

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

**THE AMERICAN FEDERATION OF STATE, COUNTY, AND
MUNICIPAL EMPLOYEES, WISCONSIN COUNCIL 40, AFL-CIO, Complainant,**

vs.

THE VILLAGE OF POYNETTE, WISCONSIN, Respondent.

Case 8
No. 64185
MP-4105

Decision No. 31178-A

Appearances:

Sam Gieryn, Organizer, Wisconsin Council 40, AFSCME, AFL-CIO, 8033 Excelsior Drive, Suite B, Madison, Wisconsin 53717-1903, appearing on behalf of the Complainant.

S. Bryan Kleinmaier, Stafford Rosenbaum LLP, 3 South Pinckney Street, P.O. Box 1784, Madison, Wisconsin 53701-1784, appearing on behalf of the Respondent.

**ORDER DENYING RESPONDENT'S PRE-HEARING
MOTION TO DISMISS CERTAIN ALLEGATIONS
IN THE AMENDED COMPLAINT**

The American Federation of State, County, and Municipal Employees, Wisconsin Council 40, AFL-CIO, (Complainant) filed a complaint with the Wisconsin Employment Relations Commission on November 18, 2004, alleging that the Village of Poynette (Respondent) had committed prohibited practices within the meaning of Sec. 111.70(3)(a)(1) and (3), Stats., by unilaterally implementing changes to the health insurance benefits of two unrepresented employees while a petition for unit clarification was pending. On December 13, 2004, the Commission appointed Coleen A. Burns, as Examiner to make and issue Findings of Fact, Conclusions of Law and Order in the matter of the prohibited practices complaint filed by the Complainant. On December 23, 2004, the Respondent filed its Answer to the Complaint. On January 27, 2005, the Complainant filed an amended Complaint that added the allegation that, on or about January 1, 2005, the Respondent refused to bargain and violated a collective bargaining agreement by unilaterally implementing changes to an existing bargaining unit's health insurance benefit in violation of Sec. 111.70(3)(a)4 and 5, Stats. On February 2, 2005, Respondent filed its Answer to the Amended Complaint and a Motion to Dismiss Certain Allegations Contained in the Amended Complaint. On February 11, 2005 the Respondent filed an initial brief in support

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of the Motion to Dismiss and the Complainant filed an initial brief in opposition to the Motion to Dismiss. On February 17, 2005, the Complainant filed a reply brief in opposition to the Motion to Dismiss and, on February 18, 2005, the Respondent filed a reply brief in support of the Motion to Dismiss. The Examiner, having considered the record to date and the arguments of the parties, makes and issues the following

ORDER

The pre-hearing Motion to Dismiss Certain Allegations in the Amended Complaint is denied.

Dated at Madison, Wisconsin, this 16th day of March, 2005.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Coleen A. Burns /s/

Coleen A. Burns, Examiner

VILLAGE OF POYNETTE

**MEMORANDUM ACCOMPANYING ORDER DENYING
RESPONDENT'S PRE-HEARING MOTION TO DISMISS
CERTAIN ALLEGATIONS IN THE AMENDED COMPLAINT**

In its Motion to Dismiss, as well as in an Affirmative Defense in its Answer to the Amended Complaint, Respondent seeks to have the Examiner dismiss certain allegations in the Amended Complainant. These "certain allegations" are as follows:

In addition, on or about January 1, 2005, the Village of Poynette did unilaterally implement changes to the existing bargaining unit's previously bargained health insurance opt-out benefit without bargaining over said changes. Such action was both a refusal to bargain and a violation of the contractual agreement then in effect between the parties.

...

The failure to bargain with the union regarding the change of health insurance benefit for the entire union membership is a violation of Wisconsin Statute 111.70(3)(b)(3) and the violation of the contract is a violation of Wisconsin Statute 111.70(3)(b)(4).

In e-mails dated February 3, 2005, Complainant's representative confirmed that the above cited statutory sections should be Sec. 111.70(3)(a)4 and 5, Stats., and Respondent's representative confirmed that he understood this to be the case.

The Motion to Dismiss does not take issue with the allegations raised in either the first paragraph of Paragraph C or the first paragraph of Paragraph D. Thus, regardless of whether or not Respondent's Motion to Dismiss is granted, these allegations, *i.e.*, that Respondent violated Secs. 111.70(3)(a)1 and 3, Stats., when Respondent unilaterally changed the health insurance benefits of two unrepresented employees during a period of time in which these employees were the subject of a unit clarification petition will be heard at the hearing scheduled for March 24, 2005.

Respondent's Argument

The Commission has jurisdiction to hear and decide allegations that a municipal employer has violated Sec. 111.70(3)(a)4 and 5, Stats. The Commission, however, has consistently refused to assert its jurisdiction over such allegations when the Complainant has failed to exhaust the contractual grievance procedure.

