STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

COMMUNICATION WORKERS OF AMERICA, LOCAL 4671, AFL-CIO, Complainant,

vs.

CITY OF EDGERTON, Respondent.

Case 34
No. 71367
MP-4701

Decision No. 33996-A

Appearances:

Messrs. Frank Mathews and **Michael Oliver**, Communication Workers of America, 106 South Wynstone Park Drive, Suite 104, North Barrington, Illinois 60010, appearing on behalf of Complainant Communication Workers of America, Local 4671, AFL-CIO.

Attorney Nancy Pirkey, Buelow Vetter Buikema Olson & Vliet, LLC, 20855 Watertown Road, Suite 200, Waukesha, Wisconsin, appearing on behalf of Respondent City of Edgerton.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

The Communication Workers of America, Local 4671, AFL-CIO, filed a complaint with the Wisconsin Employment Relations Commission on January 11, 2012, alleging a violation by the City of Edgerton of the Municipal Employment Relations Act, citing Section "111.70(3)(a)5 and all that may apply". Thereafter the parties entered into a stipulated record. No evidentiary hearing was held. Each party filed an initial brief; each party declined the opportunity to file a reply brief; and the record was closed on September 18, 2012. The Commission appointed Danielle Carne to act as Examiner. Having considered the evidence and arguments of the parties, the Examiner makes and issues the following Findings of Fact, Conclusions of Law, and Order.

FINDINGS OF FACT

1. The Communication Workers of America, Local 4671, AFL-CIO ("Union") is a labor organization within the meaning of Section 111.70(1)(h), Wis. Stats.

2. The City of Edgerton ("City") is a municipal employer within the meaning of Section 111.70(1)(j), Wis. Stats.

3. The Union has been the exclusive collective bargaining representative for a bargaining unit composed of all regular full-time and regular part-time employees, excluding supervisory and managerial employees, employed in the Water, Sewer, Street, City Hall, Cemetery, and Parks Departments for the City.

4. The City and the Union have been parties to a collective bargaining agreement ("Agreement") which became effective on January 1, 2010.

5. Article XVII of the Agreement contains the following provision:

> This Agreement shall be effective as of January 2, 2010, and shall remain in effect for an initial period of three (3) [*sic*][1] years to and including December 31, 2011, and shall continue in effect thereafter until terminated by written notice given by either party expressly stating its intentions to terminate this Agreement, in which case it shall terminate one hundred and eight [*sic*] (180) days following receipt of such notice to terminate this Agreement. The Union and the City shall then commence collective bargaining with respect to a new Agreement. (Notice to renegotiate contract shall be given on or before June 30, 2011).

6. On June 30, 2011, the Union sent correspondence to the City, which stated the following:

> Notice of hereby given under the provisions of the current collective bargaining agreement between the Communication Workers of America and the City of Edgerton, that the Union requests a meeting for the purpose of negotiating an agreement covering wages, hours, and other conditions of employment. The contract will expire on December 31, 2011.
>
> The Union hereby offers to have our bargaining committee meet and confer with representatives of the City to present and explain our bargaining proposals. The meetings will be held at such time and place as is determined to be mutually agreeable between the parties. Listed below is the name, address, and telephone number of the Chairperson of the Union:

[1] This duration provision states that the Agreement would be in effect for an initial period of three years, but it identifies that term as running from the beginning of 2010 until the end of 2011, which is clearly a period of two years. The parties stipulated that the three-year reference is a drafting error.

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Communications Workers of America – Local 4671
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The Chairperson will advise you of the composition of the Bargaining Committee. The Committee may be supplemented or modified from time to time as deemed necessary or advisable by the Union. This letter cancels all previous notifications of bargaining committees authorized to act on behalf of the Communications Workers of America.

The Union formally requests that you provide Mr. Oliver with the information requested in the enclosed Public Sector Bargaining Data Request Form, by completing and mailing it to him at the above address. This information is the minimum needed by us to prepare for negotiations with you. Your prompt attention to this request will be appreciated.

