

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

TWO RIVERS CITY HALL AND RELATED DEPARTMENT EMPLOYEES,
LOCAL 76, and TWO RIVERS PUBLIC WORKS, PARKS AND
UTILITY, LOCAL 76, AFSCME, AFL-CIO, Complainants

and

CITY OF TWO RIVERS, Respondent.

Case 119
No. 71764
MP-4737

DECISION NO. 33983-A

TWO RIVERS LIBRARY EMPLOYEES, LOCAL 76, AFSCME, AFL-CIO, Complainant

and

LESTER PUBLIC LIBRARY, Respondent.

Case 4
No. 71762
MP-4735

DECISION NO. 33982-A

Appearances:

Mr. Mark DeLorme, Staff Representative, 701 North 8th Street, Manitowoc, Wisconsin, appearing on behalf of Complainants City of Two Rivers City Hall and Related Department Employees, Local 76; City of Two Rivers Public Works, Parks and Utility Employees, Local 76; and City of Two Rivers Library Employees, Local 76, AFSCME, AFL-CIO.

Mr. Mark Olson, Attorney, Buelow Vetter Buikema Olson & Vliet, LLC, 20855 Watertown Road, Suite 200, Waukesha, Wisconsin, appearing on behalf of the Respondents City of Two Rivers and Lester Public Library.

FINDINGS OF FACT
CONCLUSIONS OF LAW AND ORDER

On September 17, 2012, the Two Rivers City Hall and Related Department Employees, Local 76, AFSCME, AFL-CIO, and the Two Rivers Public Works, Parks and Utility, Local 76, AFSCME, AFL-CIO, filed a prohibited practice complaint with the Wisconsin Employment Relations Commission against the City of Two Rivers.

On September 17, 2012, the Two Rivers Library Employees, Local 76, AFSCME, AFL-CIO, filed a prohibited practice complaint with the Wisconsin Employment Relations Commission against the Lester Public Library.

The complaints allege that the City of Two Rivers and the Lester Public Library unilaterally eliminated the Deductible Reimbursement in violation of §§ 111.70(3)(a)4 and 5, Stats., and derivatively, § 111.70(3)(a)1, Stats. The cases were consolidated for hearing.

On December 17, 2012, the Commission appointed Lauri A. Millot, a member of its staff, to act as Examiner in this matter and to make and issue Findings of Fact, Conclusions of Law and Order, as provided for in §§ 111.07(5) and 111.70(4)(a), Stats. On January 4, 2013, the City and Library filed answers. A hearing on the complaints was set for January 10, 2013, but was canceled due to weather. The hearing proceeded on June 10, 2013. The hearing was transcribed. The parties filed initial briefs by August 21, 2013. The City filed a reply brief and, by October 3, 2013, the Unions informed the Examiner that it did not intend to file reply briefs.

Having considered the record evidence and arguments of the parties, I hereby make and file the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. The City of Two Rivers (hereinafter the “City”) is a municipality providing general governmental services to the people of Two Rivers. At all times relevant herein, the City Manager was Greg Buckley.

2. The Lester Public Library (hereinafter the “Library”) is located in the City of Two Rivers. At all times relevant herein, the Library Director was Jeff Dawson. Although the Library is managed by a Library Board independent of the City, the library employees are part of the City health insurance group.

3. The Two Rivers Public Works, Parks and Utility, Local 76, AFSCME, AFL-CIO (hereinafter the “DPW Union”) is a labor organization and was the exclusive bargaining

representative for the public works, parks and utility employees of the City. The represented public works, parks and utility employees are “general municipal employees” within the meaning of § 111.70(1)(fm), Stats. At all times relevant herein, Don Weiss was the President of Local 76.

4. The Two Rivers City Hall and Related Department Employees, Local 76, AFSCME, AFL-CIO (hereinafter the “City Hall Union”) is a labor organization and was the exclusive bargaining representative for the employees of the City Hall and the related department. The represented City Hall and related department employees are “general municipal employees” within the meaning of § 111.70(1)(fm), Stats. At all times relevant herein, the City Hall Union steward was Vicky Berg.

