STATE OF WISCONSIN CIRCUIT COURT MILWAUKEE COUNTY

BRANCH 8

MILWAUKEE COUNTY,

Petitioner,

v.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION,

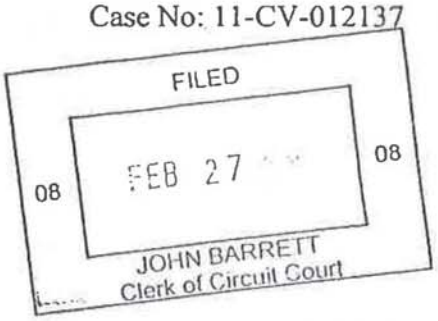
Respondent,

and

MILWAUKEE DISTRICT COUNCIL 48, AFSCME, AFL-CIO

Interested Party.

Case No: 11-CV-012137



Decision No. 33001FC1
32912FC1
32913FC1

DECISION

This is a final decision per Wis. Stat. §808.03(1).

Milwaukee County seeks judicial review of a final decision of the Wisconsin Employment Relations Commission ("WERC"). Among other things, WERC concluded that the County failed to bargain in good faith with District Council 48 when three members of the County Board Personnel Committee ("Personnel Committee") voted against a tentative successor

agreement, and when the County unilaterally imposed 22 furlough days in 2010. As to the furlough violation, WERC ordered for the restoration of the *status quo ante*. In addition, WERC ordered the County, if the Union so requests, to submit the constructively ratified tentative agreement to the county executive for his approval. Because WERC reasonably concluded that the County failed to bargain in good faith when it imposed the furloughs, this Court affirms in part. However, because WERC reached its legal conclusion on the voting issue without addressing the underlying factual issue of whether the three members had initial reservations about the tentative agreement, this Court reverses in part. Moreover, because a portion of WERC's remedial order has no tendency to effectuate the current purposes of MERA, this portion of the remedial order is set aside. The Court makes these conclusions regardless of whether a *de novo* or a deferential standard of review is applied.

The Municipal Employment Relations Act ("MERA"), Wis. Stat. §§ 111.70–111.77, governs the collective bargaining between a municipality and its employees who are members of a collective bargaining unit. "Collective bargaining" is defined in part by Wis. Stat. §111.70(1)(a) as follows:

> [T]he performance of the mutual obligation of a municipal employer, through its officers and agents, and the representative of its municipal employees in a collective bargaining unit, to meet and confer at reasonable times, in good faith, with the intention of reaching an agreement, or to resolve questions arising under such an agreement....

The Personnel Committee is primarily responsible for collective bargaining on behalf of the County. *See* §80.01, .03, Milwaukee County Code of General Ordinances.[1] However, the Director of Labor Relations has the responsibility of conducting the actual negotiations, subject

[1] Section 80.01 provides that the Personnel Committee "shall have charge of all matters arising under [MERA]." Section 80.03 provides that "[c]ollective bargaining with certified bargaining units shall be carried on by the committee on personnel."

to the prior direction and approval from the Personnel Committee. *See* §79.02, Milwaukee County Code of General Ordinances.[2]

Beginning in August of 2008, members of the County's Labor Relations staff met with members of District Council 48 in an attempt to reach a collective bargaining agreement for a successor to the 2007-08 contract. The Labor Relations staff consisted of Gregory Gracz, the Director of Labor Relations, as well as Mike Bickerstaff and Fred Bau.

On September 15, 2009, the Personnel Committee was assembled to discuss whether Gracz should be authorized to enter into the tentative agreement. The Personnel Committee members present at this meeting were County Supervisors Larson, Borkowski, DeBruin, Weishan, Dimitrijevic, Thomas and Cesarz. The Personnel Committee met in closed session, and it is uncertain whether the members voted on the issue. However, the Personnel Committee ultimately authorized Grasz to enter into the agreement. District Council 48 was not informed whether any member or members of the Personnel Committee opposed the tentative agreement.

The tentative agreement was placed on the Personnel Committee's agenda for September 23. At the meeting, a resolution, which summarized the tentative agreement, was submitted for adoption. The Personnel Committee, on a vote of 5-2 (with Supervisors Borkowski and Cesarz voting no), voted in favor of the resolution approving the tentative agreement.

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[2] §79.02, Milwaukee County Code of General Ordinances provides in pertinent part:

> The director of labor relations shall be responsible for:
>
> (1) The negotiation of all collective bargaining agreements with certified bargaining representatives of the employees of the county conducted along policy lines established by the county executive and the committee on personnel. The director of labor relations shall not agree, on behalf of the county, to any terms or provisions of a negotiated contract without prior direction and approval from the committee.

