

CITY OF MEDFORD, a  
Municipal Corporation,  
  
Plaintiff,

-vs-

LOCAL NO. 446, Affiliated with  
Chauffeurs, Teamsters, Ware-  
housemen & Helpers Union

and

WISCONSIN EMPLOYMENT RELATIONS  
COMMISSION,

Defendants.

MEMORANDUM OPINION

The factual background of and the issues to be resolved in this matter are fully and clearly set forth in the stipulation entered into between all parties and their counsel. Such stipulation is, by reference, incorporated into and made a part of this memorandum opinion.

The statutes with which we are here concerned are as follows:

Sec. 111.70 (1)(a). "Municipal employer" means any city..."  
(b) "Municipal employe" means any employe of a municipal employer except city...policemen..."

Sec. 111.70 (2). "Municipal employes shall have the right of self-organization, to affiliate with labor organizations of their own choosing and the right to be represented by labor organizations of their own choice in conferences and negotiations with their municipal employers or their representatives on questions of wages, hours and conditions of employment, and such employes shall have the right to refrain from any and all such activities."

Sec. 111.70 (4)(j). "In any case in which a majority of the members of a police...department shall petition the governing body for changes or improvements in the wages, hours or working conditions and designates a representative which may be one of the petitioners or otherwise, the procedures in pars. (e) to (g) shall apply."

Sec. 111.70 (4)(e). Fact finding. "Fact finding may be initiated in the following circumstances:...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) "Upon receipt of a petition to initiate fact findings, the board shall make an investigation and determine whether or not the condition set forth in par (e)...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 list established by the board a qualified disinterested person or 3-member panel when jointly requested by the parties, to function as a fact finder."

(g) "The fact finder may establish dates and places of hearings which shall be where feasible in the jurisdiction of the municipality involved, and shall conduct said hearings 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, the fact finder shall make written findings of fact and recommendations for solution of the dispute and shall cause the same to be served on the municipality and the union."

The W.E.R.C., after the filing of a petition pursuant to Sec. 111.70 (4)(e), made the required investigation. It then found that condition 2 in Sec. 111.70 (4)(f), had been met, ie, that the city had refused to negotiate in good faith, and issued its certificate requiring that fact finding be initiated.

The City has throughout all of these proceedings indicated a willingness to confer and negotiate with the members of the Medford Police Department. It has consistently refused to meet with union officials of Local 446 and confer and negotiate with them respecting the issues of wages, hours and working conditions of the Medford Police Department. Conversely, the officers of the Medford Police Department have indicated their willingness to confer and negotiate with the Medford Police and Fire Commission, a union representative of Local No. 446 to be their negotiator. They have consistently refused to meet, on their own and as their own negotiators, with the Medford Police and Fire Commission. Each side refuses to meet and negotiate except upon its own terms as outlined above.

It is pointed out, initially, that the statute, Sec. 111.70 (4)(e), authorizes fact finding where either the employer or union fails or refuses to meet and negotiate. It does not say that the refusal to negotiate must be unlawful, wrongful or in bad faith. That is just what we have here: a refusal to negotiate by both parties. If the union representative is entitled to sit at the bargaining table on behalf of the officers of the Medford Police Department, the Police and Fire Commission has refused to negotiate, and improperly so. If the union representative is not entitled to sit at the bargaining table on behalf of the officers of the Medford Police Department, such officers have refused to negotiate, and improperly so. But either way, there has been on both sides a refusal to negotiate which, through a literal reading of Sec. 111.70 (4)(e) warrants the initiation of fact finding, whatever may have been the major or minor premise, erroneous or correct, upon which the W.E.R.C. predicated its conclusions of law and issued its certificate.