5. The Two Rivers Library Employees, Local 76, AFSCME, AFL-CIO (hereinafter the “Library Union”) is a labor organization and was the exclusive bargaining representative for the library employees. The represented library employees are “general municipal employees” within the meaning of § 111.70(1)(fm), Stats. At all times relevant herein, the Library Union co-stewards were Kathleen Tolksdorf and Margaret Kappelman.

6. The City selects and manages the health insurance carrier and health insurance plan for the Library employees.

7. In February 2011, Governor Scott Walker proposed substantial modifications to the rights and obligations of unions and employers in the Budget Repair Bill (also known as Act 10). The legislature enacted Act 10 and, thereafter, litigation ensued as to the legality and effective date of the law. During that time of turmoil, many unions and employers negotiated with the intent to stabilize their relationship and extend the terms and conditions of their relationship in a successor collective bargaining agreement. The effective date of Act 10 was June 29, 2011.

8. The City met with the DPW Union on April 13, 2011; the City Hall Union on April 14, 2011; and the Library Union on April 25, 2011, for the purpose of negotiating successor collective bargaining agreements. The City presented each individual Union with a document entitled “City Position” that contained the City’s terms and conditions that it indicated “must” exist in order for the City to agree to extend each respective labor agreement. In exchange for extending their labor agreements through December 31, 2013, all three Unions voluntarily agreed to the terms contained in the “City Position” document.

Relevant new and revised terms to the labor agreements include¹:

¹ The language items relevant to this case are identical in content in all three collective bargaining agreements, although the numerical identification of the articles is different. The City Hall and DPW Unions contracts identify the City Manager as the management representative in both the grievance language and the insurance language while the Library Union labor agreement references the Library Director as the management representative.

GRIEVANCE PROCEDURE

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- D. Steps in Procedure: All grievances which may arise shall be processed in the following manner:

Step 1: The employee, alone or with his/her representative, shall orally explain his/her grievance to his/her immediate Supervisor no later than twenty-one (21) calendar days after the Union and Grievant knew or should have known of the cause of such a grievance. In the event of a grievance, the employee shall perform his/her assigned work task (unless his/her health or safety is endangered), and grieve his/her complaint later. The immediate supervisor, within fourteen (14) calendar days, shall orally inform the employee and the Union representative of his/her decisions.

Step 2: If the grievance is not settled in the first step, the employee and/or his/her representative may prepare and file a written grievance with the Department Head within fourteen (14) calendar days of the response at Step 1 (if the Department Head is the immediate Supervisor, the grievance shall automatically proceed to Step 3). A written grievance shall contain the name and position of the Grievant, a statement of the grievance, the relief sought, the date the incident or alleged violation took place, the specific section of the contract alleged to have been violated, the signature of the Grievant and the date. At this meeting the employee may be represented by up to (but not to exceed) two (2) members of the Union and a representative of Council 40 AFSCME. The Department Head will review the record and further investigate the grievance and inform the Grievant and the Union in writing of his/her decision within fourteen (14) calendar days after the conference with the Grievant and the Union.

Step 3: If the grievance is not settled in the second step, the decision may be appealed in writing to the City Manager. This appeal must be made within fourteen (14)

calendar days. The City Manager will inform the aggrieved employee and the Union in writing of his/her decision within fourteen (14) calendar days after receiving the grievance.

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INSURANCE, PENSION AND TERMINATION

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- B. Health Insurance: The City shall pay toward the cost of Hospital, Surgical and Major Medical Insurance premiums ninety percent (90%) of the single and family plan. The details of the insurance plan are contained in Appendix B.

Effective January 1, 2013, the City payment toward the cost of medical insurance premiums shall be 87.5% of the single and family plan.

The City reserves the right to change carriers, revise the plan structure, and revise health insurance benefits at the City's discretion, following consultation with the City Employee Insurance Committee.

. . .

8. On October 27, 2011, the City Employee Insurance Committee met and addressed the 2012 health insurance renewal. City Manager Buckley presented his budget recommendation including the elimination of the deductible carryover, increase deductibles, increase out of pocket maximums, eliminate the health reimbursement account for fire and police employees and retirees, and eliminate the annual Deductible Reimbursement. The Committee, which included Union personnel Weiss, Berg and Tolksdorf, voted unanimously to endorse the proposed changes.

