STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

COLUMBIA COUNTY AFSCME REPRESENTED EMPLOYEES LOCALS 995, 2698, 2698-A, 2698-B, 2698-C, COUNCIL 40, AFSCME, AFL-CIO, Complainants,

vs.

COLUMBIA COUNTY, Respondent.

Case 311
No. 70181
MP-4618

Decision No. 33144-A

Appearances:

Neil Rainford, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 8033 Excelsior Drive, Suite "B", Madison, Wisconsin 53717, appearing on behalf of Complainants.

Joseph Ruf III, Corporation Counsel, P.O. Box 63, Portage, Wisconsin 53901, appearing on behalf of Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On September 16, 2010, the above-captioned AFSCME Locals filed a complaint with the Wisconsin Employment Relations Commission alleging that Respondent Columbia County had violated its duty to bargain in good faith by delaying ratification votes on five tentative collective bargaining agreements covering 2009-2010. On October 8, 2010, I was appointed Examiner to conduct hearing and issue a decision as to the complaint.

On October 18, 2010, an amended complaint was filed adding the allegation that the County had modified the status quo in effect during the contract hiati and engaging in additional conduct related thereto.

On November 1, 2010, a second amended complaint was filed adding the allegation that the County had again violated its duty to bargain in good faith when certain County Board members failed to support the tentative agreement during the contract ratification process.

On December 2, 2010, a third amended complaint was filed clarifying certain allegations.

The County answered the complaint by denying that it had violated its duty to bargain in good faith.

Hearing on the complaint was held on November 2 and December 2, 2010. Briefing was completed with the filing of AFSCME's reply brief on April 27, 2011 and the record was closed on June 10, 2011 when agreement was reached regarding submission of post-hearing exhibits.

Having reviewed the record and being fully advised in the premises, I make and issue the following

FINDINGS OF FACT

1. Columbia County, herein the County, is a municipal employer.

2. AFSCME Locals 995, 2698,2698-A, 2698-B and 2698-C, herein AFSCME Locals, are labor organizations which represented County employees for the purposes of collective bargaining at all times material herein.

3. The County and the individual AFSCME Locals were parties to five collective bargaining agreements that expired December 31, 2008. Those agreements all included grievance arbitration provisions.

4. On June 7, 2010, County Board Supervisors authorized offers which the County then made to the AFSCME Locals in the hopes of settling the 2009-2010 collective bargaining agreements. The AFSCME Locals subsequently accepted the County's offers at various times, ratified the tentative agreements thereby created, and then notified the County of said ratifications on the following dates:

- June 22, 2010 - Locals 2698 and 2698-C.
- July 17, 2010 - Locals 995 and 2698-B
- August 17, 2010 - Local 2698-A

5. A County ratification vote on the five tentative agreements was ultimately scheduled for the September 15, 2010 County Board meeting. At the beginning of the meeting, the County Board deferred action on the ratification. On October 20, 2010, the County Board unanimously rejected the tentative agreements ratified by the AFSCME Locals. County Board members voting against ratification included Andy Ross, Fred Teitgen, Robert Westby, Debra

Healy Wopat, Susan Martin, Barry Pufahl, Neil Ford, Brian Landers, John Tramburg, Harlan Baumgartner and Vern Grove-all of whom were present when the County authorized the June, 2010 offer that became the tentative agreement and none of whom reserved the right to vote against any tentative agreement based on the June 2010 offer. In addition, Ross, Healy Wopat, Martin, Landers, Tramburg and Baumgartner all spoke against ratification. Thereafter the parties proceeded to interest arbitration on all five contracts and received interest arbitration awards creating 2009-2010 collective bargaining agreements. The agreements created by the interest arbitration awards contained the same wage and fringe benefit provisions included in the County's June 2010 offer.

6. During 2010, the County furloughed employees represented by the AFSCME Locals 995, 2698-A and 2698-B. Grievances were filed alleging said furloughs violated the terms of the pertinent expired collective bargaining agreements. The County is willing to arbitrate the merits of said grievances.

7. During 2011, the County reduced the hours of certain employees represented by AFSCME Local 2698-A and prorated insurance benefits. A grievance was filed alleging that the proration violated the terms of the pertinent expired collective bargaining agreement. The County is willing to arbitrate the merits of said grievance.

Based on the above and foregoing Findings of Fact, I make and issue the following

CONCLUSIONS OF LAW

1. The County violated its duty to bargain in good faith and thereby committed prohibited practices within the meaning of Sec. 111.70(3)(a) 4, Stats. by failing to vote on the ratification of the five tentative agreements at its September 15, 2010 meeting.