But the W.E.R.C. did not so ground its certificate. It determined that a union representative was and is entitled to sit at the bargaining table on behalf of the officers of the Medford Police Department; that the Medford Police and Fire Commission, in refusing to meet with such union representative, had refused to negotiate within the meaning of Sec. 111.70 (4)(e) 2; and "ORDERED 1. That fact finding be initiated for the purpose of recommending a solution to the dispute." Actually, of course, the only matter which properly may be classified at this point as a "dispute" is with respect to a union representative sitting at the bargaining table. We assume, however, that the fact finder appointed by the W.E.R.C. would give no attention to the "dispute" which is the subject of this memorandum opinion, but rather would investigate, hold hearings and make recommendations as to changes or improvements in wages, hours and working conditions of the officers of the Medford Police Department.

The W.E.R.C., Local No. 446 and the Medford Police and Fire Commission all have indicated in their arguments and briefs that they wish a resolution, first by this court and then by the Supreme Court, of the problem of labor union representation at the bargaining table. To affirm the W.E.R.C. on the ground that one side or the other or both "fail(s) and refuse(s)" to negotiate and say nothing with respect to labor union negotiators, would be an evasion, tempting though it may be, of our judicial responsibility. We shall thus make a determination as to whether or not the officers of the Medford Police Department are entitled to be represented at the bargaining table by Local No. 446. If they are then the W.E.R.C. will be affirmed and fact finding will go forward. If the officers of the Medford Police Department are not entitled to be so represented a judgment will be entered declaring this proposition of law and enjoining the W.E.R.C. from proceeding further.

The W.E.R.C. and Local 446 argue that in considering our present problem "due weight shall be accorded the experience, technical competence and specialized law of the" W.E.R.C. Sec. 227.20 (2), Wis. Stats. Several cases are cited in support of this argument. But our duty here is the construction of statutes and the application of rules of law handed down by our Supreme Court. While the reasoning of the W.E.R.C. in this matter is entitled to and it will be given our respect, and while we do not have a self regard as the fount of all legal wisdom, we refuse to concede that the expertise of the W.E.R.C. in the field of statutory interpretation and application of case law is superior to our own.

We will commence by saying that Greenfield -vs- Local 1127, 35 Wis. 2d 175, 150 NW2d 476, said one thing about which there can be no argument. Police officers may be represented by a labor union in fact finding. Although Local 446 is not in full agreement, we are further satisfied that police officers may not join a national labor union, whether there be an order to that effect made by the chief of police or not. These two propositions are all that were made crystal clear by Greenfield.

Counsel for Local 446 and the W.E.R.C. put considerable emphasis on the word "union" in Sec. 111.70 (4)(e) to (g), contending that when the legislature said, "Where an employer or union fails or refuses to negotiate..." it thereby granted the right of a labor union representative to take part in bargaining as well as in fact finding. We do not agree. A union, so said Greenfield, has with respect to employer-police fact finding only an agency status. Once a group of municipal employees, other than policemen, join a union such group becomes a union. This union is a principal, not an agent, and it is as a union that it bargains and initiates and takes part in fact finding. Police, in majority or minority, cannot be a union for they cannot join a union. A union, as a police agent only, may or may not sit at the bargaining table. But if it may it will sit, not as a union but as an agent of the police officers of the employer city. The construction placed upon the word, "union" by Local 446 would give to an agent the stature of a principal and allow such agent the power to refuse to negotiate. We do not believe this to have been the intention of the legislature. This is inferentially recognized by Local 446 in the petition for fact finding filed with the W.E.R.C. In such petition the local, by its president, is designated as the representative of the majority members of a police department and the "certified or recognized collective bargaining unit involved" is "All employees in the Medford Police Department, excluding the Chief of Police, temporary and auxiliary police officers." The use of the word "union" in Sec. 111.70 (4) (e to g), did not and does not, of itself confer upon Local 446 the right to sit at the bargaining table.

Municipal employees, but not policemen, have these rights under Sec. 111.70:

1. They have the right to self organization.
2. They may affiliate with labor organizations of their own choosing.
3. They have the right to be represented by labor organizations of their own choice in conferences with their employer on questions of wages, hours, and working conditions.
4. They have the right to refrain from any and all of the foregoing activities.

