

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS BOARD

Case III
No. 10076 FF-65
Decision No. 7106

FINDINGS OF FACT, CONCLUSIONS OF LAW,
CERTIFICATION OF RESULTS OF INVESTIGATION
AND ORDER APPOINTING FACT FINDER

2. That the City of Wauwatosa, hereinafter referred to as the Municipal Employer, is a city located in the State of Wisconsin and has its offices at the City Hall, Wauwatosa, Wisconsin.

3. That at all times material herein the Municipal Employer has recognized the Petitioner as the exclusive representative of the non-supervisory members of its Police Department, having the power to make arrests; that in said relationship the Petitioner, on July 21, 1964, by letter to the Municipal Employer, requested changes and improvements in the wages, hours and conditions of employment of said non-supervisory members of its Police Department; that thereafter representatives of the Petitioner and the Finance Committee of the Municipal Employer's City Council met on various occasions in negotiations with respect to the matters contained in the Petitioner's request; and that at least as of January 20, 1965, the date upon which the Petitioner filed the instant petition with the Wisconsin Employment Relations Board, and continuing at all times thereafter material herein, the parties remained deadlocked, after a reasonable period of negotiation, with respect to Petitioner's request for such changes and improvements in the wages, hours and conditions of employment.

4. That on December 5, 1962, the Municipal Employer adopted an ordinance known as Section 17.34 of the Code of the City of Wauwatosa, establishing local fact finding procedures providing for the initiation of fact finding in cases where, after a reasonable period of negotiations, the parties are deadlocked, or where one of the parties fails or refuses to meet and negotiate in good faith at reasonable times in a bona fide effort to arrive at a settlement of their dispute; that said ordinance establishes time limitations for the filing of requests for changes in wages, hours and working conditions of municipal employees in matters subject to the initial jurisdiction of the Common Council, as well as time limitations for the filing of requests for changes, hours and working conditions of municipal employees in matters not subject in the first instance to the jurisdiction of the Common Council but to the municipal body having initial jurisdiction, and also time limitations for the filing with the Common Council of written evidence as to the disposition of the request by said municipal body; that said ordinance further establishes a local fact finding panel, consisting of an appointee of the employee organization involved, an appointee of the Municipal Employer, and a third and neutral member to act as Chairman, who is to be mutually selected by the two aforesaid appointees or, failing an

agreement on same, to be appointed at the request of either party, by either the American Arbitration Association or the Wisconsin Employment Relations Board; that said ordinance also provides that the Chairman shall make an investigation, as he deems necessary, to determine whether the conditions precedent to fact finding exists, to make his report thereon to the remaining members of the fact finding panel at a meeting of the full panel, at which time the panel shall determine whether the conditions precedent to fact finding have been met; and said ordinance further provides that, should the panel determine that the conditions for fact finding have been met, the panel shall meet and take evidence with regard to matters in dispute and issue its findings of fact and recommendations for the solution of the dispute.

5. That said ordinance further provides that members of the fact finding panel shall be compensated in the amount of \$50.00 per day, in addition to reasonable and necessary expenses.

Upon the basis of the above and foregoing Findings of Fact, the Board makes the following

CONCLUSIONS OF LAW

1. That Section 17.34 of the Code of the City of Wauwatosa, pertaining to fact finding proceedings in municipal employment relations, since (a) it establishes time limitations as conditions precedent to the initiation of fact finding, and (b) since it would deprive the Wisconsin Employment Relations Board of the latter's jurisdiction to determine whether the conditions precedent to fact finding exist, is not in substantial compliance with Section 111.70 of the Wisconsin Statutes.

2. That the Wisconsin Employment Relations Board has sole jurisdiction to entertain the filing of petitions or stipulations to initiate fact finding proceedings to determine whether the conditions precedent to fact finding exist and to determine whether fact finding should be initiated.

