



STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of
MILWAUKEE DISTRICT COUNCIL 48, AFSCME,
AFL-CIO, AND ITS APPROPRIATE AFFILIATED
LOCAL UNION 645, AFSCME, AFL-CIO,
To Initiate Fact Finding Between
Said Petitioner and
COUNTY OF MILWAUKEE

Case XXIII
No. 11601 FF-138
Decision No. 8137-B

ORDER ON ISSUES RELATING TO FACT FINDING

The Wisconsin Employment Relations Commission heretofore, and on August 7, 1967, having issued an order initiating fact finding and appointing fact finder in the above entitled matter; and after the commencement of the proceeding before the fact finder, issues having arisen with respect to the status and scope thereof; and the above named Labor Organization, with the acquiescence of the above named Municipal Employer and the fact finder, having thereafter requested the Commission to conduct further hearing in the matter and to take evidence and argument with respect to said issues and to make a determination thereof; and hearing thereon having been conducted at Milwaukee, Wisconsin, on November 6, 1967, before the full Commission, where the parties were given the opportunity to present evidence and argument with respect to the matters in issue; and the Commission, having considered the evidence and arguments of counsel, and being fully advised in the premises, makes and files the following

ORDER

IT IS ORDERED that the fact finder has the authority to consider all collateral matters which are pertinent to the dispute with respect to the reallocation of the Professional Probation Officers employed in the Adult Probation Department in Milwaukee County and to make recommendations on said collateral matters if, in his opinion, such recommendations will effectuate the resolution of the dispute before him.

IT IS FURTHER ORDERED that, since the wages of the newly created Sub-professional Probation Officer II position is a proper subject for collective bargaining within the meaning of Section 111.70, Wisconsin

Statutes, and inasmuch as the County of Milwaukee has refused to engage in negotiations thereon with the Milwaukee District Council 48, AFSCME, AFL-CIO, and its appropriate affiliated Local Union 645, AFSCME, AFL-CIO, said issue is properly before the fact finder and is subject to his recommendations.

Given under our hands and seal at the City of Madison, Wisconsin, this 12th day of December, 1967.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Thomas Slavney
Morris Slavney, Chairman

Zel S. Rice II
Zel S. Rice II, Commissioner

William R. Wilberg
William R. Wilberg, Commissioner

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MEMORANDUM ACCOMPANYING
ORDER ON ISSUES RELATING TO FACT FINDING

STATEMENT OF FACTS

On February 3, 1967, the Municipal Employer and the Union entered into a collective bargaining agreement which provided in pertinent part that:

"After completion of the study of the Adult Probation Department, the reallocation of the positions of Adult Probation Officer and Children's Probation Officer shall be negotiated with the Union. Such reallocations shall be made effective no later than June 25, 1967."^{1/}

"The foregoing constitutes the total reallocations for the years 1967 and 1968 of positions within the bargaining unit. However, where it is necessary to aid recruitment or to maintain the efficient operation of the various departments and institutions, the county may make additional reallocations. In such cases, the county agrees to consult^{2/} with the Union prior to implementing such reallocations."

Prior to the commencement of negotiations of the current agreement, the Municipal Employer began a study of the Adult Probation Department. During the course of this study, recommendations were made by the Civil Service Commission with respect to the Department, and hearings were held on the recommendations. At the hearings the Union argued that the Civil Service Commission recommendations did not go far enough in correcting the problems of the Department and urged that a more comprehensive study be made. After further discussions with the Union, an additional study was conducted by the Budget Department, Civil Service Commission and the Management of the Adult Probation Department. This study resulted in recommendations to the County Personnel Committee,

^{1/} Part III (9)(c), Page 9.
^{2/} Part III (9), Page 9.

which were ultimately adopted by the County Board on July 18, 1967. These recommendations included, among other things, twelve new sub-professional positions in the Department and two additional supervisory positions. During the course of this study, a preliminary report was prepared on February 23, 1967, and the final report and recommendations were completed on May 25, 1967.

