

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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In the Matter of the Petition of :  
CITY OF GREEN BAY POLICE :  
BARGAINING UNIT :  
Involving Certain Employees of : Case XXIX  
CITY OF GREEN BAY : No. 13982 DR(M)-14  
Decision No. 9834-A  
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Appearances:  
Herrling, Lathrop, Myse & Hamilton, Attorneys at Law, by Mr.  
Gordon Myse, on behalf of the Petitioner.  
Mr. Ervin Doepke, City Attorney, on behalf of the Municipal  
Employer.

FINDINGS OF FACT, CONCLUSIONS OF LAW,  
ORDER DETERMINING CERTAIN PRELIMINARY ISSUES  
AND ORDER FOR FURTHER HEARING

City of Green Bay Police Bargaining Unit having filed a petition and an amended petition with the Wisconsin Employment Relations Commission requesting a Declaratory Ruling with respect to the alleged supervisory status of certain police personnel in the employ of the City of Green Bay, Wisconsin, and hearing in the matter having been held on September 1, 1970, at Green Bay, Wisconsin before George R. Fleischli, Hearing Officer; and the Commission being fully advised in the premises, makes and issues the following

FINDINGS OF FACT

1. That the City of Green Bay Police Bargaining Unit is a voluntary unincorporated association representing police personnel and has its office at Green Bay, Wisconsin.
2. That the City of Green Bay, Wisconsin, hereinafter referred to as the Municipal Employer, is a Municipal Employer having its office at the Green Bay City Hall, Green Bay, Wisconsin, and operates a police department.
3. That at all times material herein the Municipal Employer has recognized the Petitioner as the representative of all non-supervisory police personnel in its employ for the purposes of conferences and negotiations on wages, hours, and other conditions of employment; that, in said regard, Gordon Myse, Attorney at Law, Appleton, Wisconsin has been and is the representative of the Petitioner; and that Donald VanderKelen has been and is the Labor Negotiator for the Municipal Employer, and in that capacity VanderKelen has conferred and negotiated with the Petitioner and its representative Myse, as well as with other employe organizations representing employes of the Municipal Employer, on matters of wages and other conditions of employment for various employes of the Municipal Employer.

4. That on July 28, 1970 Myse, on behalf of the Petitioner filed the following "petition" with the Wisconsin Employment Relations Commission, hereinafter referred to as the Commission:

"STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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In the Matter of:

CITY OF GREEN BAY POLICE BARGAINING

PETITION  
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The City of Green Bay Police Bargaining Unit respectfully represents to the Wisconsin Employment Relations Commission as follows:

1. That the City of Green Bay Police Bargaining Unit is the recognized Bargaining Unit for certain officers within the Green Bay Police Department in accordance with the terms and provisions of a certain Employment Contract effective on the 1st day of January, 1970, to and including the 31st day of December, 1970.
2. That the City of Green Bay is the municipal employer for the City of Green Bay and is represented by Mr. Donald VanderKelen, 1450 Kellogg, Green Bay, Wisconsin.
3. That Gordon Myse is an attorney duly authorized to practice in the State of Wisconsin with his office at 319 North Appleton Street, Appleton, Wisconsin, and has been retained by the Green Bay Police Bargaining Unit for the purpose of negotiating an Employment Contract between the City of Green Bay and the Green Bay Police Bargaining Unit for the Employment year 1971.
4. That the municipal employer has requested a hearing as to the supervisory status of certain employees in the Green Bay Police Department including the rank of Sergeant and Lieutenant for the purpose of determining the appropriateness of including such positions within the Unit recognized by the City of Green Bay and represented by the Green Bay Police Bargaining Unit.
5. That no agreement can be made as to the definition of the Unit and that a hearing conducted by the Wisconsin Employment Relations Commission appears to be necessary and has been requested by both parties hereto.

NOW, THEREFORE, it is requested that the Wisconsin Employment Relations Commission order a hearing to be conducted into the supervisory status of certain employees within the Green Bay Police Department for the purpose of determining the definition of the Unit to be represented by the Green Bay Police Bargaining Unit for municipal negotiations with the City of Green Bay.

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Gordon Myse /s/  
Gordon Myse

CONTACT:

Mr. Donald VanderKelen  
1450 Kellogg  
Green Bay, Wisconsin

Phone: 494-1454

Mr. Gordon Myse  
Attorney at Law  
319 North Appleton Street  
Appleton, Wisconsin"

Phone: 734-9195

5. That Myse, upon the filing of the "petition" with the Commission mailed a copy thereof to VanderKelen, who received same in the regular course of mail; and that shortly thereafter VanderKelen delivered said copy to Ervin Doepke, the Municipal Employer's City Attorney.

6. That on August 3, 1970 the Commission issued an Order for Hearing, wherein it set forth that hearing in the matter would be conducted at the Brown County Courthouse, September 1, 1970 at 1:00 p.m.; that copies of said order were sent on August 3, 1970 to Myse and VanderKelen who received same in the regular course of mail, and shortly thereafter the latter delivered same to the City Attorney; that prior to August 13, 1970 the Commission discovered that it had inadvertently failed to include a copy of the "petition" along with the copy of the Order For Hearing which had been sent to VanderKelen on August 3, 1970; and that, therefore, on August 13, 1970 the Commission mailed a copy of the "petition" to VanderKelen, who received same on the following day, and who in turn delivered same, shortly thereafter, to the City Attorney.

