STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MILWAUKEE DISTRICT COUNCIL 48, AFSCME, AFL-CIO, AND ITS AFFILIATED LOCAL 2, Complainants,

vs.

CITY OF GREENFIELD, Respondent.

Case #141
No. 69933
MP-4592

(Furloughs – Effect on WRS)

Decision No. 33094-A

Appearances:

Craig R. Johnson, Attorney at Law, Sweet and Associates, LLC, 2510 East Capitol Drive, Milwaukee, WI 53211, appearing on behalf of the Complainants.

Nancy L. Pirkey, Attorney at Law, Buelow, Vetter, Buikema, Olson & Vliet, 20855 Watertown Road, Suite 200, Waukesha, WI 53186, appearing on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER DISMISSING COMPLAINT

Daniel Nielsen, Examiner: On June 14, 2010, the above named Complainants, Milwaukee District Council 48, and its affiliated Local 2, filed with the Commission a complaint, alleging that the above named Respondent, the City of Greenfield, violated the provisions of Ch. 111.70, MERA, by implementing a furlough program among certain City employees.

A hearing was held on November 10, 2010 at the Greenfield City Hall, at which time the parties presented such testimony, exhibits, other evidence and arguments as were relevant. The hearing was transcribed and a transcript was prepared. The parties submitted briefs which were exchanged through the Examiner on January 7, 2011, whereupon the record was closed. On the basis of the record evidence, the arguments of the parties, and the record as a whole, the Examiner makes and issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. The City of Greenfield (hereinafter referred to as either the City or the Respondent) is a municipal employer, which provides general governmental services to the citizens of Greenfield in western Milwaukee County. The City's business address is 7325 West Forest Home Avenue, Greenfield, WI 53220.

2. Local 2, Milwaukee District Council 48, AFSCME, AFL-CIO (hereinafter referred to as either the Union or the Complainant) is a labor organization and is the exclusive bargaining representative for the employee of the City's Department of Public Works.

3. The City and the Union have been parties to a series of collective bargaining agreements, which addressed the wages, hour and working conditions of bargaining unit members. Among the benefits provided by the collective bargaining agreement was participation in the Wisconsin Retirement System, a pension plan which, in general, pays benefits based upon years of service and the three highest years of earnings. On December 31, 2008, the collective bargaining agreement expired.

4. On June 17, 2009, Greenfield Mayor Michael Neitzke issued a memo to all employees, advising them that the severe economic downturn, and anticipated cuts in State aids, had seriously affected City revenues. In response, the Mayor announced that there would be unpaid furlough days for non-protective employees in 2009 and 2010. That same day, Ben Grandberg, the City's Director of Human Resources, issued a memo, specifying four unpaid furlough days for the balance of 2009. The four days were in conjunction with holidays, and the first furlough day was scheduled for July 6th.

5. On June 22, then-Staff Representative Jim Burnham sent a letter to Mayor Neitzke, demanding bargaining:

> The Union is requesting to impact bargain the recent Common Council decision to mandate four furlough days for the AFSCME bargaining unit.
>
> The Union has not been involved in any discussions regarding the financial situation of the City of Greenfield. The Union's position is the City needs to share with the Union any budget shortfalls or financial deficits for this budget year. Therefore, we desire to meet as soon as possible to bargain this significant change to the members of AFSCME Local 2.

Following this letter, the Mayor met with officials of Local 2, and directed Grandberg to meet with the Union.

6. Grandberg met several times with Burnham and representatives of Local 2 to discuss the furloughs. Grandberg took the position that there was nothing to negotiate about, since the right to impose furlough days was already covered under the collective bargaining agreement. In the course of these discussions, the Union proposed having partial shutdown days

in return for additional comp time or other consideration, but Grandberg rejected these proposals on the grounds that the point of the furloughs was to save money, and that partial shutdowns with offsetting concessions would not accomplish that. He told the Union he had nothing to offer them. In these negotiations, the Union did not raise the issue of the impact that furloughs might have on WRS or other wage driven benefits.

7. The first furlough day took place on July 6th, and all members of Local 2 were laid off for the day.

8. On July 31st, the Union served a class action grievance on the City, asserting that the furloughs were the result of subcontractors performing landscaping, tree planting and fire equipment maintenance. The grievance was not resolved in the lower stages of the grievance procedure and was referred to arbitration.

