

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

BROWN COUNTY SHERIFF'S DEPARTMENT
NON-SUPERVISORY LABOR ASSOCIATION, Complainant

vs.

BROWN COUNTY, Respondent.

Case ID: 115.0019
Case Type: COMP_MP

DECISION NO. 39749-A

Appearances:

Jonathan Cermele, Cermele Law S.C., 6310 W. Bluemound Road, Suite 200, Milwaukee Wisconsin appearing on behalf of the Brown County Sheriff's Department Non-Supervisory Labor Association.

James Macy, von Briesen & Roper, S.C., 55 Jewelers Park Drive, Suite 400, Neenah, Wisconsin appearing on behalf of Brown County.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On September 26, 2022, the Brown County Sheriff's Department Non-Supervisory Labor Association, herein the Union, emailed a complaint to the Wisconsin Employment Relations Commission alleging that Brown County had committed prohibited practices within the meaning of the Municipal Employment Relations Act. On October 19, 2022, the Commission appointed Peter G. Davis to serve as hearing examiner in the matter. On October 26, 2022, the Union filed an amended complaint. The County subsequently filed answers to both the original and the amended complaint.

A hearing before Examiner Davis was held on December 1, 2022, in Green Bay, Wisconsin. The parties thereafter filed written argument and supplemental argument at the request of the Examiner-the last of which was received April 26, 2023.

Having reviewed the record and being fully advised in the premises, the Examiner makes and issues the following:

FINDINGS OF FACT

1. Brown County, herein the County, is a municipal employer that provides law enforcement services through the Brown County Sheriff.

2. The Brown County Sheriff's Department Non-Supervisory Labor Association, herein the Union, is the collective bargaining representative of certain public safety employees of Brown County within the Sheriff's Department.

3. The most recent collective bargaining agreement between the County and the Union expired at midnight on December 31, 2021. Pertinent portions of Article 45 of that agreement stated:

Any difference of opinion or misunderstanding which may arise between the County and the bargaining unit shall be handled in the following manner:

1. The aggrieved employee shall present the grievance orally to his captain either alone or accompanied by a bargaining unit representative.
2. If the grievance is not settled at Step 1, it shall be reduced to writing and presented to the division head or their designee.
3. If the grievance is not settled at Step 2, the grievance shall be presented in writing to the Sheriff. . . . If the grievance is not settled to the satisfaction of all parties . . . , either party may proceed to Step 4.
4. The grievance shall be presented in writing to the Human Resources Director.

All other grievances relating to wages, hours and working conditions or any other matter under the jurisdiction of the Sheriff shall be directed to the Sheriff and Human Resources Director.

4. From 2002 until the expiration of the 2020-2021 bargaining agreement, all grievances filed by employees represented by the Union were processed thru the Article 45 four step process. After the expiration of the 2020-2021 agreement, the County began asserting that certain grievances must initially be "directed to the Sheriff and Human Resources Director."

5. Article 45 of the 2020-2021 contract also contained the following provision as to what would happen if a grievance remained unresolved and a party wished to proceed to grievance arbitration:

The parties shall request that the Wisconsin Employment Relations Commission provide the names of five (5) arbitrators.

6. The contractual language requesting a specific number of arbitrators from the Wisconsin Employment Relations Commission has always been understood and utilized by the parties as a request for a specific number of arbitrators employed by the Commission. When the Commission could provide a list of the contractually specified number of arbitrators, the parties have always utilized Commission employed arbitrators if there was a need to arbitrate a grievance.

7. At all times relevant to the matters currently in dispute, the Commission did not employ five persons who could serve as a grievance arbitrator. Because the Commission does not currently employ five persons who could serve as a grievance arbitrator, the County has been unwilling to proceed to arbitration by anyone employed by the Commission.

8. As part of email exchanges between representatives of the County and the Union regarding bargaining a successor to the parties 2020-2021 agreement, the County advised the Union in April 2022 that there was a need to bargain new contractual language regarding grievance arbitration and suggested that a panel of five ad hoc arbitrators be utilized.

9. Beginning in May 2022, as part of the parties' effort to bargain a successor agreement, the Union provided a series of written offers to the County that included a proposal as to a new grievance arbitration process. The County counter-offers did not include a proposal as to a new grievance arbitration process until after the Union filed the September 2022 prohibited practice complaint alleging in part that the County had illegally refused to bargain over that topic.

10. The County offers to the Union propose the use of ad hoc arbitrators. The cost to the Union and the County of litigating a matter before an ad hoc arbitrator will always exceed the cost of litigating the same matter before a Commission employed arbitrator.

