

STATE OF WISCONSIN

CIRCUIT COURT

WASHINGTON COUNTY

WASHINGTON COUNTY,

PETITIONER,

and

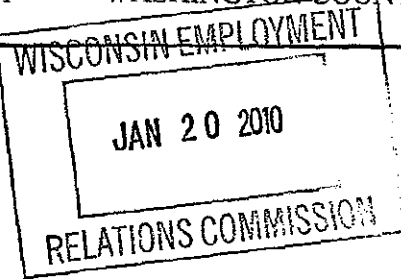
WISCONSIN EMPLOYMENT
RELATIONS COMMISSION

RESPONDENT,

and

SERVICE EMPLOYERS
INTERNATIONAL UNION LOCAL 150,

INTERESTED PARTY.



DECISION

Case No. 09-CV-232

Dec. No. 32185-D

INTRODUCTION

Washington County appeals the Wisconsin Employment Relations Commission (WERC) decision reversing the WERC's hearing examiner's Findings of Fact, Conclusions of Law and Order. The WERC's decision concluded that Washington County had engaged in a prohibited practice while negotiating the 2007-2008 collective bargaining agreement for housekeeping and maintenance services at its Samaritan Health Center (Samaritan) and its rehabilitation center, The Fields of Washington County (Fields). The Union's complaint alleged that Washington County engaged in a prohibited practice when it failed to bargain regarding its decision to subcontract out Samaritan's housekeeping and laundry services.

Hearing Examiner Richard McLaughlin, (McLaughlin) concluded that the County was not obligated to bargain over that decision or the impact of that decision on the bargaining unit. On appeal the WERC set aside several of the hearing examiner's Findings of Fact and replaced them with its own. It also amended several of McLaughlin's Conclusions of Law. Based on those changes, it concluded that Washington County engaged in bad faith bargaining when it failed to notify the Union, during negotiations of the 2007-2008 labor agreement, that it was seriously considering subcontracting out the housekeeping and laundry service at Samaritan.

FACTS

The facts that led to the filing of the prohibited practice complaint are well set forth in the parties briefs and are largely undisputed. They are, however, recited at length because the ultimate resolution of this case is highly fact intensive.

Washington County owns and operates Samaritan and the Fields. Samaritan is a skilled nursing home, and the Fields is the County's rehabilitation facility. Washington County operates the two entities as separate enterprise zones for budgeting purposes. As a result, they are required to be essentially self-funded and do not contribute to the County's tax levy.

In the summer of 2006, Edward Somers, the administrator for Samaritan and the Fields, received an unsolicited mailing from BSG Maintenance of Green Bay, Inc. (BSG) expressing an interest in providing housekeeping services at Samaritan and the Fields. That solicitation was received around the time that Somers was beginning work on the 2007 Samaritan budget. Somers reviewed the proposal but did not respond to it at the time. He was, however, aware that BSG's proposal offered Samaritan laundry and

housekeeping services at a lower rate than it was currently paying under its existing collective bargaining agreement.

In October of 2006, Somers attended a seminar hosted by BDO Seidman. At that seminar Somers obtained a report containing a comparative analysis of the per patient day costs from public and private nursing homes throughout Wisconsin. That report led Somers to conclude that Samaritan's housekeeping and laundry costs were approximately four dollars (\$4.00) per hour above the median costs for those services in the relevant labor area. Based on that conclusion, Somers concluded that Samaritan needed to reduce those costs.

The County and the Union met for collective bargaining in October of 2006. The County notified the Union that it was proposing to lay off certain employees. Three of the proposed layoffs involved housekeeping and laundry workers. By letter dated October 17, 2006, Samaritan notified the affected workers of the impending layoffs. The Union grieved the layoff notices, alleging that the layoffs were intended to subvert benefit obligations and failed to follow contractual seniority procedures. By letter dated November 6, 2006, Samaritan rescinded the layoff notices. The letters went to the effected employees and provided:

"Upon further reflection we have determined that elimination of your position will not accomplish the financial goals set for next year. Therefor, [sic] we are rescinding your layoff. We will be looking at other avenues to achieve operational savings in 2007. Rescinding your layoff is not a guarantee of future employment."

The Union was not provided a copy of that letter.

On December 18, 2006, the parties reached a tentative 2007-2008 labor agreement. The Union approved that agreement before it went in front of the Samaritan

Committee for final approval on January 9, 2007. That committee consists of a number of Washington County Board members and is charged with overseeing operation of Samaritan and the Fields.

