

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

VINCENT MURILLO, Complainant,

vs.

MILWAUKEE BOARD OF SCHOOL DIRECTORS, Respondent.

Case 413
No. 63064
MP-3997

Decision No. 30980-A

Appearances:

Barbara Zack Quindel, Attorney, Perry, Shapiro, Quindel, Saks, Charlton, Sumara & Lerner, S.C., 823 North Cass Street, P.O. Box 514005, Milwaukee, Wisconsin, appearing on behalf of the Complainant.

Donald L. Schriefer, Assistant City Attorney, City of Milwaukee, 800 City Hall, 200 East Wells Street, Milwaukee, Wisconsin, appearing on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Vincent Murillo filed a complaint with the Wisconsin Employment Relations Commission on December 9, 2003, alleging that the Milwaukee Board of School Directors had committed a prohibited practice in violation of Sec. 111.70(3)(a)1, Stats., when it denied Complainant his Sec. 111.70(2), Stats., statutory right to meet directly with his employer and a representative of his choosing. A pre-hearing conference occurred telephonically on March 15, 2004 during which time Complainant and Respondent indicated a desire to pursue settlement, while alternately waiving hearing and establishing a briefing schedule. Respondent's brief was received on May 6, 2004 and Complainant's brief and the Stipulations of Fact was received by the Examiner on June 21, 2004, following their initial mailing to the Examiner's Wausau mailing address, whereupon the record was closed.

The Commission issued an order on July 12, 2004, authorizing Examiner Lauri A. Millot to make and issue findings of fact, conclusions of law and order as provided in Sec. 111.07(5), Stats.

Dec. No. 30980-A

The Examiner, having considered the Stipulations of Facts and arguments of Counsel, makes and issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. Vincent Murillo (hereinafter Complainant) is a municipal employee of Milwaukee Board of School Directors as defined by Sec. 111.70(1)(i), Stats. At all times material herein, Complainant has resided in Milwaukee, Wisconsin and has been employed as a building service helper by the Milwaukee Board of School Directors.

2. Milwaukee Board of School Directors (hereinafter Board or Respondent) is a municipal employer as defined by Sec. 111.70(1)(j), Stats., and maintains its principal offices at 5225 West Vliet Street, Milwaukee, Wisconsin.

3. At all times material herein, SEIU, Local 150 (hereinafter Union) has been the exclusive bargaining representative for Complainant in his building service helper position. The SEIU representative is Carmen Dickerson.

The Union's principal office is located at 811 Ninth Street West, Altoona, Wisconsin.

4. Complainant and Respondent entered into a Stipulation of Facts on May 4, 2004, which reads as follows:

. . .

3. Complainant is employed as a building helper with Respondent.

4. In order to clarify issues concerning the family's health insurance, Mr. Murillo sought the assistance of Barry Gilbert and Joan Heithoff, Assistant Executive Directors for Milwaukee Teachers' Education Association.

5. On September 19, 2003, Joan Heithoff requested a meeting as a representative of Mr. Murillo to discuss an issue concerning Mr. Murillo's health insurance. The meeting was requested pursuant to Section 111.70(4)(d)(1), Stats. Attached is Exhibit 1 and incorporated by reference is the letter sent to Ms. Toth requesting this meeting, including an authorization executed by Mr. Murillo for choosing MTEA representatives to represent him at this meeting.

6. On October 9, 2003, Ms. Toth responded, setting a meeting for October 15, 2003, but requiring the presence of Mr. Murillo's collective bargaining representative, SEIU Local 150 Representative Carmen Dickerson.

Ms. Toth also conditioned the meeting on assurance that Mr. Murillo was not going to invoke an appeal under the health plan nor any grievance or collective bargaining process. Attached as Exhibit 2 and incorporated by reference is a copy of Ms. Toth's letter.

7. On October 14, 2003, Mr. Murillo's representative, Joan Heithoff responded to Ms. Toth indicating that the requested meeting was not under the contractual grievance procedure, but a conference requested by an individual employee under the provisions of Section 111.70(4)(d). Complainant also objected to the Board's effort to impose unlawful conditions on the holding of the statutory conference and confirmed the meeting to be held on October 15, 2003. Attached as Exhibit 3, incorporated by reference is a copy of Ms. Heithoff's letter of October 14, 2003.

8. Following receipt of Ms. Heitkoff's letter of October 14, 2003, the board cancelled the meeting scheduled for October 15, 2003, stating that the Board was unwilling to meet until the issues involved are resolved.