7. The letter set forth in Finding of Fact 6 was the last written communication between the City and the Union with regard to the subjects addressed therein, and the parties never engaged in the proposed negotiations.

8. During the term of the Agreement, the Legislature enacted 2011 Wisconsin Act 10 ("Act 10"), which among other things made significant changes to the duty to bargain contained in the Municipal Employment Relations Act. As a general rule, Act 10 became effective on June 29, 2011. At Section 9332, however, Act 10 contains an exception for employees covered by a current collective bargaining agreement on the day the law became effective. For those employees, Act 10 would first apply "on the day on which the agreement expires or is terminated, extended, modified, or renewed, whichever occurs first".

9. On January 1, 2012, the City made unilateral changes with regard to wages, hours, and conditions of employment for bargaining unit employees represented by the Union, which changes were inconsistent with the terms of the Agreement.

CONCLUSIONS OF LAW

1. The Union had standing to bring this complaint.

2. On December 31, 2011, the Agreement between the City and the Union terminated, at which point the provisions of Act 10 began to apply to those employees who were a part of the bargaining unit represented by the Union.

3. By making unilateral changes, starting on January 1, 2012, to the wages, hours, and conditions of employment for the employees who were a part of the bargaining unit represented by the Union, the City did not violate Section 111.70(3)(a)5, Wis. Stats., or any other provision of Chapter 111.70 of the Wisconsin Statutes.

4. The positions taken by the Union in this case were not frivolous or taken in bad faith.

ORDER

The Complaint is dismissed.

Dated at Madison, Wisconsin, this 19th day of November, 2012.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Danielle L. Carne /s/
Danielle L. Carne, Examiner

CITY OF EDGERTON

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

DISCUSSION

Standing

As a preliminary matter, it is necessary to address an affirmative defense raised by the City, asserting that the Union had no standing to bring this Complaint. Among other things, Act 10 established a requirement that the exclusive representative of each collective bargaining unit containing general municipal employees is to seek recertification on an annual basis. Section 111.70(4)(d)3.b, Wis. Stats. Pursuant to ERC 74.03(7)(a), Wis. Admin. Code, a union representing municipal employees without a current collective bargaining agreement had until January 30, 2012, to file a petition for recertification. If no such petition was filed by January 30, 2012, the exclusive representative was no longer entitled to exclusive representative status as of that date. ERC 74.03(7)(b), Wis. Admin. Code. Regardless of whether the Union ultimately filed a petition for recertification by the January 30, 2012 deadline, it is clear that the Union was still the exclusive representative of the employees in the bargaining unit on January 11, 2012, the date on which the Complaint in this case was filed. That being the case, I decline to dismiss the Complaint for lack of standing. The additional question raised by the City, as to whether the Union remained the exclusive bargaining representative after the Agreement terminated and after the Union failed to file a Petition for Recertification on or before January 30, 2012, is beyond the specific scope of this standing question and beyond the general scope of this complaint.

Merits

The focus of this case is Section 9332 of Act 10. Because the employees represented by the Union had a collective bargaining agreement in place on the day when Act 10 became effective, the provisions of Act 10 would only become applicable to those employees on the day the Agreement "expires or is terminated, extended, modified, or renewed, whichever occurs first". The question here is whether the Agreement between the City and the Union has undergone an expiration, termination, extension, modification, or renewal that caused Act 10 to become applicable. It is the City's position that, due to the actions of the Union and under the language of the Agreement, the Agreement expired on December 31, 2011, and Act 10 began to apply at that point. It is the Union's position is that the Agreement remains in effect. It argues that the "shall continue" language in the Agreement's duration clause provided for a seamless continuation of the Agreement up to and beyond the end of 2011, protecting the employees from the imposition of Act 10.

The record shows that on June 30, 2011, the Union sent correspondence to the City, the first paragraph of which stated the following:

> Notice of hereby given under the provisions of the current collective bargaining agreement between the Communication Workers of America and the City of Edgerton, that the Union requests a meeting for the purpose of negotiating an agreement covering wages, hours, and other conditions of employment. The contract will expire on December 31, 2011.