9. Buckley issued a memorandum dated November 14, 2011 to all City employees and retirees regarding changes to the 2012 health insurance benefit. Attached to the memorandum was a 3-page document entitled "City of Two Rivers Modifications to Employee Health Insurance Program Effective January 1, 2012" which identified the five changes, including the elimination of the annual Deductible Reimbursement. The City distributed this memorandum before the City Council voted to adopt the proposed health insurance changes.

10. The DPW and City Hall Unions filed a joint grievance on December 9, 2011, asserting that the City had violated the terms of Article XVI – Insurance, Pension and Termination when it eliminated the annual Deductible Reimbursement. The grievance identified the date of the alleged infraction as November 30, 2011.

11. The Library Union filed a grievance on December 20, 2011, asserting that the City had violated the labor agreement when it eliminated the annual Deductible Reimbursement.² The grievance described December 15, 2011, as the date the Library employees learned the Deductible Reimbursement had been eliminated when it was announced at a meeting. The Library Union indicated it was unable to cite a specific section of the labor agreement that had been violated because it did not have a signed copy of the current collective bargaining agreement, but that “it was included in the 2011-2013 contract in an article and in the Health Care Plan Addendum. This benefit is not part of our health insurance plan.”

12. Effective January 1, 2012, the City eliminated the Deductible Reimbursement.

13. Article XVI - Insurance, Pension and Termination contained in the City Hall Union 2011-2013 collective bargaining agreement includes:

. . .

F. Deductible Reimbursement: Move to Exhibit B

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14. Article XVI – Insurance, Pension and Termination of the Library Union 2011-2013 collective bargaining agreement with the Library Board includes in Section B, Medical Insurance:

(NOTE: MOVE EXISTING PROVISIONS REGARDING HEALTH INSURANCE DEDUCTIBLES, HRA AND DEDUCTIBLE REIMBURSEMENT TO A REVISED APPENDIX B, WHICH SHALL REFLECT THE HEALTH INSURANCE PLAN AND BENEFITS AS THEY EXISTED ON JANUARY 1, 2011.)

15. Appendix B of the DPW, City Hall and Library Union 2011-2013 collective bargaining agreements include:

² The grievance filed by the Library Union did not cite the exact article or section of the labor agreement which it believed was violated. The circumstances described the elimination of the Deductible Reimbursement, and the City understood and fully responded to the section of the agreement which the Union was challenging.

1. Deductible Reimbursement:

For those employees enrolled in the City's health insurance plan and hired and in continuous service prior to the conclusion of this collective bargaining agreement (December 31, 2009) the City agrees to pay employees the following deductible reimbursements on an annual basis:

- a. \$400 payment to employees with family coverage, with the first payroll in July.
- b. \$200 payment for single coverage, with the first payroll in July.

Said payment shall be made in July 2008, and every July thereafter.

16. The annual Deductible Reimbursement is a health insurance benefit.

Based on the above and foregoing Findings of Fact, the Examiner makes and issues the following

CONCLUSIONS OF LAW

1. Complainants DPW Union, City Hall Union and Library Union are labor organizations within the meaning of § 111.70(1)(h), Stats.

2. Respondents City and Library are municipal employers within the meaning of § 111.70(1)(j), Stats.

3. When the Respondents eliminated the Deductible Reimbursement effective January 1, 2012, they did not refuse to bargain nor did they make a unilateral change to the collective bargaining agreement in violation of § 111.70(3)(a)4, Stats. or derivatively violate § 111.70(3)(a)1, Stats.

4. The Wisconsin Employment Relations Commission does not have jurisdiction to determine whether Respondents violated the 2011-2013 collective bargaining agreements with Complainants when the Deductible Reimbursement was eliminated effective in January 2012.

Based on the above and foregoing Findings of Fact and Conclusions of Law, the Examiner makes and issues the following

ORDER

The complaints are dismissed.

Dated at Rhineland, Wisconsin, this 6th day of December 2013.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION



Lauri A. Millot, Examiner

MEMORANDUM ACCOMPANYING FINDINGS OF FACT,
CONCLUSION OF LAW AND ORDER

There are two case numbers assigned to this case, but the evidence and record establish that there are three bargaining units challenging the City's actions. The parties stipulated that the evidence and arguments contained in the record shall be applied to both cases and ultimately, all three bargaining units.

