STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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

vs.

MILWAUKEE COUNTY, Respondent.

Case 703
No. 69311
MP-4551

Decision No. 33001-F

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

vs.

MILWAUKEE COUNTY, Respondent.

Case 697
No. 69221
MP-4541

Decision No. 32912-F

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

vs.

MILWAUKEE COUNTY, Respondent.

Case 698
No. 69222
MP-4542

Decision No. 32913-F

No. 32912-F
No. 32913-F
No. 33001-F

Appearances:

Mark Sweet, Sweet & Associates, LLC, 2510 East Capitol Drive, Milwaukee, Wisconsin 53211, appearing on behalf of Milwaukee District Council #48, AFSCME, AFL-CIO.

Mark F. Vetter, Buelow Vetter Buikema Olson & Vliet, LLC, 20855 Watertown Road, Suite 200, Waukesha, Wisconsin 53186, appearing on behalf of Milwaukee County.

ORDER DENYING PETITION FOR REHEARING

On May 20, 2011, the Commission issued its Order on Review of Examiner's Decision in the above-captioned matters. The Commission affirmed the Examiner's decision in several respects. First, the Commission affirmed the Examiner's conclusion that the County did not violate Sec. 111.70(3)(a)3, Stats., when it furloughed most County employees in 2009 and 2010. Second, the Commission affirmed the Examiner's conclusion that the County did not refuse to bargain in good faith when County Supervisor Johnny Thomas published a "Road Map For Milwaukee County's Future" in 2009. Third, the Commission affirmed the Examiner's deferring to arbitration the Union's claim that the 2009 work week reduction was a unilateral change in the status quo in violation of Sec. 111.70(3)(a)4, Stats. Finally, the Commission affirmed the Examiner's conclusion that, in the totality of the circumstances, the County failed to bargain in good faith with the Union over a successor to the 2007-08 collective bargaining agreement, in violation of Sec. 111.70(3)(a)4, Stats.

The Commission departed from the Examiner's decision in two respects. First, subsequent to the Examiner's decision, the County had withdrawn its agreement to arbitrate the Union's grievances related to the 2009 and 2010 furloughs; hence, the Commission set aside the Examiner's order deferring to arbitration the related prohibited practice claim in the instant case. Reaching the merits of that claim, the Commission concluded that the furloughs violated a term of the expired collective bargaining agreement and thus changed the status quo during a contract hiatus in violation of the County's duty to bargain in good faith and Sec. 111.70(3)(a)4, Stats. The Commission also concluded, contrary to the Examiner, that, since the County's Personnel Committee was present during the final bargaining session and specifically pre-authorized the tentative collective bargaining agreement without informing the Union of any opposition from any member of the Personnel Committee, good faith bargaining required the Personnel Committee to support the agreement thus pre-authorized; the County violated that duty (and thus, Sec. 111.70(3)(a)4, Stats.) when three of the Committee's seven members voted against the agreement during the ratification process, which led to the rejection of the agreement.

On June 9, 2011, the County filed a timely Petition for Rehearing challenging the Commission's decision on two issues: the Personnel Committee's duty to support the tentative agreement and the County's unilateral change in the status quo by implementing the 2010 furloughs. On June 24, 2011, the Union submitted written argument in opposition to the petition for rehearing. On June 28, 2011, the County filed a letter in response to the Union's opposition.

For the reasons set forth below, the County's request for rehearing is denied.

DISCUSSION

The Personnel Committee's Duty to Support the Tentative Agreement

The County contends that the Commission erred in Conclusion of Law 3, which faulted members of the Personnel Committee for not voting in favor of the tentative agreement at the ratification meeting on October 14, 2009.[1] The County advances three arguments, each of which will be addressed in sequence, below.