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

CONCLUSIONS OF LAW

1. By insisting that certain grievances be "directed to the Sheriff and Human Resources Director", Brown County unilaterally modified the grievance procedure status quo which the County was obligated to maintain during a contract hiatus and thereby committed prohibited practices within the meaning of Wis. Stat. §§ 111.70(3)(a)4. and 1.

2. By refusing to utilize arbitrators employed by the Wisconsin Employment Relations Commission unless it received a panel of five Commission-employed arbitrators, Brown County did not unilaterally modify the status quo the County was obligated to maintain during a contract hiatus and thereby did not commit a prohibited practice within the meaning of Wis. Stat. §§ 111.70(3)(a)4. or 1.

3. By failing to make a formal written grievance arbitration proposal until after September 2022, Brown County did not violate its duty to bargain in good faith and thus did not commit a prohibited practice within the meaning of Wis. Stat. §§ 111.70(3)(a)4. or 1.

4. By proposing that the successor to the parties' 2020-2021 contract contain language utilizing ad hoc arbitrators, Brown County did not illegally interfere with or coerce the right of the Brown County Sheriff's Department Non-Supervisory Labor Association employees to enforce the terms of that successor contract and thus did not commit a prohibited practice within the meaning of Wis. Stat. § 111.70(3)(a)1.

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

ORDER

1. The complaint allegations rejected in Conclusions of Law 2-4 are dismissed.
2. Brown County, its officers and agents, shall immediately take the following action that is consistent with and advances the purposes of the Municipal Employment Relations Act.
 - A. Cease and desist from refusing to utilize the four step grievance procedure set forth in Finding of Fact 3 for all grievances unless and until the four step grievance procedure is modified in the successor to the 2020-2021 agreement in a manner consistent with the Brown County's position in this litigation.
 - B. Distribute the Notice attached hereto as Appendix A to all employees represented for the purposes of collective bargain by the Brown County Sheriff's Department Non-Supervisory Labor Association.

Issued at the City of Madison, Wisconsin, this 8th day of June 2023.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Peter G. Davis, Examiner

APPENDIX A

By order of the Wisconsin Employment Relations Commission, notice is hereby given to all employees of Brown County represented for the purposes of collective bargaining by the Brown County Sheriff's Department Non-Supervisory Labor Association that the County will cease and desist from violating its duty to bargain with the Association by refusing to use the four step grievance procedure in the expired 2020-2021 bargaining agreement for all grievances.

Dated this _____ day of June, 2023

Brown County Executive

**MEMORANDUM ACCOMPANYING FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER**

The Union alleges that the County committed four separate prohibited practices-all of which occurred during the hiatus following expiration of the 2021-2022 contract.¹ Three of the alleged prohibited practices assert the County violated its duty to bargain in good faith. Of those three, two relate to alleged modification of what the Union views as binding past practices that are part of the status quo the County was obligated to maintain during the contract hiatus.

During a contract hiatus, the County is generally obligated to maintain the status quo as to all mandatory subjects of bargaining. *See School District of Wisconsin Rapids*, Dec. No. 19084-C (WERC, 3/85). Failure to maintain the status quo in this regard constitutes a violation of the duty to bargain and thus is a prohibited practice within the meaning of Wis. Stat. § 111.70(3)(a)4. and derivatively Wis. Stat. § 111.70(3)(a)1. *See Green County*, Dec. No. 20308-B (WERC, 11/84).

The status quo is defined by consideration of the language of the expired contract, any past practice and any relevant bargaining history. *See City of Brookfield*, Dec. No. 19822-C (WERC, 11/84).

The Union alleges that the County violated Wis. Stat. § 111.70(3)(a)4. and 1. by: (1) refusing to continue to use grievance arbitrators employed by the Commission and (2) modifying the parties grievance procedure.

The Alleged Status Quo Violation Regarding Use of Commission Employed Arbitrators

The Union focuses on the general fact that the parties' contracts have always called for use of Commission employed arbitrators. However, the language of the expired agreements has also always specified selection from a list of five such arbitrators-a condition that cannot currently be honored or implemented. Weighing the general practice in the context of the specific contractual language, it is concluded that the specific language prevails. Thus, the status quo is use of a Commission employed arbitrator from a panel of five names. Because the Commission cannot provide a panel of five Commission employed arbitrators, it is further concluded that the County did not violate the status quo by refusing to proceed to arbitration with a Commission employed arbitrator as to any grievance filed during the term of the 2021-2022 agreement.²

The Alleged Status Quo Violation Regarding The Four Step Grievance Procedure

¹ Thus, to the extent the Union asserts that any of the alleged prohibited practices also the violate the Wis. Stats. § 111.70(3)(a) 5. prohibition against violating a collective bargaining agreement, that assertion is misplaced and rejected.