The parties began negotiating the reallocation of the Probation Officer positions pursuant to Part III (9)(c) of the collective bargaining agreement in May 1967, after the preliminary study had been completed. During the course of the negotiations, the Union was given copies of both the preliminary report and final recommendations resulting from the study. During the negotiations the Union also submitted to the Municipal Employer a proposal setting forth its position with respect to the needs of the Department, including proposals related to case load, organizational structure, recruitment, supervision, staffing and other conditions of employment of the Probation Officers. The Union submitted its proposal at a meeting on June 5, 1967. The Municipal Employer considered the proposal, but advised the Union at the next meeting on June 7, 1967, that it intended to implement the recommendations of its own study, and that its wage proposals would be based upon these recommendations. At this meeting the Municipal Employer made a wage proposal, and attached to the proposal was the recommended organizational structure of the Adult Probation Department and the established pay ranges for the twelve new sub-professional positions. During the negotiations the Municipal Employer bargained with the Union with respect to the wages of the Professional Probation Officers, but did not do so with respect to the wages of the proposed sub-professional positions, claiming no obligation to do so. The Union membership subsequently rejected the Probation Officer wage proposal. At the next meeting the parties agreed to mediate the dispute. The agreement to mediate was confirmed by letter of June 13, 1967, in which the Municipal Employer and the Union agreed to mediate the dispute, subject to the following pertinent condition:

"That the subject matter of such mediation be restricted to those matters bearing upon the salaries paid or to be paid to Adult Probation Officers."

During mediation the County made offers to further increase the pay range of the Probation Officers and to change the overtime regulations so that Probation Officers in the higher pay ranges would be eligible to receive overtime benefits. The mediation efforts however did not resolve the dispute. Subsequently the Municipal Employer implemented the recommended department structural reorganization, including the establishment of twelve new sub-professional probation officer positions.

The Union filed the petition for fact finding on July 20, 1967, alleging as the basis of the petition that the parties were deadlocked after a reasonable period of negotiation over wages, hours and conditions of employment of Children and Adult Court Probation Officers of the County of Milwaukee. In the findings of fact in the Order Initiating Fact Finding, the Commission found that the parties met on several occasions and entered into mediation in an attempt to negotiate and reach agreement on wages, hours, and conditions of employment of the Children and Adult Court Probation Officers of the Municipal Employer, and that the parties had reached no agreement and remained in deadlock with respect to said matter. The Commission therefore concluded that a deadlock within the meaning of Section 111.70(4)(e) of the Wisconsin Statutes existed between the parties and ordered that fact finding be initiated for the purpose of recommending a solution to the dispute. During the fact finding hearings which were held on October 24 and 25, 1967, a dispute arose between the parties concerning the scope of the fact finder's authority to make recommendations to resolve the dispute.

Although both parties agreed that the salaries of the Children and Adult Court Probation Officers are at issue and are properly subject to recommendations by the fact finder, there was no agreement with respect to the fact finder's authority to make recommendations regarding other conditions of employment of these employes. Secondly, the parties were not in agreement over the authority of the fact finder to make recommendations with respect to the wages of the newly created sub-professional classification of Probation Officer II.

POSITION OF THE PARTIES

With respect to the issue of the fact finder's authority to make recommendations regarding working conditions other than wages of the Probation Officers, the Municipal Employer asserts that the collective bargaining agreement limits the subjects of negotiation in this instance to the reallocation of Probation Officer positions. It asserts that the fact finder cannot make any recommendations with respect to collateral issues, since the collective bargaining agreement clearly delineates the area which is subject to negotiations, and therefore limits the issues which are subject to the fact finder's recommendations. Therefore, in the Municipal Employer's opinion, evidentiary matters with respect to collateral working conditions, even though that may be relevant to wages, are not subject to recommendations by the fact finder. The Municipal Employer does not object to the fact finder's consideration of relevant collateral issues, so long as he considers these issues only

for the purpose of formulating a recommendation with respect to the pay ranges for the Probation Officers. Thus, for example, the Municipal Employer agrees that the Probation Officers' case load may be relevant to the fact finder's consideration of their wages; however, it is the Municipal Employer's position that such relevancy does not permit the fact finder to make independent recommendations with respect to the case load of Probation Officers.

