

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 150, Complainant,

vs.

WASHINGTON COUNTY, Respondent.

Case 163
No. 67108
MP-4360

Decision No. 32185-D

Appearances:

Marianne Goldstein Robbins and **Sara J. Geenen**, Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., Attorneys at Law, 1555 North Rivercenter Drive, Suite 202, P.O. Box 12993, Milwaukee, Wisconsin 53212, appearing on behalf of Service Employees International Union Local 150.

Nancy L. Pirkey and **Geoffrey S. Trotier**, Davis & Kuelthau, S.C., Attorneys at Law, 111 East Kilbourn Avenue, Suite 1400, Milwaukee, Wisconsin 53202-6613, appearing on behalf of Washington County.

ORDER MODIFYING JANUARY 20, 2009 ORDER

On January 20, 2009, the Wisconsin Employment Relations Commission issued an Order on Review of Examiner's Decision in the above matter in which the Commission concluded that Respondent Washington County had not bargained in good faith with Complainant Service Employees International Union Local 150 and had thereby committed a prohibited practice within the meaning of Sec. 111.70 (3)(a) 4, Stats. As part of the remedy for the prohibited practice, the Commission ordered that the County:

2.

...

- b. Give the Union notice and, upon request, bargain in good faith with the Union, before subcontracting bargaining unit work, including the work that had been performed by bargaining unit

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members prior to August 1, 2007, and over the impact of any such decision on the wages, hours, and conditions of employment of bargaining unit members.

- c. Bargaining that occurs in connection with paragraph (2)(b) of this Order is part and parcel of the negotiations for the parties' 2007-08 successor agreement and thus subject to the statutory dispute resolution procedures set forth in Sec. 111.70(4)(cm), Stats.

On February 6, 2009, Local 150 filed a Motion to Revise Remedy asking that the Commission revise Paragraph 2. c. of the above quoted portion of the January 20, 2009 Order by adding the following sentence at the end thereof:

Any negotiated amendments in the parties' 2007-2008 agreement under this Order shall be applied to the successor agreement covering 2009-2010 to which the parties agreed prior to receipt of the Commission's decision.

By e-mail received after the close of the Commission's offices on February 9, 2009, Local 150 advised the Commission that the Motion had been filed pursuant to the petition for rehearing provisions of Sec. 227.49, Stats.

The parties thereafter filed written argument in support of and in opposition to the Motion-the last of which was received February 27, 2009.

On March 6, 2009, we granted the petition for rehearing for the purpose of determining whether there is "new evidence sufficiently strong to reverse or modify the order, and which could not have been previously discovered by due diligence" within the meaning of Sec. 227.49 (3)(c), Stats?

We conclude that the parties' tentative agreement to a 2009-10 collective bargaining agreement while the Complainant's petition for review was still pending before the Commission and their subsequent ratification of that agreement meets the "new evidence" standard established by Sec. 227.49(3)(c), Stats. and warrants modification of our January 20, 2009 Order as follows:

ORDER

Paragraph 2. c. of the Commission's January 20, 2009 Order is modified by the addition of the following paragraph:

Upon completion of the bargaining/statutory dispute resolution procedures for the 2007-08 agreement pursuant to paragraph (2)(b) above, if requested by either party within 30 days of said completion, the parties' shall reopen the 2009-10 agreement and bargain (and, if necessary, use the

statutory dispute resolution procedures set forth in Sec. 111.70 (4)(cm), Stats.) over the right of the County to subcontract bargaining unit work and the impact of any such subcontracting decision on the wages, hours, and conditions of employment of bargaining unit members.

Given under our hands and seal at the City of Madison, Wisconsin, this 22nd day of April, 2009.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/

Judith Neumann, Chair

Paul Gordon /s/

Paul Gordon, Commissioner

Susan J. M. Bauman /s/

Susan J. M. Bauman, Commissioner

WASHINGTON COUNTY

MEMORANDUM ACCOMPANYING ORDER
MODIFYING JANUARY 20, 2009 ORDER

Before us on rehearing is the issue of what impact, if any, the parties' agreement on a 2009-10 contract should have on the remedy we ordered on January 20, 2009. The existence of such an agreement (either as tentatively reached or as subsequently ratified) was not part of our record on January 20, 2009 and the parties agree that they bargained the 2009-10 agreement without regard to whatever action the Commission might take on the pending petition for review.