First, the County contends that "Finding of Fact 23 is premised on the erroneous conclusion that a 'vote' took place in the closed session" of the Personnel Committee meeting on September 15, 2009, in which the Committee authorized County negotiator Gracz to sign the tentative agreement. (County Petition at 3). Contrary to this argument, Commission Finding of Fact 23 does not state or presuppose that an actual vote was taken during the Personnel Committee meeting on September 15, 2009. The Finding simply says, in pertinent part, "The County's Personnel Committee met in closed session and informed the County's Director of Labor Relations [Gracz] that he was authorized to enter into the tentative agreement." The Commission acknowledges that its subsequent summary of the facts referred to the Personnel Committee "vot[ing] to authorize Gracz to enter into the agreement" on September 15, 2009. Despite this inadvertent and inaccurate reference to a vote, the Commission was fully aware that the record does not reflect whether or not a vote was taken, and the Commission intentionally phrased its factual Finding 23 without any reference to a vote.

[1] As the County points out, the Commission's Conclusion of Law 3 misstated the year of the tentative agreement and ratification meetings as 2010, when in fact they had occurred on September 15, 2009, and October 14, 2009, respectively. While the County characterizes this as a "material error of Fact," it is reasonably apparent that the mistake was inadvertent, since the Commission's Finding of Fact 23 and its affirmance of the Examiner's Finding of Fact – which relate the events of the two meetings in question – both accurately state the year as 2009 rather than 2010, as does the Commission's Summary of the Facts at pages 12 and 13 of its initial decision. The Commission nonetheless apologizes for the error.

Moreover, contrary to this first argument, it is not material to the Commission's conclusion whether the Personnel Committee authorized Gracz to sign the tentative agreement by "consensus" or by vote. All seven members were present on September 15, when the tentative successor agreement was signed. The Committee as a whole, without expressing any reservations, pre-authorized Gracz to sign it. The very purpose of the Committee assembling on that occasion was to decide whether to authorize the tentative agreement. The Committee's authorization in turn was instrumental in the Union accepting that agreement and persuading its members to ratify. Under these specific circumstances, the Personnel Committee was acting in concert with the titular County bargaining team – in effect the Personnel Committee was a constructive part of the negotiating team on September 15 – and shared the team's duty to support that agreement unless it advised the Union otherwise.

In furtherance of its first argument, the County also contends that, absent a clear vote to the contrary, only a majority of the Committee should have been bound to support the agreement. That argument inverts the normal and appropriate burden of producing evidence: the County, not the Union, is in the best position to show how many members, if any, disagreed with what the County itself characterizes as the "consensus" outcome on September 15. Indeed, consistent with longstanding precedents as discussed extensively in the Commission's initial decision, any dissenting member of a party's team has only to convey his/her reservation to the opposing party at the time to preserve a right to vote or argue against ratification. Though simple, this requirement is important in the bargaining process: it gives the opposing party an opportunity to evaluate the strength or weakness of the other party's commitment to the settlement, which could well affect the opposing party's corresponding willingness to enter into the settlement. In lieu of this simple but important requirement – that reservations are conveyed – the County suggests that the Commission should *presume* that three (why not one or two?) of the seven individuals who collectively authorized signing the tentative agreement actually did not intend to do so. It is clear from the Commission's case law that it does not apply such a presumption to negotiating teams; whether the members of the team take a formal vote or not, individual members who do not intend to support the agreement are required to make that known. Given the analogous role the Personnel Committee played in the instant situation for purposes of the September 15 meeting, such a presumption would not be appropriate here either.

Thus, contrary to the County's argument, it is immaterial to the outcome whether or not an actual vote is taken. Vote or no vote, if indeed there were three dissenting members among the Personnel Committee on September 15 (and, as the County points out, no evidence indicates how many, if any, there were), then it was the County who "disenfranchised" those dissenters by failing to convey that fact to the Union.[2]

[2] The record reflects that three Personnel Committee members ultimately voted against ratification. The County points out in its Petition for Review that the Commission erroneously stated in its Summary of the Facts that Supervisor Jursik was one of the Committee members who voted against ratification. The Commission acknowledges and regrets said reference to Jursik was inaccurate and notes that the Summary of the Facts had

