the grievance, sign, date, and return the original to our office.
>
> **Approved** **NOT Approved**

Again, the Union circled the word "approved" and dated it October 16, 2003.

11. The parties' permanent arbitrator, Sherwood Malamud, ruled on February 28, 2003, that the interpretation and application of the 2000 collateral agreement fell within the subject mater of his jurisdiction. Arbitrator Malamud found that the collateral agreement changed the terms of the Memorandum of Agreement. The grievance in that case involved a 90-day increment step for certain clerical employees, and the Arbitrator concluded that the collateral agreement did not require the County to provide the 90-day increment step.

12. On March 2, 2004, Attorney Mark Sweet wrote Hamlin regarding the lack of implementation of the two percent performance award. His letter states:

> As you know, the Personnel Committee of the County Board approved the Clerical Reclassification Study for Represented Employees on December 14, 2001. The Clerical Reclassification Study was part of the parties' negotiated agreement and specifically noted that the results ". . . shall be implemented via an informational report to the Personnel Committee as included in 17.05 of the CGO." (Point 7 of the October 3, 2000 Tentative Agreement). The Study post-dated the Clerical Study implemented in mid-2000 for Non-Represented Employees.
>
> On August 26, 2003, a grievance disposition was issued in Grievance #40267, relative to Milwaukee County's failure to fully implement the results of the Study. The specific violation was the application of the 2% Lump Sum Sustained Bonus Award. The Disposition sustained the grievance.
>
> As of this date, neither the Clerical Study nor the grievance disposition has been implemented. Rather, it is our understanding that the matter has been referred to Corporation Counsel, at the request of the Director of Administrative Services. Frankly it is of no legal relevance, and of no interest to the Union, who may be engaging in an internal review of the matter within Milwaukee County. The Union maintains that this matter was and is a part of the parties' negotiated agreement and was properly ratified by each of the respective parties. Furthermore, the process the parties agreed to as part of that negotiated settlement have been followed.
>
> The County's continuing failure to fully comply with this agreement is a gross breach of contract. The Union will not permit the repudiation of the parties' agreement in this matter. Obviously, it is the Union's desire to have members made whole with respect to the 2% Lump Sum Sustained Performance Award. Given the plain agreement by the parties, it appears that a neutral's enforcement in this matter would be a waste of both parties' time and resources. Therefore, I request that Milwaukee County take appropriate action to implement the parties' agreement. Please contact me as soon as possible, but not later than March 15, 2004, to advise me of Milwaukee County's intent in this regard.

13. On March 1, 2004, Hamblin notified District Council 48's Executive Director Richard Abelson by letter that he was withdrawing his previous decision to sustain the grievances for the two percent performance awards. His letter states:

> On August 26, 2003 and September 17, 2003, respectively, I provided written dispositions for two grievances: grievance number 40267, appeal number 1654-

987; and grievance number 40168, appeal number 594-1332, in which I sustained the grievances concerning a two-percent (2%) performance award for clerical employees. Corporation Counsel was asked to review my decision and determine if the authority existed to grant the relief requested.

It was determined there was no authority to grant the relief requested. A careful review of County Board activity regarding the reclassification of clerical positions in Locals 1654 and 594 revealed that the County Board did not approve the two-percent (2%) performance awards for eligible employees. Therefore, my written decisions from August 26, 2003, regarding the grievance of Susan Budnowski, et. al., grievance number 40267, appeal number 1654-987; and September 17, 2003, regarding the grievance of Anna Gill, et.al., grievance number 40168, appeal number 594-1332, are withdrawn.

14. The Union did not advance the grievances to final and binding arbitration.

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

CONCLUSIONS OF LAW

1. The grievance settlements of August 26, 2003, and September 17, 2003, are collective bargaining agreements within the meaning of Sec. 111.70(3)(a)5, Stats.

2. The County's revocation or withdrawal of the grievance settlements of August 26, 2003, and September 17, 2003, violates Sec. 111.70(3)(a)5, Stats.

3. The Respondent did not commit prohibited practices within the meaning of Secs. 111.70(3)(a)1, 3 or 4, Stats., by not paying employees the two percent performance awards.

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

ORDER

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

(a) Cease and desist from revoking or withdrawing prior grievance settlements, particularly those grievance settlements of August 26, 2003, and September 17, 2003, wherein the County had agreed to compensate all eligible employees represented by the Union for a 2.0% Lump Sum Sustained Performance Award that is not added to an employee's base salary.

(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 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 a responsible representative of the County 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 be 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 1st day of March, 2005.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Karen J. Mawhinney /s/

Karen J. Mawhinney, Examiner

APPENDIX A

NOTICE TO ALL EMPLOYEES

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 cease and desist from violating or failing to execute any collective bargaining agreements including grievance settlement agreements previously agreed upon by Milwaukee District Council 48, AFSCME, AFL-CIO and Milwaukee County.

2. WE WILL comply with the terms of the grievance settlement agreements dated August 26, 2003, and September 17, 2003, regarding the 2.0% Lump Sum Sustained Performance Awards that are not added to employees' base salaries.