The Municipal Employer also asserts that many issues which the Union wants to submit to the fact finder for his recommendations are not relevant to the fact finder's consideration since they are neither related to the reallocation of the Probation Officers positions nor are they "matters bearing upon the salaries paid or to be paid to the Adult Probation Officers." Among such subjects are departmental staffing, the structure of the Department, and supervision.

The Municipal Employer contends that the collective bargaining agreement evidences the fact that the parties have agreed to all of the negotiable terms and conditions of employment of the Probation Officers for the period of the agreement, except for the reallocation of the pay range for the Probation Officers, which is subject to further negotiation. It is contended that "reallocation" as used in the agreement means a change in the wage range of the Probation Officer classification. It is the movement of the classification from one pay range to another within an established structure, and it does not involve reclassification or a change of duties of the classification. The Municipal Employer therefore argues that all of the negotiable conditions of employment in this instance have been agreed to, except one, namely, the reallocation of the Probation Officers positions, and therefore, fact finding must be limited to that issue. The Municipal Employer admits that this situation is unlike the normal situation where there is no collective bargaining agreement between the parties and where all issues are subject to the fact finder's consideration and recommendations.

The Union on the other hand contends that the fact finder cannot intelligently consider the salary of Probation Officers in the abstract without considering their case load, the structure of the Department, the problems of recruitment, training, promotions, supervision and other conditions of employment. The Union further asserts that the negotiations with respect to the reallocation of the Probation Officer positions were not limited to discussions of the salaries of these positions, but involved all the related issues mentioned herein. Because, for example, the case load and the nature of the work are relevant to

the salaries of Probation Officers, the Union contends that in order for the fact finder to make recommendations which will effectively resolve the dispute between the parties with respect to the reallocation of these positions, he should be free to make recommendations with respect to the issues which are relevant to the determination of the salary of these positions. Therefore, the Union wishes to submit to the fact finder all the issues which it considers relevant to the salaries of the Probation Officer positions, and wants the fact finder to consider each of the issues and its effect upon salaries and to make recommendations which will in his opinion resolve all of the disputes which exist over these positions.

In support of its position that all working conditions of the Probation Officers should be subject to fact finding, the Union asserts that during the negotiations, proposals were submitted by both parties concerning all of the issues which are related to the salaries of Probation Officers, and it further asserts that such discussions could not have been realistically limited to salaries. The Union points out that during the mediation session, part of the Municipal Employer's proposal consisted of an offer to change the ordinance regulating overtime so that if Probation Officers were moved up to a pay range above which overtime is normally paid, they would still receive overtime benefits. Therefore, it is argued, the Municipal Employer in its own proposal did not limit the issues during the negotiations to the reallocation of the Probation Officer positions, and accordingly the fact finder cannot be so limited.

With respect to the issue of the new Sub-professional Probation Officer II classification, the Municipal Employer's position is that the creation of the new position, including the working conditions of said position, is not subject to collective bargaining and therefore is not subject to the fact finder's consideration or recommendations. It is the Municipal Employer's position that only those issues which arise during the negotiation of a collective bargaining agreement are proper subjects for fact finding. Although the Municipal Employer admits that the incumbents in the new sub-professional positions will perform probation work of a less complex nature than the Professional Probation Officers, its position is that it has the sole responsibility for the establishment of such positions during the period that the contract is in effect. It further asserts that if it is subsequently determined or agreed upon by the parties that the position is in the bargaining unit, then the conditions of employment for the position would be subject to negotiations during the negotiations of the next collective bargaining agreement.

Although during the negotiations the parties discussed the establishment of the new positions, it is the Municipal Employer's position that the subject was never "negotiated" during the discussions, but instead the Municipal Employer merely advised the Union that it intended to establish the position. It is admitted that the new positions will affect the duties of the Adult Probation Officers, since the duties of the new positions include some of the less complex duties now performed by the Adult Probation Officers, such as filling out forms, the collection of monies, and visiting minor cases where there is no treatment or correction involved.