9. Complainant Murillo is in a collective bargaining unit represented by SEIU Local 150. He has not filed a grievance under the collective bargaining agreement between SEIU Local 150 and the Milwaukee Board of School Directors.

5. The letter dated September 19, 2003, from Heithoff to Toth as referenced in Stipulation of Fact number 5 reads as follows:

Dear Ms. Toth:

I am requesting a meeting with you, Mr. Vincent and Evangelina Murillo, Barry Gilbert and myself to discuss an issue concerning Mr. Murillo's health insurance. Wisconsin statute 111.70 states:

Any individual employee, or any minority group of employees in any collective bargaining unit, shall have the right to present grievances to the municipal employer in person or through representatives of their own choosing, and the municipal employer shall confer with said employee in relation thereto, if the majority representative has been afforded the opportunity to be present at the conferences.

I have included a copy of the statue for your review as well as a copy of an authorization for MTEA representation by Mr. Murillo. Mr. Murillo is not available to meet until 4:30 p.m. Please contact me with a list of possible dates for a meeting.

Thank you for your anticipated cooperation.

Sincerely,

/s/

Joan Heithoff
Assistant Executive Director
MTEA

cc: Carmen Dickinson, Local 150 representative

. . .

6. The letter dated October 9, 2003, from Toth to Heithoff as referenced in Stipulation of Fact number 6 reads as follows:

Dear Ms. Heithoff:

This is in response to your letter of September 19, 2003 and to confirm the basis for our upcoming meeting on October 15, 2003 at 4:30 p.m. in our office with Mr. And (sic) Mrs. Murillo and Ms. Carmen Dickinson.

This is to confirm that we will proceed with this meeting provided that Ms. Carmen Dickinson, Local 150 Representative, is present and that the meeting is not:

- a. an appeal under the health plan(s) covering Mr. and Mrs. Murillo, and
- b. does not invoke any grievance or collective bargaining process

Unless I hear otherwise from you prior to October 15, 2003, the meeting will proceed based upon these conditions. Thank you and please contact me if you have any questions.

Sincerely,

/s/

Chris M. Toth
Director
Benefits and Insurance Services Division

cc: Deborah Ford
Therese Freiberg
Carmen Dickinson

7. The letter dated October 14, 2003, from Heithoff to Toth as referenced in Stipulation of Fact number 7 reads as follows:

Dear Ms. Toth:

This is in response to your letter of October 9, 2003.

Be assured that in conformity with Section 111.70(4)(d), Wisconsin Statutes, Carmen Dickenson, the majority representative of Vincent Murillo has been afforded the opportunity to be present at the October 15, 2003 conference. Whether Ms. Dickenson chooses to attend is irrelevant under the above provision of Section 111.70. I intend to proceed with the conference representing Mr. Murillo whether Ms. Dickenson is present or not.

With respect to your second request, whether Mr. Murillo appeals the administrations (sic) decision under his health plan or wishes to file a contractual grievance depends in large measure upon the outcome of the October 15th conference. The MTEA is not willing to rule out either possibility at the present time. It is improper for you to attempt to impose unlawful conditions on Mr. Murillo's exercise of rights guaranteed by Wisconsin Statutes.

I expect you to meet on October a 15th as previously arranged in accordance with Section 111.70(4)(d), Wisconsin Statutes.

Sincerely,

/s/

Joan Heithoff

Assistant Executive Director

8. The District refused to meet and confer with Complainant on October 15, 2003 and thus has interfered with, restrained and coerced Complainant in the exercise of his right to refrain from engaging in lawful concerted activity.

CONCLUSIONS OF LAW

1. Complainant Vincent Murillo is a municipal employee within the meaning of Sec. 111.70(1)(i), Stats.

2. Respondent Milwaukee Board of School Directors is a municipal employer within the meaning of Sec. 111.70(1)(j), Stats.

3. SEIU, Local 150 is a labor organization within the meaning of Sec. 111.70(1)(h), Stats.

4. By the acts described in the above and foregoing Findings of Fact Respondent refused to meet and confer with the Complainant in violation of Sec. 111.70(4)(d)(1), Stats.

5. By the acts described in the above and foregoing Findings of Fact, the Complainant demonstrated by a clear and satisfactory preponderance of the evidence that the Respondent interfered, restrained and coerced the Complainant in the exercise of his rights guaranteed by the Municipal Employment Relations Act, and therefore, the **Respondent County** violated Sec. 111.70(3)(a)1, Stats.