On January 4, 2007, the Samaritan Committee met and received a number of reports from Somers. One of those reports involved the solicitation received in 2006 from BSG. Upon receiving that report, the Samaritan Committee authorized Somers to develop a request for proposals for housekeeping and laundry services. The County did not notify the Union of its intention to prepare the request for proposals.

On April 4, 2007, the Samaritan Committee met and discussed the RFPs for laundry and housekeeping services. The committee authorized Somers to seek bids for the housekeeping and laundry services. Samaritan received five responsive bids for housekeeping services and four for laundry services. The two most competitive bids were from ABM Janitorial and BSG. Samaritan would save \$234,165.00 under the BSG bid and \$171,478.00 under the ABM proposal. At its June 7, 2007, meeting the committee authorized Somers to accept BSG's bid. That action was final because County Board approval was not required.

By letter dated June 8, 2006, Somers notified the Union of the committee's decision to subcontract housekeeping and laundry services. He also sent letters to the affected employees. His letter to these employees was dated June 8, 2006, and provided in pertinent part:

~~"Your employment at Samaritan Health Center is being~~
eliminated. This will result in you being laid off from
employment at Samaritan Health Center, effective August 1,
2007. You are welcome to apply for any open positions with
Washington County for which you are qualified. If you have any

questions regarding separation benefits, please feel free to contact the Washington County Human Resources Department."

In the fall of 2006, while the parties were engaged in negotiation of the 2007-2008 contract the County never notified the Union that it was contemplating subcontracting housekeeping and laundry services at Samaritan and the Fields. It did not disclose that possibility until the labor management meeting on April 16, 2007. At that meeting Somers informed Becky Kroll, the Union's administrative organizer, that the County had authorized him to issue RFPs for housekeeping and laundry services.

By letter dated May 9, 2007 to the County's Human Resource Administrator, Kroll requested information regarding the County's plan for subcontracting those services. She also requested the opportunity to negotiate concerning the decision and its affect on the bargaining unit. The County provided partial responses by e-mail dated May 9, 2007, and letter dated May 11, 2007.

On May 18, 2007, the Union filed a grievance regarding the County's plan to subcontract housekeeping and laundry services at its nursing facilities. On July 2, 2007, the Union filed a prohibited practice complaint against the County alleging that the County engaged in a prohibited practice by refusing to bargain regarding the subcontracting issue and its affect on the bargaining unit.

Following the hearing on the prohibited practice complaint, McLaughlin entered Findings of Facts and Conclusions of Law. Specifically, he concluded that Sections 2.01 and 18.01 allowed the County to subcontract the housekeeping services without the need for collective bargaining as requested by the Union. Sections 2.01 and 18.01 provided in pertinent part:

"Section 2.01. The County retains and reserves the sole right to manage its affairs in accordance with applicable law, ordinances and regulations. Included in this responsibility, but not limited thereto, is the right ... to contract out for goods or services....

Section 18.04. Should the County deem it necessary to shut down or contract out the operation of the Samaritan Health Center during the lifetime of this agreement, the County will provide the employees and the union with a minimum of forty-five (45) calendar days of notice of the date of shutdown."

McLaughlin concluded that the dispute involved two fundamental issues. The first issue focused on the County's duty to bargain the decision to subcontract the housekeeping and laundry service as well as the impact of that decision on the bargaining unit. The second focused on the County's conduct in deciding to subcontract the work, as well as the implementation of that decision and whether that conduct demonstrates bad faith on the County's part.

With regard to the first issue, McLaughlin concluded that the County did not have an obligation to bargain with the Union on the decision to subcontract or its impact on the bargaining unit. In reaching that conclusion, McLaughlin noted that the "duty to bargain collectively does not extend to matters covered by the agreement or to matters on which the Union has otherwise clearly and unmistakably waived its right to bargain."

Applying that precedent to this case, he concluded that the language of Section 2.01 and 18.04 sufficiently defined the parties' rights with regard to subcontracting unit work and that each party was entitled to rely on the bargain they negotiated.

In reaching his decision, McLaughlin also rejected the Union's contention that the County was obligated to bargain over the impact of the subcontracting decision on the bargain unit. Once again, that conclusion turned on the language of Section 2.01 and

18.04 of the collective bargaining agreement. According to McLaughlin, acceptance of the Union's argument would require him to restore the status quo ante between the parties. That, however, would not resolve the issue concerning the parties' respective obligations because the contract language remained unchanged. Instead, he concluded it would give the Union the opportunity to bargain about language to which it had already agreed. Forcing the County to bargain over the subcontracting issue would, in McLaughlin's opinion essentially render the language of Sections 2.01 and 18.04 superfluous.