9. Negotiations over a successor to the collective bargaining agreement took place throughout late 2008 and the first nine or ten months of 2009, until a tentative agreement was reached. The tentative agreement was ratified by both parties and signed in November 2009. In the course of those negotiations, neither party made proposals regarding furlough days or the impact of furlough days on pension benefits under the Wisconsin Retirement System.

10. The Union's grievance over the furloughs and the presence of subcontractors was heard by Arbitrator Paul Gordon on November 4. On March 26, 2010, Arbitrator Gordon issued his Award, denying the Union's grievance. Arbitrator Gordon concluded that the furloughs were not caused by any of the subcontracts the City had entered into, all of which pre-dated the furlough decision. He further concluded that the City had the right, under the layoff language, to engage in unit-wide furloughs:

> The City did not violated *(sic)* Article 5 Section G, but that does not end the inquiry. The grievance specifically objected to furloughs/layoffs, which is a matter covered in Article 7 Section F as well as referred to in Article 5 Section G. Article 7 Section F reads in pertinent part:
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> > E. Layoff and Recall: In the event the City decides to reduce the work force for any reason, the City shall have the sole right to select which job classifications shall be subject to a reduction. Within that classification, the reduction will be made by departmental seniority. Employees affected by the reduction shall have the right to replace the most junior employee in a lower classification within the department for which they can establish qualifications. . . .
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> The Union argues that the City should have applied this provision to layoff a less senior member rather that furlough the entire bargaining unit for the four days. But again, that decision is for the City to make. The Article provides that it is (sic) if the City decides to reduce the work force for any reason it has the sole right

> to select which job classification shall be subject to a reduction. Reductions can be permanent or temporary, as a layoff can be permanent or temporary. As the City argues, this concept has been applied by arbitrators in finding that furloughs of an entire bargaining unit are temporary layoffs which language such as this allows an employer to do rather than layoff a less senior employee or less senior employees for a longer time period. See, e.g., LANGLADE COUNTY HIGHWAY EMPLOYEES, MA-12597 (Bielarczyk, March, 2005), JACKSON COUNTY, MA-12338 (Houlihan, March 2005). Both of those cases involved, and allowed, the furlough of all employees in an entire bargaining unit for several days to meet budget needs. While those cases did not involve the issue of subcontracting while implementing furloughs, they do address the narrow application of furloughs to layoff language, and the undersigned finds the reasoning in those cased both persuasive and applicable to the narrow question here. Due to budgetary reasons the City laid off the entire bargaining unit at once on four occasions and no less senior member worked while a more senior member didn't. There was a layoff and it did not violate the seniority provisions of Article 7 Section F.
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> The Union makes the point that the decision and implementation of the furloughs was done by the City unilaterally without discussing or negotiating the matter with the Union. The Union contends that this implicates the Wisconsin Municipal Employment Relations Act (MERA) and the City puts up its defenses to that. MERA is beyond the scope of the arbitrator's jurisdiction, which is to interpret the parties' collective bargaining agreement. No consideration of MERA and the arguments raised therein will be made here. . . .
> City of Greenfield, MA-14520 (Gordon, 3/26/10) at pages 18-19.

15. On June 14, 2010, the instant complaint was filed, asserting that the City's decision to impose furlough days in the DPW bargaining unit unilaterally reduced the pension benefits payable to employees by the Wisconsin Retirement System, and thereby violated Sections 111.70(3)(a) 1 and (3)(a) 4, MERA.

16. The implementation of the layoff days in the DPW bargaining unit reduced the annual compensation of unit employees, and reduced their earnings for purposes of the Wisconsin Retirement System, Social Security, Medicare and other wage driven benefits and programs.

17. No demand to bargain the impact of the furlough days on the employees' benefits under the Wisconsin Retirement System was made by the Union.

18. The furlough days in the DPW bargaining unit were economically motivated, on the basis of the City's perception of a budget shortfall.

19. The collective bargaining agreement, and the practice of the parties prior to this complaint, contemplated that the earnings of laid off employees would be reduced by virtue of the layoff, and that this would affect wage driven benefits such as the Wisconsin Retirement System. The furlough days in the DPW bargaining unit did not violate the status quo ante for determining WRS earnings and pension credit.