These enumerated rights are set forth in the cited section without indication that one is of greater importance than another. Greenfield held that right No. 2, an affiliation with a labor organization of their own choosing, while enjoyable by municipal employees, was denied to police officers by virtue of the exception in Sec. 111.70 (1)(b). Greenfield further held that right No. 2 was not given police officers by Sec. 111.70 (4)(j). Did, then, Greenfield hold that Sec. 111.70 (4)(j) gave to policemen right No. 3 alone of all of the three affirmative rights above set forth. It certainly did not do so explicitly. But did it do so by implication? That is, did the holding of the court permitting labor union representation at police-city fact finding, in the light of the surrounding fact and procedural situation in Greenfield, embody in it a holding that labor union representatives may sit at the bargaining table? To arrive at a conclusion on this point we must study the memorandum opinion of the trial judge in conjunction with briefs of counsel and the opinion of the Supreme Court.

The stipulation of facts as set forth in the trial judge's memorandum opinion is in part as follows:

1. Local 1127 is a chartered labor union affiliated with the American Federation of State, County and Municipal employees, AFL-CIO.
2. A majority of the police personnel of Greenfield signed application for membership blanks of Local 1127 authorizing the local to represent them.
3. Local 1127 wrote to the finance committee of Greenfield advising the committee that all of the personnel of the Greenfield Police Department, except the Chief of Police, had joined Local 1127 and requested a hearing by the Finance Committee.
4. The Finance Committee denied the request and refused to meet with Local 1127.
5. Local 1127 filed a petition with the W.E.R.B. for fact finding under Sec. 11.70.
6. The W.E.R.B. held a hearing and ordered fact finding.
7. Fact finding was had before a fact finder appointed by the W.E.R.B.

Greenfield then commenced an action for declaratory judgment which would declare: 1. Greenfield police cannot be and were not represented by Local 1127, a chartered labor union, in bargaining for wages, hours and working conditions. 2. The W.E.R.C. had no jurisdiction to hold any hearings or issue any orders on any petition filed by Local 1127.

Local 1127 in its answer specifically denied that Sec. 111.70, Wis. Stats., prohibits police officers from joining a union for the purpose of negotiating with their employer. By counter-claim the local also asked for declaratory relief which would provide:

1. That the order of the Chief of Police of Greenfield directing that no policeman may be in any way affiliated with a national labor organization be held null and void.
2. For an injunction preventing Greenfield interference with the claimed right of city policemen to join a labor union for the purpose of having the union represent them at the bargaining table.

The W.E.R.B. in its answer also denied that Sec. 111.70 prohibits police officers from joining a union for the purpose of negotiating on their behalf, but in its prayer for relief asked only for a declaration validating the application of fact finding procedures to a dispute between policemen and their employing city.

As set out in the memorandum opinion, each party stated its version of the issues:

Plaintiff Greenfield: "What is the effect of Sec. 111.70, Wis. Stats?"

Defendant Local 1127: "Whether or not Sec. 111.70 (e)(f), confers upon the police personnel the right to designate a labor organization as their representative?"

Defendant W.E.R.B.: "Does Sec. 111.70 (4)(j), Stats., authorize fact finding procedures with respect to a labor dispute between city policemen and the plaintiff?"

After recitation of the above issues the trial court said: "In effect they state the same central issue." With all due respect to Hon. Elmer Roller, a most eminent and respected Circuit Judge, we say that we wish they did state the same central issue. For if they did so state we would be spared the necessity of writing this opinion. The Greenfield issue is so broad as to be meaningless. The W.E.R.B. issue has been resolved by the Supreme Court, but the resolution of that issue does not solve the problem here. The issue of Local 1127 is ambiguous. Does, "the right to designate a labor organization as their representative" mean representation at fact finding and across the table bargaining with respect to wages, hours and working conditions or does it mean representation at fact finding alone.