Dated this ______ day of ____________________, 2005.

By _____________________________________
On Behalf of Milwaukee County

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

MILWAUKEE COUNTY

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Section 111.70(3)(a)5, Stats., makes it a prohibited practice for a municipal employer to violate a collective bargaining agreement, and Section 111.70(3)(b)4, Stats., 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 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. 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).

A grievance settlement agreement is also a collective bargaining agreement within the meaning of MERA. VILLAGE OF KIMBERLY, DEC. NOS. 28759-C AND 29793-A (BURNS, 11/97); BROWN COUNTY, DEC. NO. 27624-A (NIELSEN, 4/93); ONEIDA COUNTY, DEC. NO. 15374-B (YEAGER, 12/77) AFF'D, DEC. NO. 15374-C (WERC, 6/78). In this case, there were actually two settlement agreements made on August 26, 2003, and September 17, 2003, when Hamblin sustained the grievances filed over the two percent performance awards. On behalf of the County, the Director of Labor Relations agreed to sustain the grievances, and the Union approved his disposition of those grievances. The collective bargaining agreement, in Section 4.02(5) states that any grievance ***shall be considered settled*** at the completion of any step in the procedure if all parties concerned are mutually satisfied. They were. The Union circled the word "approved" on the letters from Hamblin, and why not? It had just gotten what it sought in the grievances. And Hamblin clearly had the authority to resolve the grievances. Under Section 4.02(7)(b), the Director of Labor Relations or his/her designee shall attempt to resolve all grievances timely appealed to the second step. It is the step before arbitration. The collective bargaining agreement goes on to say that in the event the Director of Labor Relations or his/her designee and the appropriate Union Representative mutually agree to a resolve of the dispute, it shall be reduced to writing and ***binding upon all parties and shall serve as a bar to further appeal***. Therefore, the Union could not appeal it to arbitration because the parties had mutually agreed to a resolution of a dispute. They put it in writing. It was a settlement agreement of grievances.

The Union was thus entitled to rely on the settlement agreement and forego appealing the grievances to arbitration. It had no reason to believe that the County would renege on the settlement agreement several months later, in March of 2004. Under these circumstances, it is appropriate to find that the County has violated the collective bargaining agreement and

violated Sec. 111.70(3)(a)5, Stats. The County could not lawfully withdraw its settlement agreement anymore than it could revoke the collective bargaining agreement.

There are also allegations of violations of Secs. 111.70(3)(a)1 and 3, Stats. To establish a claim of interference or a Sec. 111.70(3)(a)1 claim, a complainant must establish by a clear and satisfactory preponderance of the evidence that the respondent's conduct contained either some threat of reprisal or promise of benefit which would tend to interfere with, restrain or coerce employees in the exercise of the section (2) rights. BEAVER DAM UNIFIED SCHOOL DISTRICT, DEC. NO. 20283-B (WERC, 5/84). It is not necessary to demonstrate that the employer intended its conduct to have such effect, or even that there was actual interference; instead, interference may be proven by showing that the conduct has a reasonable tendency to interfere with the exercise of protected rights. WERC V. EVANSVILLE, 69 WIS.2D 140 (1975); CITY OF BROOKFIELD, DEC. NO. 20691-A (WERC, 2/84). The Union has not proven any violation of Sec. 111.70(3)(a)1 in this case, at least as an independent violation.

To establish a violation of Sec. 111.70(3)(a)3, the Union must show that the employee was engaged in protected activity, the employer was aware of that activity, the employer was hostile to it, and the employer's conduct was motivated in whole or in part by hostility to that protected activity. MUSKEGO-NORWAY C.S.J.S.D. NO 9 V. WERB, 35 WIS.2D 540, 151 N.W.2D 617 (1967). The Union has shown that non-represented clericals got the two percent performance awards while members of its bargaining units did not. However, this by itself is insufficient to establish a claim of discrimination. There were only seven non-represented employees shown to have received the performance awards. There is no evidence that the County was hostile in any fashion to the clerical study or the performance awards which were a part of the study. In fact, the County rolled out payroll information including the performance awards, it implemented the rest of the study, it initially granted the grievances over the performance awards, and then it mysteriously withdrew its granting of the grievances and did not pay the performance awards. None of that conduct shows hostility to union activity.

The Union also alleged a violation of Sec. 111.70(3)(a)4, Stats., which makes it a prohibited practice to refuse to bargain. The parties had bargained for the two percent performance awards – they had bargained the clerical study into the collective bargaining agreement, and the two percent performance awards were part of the clerical study results. Thus, the County did not violate Sec. 111.70(3)(a)4, Stats.

The appropriate remedy for the violation of Sec. 111.70(3)(a)5, is to have the County honor its settlement agreement, and it has been so ordered.

Dated at Elkhorn, Wisconsin, this 1st day of March, 2005.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Karen J. Mawhinney /s/

Karen J. Mawhinney, Examiner

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