Unions' Claim Under § 111.70(3)(a)4, Stats.

Complainants assert that the City and Library made a unilateral change to their collective bargaining agreements when they eliminated the Deductible Reimbursement. A municipal employer is obligated to bargain collectively with the employees' representatives and a unilateral change in the status quo constitutes a refusal to bargain violation. Refusal to bargain claims are governed by § 111.70(3)(a)4, Stats., which states it is a prohibited practice for a municipal employer, individually or in concert with others:

4. To refuse to bargain collectively with a representative of a majority of its employees in an appropriate collective bargaining unit

The Unions allege that the City and Library unilaterally changed the status quo when they eliminated the Deductible Reimbursement. The evidence does not support a finding that Respondents' made a unilateral change when they eliminated the Deductible Reimbursement.

The 2011-2013 collective bargaining agreements for all three bargaining units contain the clause:

The City reserves the right to change carriers, revise the plan structure, and revise health insurance benefits at the City's discretion, following consultation with the City Employee Insurance Committee.

The City consulted and gained the approval of the City Health Insurance Committee to eliminate the Deductible Reimbursement as a part of the City's 2012 budget cost containment efforts. The labor agreements specifically grant Respondents with the authority to change and/or revise the medical insurance plan following consultation with the Committee. Having fulfilled the sole prerequisite, Respondents' actions were well within their contractual rights and therefore not a unilateral change.

Moreover, the Commission has held that "a municipal employer's duty to bargain during the term of a contract extends to all mandatory subjects of bargaining *except those*

which are covered by the contract or as to which the union has waived its right to bargain through bargaining history or specific contract language.” School District of Cadott Community, Dec. No. 27775-C (WERC, 6/94) (emphasis added), *aff’d.* by Cadott Educ. Ass’n v. Wisconsin Employment Relations Comm’n, 197 Wis. 2d 46, 540 N.W.2D 21 (Ct. App. 9/95). While it is true that the parties did not discuss all conceivable medical health insurance plan design and benefits changes, modifications, additions and deletions, the issue is whether the labor agreement defines the parties’ rights on the subject of medical health insurance and the process they will follow to make changes and/or revisions. The language contained in the insurance article unequivocally delegates decision-making power relative to the medical health insurance plan carrier, design, and benefits to Respondents, so long as the City Health Insurance Committee is consulted. Respondents have already bargained medical health insurance and are not compelled to do so again.

Accordingly, Complainants’ derivative claim under §111.70(3)(a)1, Stats., fails.

Unions’ Claim Under § 111.70(3)(a)5, Stats.

Prior to June 29, 2011, § 111.70(3)(a) 5, Stats., provided that it was a prohibited practice for a municipal employer to:

... violate any collective bargaining agreement previously agreed upon by the parties with respect to wages, hours and conditions of employment affecting municipal employees

Effective June 29, 2011, § 111.70(3)(a) 5, Stats., was amended to:

... violate any collective bargaining agreement affecting general municipal employees, that was previously agreed upon by the parties with respect to wages.

The Deductible Reimbursement at issue in these cases is not wages and, therefore, consistent with prior Commission decisions, the Commission lacks jurisdiction to address the Unions’ claims. See Manitowoc County, Dec. No. 43189 (WERC, 7/13) and City of Reedsburg, Dec. No. 34190 (WERC, 7/13).

Assuming wages are defined broad enough to include the Deductible Reimbursement and the Commission would have jurisdiction, I address the merits of the Unions’ assertion that the City and Library have violated the parties’ collective bargaining agreement. As a preliminary matter, it need be pointed out that the collective bargaining agreements between Complainants and Respondents do not contain an arbitration clause.

As addressed above, Respondents eliminated the Deductible Reimbursement, effective January 1, 2012, and relied on the following clause in each of the Unions' 2011-2013 collective bargaining agreement:

The City reserves the right to change carriers, revise the plan structure, and revise health insurance benefits at the City's discretion, following consultation with the City Employee Insurance Committee.

The Unions first argue that the Deductible Reimbursement is neither an insurance carrier, part of the plan design, nor a health insurance benefit and therefore the City violated the labor agreement when it terminated the payments. The Unions define a health insurance benefit as "the amount payable by the insurance company to a claimant, assignee, or beneficiary when the insured suffers a loss. <http://www.healthinsurance.org>." While this is one definition, it is not the sole definition nor is there any evidence to indicate that the parties intended this to define the term contained in the insurance, pension and termination articles of their respective collective bargaining agreements.