The issue which Judge Roller said was one of statutory construction (page 19, memorandum opinion) is identical with that posed by Local 1127. We have read with care Judge Roller's decision and are satisfied that he considered the issue: "Whether or not Sec. 111.70 (4)(f) to (g) confers upon the police personnel the right to designate a labor organization as their representative," was limited to labor union representative at fact finding and did not include representation at the bargaining table. He said: (page 27, memorandum opinion)

"As hereinbefore stated subsection (4)(j), in the court's opinion, is susceptible of one construction independently of and without resort to subsection (1)(b) and (2) of the statute."

Sec. 111.70 (1)(b) and (2) spell out the rights of municipal employees, except policemen, which include the right to have labor organization representation at the bargaining table. In order to hold that such representation on behalf of policemen is permitted at the bargaining table Judge Roller would have been compelled to "resort to subsection (1)(b) and (2) of the Statute."

Turning to the appellate briefs of the parties filed in Greenfield we find the following statements of the issues:

Appellant Greenfield:

- "1. Does section 111.70 of the Wisconsin Statutes, give to city policemen the right to belong to or affiliate with labor organizations of their choosing? The trial court answered this in the affirmative.
2. Does section 111.70 of the Wisconsin Statutes, give to city policemen the right to be represented by a labor organization in conferences and negotiations with their municipal employers on questions of wages, hours, and conditions of employment?

The trial court answered this in the affirmative."#

# We believe the trial court did not answer this question at all.

Respondent Local 1127:

"The defendant-respondent union agrees with the plaintiff-appellant's statement of the questions involved."

Respondent W.E.R.B.:

"Does Sec. 111.70 (4)(j), stats. authorize policemen employed by cities to designate a labor organization as their representative for the purpose of initiating fact finding under Sec. 111.70 (4)(e) to (g), stats."

Within the perimeter of the trial court's memorandum opinion and the interpretations placed upon it by the parties, we must canvass Greenfield in the appellate court to find out what that court decided it was deciding.

Despite the phrasing of the above quoted second issue in Greenfield's "Issues Involved" Justice Wilkie said:

"The first issue raised on this appeal is whether police officers in the City of Greenfield have the right to be represented in fact finding pursuant to sec. 111.70 (4)(j), stats., by a labor union affiliated with a national labor organization."

This is not what Greenfield and Local 1127 considered to be the issue with respect to labor union representation. Nor is it precisely as stated by the W.E.R.B. For we believe that the W.E.R.B. phrase "labor organization as their representative for the purpose of initiating fact finding" is not identical with "representative in fact finding by a labor union." But, whatever the wording of the question, the answer given by the court is unambiguous.

"We conclude, in view of the entire purpose of the fact finding legislation, a broad construction should be given to the language, entitling the policemen to designate a labor union affiliated with a national labor organization as their representative in fact finding."

We are satisfied that in view of the opportunity given the Supreme Court to pass upon the question now before us, its answer, limited as it is to fact-finding alone, cannot be interpreted as one even implicitly giving approval to labor union representation at the bargaining table. The court had the opportunity, in view of the statement of issue No. 2 by Greenfield, concurred in by Local 1127, to say clearly and unmistakably that labor union representation is or is not permitted at the bargaining table. The court did not do so and we must believe that in ruling on union representation it withheld its opinion on union bargaining representation deliberately. A failure or refusal to negotiate by either the city or its police employees may come about through disputes other than over union representation at the bargaining table. Thus the court's ruling, quoted above, is broad rather than narrow, and holds that whatever the differences between the parties that led to fact finding, police officers are entitled to have union representation at the fact finding hearings.

We thus are satisfied that, with respect to labor union representation, Greenfield's solution of what Justice Wilkie labeled the first issue did no more, and was intended to do no more, than permit labor union representation in city-police fact finding. We are also satisfied that Justice Wilkie, in determining what he considered to be the second issue, answered the question asked of us in this case.

The second issue, as recited by Justice Wilkie was:

"...where even though the Greenfield Police are entitled to designate Local 1127 as their fact finding representative, these policemen have a right to join that union."