Finally, the Examiner considered the Union's argument that the County had engaged in bad faith by failing to disclose that it was considering subcontracting housekeeping and laundry services while simultaneously negotiating the 2007-2008 collective bargaining agreement. Before McLaughlin, the Union argued that by failing to disclose the possibility of subcontracting during those negotiations, the County denied them meaningful involvement in the subcontracting decision.

After reviewing the evidence, McLaughlin rejected that argument, holding that the decision to subcontract evolved from ongoing cost control efforts rather than a concerted effort on the part of the County to prevent the Union from having meaningful involvement in the decision. Based on his review of the evidence, McLaughlin found that the County had neither bargained in bad faith nor engaged in bad faith during the negotiations leading to the 2006-2007 collective bargaining agreement. Based on those findings, McLaughlin ordered the complaint dismissed.

On April 8, 2008, the Union petitioned for review on the Examiner's decision. The WERC affirmed a number of McLaughlin's Findings of Fact and Conclusions of Law. It also made the following modifications to a number of McLaughlin's findings. Those modifications are as follows:

"B. The examiner's Finding of Fact 5 is modified by adding the following, and, as modified, is affirmed: 5 ... By the end of October 2006, Somers and the other Samaritan officials were seriously considering the subcontracting of housekeeping and laundry services at the Samaritan home as a way to effectuate substantial costs savings. Although the County and the Union were in the process of negotiating a successor collective bargaining agreement at the time, neither Somers nor any agent of the County informed the Union of the serious consideration of subcontracting.

C. The Examiner's Finding of Fact 6 is modified to substitute the following for the sentence beginning "At its April 4, 2007, meeting" and for the next sentence, and as modified is affirmed: 6... At its April 4, 2007, meeting the Samaritan Committee authorized Somers to release the request for proposals (RFP) that he, in conjunction with the County's purchasing Department, had previously prepared for subcontracting Samaritan's laundry and housekeeping services.

E. The Examiner's Finding of Fact 9 is eliminated and replaced with the following:

9. ...The County dropped the proposed layoffs during the 2006 negotiations because the County had concluded that the layoffs would not save a sufficient amount of money to meet the County's budgetary needs, because the county planned instead to pursue the subcontracting option, and because the County did not want to "fight the battle" with the union twice over cost saving measures.

The WERC also set aside a number of McLaughlin's Conclusions of Law and replaced them with the following:

4. The County's decision to subcontract laundry and housekeeping services traditionally preformed by bargaining unit members is a mandatory subject of collective bargaining.

5. During negotiations for a successor agreement, the County developed a plan to seriously consider subcontracting of laundry and housekeeping services, but did not inform the union of same during negotiations for the successor agreement.

By this conduct, the County failed to bargain in good faith with the union, in violation of Sec. 111.70(3) (a) 4, stats.

Based on those modifications, the WERC set aside McLaughlin's decision dismissing the Union's complaint as it related to the unilateral implementation of the decision to subcontract and/or the refusal to bargain regarding the impact of that decision. It also reversed McLaughlin's decision to the extent that it dismissed the Union's allegation that the County refused to bargain in good faith with the Union during negotiations for the 2007-2008 labor agreement by failing to disclose that it was seriously considering subcontracting housekeeping and laundry work preformed by Union members. It is that decision that Washington County appeals.

DISCUSSION

The standard of review to be applied by a court reviewing a WERC decision is set forth in Cadott Education Association v. Wisconsin Employment Relations Commission, 197 Wis. 2d 52-53; 540 N.W. 2d 21 (Ct App.1996). In that case the court stated that with respect to Findings of Fact made by the WERC, a reviewing court must uphold those findings if they are supported by relevant evidence in the record. *Id.* at 197 Wis. 2d 52-53. Moreover, a reviewing court may not substitute its judgment for that of the WERC in evaluating the weight or credibility to be assigned to the evidence. Larson v. LIRC, 184 Wis. 2d 386, 516, N.W. 2d 456, (Ct. App. 1994). A Reviewing Court is also prohibited from setting aside agency action if that action is based upon Findings of Fact that are supported by substantial evidence in the record. For purposes of reviewing an administrative decision, substantial evidence is defined as relevant evidence which a reasonable mind might accept as adequate to support the conclusion. *Id.* at 197 Wis. 2d 52. (Internal citations omitted).