The Union, although it does not concede that the Municipal Employer has the unilateral right to establish new positions in the collective bargaining unit without consulting with the Union on the establishment of the positions, is not asking to negotiate the duties, qualifications, or classifications of the new position, but instead only wants to negotiate the salaries of the new sub-professional classification. It asserts that it is clear that the classification is part of the bargaining unit since the prescribed duties are essentially the same as the Professional Probation Officers, only of a less complex nature, since the creation of the position clearly affects the duties of the Professional Probation Officers, and since the position appears to be a training position preparing the incumbents for the more complex duties of the Professional Adult Probation Officer, similar to an apprenticeship program for craft employes. Therefore, the Union asserts that since the sub-professional positions are clearly in the bargaining unit, the wages of these positions are subject to negotiations; and accordingly, because the Municipal Employer has refused to negotiate said wages, an impasse exists with respect to this issue and it should be, therefore, subjected to the recommendations of the fact finder.

DISCUSSION

Section 111.70 of the Wisconsin Statutes prescribes that it is the policy of the state to encourage collective bargaining between municipal employers and their employes. In order to implement the legislative intent of this section, the statute provides procedures which are available to the parties to aid in the resolution of municipal employer-employee disputes which arise during collective bargaining. Among the procedures which are available under the statute is fact finding. This procedure is set forth in Section 111.70(4) of the statute, which provides:

"(e) Fact finding. Fact finding may be initiated in the following circumstances: 1. If after a reasonable period of negotiation the parties are deadlocked, either party or the parties jointly may initiate fact finding; 2. Where an employer or union fails or refuses to meet and negotiate in good faith at reasonable times in a bona fide effort to arrive at a settlement.

"(f) Same. Upon receipt of a petition to initiate fact finding, the board shall make an investigation and determine whether or not the condition set forth in par. (e) 1 or 2 has been met and shall certify the results of said investigation. If the certification requires that fact finding be initiated, the board shall appoint from a panel established by the board a qualified disinterested person to function as a fact finder.

"(g) Same. The person appointed as fact finder may establish dates and place of hearings which shall be where feasible in the jurisdiction of the municipality involved. He shall conduct said hearing pursuant to rules established by the board. Upon request, the board shall issue subpoenas for hearings conducted by the fact finder. The fact finder may administer oaths. Upon completion of the hearings, he shall make written findings of fact and recommendations for solution of the dispute and shall cause the same to be served on the municipal employer and the Union."

Section 111.70(4)(g) of the Statutes provides that a fact finder is required to make recommendations for the solution of disputes arising during collective bargaining. The statute does not impose any limitations on the fact finder's authority to make recommendations for the solution of the dispute; however, the Commission stated in Madison Teachers Inc.^{3/} that where any phase of the legislative responsibility of the Municipal Employer has a "direct and intimate effect upon salaries, hours and working conditions of its employes, then those matters are subject to collective bargaining within the meaning of Section 111.70 of the Wisconsin Statutes, and any refusal to negotiate and bargain on such items, or any deadlock with respect to issues on those items, after a reasonable period of negotiations, are subject to fact finding under the statute."

The rules and regulations of the Commission provide that the fact finding hearing "shall concern pertinent matters necessary for the fact finder to determine the facts in the dispute and which, in the opinion of the fact finder, assists him in reaching his recommendation for the solution of the dispute."^{4/} The rules also provide that the fact finding report shall contain "(a) a statement of findings of fact and conclusions, upon all material issues presented on the record; (b) recommendations for the solution of the dispute..."^{5/} Thus, the

^{3/} WERC Dec. No. 7768, 10/66, Circuit Court, Dane County, Case 121-135 (affirmed).

^{4/} ERB 14.10(3).

^{5/} ERB 14.11(2).

Rules provide that the fact finder may consider in the hearing all pertinent matters which are necessary to determine the facts in dispute, and which will, in the fact finder's opinion, facilitate the resolution of the dispute. In addition, the fact finder may make conclusions and recommendations with respect to all material issues presented on the record.