The County's second argument regarding the Personnel Committee's duty to support is that the Commission's decision is "impractical in the extreme" because it "would unreasonably compel the municipal employer to affirmatively advise the union of the position of each elected official, on every issue, upon which the parties are negotiating or reach a tentative agreement at these various steps." (County Petition at 4 and 5) (emphasis in original). Contrary to the County's argument, the Commission is well aware of the relationship between and among executives, policymakers, and bargaining teams in the municipal sector. In issuing the decision here, the Commission certainly understood that "elected bodies provide general direction and authority to their bargaining teams regarding negotiations with their unions through the process," that discussions between the bargaining teams and elected officials occur at the outset of bargaining, during mid-process updates, and when the parties are nearing tentative agreement, and that "[t]here is not always unanimity among the elected officials at each of these steps…." County's Petition at 4.[3]

Contrary to this argument, nothing in the Commission's decision is inconsistent with appreciating the difference between general oversight and direction of collective bargaining, which was the province of the Personnel Committee here, and the day to day negotiations process that the Committee delegated to its designated bargaining team comprising Gracz and his staff. Nothing in the Commission's decision implies that general oversight of the bargaining process or discussions/commitments regarding particular items during the course of such general oversight would bind policymakers to a particular vote at the time of ratification. Indeed, nothing in the Commission's prior case law suggests that preliminary commitments on individual items or partial packages confer a "duty to support" upon members of a party's formal bargaining team. Rather, the duty to support arises at the culmination of negotiations, when the parties have tentatively agreed upon a complete successor contract and have committed to take that contract to their respective bodies for ratification. In this case, the Personnel Committee's authorization of the final complete tentative agreement – the specific purpose of the parties' teams meeting on September 15, 2009 – expressly triggered the Union's corresponding commitment to undertake in an expedited fashion the cumbersome process of

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stated earlier on the same page that Jursik was not a member of the Personnel Committee. As the County correctly states, the three members who voted against ratification were Thomas, Cesarz, and Borkowski. As to the County's suggestion that we presume that there were three dissenters, it is also notable that, at the Personnel Committee's formal meeting adopting the resolution in favor of the tentative agreement and forwarding it to the full Board for ratification, only two members of the Committee voted against the tentative agreement. Examiner's Finding of Fact 29, affirmed by the Commission.

[3] The County also contends that the Commission "erroneously states that 'the County's Personnel Committee was tasked by ordinance with the duty to negotiate collective bargaining agreements.'" County Petition at 4 (emphasis in original). The Commission's statement is correct. The Examiner's Finding of Fact 9, affirmed by the Commission, states that the Personnel Committee is "primarily responsible for collective bargaining," pursuant to Chapters 79 and 80 of the Milwaukee County ordinances. Finding of Fact 9 quotes Chapter 80.03 of the Ordinances, which states, "Collective bargaining with certified bargaining units shall be carried on by the committee [on] personnel …."

communicating the terms of the tentative agreement to its large and dispersed membership and conducting a ratification vote among that group. Imposing a duty to support the final comprehensive product of negotiations under these circumstances is fully practical and in fact is essential to the integrity of the bargaining process. Had Union officers, not members of the formal bargaining team, assembled in similar fashion and provided similar authorization for the Union's team to sign a tentative agreement, and had the County relied on that authorization to engage in a perhaps contentious ratification vote of the full County Board, only to learn that one or more of those Union officers spoke persuasively against the agreement at the ratification meeting resulting in the membership turning it down, there can be little doubt that the County would view the Union as having failed to bargain in good faith. Any sense that this requirement overly burdens the franchise of the officials involved is mitigated by the longstanding exception to the duty to support, which is simply that dissenters communicate their reservations (vote or no vote) to the opposing party at the time of the tentative agreement, so as to allow that party to make an informed decision about how to proceed. To hold otherwise would permit a party to renege after having induced the other party to agree to terms. As reflected in the quote from WAUNAKEE COMMUNITY SCHOOL DISTRICT, DEC. NO. 27837-B (WERC, 6/95) set forth in the Commission's initial decision at pages 18-19, this is "destructive of collective bargaining."