ORDER

To effectuate the purposes of the Wisconsin Employment Peace Act and remedy the violation of Sec. 111.70(3)(a)1, Stats., noted in Conclusion of Law 5 above, IT IS ORDERED that the Respondent, its officers and agents shall:

Notify all employees, by posting in conspicuous places in Respondent's offices and buildings where such employees are employed, copies of the Notice attached hereto and marked "Appendix A." This notice shall be signed by an authorized representative of the Respondent and shall be posted immediately upon receipt of a copy of this Order and shall remain posted for a period of sixty days (60) thereafter. Reasonable steps shall be taken by the Respondent to insure that this Notice is not altered, defaced or covered by other material.

Dated at Rhinelander, Wisconsin this 1st day of September, 2004.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Lauri A. Millot /s/

Lauri A. Millot, Examiner

APPENDIX "A"

**NOTICE TO ALL EMPLOYEES REPRESENTED OF THE
MILWAUKEE BOARD OF SCHOOL DIRECTORS**

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

The Milwaukee Board of School Directors will not interfere with, restrain or coerce its employees in the exercise of their right to refrain from engaging in lawful concerted activity.

Milwaukee Board of School Directors

THIS NOTICE WILL BE POSTED IN THE LOCATIONS CUSTOMARILY USED FOR POSTING NOTICES TO EMPLOYEES OF THE MILWAUKEE BOARD OF SCHOOL DIRECTORS FOR A PERIOD OF SIXTY (60) DAYS FROM THE DATE HEREOF. THIS NOTICE IS NOT TO BE ALTERED, DEFACED, COVERED OR OBSCURED IN ANY WAY.

Milwaukee Board of School Directors

MEMORANDUM ACCOMPANYING FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

POSITIONS OF THE PARTIES

Complainant

Complainant asserts that the Board violated Sec. 111.70(3)(a)1, Stats., when it refused to meet and confer with him and his chosen representative as requested under Sec. 111.70(4)(d)1, Stats.

The Board is statutorily bound to meet and confer with Complainant. The language of Sec. 111.70(4)(d)1, Stats., provides him the right to confer with his employer outside the context of any collectively bargained grievance procedure without utilizing the majority representative.

The seminal case that distinguishes between the statutory right to confer and an individual employee's right to utilize the collectively bargained grievance procedure is MILWAUKEE BOARD OF SCHOOL DIRECTORS, DEC. NO. 11280-B (WERC, 12/72). The WERC has similarly addressed the issue of statutory rights and individual employee efforts to utilize the grievance machinery in State of Wisconsin, DEC. NO. 30124-D (WERC, 1/03) and found that statutory right is separate and distinct from the contractual right. Although this case does not follow the case law pattern, the conclusions reached in both cases should be followed.

The Board's refusal to meet with Murillo is a violation of Sec. 111.70(3)(a)1, since its actions constitute an interference with his Sec. 111.70(2) right. This conclusion is supported by the WERC decision in MILWAUKEE BOARD OF SCHOOL DIRECTORS, DEC. 6995-A (WERC, 3/66) wherein the Commission found that the statute was violated when the Board restricted the employee's right to have a representative of his/her choosing if the employee chose the minority representative.

Respondent

Respondent asserts that no violation of MERA has occurred.

In COLUMBIA COUNTY, DEC. NO. 22683-B (WERC, 1/87) the Commission stated an employer is not required to meet and confer with employees and their personal representatives, but rather, is permitted to meet and confer with employees and their personal representatives

without concern that they will violate the provisions of MERA. Ten years later, the Commission, in STATE OF WISCONSIN, DEC. NO. 28938-C (WERC, 1/99), let stand Examiner's lengthy citations from COLUMBIA COUNTY, SUPRA., including

That provision [i.e. Section 111.70(4)(d)1, of MERA] does not impose an affirmative obligation that the Employer meet and confer with employees and their representatives about grievances; rather, it is intended "to permit employees to present grievances and to authorize the employer to entertain them without opening itself to liability for dealing directly with employees in derogation of the Sec. 111.70(3)(a)4, Stats. duty to bargain only with the exclusive bargaining representative." GREENFIELD SCHOOLS, DEC. NO. 14026-B (WERC, 11/77), citing EMPORIUM CAPWELL CO. v. WESTERN ADDITION COMMUNITY ORGANIZATION, 420 U.S. 50, 61 N.12 (1975). at 10.

The present case is based solely on the Complainant's mistaken belief that Sec. 111.70(4)(d)1, Stats., requires the Board to meet with Murillo and his minority representative. Given that COLUMBIA COUNTY, SUPRA, clarifies that no obligation exists, then the Board's decision to refrain from participating in a permissive meeting is not a prohibitive practice.