It is primarily the last sentence of this paragraph that leads me to the conclusion that the term of the Agreement ended on December 31, 2011.

In its written arguments, the Union's explanation of the meaning of this letter is that it was "a courtesy letter that advised the City of contract expiration date and offered a meeting". I reject this explanation for two reasons. First, insofar as the recognition of an expiration date appears to run directly contrary to the Union's fundamental position in this case – that is that the Agreement never expired but rather continued "seamlessly" beyond the last day of 2011 – it seems to represent an inadvertent admission more than anything else.

Second, the suggestion that the Agreement's duration provision provides for a certain expiration date is completely contradicted by the language of that provision. The plain meaning of the duration provision provides that the term of the Agreement is to continue indefinitely until it is terminated by either party.[2] For that reason, I reject any assertion by either party that the Agreement automatically expired, pursuant to its own terms, on December 31, 2011.

Having rejected the notion that the last sentence of the first paragraph of the Union's June 30, 2011 letter is merely an observation of the self-enacting status of the Agreement, the question remains as to what can be made of the Union's statement that "[t]he contract will expire on December 31, 2011". This decision turns on my reading of the statement as a proclamation by the Union, reflecting its intent to have the Agreement terminate on December 31, 2011. I conclude that the Union was exercising a privilege that either party had the option to exercise, pursuant to the terms of the Agreement, to cause the Agreement's termination, and it did so by simply identifying the date on which the Agreement would expire. When the Agreement terminated, that event triggered the application of Act 10, pursuant to Section 9332.

The Union has asserted that the Agreement could not have been terminated, because there was no "Notice of Termination" provided. The capitalization of this phrase in the Union's arguments implies that some special form needed to be used, but the Agreement does not set forth that specific requirement. What the Agreement requires is written notice from

[2] Obviously an indefinite term would run up against contract duration restrictions provided for in the law at some point, but that is not an issue for concern here.

either party "expressly stating its intentions to terminate [the] Agreement". Admittedly, the sentence of the above-quoted paragraph that identifies December 31, 2011, as the Agreement's expiration date does not use the word "notice", but it is the second in a two sentence paragraph that begins with the following words: "Notice is hereby given". The paragraph then goes on to request bargaining and to identify an end date for the Agreement. Read as a whole, the paragraph was sufficient to constitute express notice not only of the Union's desire to begin bargaining, but also of the Union's intention to have the Agreement end.

In the pre-Act-10 world, providing notice of termination would have had relatively minor consequences, because the parties would have had the opportunity to negotiate a successor agreement under the same statutory duty to bargain, and City would have been required to maintain the status quo during any hiatus. In the post-Act-10 world, however, such a notice invoked Section 9332, causing Act 10 to begin to apply on the day on which the Agreement was terminated, and making it truly impossible for the Union to put humpty-dumpty back together again.

Fees and Costs

The City has requested that the Union be ordered to reimburse the City for the costs, disbursements, and attorney fees expended in defending this action. It is well-established that such fees are granted only in exceptional cases. Clark County, Dec. No. 30361-B (WERC, 11/03); Wisconsin Dells School District, Dec. No. 25997-C (WERC, 8/90). Only where a party's position is found to have been frivolous or taken in bad faith is such a remedy appropriate. City of Whitewater, Dec. No. 28972-B (WERC, 4/98); Hayward Community School District, Dec. No. 24259-B (WERC, 3/88). The circumstances surrounding the events in this case, stemming from the introduction and application for the first time ever of the significant changes introduced by Act 10, were exceptionally novel. Considering that fact as well as the arguments introduced by the parties, it cannot be said that the Union's position was either frivolous or taken in bad faith. That being the case, I have not granted the City's request for reimbursement of costs, disbursements, and fees.

Dated at Madison, Wisconsin, this 19th day of November, 2012.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Danielle L. Carne /s/
Danielle L. Carne, Examiner

DLC/gjc
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