STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MILWAUKEE DISTRICT COUNCIL #48, AFSCME, AFL-CIO, Complainant,

vs.

MILWAUKEE COUNTY, Respondent.

Case 697
No. 69221
MP-4541

Decision No. 32912-B

MILWAUKEE DISTRICT COUNCIL #48, AFSCME, AFL-CIO, Complainant,

vs.

MILWAUKEE COUNTY, Respondent.

Case 698
No. 69222
MP-4542

Decision No. 32913-B

MILWAUKEE DISTRICT COUNCIL #48, AFSCME, AFL-CIO, Complainant,

vs.

MILWAUKEE COUNTY, Respondent.

Case 703
No. 69331
MP-4551

Decision No. 33001-A

Appearances:

Mark Sweet, Attorney at Law, Sweet and Associates, LLC, 2510 East Capitol Drive, Milwaukee, Wisconsin 53211, appearing on behalf of District Council 48.

Timothy Schoewe, Deputy Corporation Counsel, Milwaukee County, 901 North 9th Street, Room 303, Milwaukee, Wisconsin 53233, appearing on behalf of Milwaukee County.

ORDER DENYING MOTIONS TO DISMISS CASES 698 AND 703 AND GRANTING MOTION TO MAKE MORE DEFINITE AND CERTAIN THE ALLEGATIONS IN CASE 697

Daniel Nielsen, Examiner: On October 5, 2009, the above named Complainant, Milwaukee District Council #48, filed with the Commission a complaint, alleging that the above named Respondent, Milwaukee County, violated the provisions of Ch. 111.70, MERA, when the County allegedly reneged on a tentative agreement to a collective bargaining agreement, by failing to present the tentative for ratification by the County Board as previously agreed (Case 698). On that same date, the Complainant filed Case 697, repeating the same factual allegations, but further alleging that County Board Supervisor Johnny Thomas personally reneged by failing and refusing to support the tentative agreement and by announcing public support for privatization plans that had not been proposed in bargaining or discussed with the Union.

The two cases were assigned to this Examiner, and were consolidated for the purposes of hearing and decision. A hearing was scheduled for December 16, 2009. On November 6, the Complainant filed Case 703, alleging that the County had violated MERA when the Milwaukee County Executive ordered employee furloughs and a thirty-five hour work week, and when the County Board of Supervisors and County Executive thereafter adopted a furlough program without first bargaining the issue with the Union, both of which adversely affected employees based on the length of their membership in the union and thereby discouraged membership in a labor organization, and interfered with the exercise of protected rights.

Case 703 was consolidated with the two prior cases for the purpose of hearing, and the December 16th hearing was rescheduled to January 25th. Prior to that time, the Union gave notice that it would file an amendment to Case 703, adding assertions that the County had unilaterally established policies and procedures for administering the furlough plan previously adopted by the County Board, and that the County Executive had made statements denigrating the Union's status and informing employees that support for the Union and its activities were futile, and had thereby engaged in bad faith bargaining, refusal to bargain, discrimination and illegal interference with protected rights. The January 25th hearing was postponed with the concurrence of the parties in order to review the amendment, and to allow the County to answer the amended complaint, and to reasserts, revise or withdraw its pending Motions to Dismiss.

On February 5th the County submitted its Answer to the amended complaint and reasserted its Motions to Dismiss. With respect to Case 697, the County alleged that the complaint was defective in form for not having been sworn and not asserting that the appropriate fee was paid, failed to state a claim, and was substantively deficient in that County Supervisor Johnny Thomas was not the County's collective bargaining representative and that the County did not act through Supervisor Thomas. With respect to Case 698, the County asserted that the complaint failed to state a claim, that there was no portion of the tentative agreement that required a ratification vote by a date certain, that the complaint was barred by a

prior ruling of the WERC, and that the complaint was defective in form. With respect to the amended complaint in Case 703, the County alleged that the complaint was defective in form, that the claim related to a thirty-five hour work week was moot, since the shortened week was never implemented, and that the complaint against the furloughs was subject to preclusion since the circuit court had already heard and dismissed a complaint by the Union related to that program. The County proposed that a briefing schedule be established to further argue the Motions. The Union opposed the Motions and argued that additional briefing was unwarranted in light of the policy disfavoring Motions to Dismiss in WERC proceedings and requiring liberal construction of complaints in favor of the Complainant in the face of such Motions.

Now having considered the pleadings and the additional submissions of the parties, the Examiner makes and issues the following

ORDER

1. The Motion to Dismiss Case 698 is denied;

2. The Motion to Dismiss Case 703 is denied;

3. The Complainant is directed to, within seven days of the date of this Order, submit an amendment to the pleadings in Case 697 specifying how and in what capacity Supervisor Thomas is alleged to have personally violated MERA. Absent such an amendment Case 697 will be dismissed.

Dated at Racine, Wisconsin, this 15th day of March, 2010.[1]

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Daniel J. Nielsen /s/
Daniel J. Nielsen, Examiner

[1] The substance of the Order was communicated to counsel for the parties via e-mail on Thursday, March 4, 2010.

MILWAUKEE COUNTY

**MEMORANDUM ACCOMPANYING ORDER
DENYING MOTIONS TO DISMISS CASES 698 AND 703 AND
TO MAKE MORE DEFINITE AND CERTAIN THE ALLEGATIONS IN CASE 697**

The County seeks to have three complaints dismissed. Two of the complaints concern themselves with the County Board's initial failure to take a ratification vote on the tentative agreement for a successor collective bargaining agreement. The County alleges technical imperfections, including the lack of a statement that the filing fee was paid and the fact that the complaints are not sworn. The alleged technical defects do not prevent the conduct of a hearing on these matters. The revised administrative rules governing WERC complaint cases no longer require that the complaints be sworn, and that fact that the cases were opened and an Examiner assigned allows for the reasonable inference that the fees were, in fact, paid. In connection with this, I take administrative notice of the cover letters for each complaint, advising the Commission that the appropriate fee accompanies the filing.