In its Complaint, the Complainant specifically alleges that the Respondent's conduct violated a contractual agreement. Article 7 of the parties' collective bargaining agreement contains a grievance procedure that provides for final and binding arbitration. After filing this complaint, the Complainant filed a grievance alleging the same contractual violations as those

alleged in the second paragraphs of C and D of the complaint.

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The Respondent and the Complainant have agreed upon a procedure for resolving disputes regarding the interpretation and application of this agreement and the Complainant is obligated to follow this procedure. It is undisputed that the Complainant has failed to exhaust the contractual grievance procedure.

The Respondent is not raising any procedural defenses to the grievance. As far as the grievance is concerned, the grievance procedure and, if necessary, grievance arbitration is the appropriate mechanism to resolve the dispute concerning the Respondent's decision to discontinue the health insurance opt-out benefit. The Union's submission of the grievance demonstrates that it is also agreeable to this process.

By granting Respondent's Motion to Dismiss, the Examiner is not preventing the Complainant from challenging the Respondent's decision to discontinue the opt-out payment, but rather, the Examiner would be ensuring that the dispute is resolved in the proper forum, *i.e.*, grievance arbitration. If the Complainant prevails in grievance arbitration, it would obtain the remedy it seeks with a prohibited practices claim – make-whole payments for its bargaining unit members. If the Examiner denies Respondent's Motion to Dismiss, the Examiner should include in her decision a ruling that Complainant not also be allowed to challenge Respondent's decision to discontinue the health insurance opt-out benefit through grievance arbitration.

Complainant's Argument

The Respondent and the Complainant were parties to a collective bargaining agreement that expired on December 31, 2004. The allegations that are the subject of Respondent's Motion to Dismiss are that, on or about January 1, 2005, Respondent violated Sec. 110.70(3)(a)4 and 5, Stats., by unilaterally implementing changes to the existing bargaining unit's previously bargained opt-out health insurance benefit.

The Commission has consistently held that it will only dismiss this type of complaint upon a showing that the subject matter of the alleged violation of Sec. 111.70(3)(a)4, Stats., has been resolved in a manner that is not clearly repugnant to the underlying purposes of the Municipal Employment Relations Act. Although the Commission does not generally dismiss claims of contract violations, on occasion the Commission may find it appropriate to defer such claims to the contractual grievance procedure.

An essential premise underlying the deferral doctrine is that disputes should be resolved in the forum agreed upon by the parties. In this case, the Respondent conduct giving rise to Complainant's claim occurred after the expiration of the collective bargaining agreement and, thus, the final and binding grievance arbitration provision is not continued as part of the dynamic *status quo*.

Absent an agreement from both parties to arbitrate, there is no agreed upon forum for resolving this dispute to which the Complainant's complaint may be deferred. The Commission cannot have any confidence that an arbitrator will be able to address the merits of Complainant's

claim in a timely fashion and in a manner not repugnant to MERA.

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Even if arbitration were available, a grievance arbitrator would not be able to authorize payment to the employees of the twelve percent interest that is available as a Commission remedy. Respondent has not waived procedural and substantive objections to arbitration, thus clouding the issue of whether a grievance arbitrator would ever decide the statutory violations on their merits. There is not a high degree of probability that grievance arbitration would fully resolve either of the statutory violations in a manner that is final and binding upon the parties. Deferral to arbitration is not appropriate in this case.

The Commission's decision in RACINE UNIFIED SCHOOL DISTRICT, DEC. NO 29203-B (WERC, 10/98) lends support to Respondent's argument that Complainant must exhaust the existing grievance procedure before proceeding on a Sec. 111.70(3)(a)4 claim. The Complainant does not take issue with the Commission's rationale that labor peace is poorly served when parties fail to exhaust agreed-upon procedures. In this case, however, labor peace is even more poorly served when one of the parties to a labor agreement is forced to utilize procedures that are likely to be fruitless, duplicative or repetitive.

The parties have discussed this dispute at the bargaining table. Inasmuch as the decision to eliminate the opt-out benefit was made at the Village Board level, a resort to the grievance process would be purely dilatory. The termination of the health and dental opt-out benefit claimed to be a part of the *status quo* has had a severe economic impact upon the affected employees. Further delay would be an undue hardship.

Merits

Complainant claims that Respondent unilaterally implemented a change to the bargaining unit employees' health insurance opt-out benefit, thereby both refusing to bargain in violation of Sec. 111.70(3)(a)4, Stats., and violating a contractual agreement then in effect between the parties in violation of Sec. 111.70(3)(a) 5, Stats. The Municipal Employment Relations Act provides the Commission with jurisdiction to hear and decide each of these allegations.

Arguing that the Complainant has not complied with its duty to exhaust the applicable contractual grievance procedure, Respondent requests that the Commission not assert its jurisdiction to decide Complainant's Sec. 111.70(3)(a)4 and 5 claims and that these claims be dismissed.