During the hearing the Municipal Employer agreed that where there is no collective bargaining agreement in existence and where fact finding is utilized to resolve deadlocks in the negotiations leading to a collective bargaining agreement, all working conditions are subject to the fact finder's consideration and recommendation. The Commission is also of the opinion that absent any stipulated limitation by the parties on the fact finder's authority to make recommendations, the fact finder has the discretion to make recommendations with respect to any matters which, in his opinion, have a direct and intimate effect upon salaries, hours and working conditions of the employes in the unit; and the determination of the relevancy of collateral issues to the salaries, hours and working conditions of the employes must be left to the fact finder, absent agreement by the parties on the relevancy of the particular issue in question. The primary function of fact finding is to provide a means to resolve disputes arising out of collective bargaining, and where the parties are not agreed on the scope of the issues which are subject to the fact finder's recommendations, the fact finder must have the discretion to hear and consider all issues which have been discussed during negotiations, to determine whether the issues are properly subject to negotiation, and to make recommendations with respect to those matters which in the fact finder's opinion are essential to the resolution of the dispute. Under such circumstances, only where the parties jointly agree to define or limit the issues which are before the fact finder, is the fact finder limited in his consideration of the issues.

In this instance, fact finding arose out of an impasse in negotiations which were specifically prescribed in an existing collective bargaining agreement which provided that "...the reallocation of the positions of Adult Probation Officer and Children's Probation Officer shall be negotiated with the Union after the completion of a study of the Adult Probation Department." The Municipal Employer has construed this language as limiting the subject of negotiations to the pay range or salaries of the Probation Officers, while the Union construes it more broadly to include all working conditions which are relevant to the determination of the salary of Probation Officers. Although the Municipal

Employer admits that working conditions, the nature of the work, and case load may be relevant to the fact finder's determination with respect to the salaries of Probation Officers, it asserts that these issues are not subject to independent recommendations by the fact finder, since they are not negotiable items under the collective bargaining agreement which currently is in existence. Therefore, although the Municipal Employer does not object to the fact finder's consideration of relevant collateral issues, it asserts that only the salaries of Probation Officers are subject to the recommendations of the fact finder because the agreement specifically prescribes the area of negotiations.

Although during the negotiations the Municipal Employer asserted that it would only negotiate the salaries of the Probation Officers, it is clear that the negotiations of this issue did not occur in a vacuum, and that the parties discussed several other issues which both parties admit are related to salaries. In fact, in the Memorandum of Understanding in which the parties agreed to mediate the dispute, the Municipal Employer agreed that the issues to be mediated were to be limited to "those matters bearing upon the salaries (as distinguished from salaries) paid or to be paid to Adult Probation Officers." It would appear, therefore, that both parties were cognizant of the fact that the negotiations of the reallocation of the Probation Officer positions could not be limited merely to discussions of salary, but required that the discussions at least would involve other issues which directly and indirectly affect the salary of the Probation Officers.

In the Commission's opinion, the area of negotiation prescribed in the collective bargaining agreement cannot realistically be limited to the salaries of Probation Officers to the exclusion of all other conditions of employment affecting salaries. In order to determine or agree upon the salaries of the Probation Officers during negotiations, the parties must consider the many factors which are determinative of such salaries. Similarly, it is not possible to limit the issues subject to the fact finder's consideration, absent agreement between the parties, since he must also determine which issues are relevant in order for him to recommend a salary for the job classification. The fact finder must concern himself with pertinent matters, which in his opinion will assist in making recommendations with respect to those matters affecting the salaries of Probation Officers, if in his opinion, such recommendations will effectuate the resolution of the dispute, which in this case arose during the negotiation of the reallocation of the Probation Officer positions. The fact finder may decide whether issues such as case load, organizational structure, supervision, recruit-

ment problems and other working conditions are relevant to the determination of the salaries of the Probation Officers, and he may decide whether recommendations with respect to material collateral issues will facilitate the resolution of the dispute which is presently before him. Although the Commission may decide whether a matter is properly a subject for collective bargaining, i.e., the school calendar,^{6/} it cannot make the determination as to which issues are relevant in a fact finding proceeding and, accordingly, which issues are subject to the fact finder's recommendations. It is the responsibility of the parties to the dispute to present evidence to the fact finder with respect to the relevancy and materiality of the issues, and it is the responsibility of the fact finder to weigh the evidence before him, to determine the relevancy of the issues, and to make recommendations with respect to material matters, based upon the relevant evidence, which will, in his opinion, resolve the dispute.