Third and last, the County contends that the County Executive's budget for the upcoming fiscal period was an intervening event that justified Personnel Committee members in failing to support the tentative agreement at ratification. According to the County, "the fiscal issues which were highlighted in the County Executive's Recommended Budget presentation on September 24, 2009 were not known to the members of the Personnel Committee on September 15, 2009; had they known, their support for the tentative agreement which was attained in that meeting might not have been achieved." County Petition at 8 (emphasis in original). On this factual record, this contention is strained at best. The Examiner's Findings of Fact, affirmed by the Commission, are replete with evidence of Walker's public remarks about the County's financial situation during the months and weeks leading up to the September 24 budget proposal. See Findings of Fact 16, 17, and 18. On September 11, the *Milwaukee Journal* reported Walker's comments about the upcoming budget at length and included his statements that he would be pressing for benefit reductions to balance the 2010 budget and proposing to privatize some County services. He threatened layoffs if sufficient wage and benefit concessions were not forthcoming. (Examiner's Finding of Fact 22). The Examiner himself rejected the County's argument that the introduction of the Executive Budget somehow excused the County's overall bad faith bargaining:

> If the County Board members were generally aware that the financial circumstances of the County were such that would lead to the adopted budget, the committees actions in authorizing and approving the tentative agreement are inexplicable. If the County Board members lacked any realistic idea as to the financial circumstances facing the County, until confronted by the Executive

> Budget, how could they provide any meaningful direction to the County bargaining team. … If the County wanted the changes reflected in its budgets it should have put those proposals to the Union. If layoffs, furloughs and the like were potential consequences of a failure to control or reduce wages and benefits that should also be brought to the bargaining table at a time when it can be meaningfully discussed.

Examiner's decision at pages 61-62 (citations omitted). The Examiner also noted at page 61 of his decision that, "The economy did not tank overnight. The potential budget shortfall was announced months earlier." Ultimately the Examiner concluded that the dissonance between the Executive Budget and the tentative agreement did not justify the County's overall bad faith bargaining, but instead was a matter that should have been harmonized before reaching agreement with the Union. By the same token, any such dissonance was not a surprise on September 24 such that it would justify the Personnel Committee's failure to support the agreement during the ratification process.

The Furloughs as a Unilateral Change in the Status Quo

During 2009 and 2010, the County implemented across the board furloughs for bargaining unit members. One of the Union's claims in the instant cases is that these furloughs, which occurred after the 2008 agreement had expired and before any successor agreement was reached, constituted a unilateral change in the status quo on wages, hours, and conditions of employment, in violation of longstanding principles governing collective bargaining. See discussion and citations in the Commission's initial decision at pages 21-22.

The Union had also filed contractual grievances challenging the County's right to impose the furloughs. In the proceedings before the Examiner, the County took the position that the Union's furlough claim should be resolved in grievance arbitration. Deferring a prohibited practice claim to arbitration depends, in part, upon the moving party's willingness to arbitrate the merits of the grievance. BROWN COUNTY, DEC. NO. 19314-B (WERC, 6/83). Hence the Examiner inferred from the County's motion a willingness to submit the furlough grievances to arbitration and thus deferred the related prohibited practice claim to the arbitration process. While the case was pending before the Commission on review of the Examiner's decision, the County withdrew its willingness to submit the furlough claim to arbitration. See Commission decision at pages 3-4. As a result, the Commission could not affirm deferral to arbitration and instead had to decide the unilateral change allegation.

The first step in deciding a unilateral change during contract hiatus claim is determining what the status quo was with respect to the particular subject – in this case, furloughs. The County appears to agree that, as set forth in the Commission's initial decision, the status quo is usually prescribed by the expired contract if said contract addresses the subject. In this case, the contract does not explicitly address "furloughs" as such. However, two prior arbitration

awards had interpreted the contract to apply to work week reductions, another form of achieving across the board payroll savings. The contract was interpreted to permit such across the board reductions but only to a limited degree (in a nutshell, 45 hours). In order to decide what the status quo (i.e., contract) required as to furloughs, therefore, the Commission had to extrapolate from those arbitration awards, and the underlying contract language, just as an arbitrator would have had to do had the County agreed to submit this matter to arbitration. As explained in its initial decision, the Commission decided that the contract, as construed by the arbitration awards, permitted up to 45 hours of furlough in a calendar year. The 2009 furloughs did not change the status quo (i.e., contract terms) because they were for less than 45 hours. However, the 2010 furloughs were in excess of said 45 hours and to that extent changed the status quo in violation of the law.