The Amended Complaint alleges that the Respondent's unlawful conduct occurred on or about January 1, 2005, at a time in which there was a contract in effect. Complainant then argues that this conduct occurred after the expiration of the contract. Respondent does not deny, or confirm, that the alleged unlawful conduct occurred during a time in which there was a contract in effect, but does rely upon a grievance procedure of a collective bargaining agreement that, by its terms, is in effect from January 1, 2002 through December 31, 2004.

The parties present conflicting positions with respect to whether the alleged unlawful conduct occurred during the term of a collective bargaining agreement, or after the expiration of a collective bargaining agreement. As discussed more fully below, the Commission may require

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the exhaustion of the contractual grievance procedure for certain unlawful conduct occurring during the term of a collective bargaining agreement, as well as for certain unlawful conduct occurring after the expiration of a collective bargaining agreement.

The collective bargaining agreement relied upon by the Respondent contains a grievance arbitration provision that culminates in final and binding arbitration. Generally speaking, the Commission will not assert its jurisdiction to determine the merits of a Sec. 111.70(3)(a)5 breach of contract claim where the parties' collective bargaining agreement contains a grievance procedure culminating in final and binding arbitration unless there has been an exhaustion of the contractual grievance procedure, including any grievance arbitration provision. The underlying rationale for this requirement is that the contractual grievance arbitration procedure is presumed to be the exclusive mechanism for resolution of alleged violations of the contract and a Commission desire to honor the parties' agreement. CITY OF MADISON, DEC. NO. 28864-B (10/97). There are certain exceptions to this requirement to exhaust the contractual grievance procedure, *e.g.*, the employer's repudiation of the grievance procedure, unfair representation by the union and futility. CITY OF MADISON, DEC. NO. 288864-A (Crowley, 3/99)

The Commission will defer the assertion of its jurisdiction over a Sec. 111.70(3)(a)4 refusal to bargain charge that arises during the term of a collective bargaining agreement when the employer is willing to arbitrate the merits of the dispute; it is clear that the bargaining agreement addresses the dispute; and the dispute does not involve important issues of law or policy. Thereafter, the Commission will dismiss the allegation upon a showing that the subject matter of the alleged violation of Sec. 111.70(3)(a)4, Stats., has been resolved in a manner that is not clearly repugnant to the underlying purposes of the MERA. ROCK COUNTY, DEC. NO. 29970-B (WERC, 7/01).

If the alleged Sec. 111.70(3)(a)4 claim is that there has been a unilateral change in the *status quo* after the expiration of a collective bargaining agreement, then there is a requirement to exhaust the contractual grievance procedure. The underlying rationale being that labor peace is poorly served when the parties can ignore an existing dispute resolution mechanism which is part of the *status quo* and turn to lengthy and expensive litigation as a matter of right. RACINE UNIFIED SCHOOL DISTRICT, DEC. NO. 29203-B (WERC, 10/98).

The grievance procedure of an expired collective bargaining agreement continues as part of the *status quo* required to be maintained during the contract hiatus period, but an arbitration provision of the contractual grievance procedure does not continue as part of such *status quo*. CITY OF GREENFIELD, DEC. NO. 14026-B (WERC, 11/77). Thus, with respect to the Sec. 111.70(3)(a)4 allegation discussed above, the duty to exhaust the contractual grievance procedure does not include a duty to submit the dispute to the contractual grievance arbitration provision. RACINE, *supra*.

Conclusion

In summary, the basis for Respondent's Motion to Dismiss is that Complainant has failed to exhaust the contractual grievance procedure. As discussed above, the Commission has refused to assert jurisdiction over Sec. 111.70(3)(a)4 and 5 claims when it has found that Complainant has failed to comply with a duty to exhaust an applicable grievance procedure.

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Respondent asserts that it is undisputed that the Complainant has failed to exhaust an applicable grievance procedure. Respondent also asserts that there is an agreement to arbitrate the dispute.

Complainant has not admitted that it has failed to exhaust an applicable grievance procedure and asserts that, for a variety of reasons, it should not be required to exhaust the contractual grievance procedure relied upon by Respondent. Among these reasons is that resort to the grievance process is likely to be fruitless. As discussed above, there is no requirement to exhaust the contractual grievance procedure if resort to the contractual grievance arbitration procedure would be futile. CITY OF MADISON, DEC. NO. 28864-A (Crowley, 1/97). Complainant also denies that there is an agreement to arbitrate the dispute.

The record before the Examiner is not sufficient to establish either that Complainant has failed to comply with a duty to exhaust a contractual grievance procedure, or that there is an agreement to arbitrate this dispute. The pleadings present a contested case within the meaning of Chapter 227, Stats., requiring a full evidentiary hearing. Accordingly, the Examiner has denied Respondent's Motion to Dismiss.

Dated at Madison, Wisconsin, this 16th day of March, 2005.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Coleen A. Burns /s/

Coleen A. Burns, Examiner

CAB/gjc
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