3. That the collective bargaining unit appropriate for the purposes of the instant fact finding proceeding consists of all non-supervisory members of the Police Department of the City of Wauwatosa having the power to make arrests, excluding the Chief of Police, Inspector of Police, Police Captain, Police Lieutenant and Detective Lieutenant.

Upon the basis of the above and foregoing Findings of Fact and Conclusions of Law, the Board makes and issues the

following

CERTIFICATION AND ORDER

IT IS HEREBY CERTIFIED that the conditions precedent to the initiation of fact finding as set forth in Section 111.70 (4) of the Wisconsin Statutes in respect to the negotiations between the Wauwatosa Professional Policemen's Association and City of Wauwatosa have been met.

NOW, THEREFORE, the Wisconsin Employment Relations Board does hereby appoint Mr. Thomas Whelan of Milwaukee, Wisconsin as the fact finder, to proceed forthwith in the matter pursuant to Section 111.70 (4)(g) of the Wisconsin Statutes.

Given under our hands and seal at the City of Madison, Wisconsin, this 13th day of April, 1965.

WISCONSIN EMPLOYMENT RELATIONS BOARD

By Morris Slavney /s/
Morris Slavney, Chairman

SEAL

Arvid Anderson /s/
Arvid Anderson, Commissioner

Zel S. Rice II /s/
Zel S. Rice II, Commissioner

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS BOARD

In the Matter of the Petition of

WAUWATOSA PROFESSIONAL POLICEMEN'S
ASSOCIATION

Involving Employees of

CITY OF WAUWATOSA, Employed in
its POLICE DEPARTMENT

Case III '
No. 10076 FF-65
Decision No. 7106

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW,
CERTIFICATION OF RESULTS OF INVESTIGATION AND
ORDER APPOINTING FACT FINDER

There are three issues involved in this matter. They are (1) May a local fact finding panel, established by a municipal ordinance, determine whether the conditions precedent to fact finding exist and whether fact finding should be initiated? (2) Is the fact finding ordinance adopted by the City of Wauwatosa in substantial compliance with Section 111.70 of the Wisconsin Statutes? and (3) What employee classifications are to be included in the appropriate collective bargaining unit for the purposes of fact finding.

In December, 1962, the City of Wauwatosa adopted an ordinance establishing local fact finding procedures. The provisions of said ordinance, material to the resolution of the issues herein, are as follows:

"(4) (a) Fact finding may be initiated under the following circumstances and shall be requested in accordance with the provisions herein contained:

(i) If after a reasonable period of negotiation the parties are deadlocked, either party or the parties jointly may initiate fact finding;

(ii) Where the City of Wauwatosa or any union fails or refuses to meet and negotiate in good faith at reasonable times in a bona fide effort to arrive at a settlement.

(b) For purposes of this section, requests for changes or improvements in wages, hours or conditions of employment requiring appropriation of funds shall not be subject to fact finding, notwithstanding paragraph (a) above, if such requests have not been submitted in writing to the Common Council on or before July 1st.

In those cases where matters of wages, hours or conditions of employment are not subject to

the jurisdiction of the Common Council in the first instance, but where the Common Council must act to establish a tax levy which levy is to raise funds for purposes including the above, requests for changes or improvements in such matters shall not be subject to fact finding, notwithstanding paragraph (a) above, if such requests have not been submitted in writing to the body having jurisdiction over such matters on or before July 1st and, further, written evidence of the action taken by such body relative to such requests is not submitted to the Common Council at least one month prior to the establishment of a tax levy by said Council.

(c) A petition for fact finding shall be in writing, shall designate the matters on which the fact finding is requested, shall designate the petitioners appointee to a fact finding panel and shall be filed with the City Clerk.

(d) The party to whom such petition is addressed shall within fourteen (14) days after receipt thereof serve upon the petitioner written certification of its appointee to the fact finding panel.