2. The County violated its duty to bargain in good faith and thereby committed prohibited practices within the meaning of Sec. 111.70(3)(a) 4, Stats. when the members of the County Board who authorized the County's June 7, 2010 settlement offers spoke and voted against ratification of the five tentative agreements on October 20, 2010.

3. The provisions of the expired 2008-2009 agreements allegedly violated by the County's conduct referenced in Findings of Fact 6 and 7 are mandatory subjects of bargaining and thus are part of the status quo the County was obligated to maintain during the period after the expiration of the 2008-2009 agreements and prior to the creation of the 2009-2010 agreements.

4. Pursuant to the provisions of Sec. 111.70 (3)(a) 8, Stats., it is appropriate to defer the alleged violations of the status quo referenced in Conclusion of Law 3 (and all related Sec. 111.70(3)(a) 4, Stats. allegations) to grievance arbitration.

Based on the above and foregoing Findings of Fact and Conclusions of Law, I make and issue the following

ORDER

A. Columbia County, its officers and agents, shall cease and desist from violating the duty to bargain in good faith and shall take the following affirmative actions to remedy its violations.

1. On or before March 1, 2012, pay each employees represented by AFSCME Locals 995, 2698, 2698-B and 2698-C an amount equal to 2% of the back pay received by each employee pursuant to the interest arbitrator's awards. If such payment is not made on or before March 1, 2012, employees are owed an additional 1% for each month (including February, 2012) until payment is made.

2. On or before March 1, 2012, pay each employees represented by AFSCME Local 2698-A an amount equal to 1% of the back pay received by each employee pursuant to the interest arbitrator's awards. If such payment is not made on or before March 1, 2012, employees are owed an additional 1% for each month (including February, 2012) until payment is made.

3. Immediately post the Notice attached to this decision as Appendix A in the workplaces of the employees represented or formerly represented by AFSCME Locals 995, 2698, 2698-A, 2698-B and 2698-C.

4. Proceed to arbitrate the grievances over furloughs and pro-rated insurance contributions.

5. Within 20 days of the date of this Order, notify the Wisconsin Employment Relations Commission and the AFSCME Locals of the actions taken to comply with this Order.

B. I retain jurisdiction over the complaint allegations referenced in Conclusion of Law 4.

Dated at Madison, Wisconsin, this 24th day of January, 2012.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Peter G. Davis /s/

Peter G. Davis, Examiner

APPENDIX "A"

NOTICE TO ALL EMPLOYEES REPRESENTED (or formerly represented) BY AFSCME LOCALS 995, 2698, 2698-A, 2698-B and 2698-C

Pursuant to an Order of the Wisconsin Employment Relations Commission issued to effectuate the purposes and policies of the Municipal Employment Relations Act, Columbia County, its officers and agents, hereby notify Columbia County employees that:

1. WE WILL cease and desist from failing to vote in a timely manner on the ratification of tentative collective bargaining agreements.

2. WE WILL cease and desist from failing to vote to ratify tentative collective bargaining agreements consisting of County offers we approved.

3. WE WILL pay each employees represented by AFSCME Locals 995, 2698, 2698-B and 2698-C an amount equal to 2% of the back pay received by each employee pursuant to the interest arbitrator's awards.

4. WE WILL pay each employees represented by AFSCME Local 2698-A an amount equal to 1% of the back pay received by each employee pursuant to the interest arbitrator's award

COLUMBIA COUNTY

By ______________________________
Andy Ross

____
Fred Teitgen

____
Robert Westby

____
Debra Healy Wopat

____
Susan Martin

____
Vern Grove

By______________________________
Barry Pufahl

____
Neil Ford

____
Brian Landers

____
John Tramburg

____
Harlan Baumgartner

Dated this ____________________ day of __________________________, 2012

THIS NOTICE MUST REMAIN POSTED FOR 60 DAYS FROM THE DATE HEREOF AND MUST NOT BE ALTERED, DEFACED OR COVERED BY ANY OTHER MATERIAL.

COLUMBIA COUNTY

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The AFSCME Locals complaint evolved from an allegation that (1) the County violated its duty to bargain in good faith by delaying the County's ratification vote on five separate collective bargaining agreements to (2) an additional allegation that the County violated its duty to bargain in good faith when the members of the County Board of Supervisors who authorized the County settlement offer that became the parties' tentative agreement subsequently voted against ratification of the five agreements to (3) an additional allegation that the County violated its duty to bargain in good faith by furloughing employees and engaging in related conduct to (4) an additional allegation that the County violated its duty to bargain in good faith by prorating the health insurance benefits of employees whose hours were being reduced from full-time to part-time.