Before looking to extrinsic evidence to define "health insurance benefit," it is more instructive to look to the content of the parties' respective labor agreements. The 2011-2013 labor agreements for all three Unions list the Deductible Reimbursement in Appendix B. Appendix B represents the "details" of the health insurance plan and delineates plan design, covered benefits and other elements of the medical health insurance plan. The specific reference to the Deductible Reimbursement in Appendix B establishes that the parties intended and understood that the Deductible Reimbursement was a part of the medical insurance plan and flowed from the health insurance plan. It is reasonable to conclude that the Deductible Reimbursement is a health insurance benefit.

The Unions next characterize the Deductible Reimbursement as a "wage" rather than a health insurance benefit. The term "wages" as contained in § 111.70(3)(a)5, Stats., has not been defined by the Commission and the Unions' reference to and argument herein does not contemplate or attempt to statutorily define that term. Rather, the Unions are contrasting wages with health insurance benefits and concluding that since the Deductible Reimbursement payment was included in employee paychecks, it is a wage. The Deductible Reimbursement was payment made to employees enrolled in the City health insurance plan to offset monies that they paid toward their health insurance deductible.³ Although the tender for this payment was the employee paycheck, that paycheck also includes tax deductions, health insurance premium deductions and other like transactions. I am not persuaded that inclusion on a paycheck is the standard by which to define what constitutes a "wage."

³ Employees that were not enrolled in the City medical health insurance plan were not eligible for and were not paid the annual Deductible Reimbursement.

Complainants argue that the 2011-2013 negotiations were “hasty” resulting in a lack of mutual understanding as it related to the elimination of the Deductible Reimbursement. There is no question that the negotiations for the 2011-2013 successor agreement were completed quickly due to the impending effective date of Act 10, but speed of the bargain does not determine if a labor agreement has been violated. As for the lack of understanding, the evidence establishes that the City met with each Union and presented its “City Position” document. That document for each Union was six pages in length and contained more than forty changes to the respective labor agreement. Complainants acknowledge that City Manager Buckley responded to questions posed by employees and further that “it is not hard to fathom why the specifics regarding the Deductible Reimbursement were not covered.” Union Brief, p.7. The Unions were in a weak bargaining position, lacking leverage, and it was their view that they “had no choice but to take it [the City’s settlement offer] or get nothing.” Union Brief, p.7. While it may be true that the Unions did not anticipate that the Deductible Reimbursement was a health insurance benefit, they understood that if they wanted a successor agreement they would need to accept the “City Position” and, further, that failing to accept the “City Position” meant that they likely would not have a successor agreement. Given this, I cannot conclude that the parties’ failure to discuss whether language granting the City and Library the unilateral right to “revise health insurance benefits,” following consultation with the Employee Health Insurance Committee, included the elimination of the Deductible Reimbursement and constituted a “misunderstanding” that would render the labor contracts unenforceable.

Having found that the City did not violate the parties’ collective bargaining agreements, the Complainants’ § 111.70(3)(a)5, Stats., claim is without merit.

Finally, it is necessary that I address the City and Library’s procedural challenge. Respondents argue that the grievances were not timely filed and therefore are not arbitrable. I do not accept October 27, 2011, as the date to start the 21-day filing time limit for the grievances since the proposed modifications were just that, proposed, and final action was still necessary by the City Council. Mr. Buckley testified that the November 14, 2011 communication to employees informing them of the changes to their health insurance plan “went out from my office prior to the date of adoption of the budget and prior to the date the City Council” met and voted to adopt the 2012 budget and proposed health insurance plan modifications. Tr.151. The record is silent as to when the City Council voted and silent as to when the employees received the November 11, 2011 memorandum. Lacking this specific information and since I have already concluded that the City and Library did not violate the labor agreements when the Deductible Reimbursement was eliminated, I decline to make a determination on the Respondents’ procedural arbitrability challenge.

Dated at Rhineland, Wisconsin, this 6th day of December 2013.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION



Lauri A. Millot, Examiner