(e) The two appointees selected by the parties to the dispute shall select a competent and disinterested third member of the fact finding panel and, failing for three (3) days to agree upon such third member, either party may apply to the American Arbitration Association or the Wisconsin Employment Relations Board, and such board or association shall then make the appointment of the third member.

(5) (a) The third and disinterested member of the panel shall be the chairman and shall administer oaths. It shall be the duty of the chairman prior to the first meeting of the panel to make an investigation in such manner as he deems necessary to determine whether either of the circumstances set forth in subsection (4) (a) above exist and to report thereon to the panel at its first meeting. Either party, at its own expense, may file a written brief with the chairman relative to the question of the existence of such circumstances. Such briefs shall be filed within ten (10) days of the date of appointment of the chairman, and no report shall be made as provided in paragraph (b) below until such ten (10) days has expired or unless both parties waive the right to file briefs. If the chairman so determines, he may order oral arguments on the matter before him. He shall be entitled to compensation for his services during the period of investigation relative to the existence of the above circumstances as provided in subsection 12 of this ordinance.

(b) Upon conclusion of his investigation, as set forth in paragraph (a) of this section, the chairman shall call a meeting of and report to the entire fact finding panel. The panel shall then determine whether or not either of the circumstances set forth in subsection (4) (a) above exist and shall

serve written notice of its findings and determination and the facts or basis thereof on the parties to the dispute.

If the determination of the panel is that no grounds for formal fact finding exist, it shall dismiss the petition and adjourn. If the panel determines that such grounds do exist, it shall proceed to hear testimony and make further findings and recommendations as hereinafter provided.

(13) Members of the fact finding panel shall receive compensation of \$50.00 per day plus reasonable and necessary expenses, provided that any member or party paid by the municipality shall receive no additional compensation for his services as fact finder. All costs of fact finding proceedings shall be divided and borne equally by the parties."

As can be seen from the ordinance, the chairman, a neutral member of the fact finding panel, conducts the investigation to determine whether the conditions precedent to fact finding exist, and that upon conclusion of his investigation, meets with the remaining members of the panel to consider the matter and thereupon the full panel makes determination as to whether the conditions for the initiation of fact finding exists. If the determination is in the affirmative, the panel then proceeds to the hearing of the dispute, and thereafter makes its recommendations. Further, the compensation for the members of the fact finding panel is limited to \$50.00 per day.

Shortly following the enactment of Section 111.70, the Board requested an opinion from the Attorney General of the State of Wisconsin on various questions concerning the procedure preliminary to fact finding. In an opinion dated May 18, 1962, the Attorney General stated as follows:

"There are a number of considerations pertinent to the question whether the existence of a local ordinance establishing "fact-finding procedures" prevents the Wisconsin Employment Relations Board from exercising the steps preliminary to fact-finding.

1. Sec. 111.70 (4) (m) designates no agency other than the board to determine whether the local procedures are "substantially in compliance with" the state law. The agency charged with enforcement of a law must, in the first instance, determine whether the conditions invoking application of the law or exceptions to it, exist.

2. Whether the local "fact-finding procedures" may include the steps preliminary to the fact-finding is questionable. Unless the local procedures established by the employer under sec. 111.70 (4) (m) are agreed upon between employer and employees, the

1/ 51 AG90, 5/18/62

agency charged with determining whether fact-finding should take place would be one of the parties to the dispute, or an agency designated by it.

It seems unlikely that the legislature intended that one party to the dispute, or an agency representing it, should determine whether the conditions precedent to fact-finding exist as enumerated in sec. 111.70 (4) (e).

One of the reasons for designation of the board to determine whether such conditions exist is to insure that the decision shall not rest with either of the parties to the dispute.

Leaving open the question whether a local plan might, in any circumstance, substitute a local agency for the Wisconsin Employment Relations Board to determine whether the conditions to initiate fact-finding have been met, it seems clear the procedures would not be "substantially" in compliance with the state plan if they left any determination to one of the parties to the dispute, particularly when one of the questions is whether that party failed to bargain in good faith.