There is a threshold issue of whether the agreement is "new evidence . . . which could not have been previously discovered by due diligence" within the meaning of Sec. 227.49(3)(c), Stats? Clearly the agreement in question falls within the literal meaning of the above-quoted statutory phrase. We are also satisfied that the agreement fits within the apparent purpose of Sec. 227.49(3)(c), Stats. - avoiding litigation results that are potentially at odds with relevant subsequent developments which were outside the scope of the decision-maker's knowledge at the time the decision was issued. Therefore, we conclude that the 2009-10 agreement is indeed "new evidence" that is properly before us. We turn to a determination of the impact, if any, which the existence of that agreement has upon our remedy in this matter.

In our January 20, 2009 decision, we ordered the following in Paragraphs 2 b. and c. of our Order:

2.

. . .

- b. Give the Union notice and, upon request, bargain in good faith with the Union, before subcontracting bargaining unit work, including work that had been performed by bargaining unit members prior to August 1, 2007, and over the impact of any such decision on the wages, hours and conditions of employment of bargaining unit members.
- c. Bargaining that occurs in connection with paragraph (2)(b) of this Order is part and parcel of the negotiations for the parties 2007-08 successor agreement and thus subject to statutory dispute resolution procedures set forth in Sec. 111.70(4)(cm), Stats.

As we explained in the Memorandum portion of our decision, the purpose of this portion of the remedy was to place the parties in the position they would have been in had the

Respondent County honored its duty to bargain by advising the Complainant Union during negotiations over the 2007-08 agreement that it was seriously considering subcontracting bargaining unit work. Had the Respondent done so, the Union would then have had the opportunity to bargain over the subcontracting issue in the context of those negotiations. We ordered that such bargaining occur.

Complainant Union asks that we modify our Order to specify that whatever result emerges from the subcontracting bargain in the context of the 2007-08 agreement be automatically incorporated into the recently reached 2009-10 agreement. The County objects to the modification request. While the parties are free to voluntarily agree upon such an incorporation, it is not a result which we will order because it deprives the parties of the right to insist on bargaining over the subcontracting issue in the context of their 2009-10 contract. Consistent with our remedial purpose of placing the parties in the position they would have been in had the duty to bargain been honored, once the subcontracting bargain was completed for the purposes of the 2007-08 agreement and had the parties not had a 2009-10 agreement in place, either party would have been entitled to revisit the result of that 2007-08 bargain in the context of negotiations over the successor 2009-10 agreement. In our view, the fact that the parties reached agreement on a 2009-10 agreement during the pendency of the litigation before us ought not deprive either party of that entitlement-particularly where it is clear that potential results of that litigation were not the subject of discussion or agreement during the 2009-10 negotiations.

Given the foregoing, we reject the modification sought by the Union. However, we are satisfied that modification of our Order is appropriate in the context of the now existing 2009-10 agreement. Consistent with our rationale for denying the Union's request, we have ordered that the upon completion of the 2007-08 bargain over the subcontracting issue, either party can insist upon reopening the 2009-10 agreement to again address subcontracting.

When making this modification, we have considered but rejected the County argument that by failing to address the subcontracting issue during the just completed 2009-10 negotiations, the Union waived any right to revisit the subcontracting issue in the context of the 2009-10 contract. The County premises much of its waiver argument on the fact that, going into the 2009-10 bargain, the Union knew a grievance arbitrator had concluded that the County did not violate the relevant collective bargaining agreement when it subcontracted the work in question. In such circumstances, the County contends that the Union had but did not exercise the opportunity to seek a change in the existing contract language during the 2009-10 bargain and thus waived its right to now do so. However, the County's waiver argument fails because the litigation before us was over the County's duty to bargain over the subcontracting issue - not over what the parties' contractual rights had been determined to be. Where, as here, the result of the duty to bargain litigation was unknown at the time the parties settled the 2009-10 contract, and where, as here, the parties had no discussion about how the 2009-10 contract

might affect whatever result was ultimately reached by the Commission in that litigation, neither party waived its bargaining rights as to the subcontracting issue for the 2009-10 contract.

Dated at Madison, Wisconsin, this 22nd day of April, 2009.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/

Judith Neumann, Chair

Paul Gordon /s/

Paul Gordon, Commissioner

Susan J. M. Bauman /s/

Susan J. M. Bauman, Commissioner