² Because the obligation to arbitrate grievances does not typically survive the expiration of a contract except as to grievances that arose during the term of the contract, the scope of an alleged breach of the status quo is limited to grievances that arose during the term of the contract. *See Greenfield Schools*, Dec. No. 14026-B (WERC, 11/77); *Racine Unified School District*, Dec. No. 24272-B (WERC, 3/88)

As to the alleged modification of the status quo related to County failure to honor the four step grievance procedure, it is undisputed that a grievance procedure is part of the status quo that must be maintained during a contract hiatus. *Greenfield Schools*, Dec. No. 14026-B (WERC, 11/77). As reflected in the language of the expired agreement set forth in Finding of Fact 3, it also seems it is beyond dispute that there is ambiguity as how the contract language regarding “All other . . . “ interacts with the “Any . . .” language that precedes the four step portion of the grievance procedure. Given this ambiguity, evidence of past practice becomes quite relevant when defining the status quo. The Union persuasively argues that there is a long standing consistent practice of using the four step grievance process for all grievances no matter what the subject.³ In the context of ambiguous contract language, that practice provides a determinative definition of the status quo which must be maintained during the hiatus. By refusing to follow the four-step process for all grievances during the contract hiatus, the County breached its obligation to maintain the grievance procedure status quo and thus committed a prohibited practice within the meaning of Wis. Stat. §§ 111.70(3)(a) 4. and 1.

The Alleged Refusal to Bargain Over Arbitration Process

As reflected in Finding of Fact 9, the County failed to make a formal substantive proposal as to the grievance arbitration process until after the Union threatened to and ultimately did file the instant complaint alleging illegal conduct for the failure to do so. While this failure was understandably frustrating to the Union, it is noteworthy, as reflected in Finding of Fact 8, that the County had earlier acknowledged the need to bargain new grievance arbitration language and informally floated the proposed use of ad hoc arbitrators. Thus, it was apparent that a formal County proposal would ultimately be forthcoming. In that factual context, I conclude that the delay in making a proposal does not rise to the level of bad faith bargaining.

Alleged Interference by Proposing Use of Ad Hoc Arbitrators

The Union accurately alleges that proceeding before an ad hoc arbitrator is more expensive than proceeding before an arbitrator employed by the Wisconsin Employment Relations Commission. In the context of its limited financial resources, the Union then credibly contends that the County proposed switch to use of ad hoc arbitrators would mean that the Union will be unable to litigate certain matters. The Union contends that the proposed switch to ad hoc arbitrators unlawfully interferes with the Union represented employees right to seek redress of alleged contractual violations by the County.

At hearing, the County correctly noted that use of ad hoc arbitrators is commonplace in both public and private sector collective bargaining relationships. Acceptance of the Union argument in this matter would be tantamount to a declaration that it is a prohibited subject of bargaining for an employer to propose use of ad hoc arbitrators and, in turn, that the County is

³ As to the testimony of Bilgo and Poteat cited by the County in an attempt to undercut the Union’s claim of a consistent practice, the Union reply brief at pages 6-7 successfully counters the County’s argument.

obligated to continue to utilize Commission employed arbitrators. If accepted, the Union argument would also extend to a wide range of common contractual proposals that restrict or limit access to grievance arbitration substantively or procedurally. In the final analysis, the Union's argument is certainly relevant to the merits of the County proposal but does not establish a violation of law.

Summary

As reflected in the foregoing, three of the four complaint allegations have been found to be without merit and have been dismissed. As to the fourth allegation found to be meritorious, an appropriate remedy has been ordered.⁴

Issued at the City of Madison, Wisconsin, this 8th day of June 2023.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Peter G. Davis, Examiner

⁴ The Union requested attorney fees as part of the remedy. While there is Commission precedent for award of fees where an extraordinary remedy is appropriate, I am satisfied that there is no such need here. *See generally City of Eau Claire*, Dec. No 29346-D (WERC, 8/06). The County requested its fees and costs for defending the complaint. As is apparent from the text of this decision, the Union's positions in this litigation are far from "frivolous" and thus this County request is denied.