On September 24, County Executive Scott Walker presented his recommended budget, which included components that were inconsistent with the tentative agreement. On that date, the County Board of Supervisors met to vote on whether to ratify the resolution. On a motion by Supervisor Jursik, and a vote of 8-10, the ratification vote was held over.

On October 14, 2010, the Board of Supervisors voted to reject the tentative agreement. At the Board meeting, four out of the seven members of the Personnel Committee voted in favor of the tentative agreement. Supervisor Thomas, who had previously voted in favor of the agreement as a Personnel Committee member, as well as Supervisors Borkowski and Cesarz, voted against the agreement. Had Supervisors Borkowski, Cesarz and Thomas voted differently, the tentative agreement would have been ratified.

At a hearing held before Hearing Examiner William Houlihan, District Council 48 argued, among other things, that the County failed to bargain in good faith when the three members of the Personnel Committee voted against the successor agreement after they earlier had authorized Gracz to enter into the agreement. Examiner Houlihan concluded that the Personnel Committee members were not part of the County's bargaining team and, despite having authorized the bargaining team to enter into the tentative agreement, had no duty to vote in favor of ratifying the agreement. Hence, the County did not violate the law when three Personnel Committee members voted against ratification, including one member (Supervisor Thomas) who had earlier voted to recommend the agreement.

On November 9, 2010, District Council 48 petitioned for commission review of the examiner's decision. On May 20, 2011, WERC reversed. According to WERC:

> It is well-settled that individuals who comprise a party's bargaining team, even if they are also policymakers such as members of a county board of supervisors, have a duty to support a tentative agreement into which the team has entered, including a vote to ratify, unless such an individual has expressly informed the other party of an intention to vote otherwise. The Commission has long ago determined that imposing this restriction upon a policymaker's voting rights is a permissible intrusion because it is necessary to effectuate the collective bargaining law and prevent wasteful or sham negotiations.

WERC found that "common sense concepts of good faith bargaining" "make it clear that agents of either party who have actually authorized a tentative agreement generally are bound to support the agreement during the ratification process, regardless of their status as titular members of a bargaining team." Stated differently, "agents who have played a clearly instrumental role in securing the tentative agreement are bound to support it at ratification unless they have specifically notified the other party of reservations or an intention to oppose." Stated in yet another way, "agents of either party who are present and play an actual role in overseeing and/or authorizing a tentative agreement, whether or not they are formally designated members of a 'bargaining team,' have a duty to support the agreement thus authorized through ratification, unless they have expressly stated their personal opposition or reservations to the opposing party at a relevant point in the process of reaching the tentative agreement." Because the County did not inform District Council 48 of any reservations about the tentative agreement or an intention to withhold support, "[b]asic principles of good faith bargaining . . . required the Committee members to carry out the commitment they thus made, including a vote in favor of ratification." Accordingly, "all members of the Personnel Committee had a duty to support and vote for the tentative agreement that the Committee expressly authorized on September 15, 2009," and

"[t]he County failed to bargain in good faith when three members of that Committee voted against ratification on October 14, 2009."[3]

WERC reached its legal conclusion on the voting issue without addressing the underlying factual issue of whether the three members had initial reservations about the tentative agreement.

On judicial review, the County makes two primary arguments. First, the County argues that the Personnel Committee had no duty to support the tentative agreement because it was not part of the County bargaining team. Second, the County argues that WERC's decision improperly disenfranchises the three Personnel Committee members of their right to vote on a matter of significant legislation, especially when the record is devoid of any evidence that these three committee members ever supported the tentative agreement. In the alternative, the County argues that the budget presentation of an alarming and unexpectedly large county deficit was a "significant intervening event," and thus "good cause" to vote against ratification, even if the committee members had initially supported the tentative agreement on September 15, 2009.

The term "bargaining team" is not defined by the statutes. However, "collective bargaining" is defined as follows:

> [T]he performance of the mutual obligation of a municipal employer, *through its officers and agents*, and the representative of its municipal employees in a collective bargaining unit, to meet and confer at reasonable times, in good faith, with the intention of reaching an agreement, or to resolve questions arising under such an agreement....

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[3] It is important to note that WERC did not decide the issue of whether the Personnel Committee members had a duty, on September 23, to vote in favor of the resolution approving the tentative agreement.

