STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MILWAUKEE DEPUTY SHERIFFS' ASSOCIATION, Complainant

vs.

MILWAUKEE COUNTY, Respondent

Case 610
No. 66761
MP-4331

Decision No. 32038-A

Appearances:

Matthew L. Granitz, Cermele & Associates, S.C., 6310 West Bluemound Road, Suite 200, Milwaukee, Wisconsin, 53213, appearing on behalf of the Milwaukee Deputy Sheriffs' Association.

Timothy R. Schoewe, Office of Corporation Counsel, 901 North 9th Street, Milwaukee, Wisconsin, 53233, appearing on behalf of the Milwaukee County.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

On February 26, 2007, the Milwaukee Deputy Sheriffs' Association (hereafter "Association") filed a complaint with the Wisconsin Employment Relations Commission, asserting that the Milwaukee County Sheriff's Department (hereafter "County") had violated Sections 111.70(1) and 111.70(3)(a)4 of the Municipal Employment Relations Act. The Commission appointed Danielle Carne to act as Examiner, to make and issue Findings of Fact and Conclusions of Law, and to issue appropriate Orders. On April 3, 2007, the Association filed an amended complaint, alleging violations of Sections 111.70(1), 111.70(3)(a)4, and 111.70(3)(a)5, Wis. Stats. On April 9, 2007, the County filed its answer to the amended complaint, denying any alleged violation and making certain affirmative defenses. A hearing on the matters at issue in the case was held in Milwaukee, Wisconsin, on April 18, 2007. Thereafter, the Association and County submitted initial briefs; the Association then filed a reply brief on June 26, 2007; and on June 29, 2007, the County informed the Examiner that it did not intend to file a reply brief, whereupon the record was closed.

On the basis of the record evidence, the arguments of the parties, and the record as a whole, the Examiner makes and issues the following

FINDINGS OF FACT

1. The County is a municipal employer providing general governmental services to the people of the County. Among the municipal services provided by the County is the operation of a Sheriff's Department. The Sheriff's Department is divided into "divisions", including the Courts Division and the Jail Division.

2. The Association is a labor organization which is the exclusive collective bargaining representative for all Deputy Sheriffs I, Deputy Sheriffs I (Bilingual)(Spanish), and Deputy Sheriff Sergeants in the employ of the County of Milwaukee.

3. The County and the Association were parties to a collective bargaining agreement (hereafter "Agreement" or "2005-2006 Agreement"), which became effective January 1, 2005 and expired December 31, 2006.

4. The Agreement provided as follows, with regard to the annual selection of vacations by bargaining unit employees:

> **3.14 VACATION**
>
> . . .
>
> (3) The department shall establish a vacation selection procedure, which will enable all Deputies to be informed of their approved vacation request by March 1 of each year. Assignment to another division within the Sheriff's Department shall not invalidate approved vacation requests.
>
> (4) Vacation picks will be made within classification in division and within current shift assignment on the basis of the date of hire within the bargaining unit.
>
> . . .

5. Under the current and long-standing practice, the vacation selection procedure referred to at Section 3.14 of the Agreement operates as follows. Typically commencing with an announcement at roll call, vacation selections begin in late November or early December of each calendar year. Seniority among bargaining unit employees determines the order in which selections are made, giving the most senior bargaining unit employee the opportunity to make his or her selections first and working down the list to the least senior employee. At the appropriate time, each bargaining unit employee is told that it is his or her turn to make

vacation selections, and that individual is given approximately three to five days to review and choose from the remaining available vacation slots. Each bargaining unit employee may take only two vacation weeks during peak vacation periods, namely the summer months and the month of December. Vacation selection generally is completed by late December or early January, allowing bargaining unit employees to be informed of their approved vacation requests by March 1 of each year.

6. The vacation selection system set forth in Finding of Fact 5 was followed in late 2006 and early 2007, for the vacation selections for calendar year 2007.

7. Sometime in the early 2007, however, the bargaining unit employees in the Courts Division were informed that the number of vacation slots available to them, for 2007, had been reduced.

8. The effect of the reduction in vacation slots for 2007 was that some of the Courts Division employees had to re-select their vacations. Further, some employees were denied vacation slots they previously had selected and some were placed, soon thereafter, on mandatory vacations in slots they had not selected.

9. Because of the change in the number of available vacation slots and the resulting need to reselect slots, vacation selections were not completed by March 1 of 2007.

10. The Agreement between the parties provided the following with regard to the applicability of the grievance procedure:

> **5.01 GRIEVANCE PROCEDURE**
>
> (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 other existing procedures. Only matters involving the interpretation, application or enforcement of rules, regulations or the terms of this Agreement shall constitute a grievance.

. . . .

11. The Association did not file any grievance relating to the reduction in the number of vacation slots or the resulting impact on the vacation selections of the effected bargaining unit employees.