A reviewing court is required to apply one of three levels of deference to an administrative agency's Conclusions of Law. In Jicha v. DIHLR, 169 Wis. 2d 284, 290-291, 485 N.W. 2d 256, 258-59, the Supreme Court discussed those levels of deference stating:

"This Court has generally applied three levels of deference to conclusions of Law and statutory interpretation in agency decisions. First, if the administrative agency's experience, technical competence, and specialized knowledge aid the agency in its interpretation and application of the statute, the agency decision is entitled to "great weight." The second level of review provides that if the agency is very nearly one of first impression, it is entitled to "due weight or great bearing". The lowest level of review, the *de novo* standard, is applied where it is clear from the lack of agency precedent that the case is one of first impression for the agency and the agency lacks specialized expertise or experience in determining the question presented (Emphasis in original, internal citations omitted.)"

The issue in the instant case with regard to the WERC's Findings of Fact is whether those findings are supported by substantial evidence. That standard equates to a finding of relevant evidence that a reasonable mind might accept as supporting the agency's conclusion. This court may not substitute its judgment for the agency in evaluating the weight and credibility of the evidence.

Given that limited standard, this Court believes that the WERC's Findings of Fact must be upheld. The WERC is entitled to draw its own conclusions and inferences from the record concerning Washington County's plan to subcontract housekeeping and laundry services for its nursing homes. The agency could find, as it did, that the Somers and the Samaritan Committee were seriously considering a plan to subcontract those services in the fall of 2006. The WERC also could easily have found that the Samaritan Committee and Somers were engaged in preliminary discussions concerning the decision

to subcontract those services and that those discussions only began after Somers received an unsolicited mailing from BSG in August of 2006 and gained momentum as the 2007 budget was being developed in the fall of 2006. It chooses not to make that finding.

Because there is substantial relevant evidence in the record that in the fall of 2006 and spring of 2007 concerning the Court's commitment to the subcontracting decision, the WERC's findings must be upheld. That evidence includes, but is not limited to, Somers testimony that he was seriously considering the subcontracting plan in the fall of 2006 and that he withdrew layoff notices because he did not want to fight with the Union twice regarding budgetary reductions if the layoffs would not net sufficient savings. Despite that, neither he, nor anyone connected with the Samaritan Committee, notified the Union of the possibility of subcontracting. Because the WERC's Findings of Fact were supported by relevant evidence in the record, those findings must be and are affirmed.

This Court also finds that the WERC's conclusion of law are entitled to "great weight" because the WERC was utilizing its expertise, technical and specialized competence, and specialized knowledge with respect to the good faith bargaining requirement set forth in Sec. 111.70(1) (a) Wis. Stats. That statute imposes upon both parties to a public sector collective bargaining relationship an obligation to engage in good faith during the process leading to the formation of the collective bargaining agreement. According to the WERC that obligation is unique to public employment relationship. The WERC is charged with enforcing sec. 111.70 Wis. Stats. and also has expertise in public employee labor relations; the concept of good faith negotiations in the formation of the collective bargaining agreement and it utilized that expertise and

knowledge in issuing its Conclusions of Law in this case. More specifically, it found six separate reasons for its Conclusions of Law.

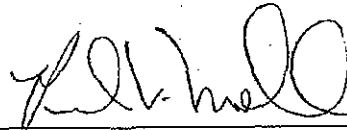
Primary among those considerations was the fact that at no time during negotiations of the 2007-2008 agreement was the Union notified that the County was considering a subcontracting decision, that when implemented, would have a major impact on the bargaining unit. It also found that decision to subcontracting in order to achieve reduced cost was one that was uniquely suited to the collective bargaining process. Finally, the WERC was reluctant to give the language of Section 2.01 the weight assigned to it by McLaughlin because there was very little relevant bargaining history regarding that clause, and no one could remember it ever being utilized in this manner.

Based on those conclusions, the WERC found that the County's conduct, while falling short of an active misrepresentation, did represent a conscious effort to shield the process leading to the decision to subcontract the laundry and housekeeping from the Union. Once again, given the standard of review to be applied in this situation, the WERC's Conclusions of Law must be affirmed.

ORDER

Based upon the foregoing, the Findings of Fact, Conclusions of Law and Order of the WERC dated January 20, 2009, are affirmed.

Dated at Port Washington Wisconsin this 4th day of January, 2010.

A handwritten signature in dark ink, appearing to read "P. V. Malloy", is written over a horizontal line.

Honorable Paul V. Malloy
Circuit Court Branch 1
Ozaukee County

This is a final order for purposes of appeal.