Wis. Stat. §111.70(1)(a) (emphasis added). This statute contemplates situations in which government entities, such as the Personnel Committee, perform its obligation to collectively bargain through its agents, such as Gracz. As noted above, the Personnel Committee is primarily responsible for collective bargaining on behalf of the County. *See* §80.01, .03, Milwaukee County Code of General Ordinances. In addition, while Gracz had the responsibility of conducting the actual negotiations, Gracz was nonetheless subject at all times to the prior direction and approval from the Personnel Committee. *See* §79.02, Milwaukee County Code of General Ordinances. In light of the applicable statute and ordinances, WERC reasonably concluded that the Personnel Committee was a constructive part of the County's bargaining team on September 15. At that time, the Personnel Committee met for the very purpose of authorizing Grasz to enter into the tentative agreement, and it authorized Gracz to enter into the agreement without any express reservations. Perhaps more importantly, the Personnel Committee's authorization was instrumental in District Council 48 accepting the agreement for ratification.

Based on the County's submissions, the County's "disenfranchising" argument must also be rejected. Importantly, the County has never disputed the principle that "individuals who comprise a party's bargaining team, even if they are also policymakers such as members of a county board of supervisors, have a duty to support a tentative agreement into which the team has entered, including a vote to ratify, unless such an individual has expressly informed the other party of an intention to vote otherwise." The County's argument must be construed in light of this concession. As stated by WERC, "if there were three dissenting members on the Personnel Committee on September 15, . . . then it was the County who "disenfranchised" those dissenters by failing to convey that to the Union.

The County's alternative argument has more merit. As stated above, WERC concluded that "[t]he County failed to bargain in good faith when three members of that Committee voted against ratification on October 14, 2009." Supervisor Thomas is one of these three members. It is important to reiterate that Supervisor Thomas previously voted in favor of the tentative agreement when the resolution was submitted for adoption on September 23. This evidence supports the conclusion that Supervisor Thomas had no reservations a week earlier. WERC's legal conclusion, however, appears to be based on the "fact" that Supervisor Thomas failed to notify District Council 48 of its reservations or intention to oppose ratification. Such a factual conclusion is not supported by credible evidence in the record.

While the record reveals that Supervisors Borkowski and Cesarz had reservations as of September 23, the record does not indicate whether Borkowski and Cesarz had reservations as of September 15, when they, according to WERC, should have made their reservations known to District Council 48. Significantly, WERC reached its legal conclusion without addressing the underlying factual issue of whether Supervisors Borkowski and Cesarz had reservations as of September 15. It is entirely possible that these supervisors initially approved the tentative agreement without reservation. It is also possible that they subsequently changed their positions when they became acquainted with the County Executive's views. In addressing this issue, WERC concluded, in a roundabout way, as follows:

> [N]othing in this record explains, much less excuses, the Personnel Committee's failure to acquaint themselves with and/or take into account the County Executive's views prior to offering the Union proposal that led to the tentative agreement and prior to explicitly authorizing Gracz to sign off on that agreement. . . .
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> 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. . . . 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. . . . The Examiner himself rejected the County's argument that the introduction of the Executive Budget somehow excused the County's overall bad faith bargaining:
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> > 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 his 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.
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> The Examiner also noted . . . that "[t]he economy did not tank overnight." 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.

WERC's interpretation of "good faith," as applied to the particular facts of this case, appears to involve an objective standard, rather than a subjective standard involving the committee members' actual state of mind. This appears to deviate from Examiner Houlihan's position, and no explanation is given for this deviation. (Examiner's Decision at 54) ("Determinations concerning the good faith aspect of the bargaining obligation are, of necessity, subjective in nature). Instead of addressing whether Supervisors Borkowski and Cesarz actually changed their minds, WERC apparently focused on whether they should have brought certain issues to the bargaining table in the first place. In order to provide a meaningful review of WERC's decision on this issue, further clarification is required.

WERC reasonably determined that the County changed the status quo during a contract hiatus and thereby violated its duty to bargain in good faith by unilaterally imposing furloughs on bargaining unit members during 2010.

In its decision, WERC concluded that the County violated its duty to bargain in good faith when it unilaterally imposed 22 furlough days in 2010. WERC extrapolated from arbitration awards, and the underlying contract language, and concluded that the applicable bargaining agreement only authorized 45 hours during a calendar year. The County violated its duty to bargain because the imposition of 22 furlough days, which equates to 176 furlough hours, improperly changed the status quo on a mandatory subject of collective bargaining.