On the basis of the above Findings of Fact, the Examiner makes and issues the following

CONCLUSIONS OF LAW

1. The County is a municipal employer within the meaning of Section 111.70(1)(j), Wis. Stats.

2. The Association is a labor organization within the meaning of Section 111.70(1)(h), Wis. Stats.

3. Because the Association failed to file a grievance over the conduct described in Finding of Fact 7, the Examiner will not exercise the Commission's jurisdiction over the 111.70(3)(a)4 claim that the County's conduct violated its duty to bargain obligation to maintain the status quo, as to a mandatory subject of bargaining, during the contract hiatus following the expiration of the parties' 2005-2006 Agreement.

4. At the time of the County's conduct described in Finding of Fact 7, the parties' 2005-2006 Agreement had expired, and there was no separate, free-standing agreement governing the selection of vacations. Therefore, the County's conduct did not violate a collective bargaining agreement, and thus the County did not commit a prohibited practice within the meaning of Section 111.70(3)(a)5, Wis. Stats.

On the basis of the above and foregoing Findings of Fact and Conclusions of Law, the Examiner makes and issues the following

ORDER

It is ORDERED that the complaint is hereby dismissed in its entirety.

Dated at Madison, Wisconsin, this 28th day of August, 2007.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Danielle L. Carne /s/
Danielle L. Carne, Examiner

MILWAUKEE COUNTY

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

This case concerns the Association's complaint that the County engaged in prohibited practices in violation of the Municipal Employment Relations Act, when it unilaterally reduced the number of vacation slots available to the bargaining unit employees in the Court Division of the County Sheriff's Department. Specifically, the Association alleges that the County violated Section 111.70(3)(a)4, Wis. Stats., by failing to bargain before eliminating vacation slots and thereby making a unilateral change to the status quo, as to a mandatory subject of bargaining, during the contract hiatus following the expiration of the parties' 2005-2006 Agreement. Further, the Association argues that the District committed a breach of contract in violation of Section 111.70(3)(a)5, Wis. Stats., because it failed to adhere to a "vacation agreement" that embodied the vacation selection process, as well as the year 2007 vacation selections made by the bargaining unit employees in the Court Division.

1. Alleged Violation of Section 111.70(3)(a)4, Wis. Stats.

In response to the Association's claims, the County makes the threshold defense that the Commission has no jurisdiction to determine whether prohibited practices occurred in the present case, because the grievance procedure set forth in the 2005-2006 Agreement between the County and the Association was not exhausted prior to the Union's filing of its prohibited practice claims. While there is no need to address the County's defense with respect to the Association's 111.70(3)(a)5 claim, as discussed below, it is one upon which the disposition of the 111.70(3)(a)4 claim turns.

In RACINE UNIFIED SCHOOL DISTRICT AND THE BOARD OF EDUCATION OF THE RACINE UNIFIED SCHOOL DISTRICT, DEC. NO. 29203-B (WERC, 10/98), the Commission reached the conclusion that complainants must exhaust applicable contractual grievance procedures prior to pursing Section 111.70(3)(a)4 unilateral change claims that are based solely on alleged departures from the terms and conditions set forth in an expired contract. In doing so, the Commission stated as follows:

> Reviewing the policy considerations recited in GREENFIELD [DEC. NO. 14026-B (WERC, 11/77)], we are persuaded that exhaustion of the status quo grievance procedure should be required as a pre-condition to assertion of jurisdiction over duty to bargain complaints which allege a violation of the status quo. As these parties and this case establish, labor peace is poorly served when 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. Thus, as to all complaint filed after the date of this decision, we will not assert jurisdiction over alleged violations of the status quo unless any applicable grievance procedure contained in the expired contract has been utilized and exhausted.

More recently, in DODGELAND SCHOOL DISTRICT AND JOSEPH G. REED, DEC. NO. 31098-C (WERC, 2/07), the Commission reiterated the RACINE rule.

The factual basis for the Association's 111.70(3)(a)4 claim is that the County made a unilateral change to the status quo during a contract hiatus following the expiration of the parties' 2005-2006 Agreement.[1] The Association contends that the change constituted a *per se* violation of the County's duty to bargain. As the RACINE rule dictates, the Association's 111.70(3)(a)4 refusal to bargain claim should have been pursued first through the parties' mutually agreed upon contractual grievance process.[2]

The Association argues that it could not file a grievance, because the grievance procedure set forth in the Agreement was inapplicable to the present dispute. Specifically, the Association relies on the language of the grievance applicability provision, which states that "[t]he grievance procedure shall not be used to change existing wage schedules, hours of work, working conditions, fringe benefits". Because, the Association contends, all of these listed topics represent mandatory subjects of bargaining, the grievance procedure must also be inapplicable to disputes regarding vacation, which is also a mandatory subject of bargaining. This contention is unpersuasive.