3. Designation of the board to make the preliminary investigation also evidences a legislative intent that the determination whether fact-finding should ensue should be based on a uniformly applied state-wide standard rather than upon varying local practices. The statutory standards enumerated in sec. 111.70 (4) (e) are of a specialized nature dealt with frequently by the board, but more rarely by local agencies.

4. Sec. 111.70 (4) (m) provides that the board shall not "initiate" fact finding under certain circumstances. What constitutes the initiation of fact-finding is to be determined from the legislative definition.

Sec. 111.70 (4) (e) does not define when the fact-finding is initiated, but only the conditions upon which it may be initiated.

Sec. 111.70 (4) (f), however, provides an express indication of when the fact-finding is deemed initiated. It follows a certification by the board requiring "that the fact finding be initiated". Under that provision, fact-finding is "initiated" only after the board has completed its preliminary investigations. If any community has made adequate provision for fact-finding, the board should go no further than to certify the results of its investigation to the proper party, and the appointment of the fact finder will then be governed by the local plan.

5. The board's authority in any case arises only upon the filing of a petition. (Sec. 111.70 (4) (f)) In a case where no petition is filed, the board may not act, so that if local procedures are satisfactory to both sides of the dispute, presumably no petition will be filed, and none of the questions above discussed will arise."

We have, therefore, herein determined that the Board has exclusive jurisdiction under Section 111.70 to determine whether the conditions precedent to the initiation of fact finding exist.

We have also concluded that the ordinance is otherwise also not in substantial compliance with Section 111.70. The ordinance establishes conditions precedent to the initiation of fact finding, which are not required under Section 111.70. These conditions set forth a time limitation for the filing of the request for changes in wages, hours and working conditions which are subject to the initial jurisdiction of the Common Council, and it provides limitations with respect to requests concerning changes in wages, hours and working conditions made to the municipal body having the initial jurisdiction to deal with said matters, as well as a time limitation on submitting evidence to the Common Council with regard to the action of the municipal body having original jurisdiction of the matter. The bargaining requests were submitted in writing to the City on July 20, 1964, four months prior to the time when municipal budgets are normally adopted. The parties stipulated that they did in fact conduct negotiations on several occasions following July 20, but remained deadlocked on the matter of wages. They negotiated for a reasonable period of time. The time limitations are procedural requirements in the ordinance herein which establish conditions neither contemplated nor required in Section 111.70, and therefore, the ordinance fails to substantially comply with the Statute.

We recognize the desirability of early written submission of bargaining requests in order to afford the parties a reasonable opportunity to negotiate prior to the adoption of the municipal budget. While there are no specific time limitations set forth in Section 111.70 for the submission of bargaining requests affecting a municipal budget, the Statute does contemplate that such requests be submitted at such time as will permit the parties to engage in a reasonable period of negotiations prior to the adoption of the budget by the Municipal Employer involved. If bargaining requests which require budgetary action are not submitted at a date early enough to afford an opportunity for a reasonable period of negotiations, the Board may not cause fact finding to be initiated. It is our view that questions as to the necessity for changes in compensation to municipal employees are matters which a city council has the authority to consider at any time, subject to properly established requirements included in local ordinances, and also as required by

state statutes. We do not believe that such ordinances or statutes intend to prohibit and limit the ability of a municipal employer to act if necessity dictates such action.^{2/} The question arises as to whether the Board, upon determining that the conditions precedent to fact finding exist, should refer the matter to the local fact finding panel for hearing and recommendations with regard to the deadlock. We conclude that this question must be answered in the negative. While the provisions of the ordinance governing function and procedures of the local fact finding panel with respect to issuing findings of fact and recommendations for the resolution of the dispute may be in substantial compliance in those regards with Section 111.70, said provisions cannot be severed from the provisions of the ordinance which are not in substantial compliance. We wish to note that if the local ordinance would otherwise be in substantial compliance with Section 111.70, and if the parties were to request the Board to appoint the neutral member and chairman of the local fact finding panel, we would have refused to do so since it establishes the compensation of the fact finders at \$50 per day, while the Board's Rules and Regulations^{3/} sets forth that fact finders appointed by the Board are entitled to a per diem compensation for days spent in hearing not to exceed \$150 per day. We will not designate fact finders whose compensation will be limited to \$50 per day.