As to allegations (1) and (2), I find the County violated the its duty to bargain and thereby violated Sec. 111.70 (3)(a) 4, Stats. As to allegations (3) and (4), I find it appropriate within the meaning of new Sec. 111.70 (3)(a) 8, Stats. to defer those allegations to the grievance arbitration process.

Looking first at the issue of delay in the contract ratification votes, the County asserts that the ratification clock did not begin until September 8, 2011 when the County received the last of the five drafts of the collective bargaining agreements prepared by the AFSCME Locals. In that time context, the County asserts that an October 20, 2011 ratification vote is not inconsistent with the duty to bargain in good faith. Underlying this County assertion is the premise that County policy or the parties' own bargaining ground rules provided that no ratification votes would occur until all five AFSCME Locals had ratified contracts and draft contracts had been received and reviewed. There is no substantial support in the record for such a premise.

As reflected in Finding of Fact 4, on June 22, 2010, the County learned that two AFSCME Locals had ratified the tentative agreements. The County's June 23, 2010 response to AFSCME upon receiving this information anticipated that the County's review of the draft agreements and completion of the ratification process would be completed in a time frame that would allow employees to receive backpay checks on September 10, 2010. The County did not advise AFSCME that it would not proceed until all contracts had been ratified and reviewed. The two AFSCME Locals provided the County with draft agreements on July 17, 2010. From my review of the record, I am satisfied that a ratification vote at the County Board's August 2010 meeting would have been consistent with the duty to bargain in good faith.

As reflected in Finding of Fact 4, on July 17, 2010, the County learned that two more AFSCME Locals had ratified the tentative agreements and on that same date received draft

agreements from the AFSCME Locals. From my review of the record, I am satisfied that a ratification vote on these two agreements at the County Board's August 2010 meeting would have been consistent with the duty to bargain in good faith.

The County cancelled the August 2010 meeting assertedly as an internal austerity move. Whatever the motivation for the cancellation might have been, it at best reflects an indifference to the importance of the timely completion of the collective bargaining process that is inconsistent with the duty to bargain in good faith.[1]

The County held a September 2010 meeting but took ratification off the agenda when meeting began. The County asserts that worsening economic news justified this action. I disagree. Evolving economic news (at least for those members of the County Board who had not authorized the economic portions of the County's own offer in June) is relevant to the question of whether or not to ratify a contract. But any such news does not provide an adequate justification for delaying the ratification decision itself.

As the foregoing reflects, the County's two month delay in holding a ratification vote (ultimately held in October) violated the County's duty to bargain in good faith. The two month delay produced a two month delay in the receipt of back pay generated by the interest arbitrator's awards. To affirmatively remedy this violation, I have ordered the County to pay the affected employees in these four bargaining units (including employees who have since left County employment) 2% of their back pay amount.[2]

As reflected in Finding of Fact 4, the County learned of the fifth and last contract ratification on August 17, 2010 and received a draft agreement on September 8, 2010. Application of my prior rationale to this tentative agreement and the record evidence surrounding same satisfies me that a ratification vote at the September 2010 County Board meeting would have been consistent with the duty to bargain in good faith. Thus, the one month delay in the ratification vote (which ultimately occurred in October) violated the County's duty to bargain in good faith. To affirmatively remedy this violation, I have ordered the County to pay the affected employees 1% of the back pay they ultimately received.

Looking at the complaint allegation related to the ratification vote itself, it is long and well settled that individuals who are part of a party's bargaining team have a duty to support a tentative agreement into which the team has entered unless they expressly advise the other

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[1] JEROME FILBRANDT, INC., DEC. NO. 27045-C (WERC, 9/92) AFF'D CT. APP. NO. 94-1584 1/95 unpublished.

[2] The statutory Sec. 814.04(4), Stats. interest rate in effect at the time the complaint was filed was 12% per annum. See WILMOT UNION HIGH SCHOOL, DEC. NO. 18820-B (WERC, 12/83). The Commission has interpreted and applied that interest rate as providing 1% simple interest per month that monies were owed. BROWN COUNTY, DEC. NO. 20857-D (WERC, 5/93).