The provision delineating the applicability of the grievance procedure merely sets up a dichotomy whereby terms of the Agreement are to be established and changed through the bargaining process, and they are to be interpreted and applied through the grievance process. In other words, the grievance procedure is not to be used as an interest arbitration device to change existing terms of the Agreement. Rather, it is a resolution mechanism applicable to disputes over interpretation of the existing Agreement – or, in this case, the terms of the expired 2005-2006 Agreement that, like vacation, are mandatory subjects of bargaining.

Thus, the grievance procedure set forth in the expired 2005-2006 Agreement was available to the parties, was applicable to the type of dispute underlying the Association's 111.70(3)(a)4 claim, and should have been exhausted. Because it was not, this claim has been dismissed.

2. Alleged Violation of Section 111.70(3)(a)5, Wis. Stats.

The Association's 111.70(3)(a)5 claim is based on the alleged existence – and breach – of a separate agreement between the parties that was in effect even after the 2005-2006

[1] Although the Association's 111.70(3)(a)5 claim is based on the alleged existence of a separate vacation agreement, the Association does not rely on that theory in making its 111.70(3)(a)4 claim. Rather, the arguments the Association makes in conjunction with its 111.70(3)(a)4 claim presumes that the dispute is covered by the 2005-2006 Agreement.

[2] The 2005-2006 Agreement between the parties in the present case contained a grievance procedure. Although the Agreement had expired at the time when the alleged contract violations occurred, in early 2007, it has been well-established that a grievance procedure constitutes a status quo condition that must be maintained during a contract hiatus. SCHOOL DISTRICT NO. 6, CITY OF GREENFIELD, DEC. NO. 14026-B (WERC, 11/77). Thus, the contractual grievance procedure was still available.

Agreement expired. Specifically, the Association contends that a "vacation agreement" existed that embodied an extra-contractual vacation selection process, as well as the year 2007 vacation selections made by the bargaining unit employees in the Court Division. The Association makes two arguments to support its assertion that a separate agreement existed. First, because the 2005-2006 Agreement did not fully set forth the manner in which vacation selections are made or the number of vacation slots available, the vacation selection process and the resulting vacation selections constituted a separate agreement. Second, because the vacation selections are made among smaller subsections of employees within the bargaining unit, such selections constituted a separate agreement.[3]

The Examiner is not persuaded that the parties had entered into a separate, vacation agreement. With regard to the Association's first argument, it is true that the vacation selection provision in the parties' 2005-2006 Agreement does not contain – indeed, it explicitly omits – some details relating to the administration of the vacation selection system. The system for selecting vacations was, nevertheless, well-grounded in the vacation provision embodied by that Agreement. It is not unheard of for a collective bargaining agreement to leave gaps in contractual provisions. *See, e.g.,* ST. CROIX FALLS SCHOOL DISTRICT, DEC. NO. 27215-D (WERC, 7/93), MARINE CORPS DEVELOPMENT COMMAND, 71 LA 726, 728 (Ables, 1978). The manner in which the parties fill such gaps, through their day-to-day application of the agreement, is generally – and appropriately – regarded as practice that informs the meaning of the original agreement, rather than evidence of the creation of a new and separate agreement. *See, e.g.,* ID. Here, the 2005-2006 Agreement between the parties goes so far as to place specific parameters around such extra-contractual practices, at Sections 3.14(3) and (4), explicitly anticipating that those procedures will be put into place and mandating that selections are to be made within classification in division, within current shift assignment, on the basis of seniority, and by March 1. Such parameters make the link between the Agreement and the vacation administration procedure even more clear.

As stated, the Association also contends that the vacation selections constitute a separate agreement because such selections are made among smaller subsections of employees within the bargaining unit, such as the Courts Division, creating an agreement more limited in scope than the 2005-2006 Agreement, which applies to the entire bargaining unit. The fact that vacation selections are made – specifically pursuant to the direction set forth in Section 3.14 of the Agreement – among smaller subsets of the bargaining unit does nothing, from a legal or logical standpoint, to remove the vacation selection procedure from the purview of the Agreement. A contrary conclusion would mean that any aspect of a collective bargaining agreement or an employer's practice pertaining to only certain employees within a bargaining unit could be construed as a separate, stand-alone agreement, regardless of what the parties intended – a conclusion that would create disorder contrary to the policies of labor peace upon which the Municipal Employment Relations Act is premised.

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[3] The Association also asserts that the County admitted in its answer to the complaint that there was a vacation agreement. In the paragraphs in the complaint and answer on which the Association relies in making this assertion, the County admits that "[i]n approximately early January 2007, [Association] members who had selected vacation in 2006 were made aware of their 2007 vacation time". This is not an admission that a separate vacation agreement exists.

It is further true that the 2005-2006 Agreement between the parties had expired at the time when the alleged breach of contract occurred, in early 2007. Given the fact that the 2005-2006 Agreement was no longer in effect and the conclusion that no separate vacation agreement existed, there was no contract to be breached. Thus, this Association claim also has been dismissed.

Dated at Madison, Wisconsin, this 28th day of August, 2007.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Danielle L. Carne /s/
Danielle L. Carne, Examiner

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