At the hearing, the Petitioner contended that all employees of the City of Wauwatosa Police Department, with the power to make arrests, except the Chief of Police, constituted the appropriate bargaining unit for fact finding on the basis that only the Chief of Police has the power to discipline or suspend employees. The City argued that the Inspector of Police, Police Captain, Police Lieutenants, Detective Lieutenant, and Detective Sergeant were supervisory employees and should not be included in the bargaining unit. The testimony of the Chief of Police indicated that the position of Inspector of Police, which is now unoccupied, is, in effect, a deputy chief or assistant chief, who is in charge of the department when the chief is absent; and who acts as an executive officer when the chief is present, with the duty of supervising other supervisory officers. The Police Captain, while the position of Inspector of Police is unoccupied, performs the duties of Inspector of Police. He also, as Police Captain, directly supervises the Police Lieutenants and the Detective Lieutenant, and has the

2/ City of Racine, Dec. No. 6242, 2/63.

3/ ERB 14.12

authority to effectively recommend discipline or discharge of subordinates to the Chief of Police and the Police and Fire Commission. There are four Police Lieutenants, three of whom are shift commanders and supervise twelve to fifteen policemen under them. The other Police Lieutenant supervises five policemen plus 52 crossing guards. The Police Lieutenants who seldom make arrests have the authority to recommend discipline or discharge of subordinates but cannot take such steps themselves. Their primary duties involve assigning policemen to duties and supervising them in the performance thereof. The Detective Lieutenant supervises eleven officers and has the authority to recommend discipline and discharge. His primary function is to assign and supervise the detectives in the performance of their duties and he spends less than one-half of his time in police investigation and very seldom makes an arrest. The Detective Sergeant has the duty of supervising the detectives, however, he spends more than one-half of his time investigating police matters. He cannot recommend discipline unless the Detective Lieutenant is absent from the City. Those employees below Detective Sergeant receive compensatory time off for overtime duties by ordinance but the Detective Sergeant and higher ranks receive compensatory time off if their duties permit same.

The Board has established certain criteria which it will consider in determining whether an employee is a supervisor. The Board considers the authority to effectively recommend hiring, promotion, transfer, discipline or discharge of the employees, the authority to direct and assign the work force, the number of employees supervised, the level of pay, whether the supervisor is primarily supervising an activity or is primarily supervising employees, whether the supervisor is a working supervisor and the amount of independent judgment and discretion exercised.^{4/} The absence or presence of any one factor will not necessarily make the determination.

Considering the above factors, we have reviewed the evidence furnished by the Petitioner and the Municipal Employer and are of the opinion that the Chief of Police, Inspector of Police, Police Captain, Police Lieutenant and Detective Lieutenant should not be included in the bargaining unit for purposes of fact finding.^{5/} The personnel filling those positions supervise employees and are responsible for the activities of those whom they supervise,

4/ Association of Graduate and Registered Engineers of Milwaukee, Dec. No. 6960, 12/28/64

5/ City of Milwaukee, Dec. No. 7069, 3/65

giving them their assignments and directing the performance of their duties. The Detective Sergeant is included in the unit because he is a working supervisor and spends over one-half of his time performing the same type of work as those whom he supervises.

Dated at Madison, Wisconsin this 13th day of April, 1965.

WISCONSIN EMPLOYMENT RELATIONS BOARD

By Morris Slavney /s/
Morris Slavney, Chairman

Arvid Anderson /s/
Arvid Anderson, Commissioner

Zel S. Rice II /s/
Zel S. Rice II, Commissioner