According to the County, it is well-established that a municipal employer's duty to bargain extends to all mandatory subjects of bargaining except those which are covered by the contract. *See, e.g., City of Madison (Fire Department),* Dec. No. 27757-B (WERC 10/94). "Where the contract addresses the subject of bargaining, the contract determines the parties' respective rights and the parties are entitled to rely on whatever bargain they have struck." *Id.* The County maintains that because Section 1.05 of the Management Rights provision of the predecessor agreement grants it "the right to release employees from duties because of lack of work or lack of funds," it had the right to impose the furloughs at issue. According to the County, furloughs are analogous to "layoffs," not work week reductions. As the County maintains:

> Once the Commission recognized and acknowledged that the parties have bargained and agreed upon language in Section 1.05 which allows the County to implement employee furlough days, the alleged violation of Secs. 111.70(3)(a)4 and 1, Stats., must be dismissed. Any further inquiry regarding the number of furlough days, or number of furlough hours . . . is an issue of contract interpretation, not an issue regarding the alleged refusal of the County to bargain in good faith. . . .

At the administrative level, WERC found no merit to these arguments. According to WERC, "it is a routine and inherent task of the Commission in unilateral change cases under Sec. 111/70(3)(a)4, Stats., to act in the nature of grievance arbitrator and interpret the provisions of an expired contract in order to ascertain the status quo. . . The Commission had no choice but to interpret the contract in order to determine how it regulates furloughs."

This Court agrees with WERC. Employers have a duty under MERA to maintain the status quo with respect to mandatory subjects of bargaining during contract negotiations. *Jefferson County v. WERC*, 187 Wis.2d 647, 654 (Ct. App.1994). Any unilateral change in employment conditions constitutes a refusal to bargain collectively and an interference with the right of municipal employees to bargain collectively. *Id.* The status quo is determined by examining three factors: (1) the contractual language from the expired collective bargaining agreement; (2) bargaining history; and (3) past practices of the parties. *Id.* at 655-56. In this case, neither the bargaining history nor the past practices of the parties provide guidance. However, the reasonable expectations of the parties, as evidenced by the contract provisions, could have been to associate furloughs with "work week reductions," rather than with "layoffs." Although WERC could have reached a different result, this Court is unwilling to disturb this aspect of WERC's decision.

WERC erroneously ordered that the tentative agreement be submitted, upon the request of District Council 48, to the county executive for approval or rejection.

After reaching its findings of fact and conclusions of law, WERC ordered the following remedy:

> Upon request of the Union, promptly submit the tentative collective bargaining agreement for 2009-10 to the County Executive for approval or rejection.

According to the County, 2001 Wisconsin Act 10 ("Act 10") prohibits the County Executive from executing any collective bargaining agreement addressing the terms contained in the tentative agreement. Under the new law, a municipal employer cannot reduce any collective bargaining agreement to a written and signed document if that agreement addresses any factor or condition of employment beyond base wages. Wis. Stat. §111.70(1)(a), (4)(mb).

In response, District Council 48 maintains that WERC's remedial order has a reasonable tendency to effectuate the purposes of MERA because it serves to restore the status quo. District Council 48 maintains that if the county executive were to approve the successor agreement, the term would be January 1, 2009, to December 31, 2010, which was before the enactment and effective date of 2011 Wisconsin Act 10.

In *International Brotherhood of Electrical Workers v. Public Utility Commission of the City of Richland Center*, Dec. No. 33281-A (WERC 9/11), WERC concluded that the Public Utility Commission of the City of Richland Center violated its duty to meet with the union at reasonable times and reasonable places for collective bargaining. According to WERC:

> The usual remedy for this violation must be modified because of the subsequent amendments to Section 111.70, Stats. In this regard, Respondent no longer has a duty to negotiate a comprehensive collective bargaining agreement with Complainant for either bargaining unit. It is appropriate to order the Respondent post a notice to employees which notice is modified to reflect the changed circumstances. It is also appropriate to order Respondent to bargain as . . . may be required by law."

WERC did not address whether its remedy could be legally implemented by the County. Nor did WERC explain why it deviated from its holding in *International Brotherhood.* While the remedy may arguably effectuate a pre-Act 10 MERA, the parties cannot revert to the law as it

existed in 2010, as the Wisconsin legislature did not allow for such exceptions in drafting Act 10. WERC's remedial order has no tendency to effectuate the *current* purposes of MERA. As a result, it must be vacated.

CONCLUSION

THEREFORE, based on a thorough review of the record and the arguments of the parties, IT IS HEREBY ORDERED that the decision of WERC is AFFIRMED in part, and REVERSED in part, and the action is hereby REMANDED for proceedings consistent with this decision.

Dated at Milwaukee, Wisconsin this 27th day of February, 2012.

By The Court:

/s/ William Sosnay

Hon. William Sosnay
Circuit Court Branch 8