The County further asserts that the complaint in Case 698 is barred by a decision issued by Examiner McLaughlin in Village of Allouez, Dec. No. 32701-A (McLaughlin 8/12/09). While one Examiner's decision may well have persuasive value for an Examiner in another case, involving different parties, it cannot preclude the bringing of the case.

With respect to the County's allegation that there was no obligation to bring the tentative agreement to a vote within a particular time frame, that present a question of fact which is best determined through a hearing on the merits.

The County does raise a valid objection to Case 697, which identifies a specific County Supervisor, Johnny Thomas, as having committed prohibited practices by failing and refusing to support the tentative agreement and by announcing public support for privatization plans that had not been proposed in bargaining or discussed with the Union. The Union does not identify the official capacity that allows Supervisor Thomas to personally renege on a tentative agreement, or creates an agency relationship with the County such that his personal opinions on privatization rise to the level of a prohibited practice by the County itself. The Union has therefore been directed to promptly clarify the complaint in Case 697 to make it plain how the actions and words of Supervisor Thomas individually can be imputed to the County, so as to constitute a prohibited practice. Absent such clarification, Case 697 will be dismissed.

Turning to the complaint in Case 703, the County's objections center on the asserted mootness of the complaint against the 35 hour work week, and the alleged pre-emptive effect of the Circuit Court's decision on the County Executive's right to announce furloughs. As to the mootness claim, after announcing that he would impose a shortened workweek, the County Executive stepped away from that plan in light of the permanent umpire's ruling that the plan

violated the collective bargaining agreement.[2] However, the Examiner takes administrative notice of the fact that the County Executive succeeded in having the Circuit Court vacate the umpire's decision.[3] Further, to the extent that the complaint raises the issue of denigration of the Complainant's status as exclusive bargaining representative, the fact that the arbitrator's award at least temporarily stayed the County's hand does not moot the impact of the alleged Executive's attempt at unilateral action.

Turning to the issue of preclusion, the Circuit Court decision addresses the Union's June 17, 2009 request for a permanent injunction "and a declaratory ruling as to the validity of the Executive Order of 14 May 2009, given the powers of the County Executive and County Board of Supervisors under the Wisconsin Constitution and Statutes and the language of Milwaukee County General Ordinance (hereafter MCGO) 17.28 and the Management Rights language (section 1.05) of the collective bargaining agreement between Milwaukee County and DC 48."[4] The Court does not address the issue of possible furloughs, only the Executive's attempt to reduce the workweek. Neither does the Court address any issue related to MERA. Rather, the Court's primary focus throughout is on the relationship of the County Board's legislative powers, expressed in Milwaukee County General Ordinance 17.28 which require County Board approval of changes in hours or staffing levels, and the authority of the County Executive to coordinate and direct the administrative and management functions of the County. Even in one section where the court purports to interpret the collective bargaining agreement[5], the apparent purpose of citing the labor contract is to buttress the Court's conclusion that MCGO 17.28 does not limit the County Executive's ability to order a reduced workweek. Further, to the extent that the Court does purport to interpret the collective bargaining agreement, it does not go beyond the terms of the agreement to address the duty to bargain, nor the obligation to maintain the status quo ante during the course of bargaining.

The Court's January 15th Decision is wholly concerned with the allocation of powers between the Milwaukee County Board and the Milwaukee County Executive. A review of the "DECISION" portion of the ruling reveals a determination as to the meaning and application of MCGO 17.28. While District Council 48 was a party to the actions decided therein, the case was not and could not have been a vehicle for examining the issue of furloughs, nor the

---

[2] The umpire expressly declined to rule on any possible violations of MERA. MILWAUKEE COUNTY, Case 1805, Grievance No. 44710 – Reduced Workweek Grievance (Greco, 7/1/09, at page 9, footnote 8.

[3] MILWAUKEE DISTRICT COUNCIL 48, AFSCME, AFL-CIO V. MILWAUKEE COUNTY AND SCOTT WALKER, DECISION and ORDER on Application to Confirm Arbitration Award (Case No. 09-CV-14732) and all Motions to Vacate Arbitration Award (Case No. 09-CV-9523), Case No. 09-CV-9523 (Flynn, Circuit Ct. 1/15/2010).

[4] MILWAUKEE DISTRICT COUNCIL 48, AFSCME, AFL-CIO V. MILWAUKEE COUNTY AND SCOTT WALKER, DECISION in Case Tried to the Court, Case No. 09-CV-9523 (Flynn, Circuit Ct., 1/15/2010) at pages 3 and 4 (hereinafter referred to as the January 15th Decision).

[5] January 15th Decision at pages 45-47.

County's compliance with its on-going duty to bargain as they relate to furloughs. For these reasons, I conclude that Case 703 is not precluded by the prior Decisions and Orders of the Court.

For all of the foregoing reasons, and in light of the Commission's general policy of favoring a hearing on the merits rather than motion practice in prohibited practice proceedings, I have concluded that the Motions to Dismiss Cases 698 and 703 should be denied and the cases should be set for hearing.

Dated at Racine, Wisconsin, this 15th day of March, 2010.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Daniel J. Nielsen /s/
Daniel J. Nielsen, Examiner

dag
32912-B, 32913-B, 33001-A