At the same time, the fact finder's recommendations with respect to the Probation Officers must be limited to those matters which bear upon the salaries of Probation Officers, since the negotiations which have occurred and the dispute which has arisen have grown out of an agreement by the parties to negotiate the reallocation of the Probation Officer positions and the negotiations have been limited to matters bearing upon the salaries of these positions. The Commission therefore concludes that the fact finder may consider those issues which are relevant to the reallocation of the Probation Officer positions on the basis of the evidence presented at the fact finding hearing, and he may make recommendations with respect to any matter material to the dispute if, in his opinion, such recommendations will effectuate the resolution of the dispute.

With respect to the dispute over the fact finder's authority to make recommendations regarding the wages of the newly created sub-professional classification of Probation Officer II, the record demonstrates that the new position is one which is clearly in the collective bargaining unit, in view of the similarity of the functions of the position to the functions of the Probation Officers who are in the unit. The duties of the new position are those which have been performed by the Professional Probation Officers, and the creation of the new position will clearly affect the duties of the Professional Probation Officers since the incumbents in the new positions will, in fact, be performing certain duties which were formerly performed by the Probation Officers. In view of the fact that it is clear that the Sub-Professional Probation Officer II position should be included in the

^{6/} Madison Teachers Inc., Id.

collective bargaining unit, the Commission finds that the terms and conditions of employment of this position are proper subjects for collective bargaining within the meaning of Section 111.70 of the Wisconsin Statutes.

With respect to this issue, the Commission wishes to note that Section 111.70 contemplates fact finding as a method of resolving all disputes which are subject to collective bargaining pursuant to Section 111.70, Wisconsin Statutes, and that such disputes may arise not only during the negotiation of a collective bargaining agreement but also during the period that an agreement is in effect where there has been a change in the terms and conditions of employment of the employees in the bargaining unit. The Municipal Employer cannot, absent such authority in the agreement, unilaterally establish or alter wages, hours and working conditions of employees in the bargaining unit. The Municipal Employer, by creating a new sub-professional position which is in the bargaining unit, attempts to unilaterally establish the terms and conditions of employment of said employees. Accordingly, it is the Commission's position that the conditions of employment of the employees in the new classification are subject to collective bargaining pursuant to Section 111.70 of the Wisconsin Statutes, and if, after a reasonable period of negotiation, a deadlock results with respect to the terms and conditions of employment of these employees, or if the Municipal Employer refuses to negotiate these issues, fact finding may be initiated to resolve the dispute.

The statute requires that the Commission must find, prior to issuing an Order Initiating Fact Finding, that there must be a deadlock between the parties after a "reasonable period of negotiation," or there must be a refusal to "meet and negotiate in good faith." In this instance, although the new positions were not actually in existence before negotiations broke down, the parties did discuss the new sub-professional positions, and the Municipal Employer took the position that it would not negotiate the working conditions of the newly created positions since it did not consider these to be negotiable issues. In view of the fact that the Union attempted to negotiate the wages of the Sub-professional Probation Officer classification during the negotiations of the reallocation of the Probation Officer positions, and in view of the Municipal Employer's refusal to negotiate this issue, the Commission finds that the second condition in Section 111.70(4)(e) of the Statute has been met, and accordingly finds that the wages of the newly created Sub-professional Probation Officer II position are properly before the Fact Finder and are subject to his recommendations.

It may very well be that the Fact Finder will suggest that the parties return to the bargaining table with respect to the wage issue concerning the sub-professional employes and reserve his recommendations thereon if no agreement is reached. Of course, this is for the Fact Finder to decide.

Dated at Madison, Wisconsin, this 12th day of December, 1967.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Morris Slavney
Morris Slavney, Chairman

Zel S. Rice II
Zel S. Rice II, Commissioner

William R. Wilberg
William R. Wilberg, Commissioner