For all of the above reasons, Respondent requests that the Examiner dismiss the complaint in its entirety.

DISCUSSION

This case presents solely issues of law. Does an employer have Sec. 111.70(4)(d), Stats., obligation to "meet and confer" upon the request of an employee? And if so, does the refusal to meet and confer constitute a prohibitive practice? The Board maintains that the case law does not require such a meeting, while the Complainant asserts that the obligation exists and the failure to meet constitutes a prohibitive practice. Both parties cite the same case law and reach the differing conclusions.

Was the Respondent obligated to "meet and confer" with the Complainant?

Sec. 111.70(4)(d)1, Stats., provides that:

. . . Any individual employee, or any minority group of employees in any collective bargaining unit, shall have the right to present grievances to the

municipal employer in person or through representatives of their own choosing, and the municipal employer shall confer with said employee in relation thereto, if the majority representative has been afforded the opportunity to be present at the conferences. Any adjustment resulting from these conferences shall not be inconsistent with the conditions of the employment established by the majority representative and the municipal employer.

Complainant's September 19 letter, as it clearly stated, was a Sec. 111.70(4)(d) request to meet and confer with the MTEA as his representative and was not a request to meet to redress a grievance pursuant to the negotiated labor agreement. Respondent refused to meet with the Complainant and an MTEA representative unless the SEIU representative was present. An employee has a statutory right to meet and confer with his employer with a representative of his choosing provided the majority representative is afforded the opportunity to be present and provided any settlement reached is not inconsistent with the negotiated labor agreement. Toth's refusal to meet with Complainant denied the Complainant his statutory right to meet and confer with his employer.

Respondent asserts STATE OF WISCONSIN, DEC. NO. 28938-C (WERC, 1/99), citing COLUMBIA COUNTY, DEC. NO. 22683-B (WERC, 1/87) supports its position that it was not obligated to meet with Murillo without the majority labor association present. I disagree. Both STATE OF WISCONSIN, ID and COLUMBIA COUNTY, ID were situations in which the employee had initiated a contractual grievance and then sought to rely on the statutory language to obviate the contractual process. In these instances, the Commission found that the employer's failure to meet with an individual grievant did not constitute an unfair labor practice since contractual grievance machinery was already in motion, thus recognizing that the grievance belonged to the majority representative and a meeting with the grievant was permissive and not mandatory.

The Respondent's argument is further hindered by the procedure proscribed by the Commission in STATE OF WISCONSIN, DEC. NO. 30124-D (WERC, 1/03) wherein it acknowledged that although the statute does:

not specify any particular procedure for the exercise of the right therein created. As general matter, we think the statute contemplates no more than: (1) the employee advises the employer that she wishes to meet pursuant to the statute; (2) the union is advised of the request; and (3) a meeting occurs at a time satisfactory to the employee, the employer and the union (if it indicates it wishes to be present).

Nowhere in this procedure does the Commission afford an employer the opportunity to determine whether it desires to meet with the employee. Rather, the Commission's directive states that a meeting will occur, regardless of whether the majority union desires to be present or not. Thus, Respondent's contention that a "meet and confer" request is a permissible meeting and not mandatory is not persuasive.

Did the Respondent commit a prohibited practice by refusing to "meet and confer" with the Complainant?

The Complainant asserts that the Respondent engaged in a prohibited practice by refusing to meet with him since it interfered with his Sec. 111.70(2) rights. Respondent denies that it has committed a prohibited practice.

Sec. 111.70(3)(a)1, Stats., provides it is a prohibited practice for a municipal employer:

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

Sec. 111.70(2), Stats., guarantees municipal employees the right:

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, and such employees shall have the right to refrain from any and all such activities ...

Complainant sought a Sec. 111.70(4)(d)1 meeting with Toth and an MTEA representative, understanding that the SEIU representative had the right to be present. Respondent agreed to meet with the proviso that the SEIU representative was present. Had there been a grievance pending, Respondent would have been justified to require the presence of SEIU, Local 150. It is unlawful for the Respondent to condition Complainant's statutory grievance meeting on the presence of the majority representative since it is compelling the Complainant to engage in concerted activity. Respondent's refusal to afford Complainant his statutory grievance meeting interfered with, restrained and coerced the Complainant in the exercise of his right to refrain from engaging in lawful concerted activity in violation of Sec. 111.70(3)(a)1, Stats.

Dated at Madison, Wisconsin, this 1st day of September, 2004.

Lauri A. Millot /s/

Lauri A. Millot, Examiner