party that they will not be doing so. HARTFORD UNION HIGH SCHOOL DISTRICT, DEC. NO. 11002-B (WERC, 9/74); JOINT SCHOOL DISTRICT, CITY OF WHITEHALL, DEC. NO. 10812-B (WERC, 12/73). It is undisputed that in June 2010, members of the County Board authorized that a contract settlement offer be made to the various AFSCME Locals. Through that action, those County Board members were acting as the functional equivalent of a bargaining team. It is also undisputed that the County Board members never advised AFSCME that they would not be supporting (or reserved the right not to support) the offer if it were accepted by the AFSCME Locals and became a tentative agreement. Lastly, as reflected in Finding of Fact 5, it is undisputed that those County Board members who authorized the June offer then failed to vote for contract ratification in October and that some members spoke against ratification. While there may be circumstances that would allow the proponents of the offer that became a tentative agreement to then fail to vote for ratification, this record does not provide persuasive evidence of such circumstances. While the economic news between June and October may well have worsened, it did not do so to an extent that would warrant such conduct in the context of the duty to bargain in good faith. In addition, AFSCME correctly notes that the ratification comments made by some of the Board members in question suggest that their motives for voting against ratification were not based primarily or exclusively on economic news but rather also out of distaste for the collective bargaining process itself. Thus, I conclude that by the failure of the County Board members to support ratification of the tentative agreements created by their offers, the County violated its duty to bargain in good faith and thereby committed prohibited practices within the meaning of Sec. 111.70 (3)(a) 4, Stats. To remedy these prohibited practices, I am ordering that Notices be placed in the County workplaces of those employees represented (or formerly represented) by the five AFSCME Locals at the time of the violations. The Notices are to be signed by those County Board members who failed to meet their ratification obligations including the Chairperson of the County Board.

Lastly, there is the issue of whether the County violated its duty to bargain by altering the status quo as to mandatory subjects of bargaining during the hiatus between the expiration of the 2008-2009 contracts and the creation of the 2010-2011 contracts through the issuance of interest arbitration awards. AFSCME argues it did so by imposing furloughs and pro-rating insurance contributions for certain part-time employees. The County denies any violation but also notes that the furlough and insurance contribution issues were grieved and are ripe to be arbitrated on the merits. Thus, the County argues that the status quo issues should be resolved through grievance arbitration.

The County's position on the status quo/hiatus issue brings into play the relatively new statutory provision found in Sec. 111.70 (3)(a) 8, Stats. which makes it an prohibited practice for a municipal employer:

8. After a collective bargaining agreement expires and before another collective bargaining agreement takes effect, to fail to follow any grievance arbitration agreement in the expired bargaining agreement.

Where, as here, the expired contracts contained grievance arbitration provisions and where, as here, AFSCME Locals filed grievances over actions taken by the employer during a contract hiatus, and where, as here, the provisions of the expired contract allegedly violated are mandatory subjects of bargaining, I am persuaded Sec. 111.70 (3)(a) 8, Stats. obligates the County to arbitrate such grievances.[3] Given the County's obligation to arbitrate and given the central if not determinative role which interpretation of the expired contract will play in any status quo/duty to bargain analysis, deferral to the grievance arbitration process is now an available if not mandated option where, as here, the County has confirmed that it will not be raising any procedural defenses. AFSCME opposes deferral pointing out that it is not alleging violations of contract but rather breaches of the duty to bargain/maintain the status quo. However, with the passage of Sec. 111.70(3)(a) 8, Stats. (and its union counterpart Sec. 111.70(3)(b) 7, Stats.) I am persuaded that deferral is now a viable if not mandated option in circumstances such as those present herein. AFSCME also opposes deferral because its bad faith bargaining allegations extend beyond violations of the status quo and rest on how the County notified employees and the AFSCME Locals of the furloughs. However, I am persuaded that there is a likelihood that the grievance arbitrator's awards will also address the issue of notice and thus general deferral of all Sec. 111.70(3)(a) 4 complaint alegations is appropriate. It is also important to note that consistent with standard deferral practices, I am retaining jurisdiction over this portion of the dispute so that I can evaluate any request that I proceed to the merits of these allegations because the grievance arbitrator failed to resolve the issues through an award.

Dated at Madison, Wisconsin, this 24th day of January, 2012.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Peter G. Davis /s/
Peter G. Davis, Examiner

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[3] Because grievance arbitration of disputes over employer conduct that occurred during a contract hiatus was not part of the status quo either party was obligated to honor, deferral was not generally a viable motion as to hiatus disputes prior to the creation of Sec. 111.70 (3)(a) 8, Stats. (and its union counterpart Sec. 111.70(3)(b) 7, Stats.).

It is also important to note that these new statutes did not end the distinction between mandatory subjects of bargaining (which the employer must maintain during a contract hiatus) and permissive subjects of bargaining (as to which the employer is free to unilaterally act during a contract hiatus). Thus, although during the term of contract an employer must honor a contract provision that is a permissive subject of bargaining, once the contract expires, Sec. 111.70(3)(a) 8, Stats. does not extend that obligation into the contract hiatus.

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