In its Petition for Review, the County first contends that the Commission had no authority to interpret the contract in order to determine the status quo. According to the County, once the Commission held that the contract applied to furloughs, "Any further inquiry regarding the number of furlough days, or number of furlough hours, which the County has the right to impose is an issue of contract interpretation, not an issue regarding the alleged refusal to bargain in good faith on a mandatory subject of bargaining." County's Petition at page 11 (emphasis in original). This argument is plainly without merit. It is a routine and inherent task of the Commission in unilateral changes cases under Sec. 111.70(3)(a)4, Stats., to act in the nature of a grievance arbitrator and interpret the provisions of an expired contract in order to ascertain the status quo. "[I]n run-of-the-mill hiatus cases … that are essentially contract grievances arising after a contract has expired and therefore not required to be arbitrated, the contract provisions presumptively establish the status quo. … The Commission must determine the meaning of the contract language …." PRAIRIE DU CHIEN SCHOOL DISTRICT, DEC. NO. 31942-B (WERC, 9/07), at 5. The Commission had no choice but to interpret the contract in order to determine how it regulates furloughs.

The County also disagrees with how the Commission interpreted the contract, arguing that furloughs are not analogous to the work week reductions at issue in the two prior arbitration awards, but instead are analogous to "layoffs." Since the contract does not limit the length of layoffs, argues the County, it should not be interpreted to limit the length of furloughs. The County has cited some arbitration awards to support the analogy between furloughs and layoffs as opposed to work week reductions. Those arbitration awards do not necessarily support the County's argument. More to the point, arbitration awards on this topic tend to be exceedingly contract-specific. As the Commission stated in an earlier case involving a similar issue:

> The parties' dispute over whether their layoff language applies to so-called "partial layoffs" (reductions in hours) is a common but nonetheless thorny one under collective bargaining agreements, yielding highly idiosyncratic results based upon nuances of language in the layoff clauses, prior practices of the

> parties, and the extent to which important benefits, such as seniority and access to health insurance, are affected. A review of arbitration authorities reveals that, where the contract language is not clear on its face, arbitrators tend to decide the issue in an equitable manner that permits the employer to meet its reasonable needs while at the same time preserving significant benefits that the employees reasonably expect.

KETTLE MORAINE SCHOOL DISTRICT, DEC. NO. 30904-D (WERC, 4/07) at 18 (citations omitted). Indeed, unions often analogize furloughs to layoffs in order to implicate the contract protections governing layoffs, such as seniority – concepts that do not fit comfortably when applied to across the board furloughs and, in this case, could create considerably more liability for the County. As discussed thoroughly in the Commission's decision in this case as well as in its decision establishing that furloughs and work week reductions are mandatory subjects of bargaining, MILWAUKEE COUNTY, DEC. NO. 33265 (WERC, 3/11), the Commission concluded that furloughs are distinct from layoffs under this particular collective bargaining agreement and are more closely related to the work week reductions at issue in the prior arbitration awards between these parties. Those awards limited the County's authority to implement across the board reductions to 45 hours per year. Hence, the Commission applied the same restriction to furloughs.

ORDER

The County's Petition for Rehearing is denied. [4]

Dated at the City of Madison, Wisconsin, this 29th day of June, 2011.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/
Judith Neumann, Commissioner

I dissent. I would grant the Petition for Rehearing.

Rodney G. Pasch /s/
Rodney G. Pasch, Commissioner

Chairman James R. Scott did not participate.

[4] By virtue of the tie vote between Commissioners Neumann and Pasch, the petition is denied.

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