Adverting to Sec. 111.70 (1) and (2), we see that "municipal employees" have these two rights: The right to join a national labor union and a right to have labor union representation at the bargaining table. With respect to the right of policemen to join a national labor union the court said in Greenfield:

"To interpret sec. 111.70 (4)(j), Stats., as broadly as the trial court to guarantee the right of law enforcement personnel to have all of the rights given to other municipal employees under sec. 111.70 (1-3) would constitute a repeal of sec. 111.70 (1) (b)," and

"Thus we conclude that although the policemen did have the right to designate the respondent union as their fact finding representative, the individual policeman did not enjoy the right to join that union."

Justice Wilkie states that repeals by implication are not favored, citing Kienbaum -vs- Hablony, 273 Wis. 413, 78 NW2d 888. What counsel for Local 446 and the W.E.R.C. are asking us to do is to recognize Sec. 111.70 (4)(j) as repealing by implication, not the whole of (which Justice Wilkie said 111.70 (4)(j) did not do,) but an integral

part of Sec. 111.70 (1)-(3), a part that as we read Sec. 111.70 (2), is of importance and dignity equal to the right to join a national labor union. We believe that if the court in Greenfield found a partial repeal of Sec. 111.70 (1)-(3) by Sec. 111.70 (4)(j) it would have said so flatly and unmistakably. We conclude this part of our opinion by saying that Greenfield held that Sec. 111.70 (4)(j) did not repeal that part of Sec. 111.70 (1) (2) denying to policemen the right to join a labor union; that a denial of the right to labor union representation at the bargaining table is a right which also was denied to policemen by Sec. 111.70 (1) (2); that neither right may be distinguished from the other in grade, character or position of importance; and that as Sec. 111.70 (4)(j) did not by implication give to city policemen the one right (to join a labor union) neither did it give to city policemen the other right (to union bargaining representation.)

We agree with counsel that union membership by city policemen is inconsistent with the undivided allegiance owed by them to the public; and that employment by city policemen of a union official to represent them as their agent at the bargaining table would not necessarily, of itself, impair or divide their allegiance. Thus the underlying reason for denying police union membership does not sustain to an equal degree a denial of a right to union representation at the bargaining table. But this is an argument properly to be addressed to the legislature. If appropriate legislation is to be enacted it will come from that branch of our government and not from this court in the guise of statutory interpretation and construction.

Counsel also argue that the granting of the right to union representation in fact finding is inconsistent with the denial of a right to union representation at the bargaining table; that the effectiveness of union representation at fact finding is made nugatory by not allowing the union to bargain or to confer with the city with respect to the same matters that the union representative debated at fact finding; and that to carry out the purpose of Sec. 111.70 (4)(j) a union representative should be permitted to help implement at the bargaining table that which he helped to accomplish at fact finding. But we believe that the two rights are not so interwoven or dependent one upon the other that what we conceive to be the legislative purpose cannot be accomplished except by the granting of both rights.

There is only one opportunity provided by Sec. 111.70 whereby city policemen may exert force upon their employer. A city is not compelled to bargain and negotiate with city police employees; the recommendation the fact finder may be followed or ignored by the city as it desires; a court or board may compel the city to change wages, hours and working conditions of city policemen; and city policemen cannot strike to enforce their demands. But once fact finding has been had and the recommendations of an impartial fact finder have been made, there will follow the moral suasion of public opinion. After the general has been made aware that an impartial referee has heard all of the facts and has determined that the city should raise police salaries, lower police hours and improve police working conditions, the members of the Police and Fire Commission may be expected to feel a public pressure on behalf of the city policemen. It is by virtue of fact finding and the impartial



The foregoing memorandum opinion will constitute our findings of fact and conclusions of law. An order may be prepared and submitted to the court for signature, after approval as to form by counsel for Local 446 and the W.E.R.C. It will provide for a judgment:

1. Declaring that city policemen are not entitled to be represented at the bargaining table by a representative of a national labor union; and

2. Enjoining the W.E.R.C. from proceeding with fact finding in this matter.

Dated this 9th day of August, 1968.

BY THE COURT:

Lewis J. Choles /s/  
CIRCUIT JUDGE