20. The process used by the City for deciding on the furlough days in the DPW bargaining unit, and the manner in which the decision was implemented, did not have the reasonably foreseeable effect of interfering with, restraining or coercing employees in the exercise of their rights to form, join and assist labor organizations, to bargain collectively, and to engage in lawful concerted activity for the purpose of collective bargaining and other mutual aid and protection, nor did it denigrate the status of the Union as the exclusive bargaining representative of employees.

21. The failure to demand bargaining over the impact of the furloughs on employee benefits under the Wisconsin Retirement System relieved the City of its duty to bargain over that aspect of the impact of the furlough days.

On the basis of the above and foregoing Findings of Fact, the Examiner makes the following

CONCLUSIONS OF LAW

1. That the Complainants, Milwaukee District Council 48, AFSCME, AFL-CIO and its affiliated Local 2 are labor organizations within the meaning of Section 111.70(1)(h), MERA.

2. That the Respondent, City of Greenfield, is a municipal employer, within the meaning of Section 111.70(1)(j), MERA.

3. That by the acts described in the above and foregoing Finding of Fact, the City did not interfere with, restrain or coerce employees in the exercise of their rights guaranteed in Section 111.70(2), MERA, and did not violate Section 111.70(3)(a) 1, MERA.

4. That by the acts described in the above and foregoing Finding of Fact, the City did not refuse to bargain with the Complainants, and did not violate Section 111.70(3)(a) 4, MERA.

On the basis of the above and foregoing Findings of Fact and Conclusions of Law, the Examiner makes and issues the following

ORDER

The instant complaint of prohibited practices be, and the same hereby is, dismissed.

Dated at Racine, Wisconsin, this 6th day of September, 2011.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Daniel J. Nielsen /s/

Daniel J. Nielsen, Examiner

CITY OF GREENFIELD

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

BACKGROUND

This case involves the decision of the City of Greenfield to impose furlough days on City employees in 2009 and 2010. The complaint claims that this was done without bargaining over the impact of those days on the wages and pensions of unit employees, despite the Union's demand for such bargaining. The Union asserts that these are the very definition of mandatory topics of bargaining, and that the unilateral acts of the City represent a per se violation of the duty to bargain. The City denies it has any such bargaining obligation, asserting that the issue of furloughs and their impact has already been addressed by the collective bargaining agreement. A grievance over this matter was arbitrated, and the arbitrator specifically held that the contract allowed unit-wide layoffs. Those layoffs necessarily affect earnings and, thus, WRS contributions. The contract already contemplates exactly what transpired here. Moreover, the Union asked for bargaining over the general issue of furloughs, and the City met and bargained. The Union never made any timely demand to bargain the impact of furlough days on WRS contributions, the issue it now claims is at the core of its complaint. The Union also reached agreement on a 2009-2011 successor agreement with the City, after the furloughs were announced, without ever making any proposal on furloughs. Thus the City asserts that the duty to bargain is waived by contract, and waived by inaction.

DISCUSSION

At issue in this proceeding is whether the City violated the duty to bargain in good faith, including the duty to refrain from making unilateral changes to the status quo, when it imposed furlough days on City workers in response to the economic downturn. The Union focuses on the impact of the furloughs on pension benefits under the Wisconsin Retirement System. Since the WRS pays benefits based upon years of covered service and the average annual earnings for an employee's three highest years, furloughs permanently affect the pension of any employee retiring within three years following the furlough. Pensions are a facet of wages, and are quintessentially mandatory topics of bargaining. As such, an employer has a duty to bargain before taking any action that affects pensions, if such bargaining is demanded and has not been waived.

The duty to bargain is not self-executing. It arises upon demand. Here, the duty was triggered by Burnham's demand for impact bargaining, and the parties did meet for that purpose. In the course of those discussions, alternatives were examined, even though the City took the position that the right to use furloughs was already covered by the expired contract, that it had no

practical recourse, and that it would proceed with the furloughs as a matter of budgetary necessity. Until the filing of this complaint, the impact of the furloughs on WRS was not raised by the Union, nor was any proposal ever made to ameliorate the impact on pensions. The City is not required to bargain with itself, or to guess at the Union's intentions. By failing to raise the issue of pensions in conjunction with the impact bargaining over the City's furlough program, the Union waived its right to complain that the City failed to bargain on that aspect of the program. Accordingly, I have dismissed the complaint in its entirety.

Dated at Racine, Wisconsin, this 6th day of September, 2011.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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

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