7. That on August 21, 1970 the Commission sent the following letter to Myse, as well as a copy thereof to the City Clerk and City Attorney:

"The Commission has been informed by Mr. Doepke, City Attorney at Green Bay, that at the hearing he intends to move for dismissal of the above entitled matter, since your petition, which is in effect a request for declaratory ruling, does not conform to Section 227.06 of the Wisconsin Statutes.

In order to avoid any unnecessary delay in processing your petition, and further, to avoid an unnecessary expense to the Commission in conducting more than one hearing in the matter, we suggest that you file an amended petition for declaratory ruling in order to conform your petition to the statutory requirements. Your initial petition does not refer to the section of the statute involved. The particular section is Section 111.70(4)(j). Furthermore, your signature on the original petition was not verified. Since this hearing in the matter is set for September 1, 1970, we suggest that you give your immediate attention to the matter in order to avoid adjournment of the hearing."

"STATE OF WISCONSIN  
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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In the Matter of:

CITY OF GREEN BAY POLICE BARGAINING UNIT

AMENDED PETITION FOR  
THE DETERMINATION OF  
COMPOSITION OF THE UNIT

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The City of Green Bay Police Bargaining Unit respectfully represents to the Wisconsin Employment Relations Commission as follows:

1. That the City of Green Bay Police Bargaining Unit is the recognized Bargaining Unit for certain officers within the Green Bay Police Department in accordance with the terms and provisions of a certain Employment Contract effective the 1st day of January, 1970, to and including the 31st day of December, 1970.
2. That the City of Green Bay is a municipal employer and is represented by Mr. Donald VanderKelen, 1450 Kellogg, Green Bay, Wisconsin, and it is sought to bind them by this Petition.
3. That Gordon Myse is an attorney duly authorized to practice in the State of Wisconsin with his office at 319 North Appleton Street, Appleton, Wisconsin, and has been retained by the Green Bay Police Bargaining Unit for the purpose of negotiating an Employment Contract between the City of Green Bay and the Green Bay Police Bargaining Unit for the Employment year 1970 and to represent the Bargaining Unit at the hearing conducted in regard to the determination of the appropriate unit to be represented by the Green Bay Police Bargaining Unit.
4. That the municipal employer has requested that the rank of lieutenants and sergeants be excluded from the Bargaining Unit while the Green Bay Police Bargaining Unit has requested that the rank of sergeants and lieutenants be included within the Bargaining Unit.
5. That no agreement can be made as (sic) the definition of the Unit and that a hearing conducted by the Wisconsin Employment Relations Commission appears to be necessary and is hereby requested by the Green Bay Police Bargaining Unit.

NOW, THEREFORE, it is requested that the Wisconsin Employment Relations Commission order a hearing to be conducted into the supervisory status of certain employees within the Green Bay Police Department for the purpose of determining the definition of the unit to be represented by the Green Bay Police Bargaining Unit during their negotiations with the municipal employer, the City of Green Bay; that this petition is filed under the authority of Wisconsin Statutes 111.70(4)(j).

Gordon Myse, Attorney for  
Green Bay Police Bargaining Unit  
319 North Appleton St.  
Appleton, Wisconsin 54911

Mr. Donald VanderKelen      Phone: 494-1454  
1450 Kellogg                      Area Code: 414  
Green Bay, Wisconsin

Gordon Myse                      Phone: 734-9195  
Attorney at Law                Area Code: 414  
319 North Appleton Street  
Appleton, Wisconsin

City Clerk  
Green Bay City Hall  
Green Bay, Wisconsin

STATE OF WISCONSIN) ) SS:  
OUTAGAMIE COUNTY )

The above said Gordon Myse being first duly on oath deposes and says that he is an attorney for the Green Bay Police Bargaining Unit, that he has read the foregoing Petition and knows the same to be true based on records and materials within his possession, that he has been authorized to sign the Petition on behalf of the Green Bay Police Bargaining Unit.

Gordon Myse /s/  
Gordon Myse

Subscribed and sworn to before  
me this 24th day of August, 1970.

Dianne Meyer  
Dianne Meyer, Notary Public  
Outagamie County, Wisconsin  
My commission expires: 1/16/72."

9. That on August 25, 1970 the Commission sent copies of the original "petition" filed by Myse, the Commission's Order For Hearing, as well as the amended petition, to Myse, to the City Attorney, to the Labor Negotiator and to the City Clerk of the Municipal Employer; and same were received by the Labor Negotiator on August 26, 1970 and the City Attorney and City Clerk on August 27, 1970; that the Personnel Committee of the Municipal Employer's City Council met at regular business meetings on August 12, 1970 and August 26, 1970; and that at no time prior to September 1, 1970 did the Municipal Employer or any of its agents move for, or request, a delay in the hearing which was set for September 1, 1970.

10. That a hearing was held on September 1, 1970 at Green Bay, Wisconsin before George R. Fleischli, a Hearing Officer acting at the direction of the Commission; that the Petitioner called three witnesses, who testified as to the duties of the police personnel in the employ of the Municipal Employer holding the rank of Sergeant and Lieutenant; that

the Municipal Employer refused to make available as witnesses for the Petitioner or the Hearing Officer, its Chief of Police and Captain Loyal Nelson; and that the evidence presented by the three witnesses called by the Petitioner was insufficient to serve as a basis for determining the issue of the alleged supervisory status of police personnel serving in the capacity of Traffic Sergeant, Juvenile Sergeant, Training and Personnel Sergeant, Records Sergeant, Photo and Identification Sergeant and Lieutenant.

11. That the Commission has never made a prior determination of the question of the alleged supervisory status of the police personnel of the Municipal Employer's Police Department holding the rank of Sergeant or Lieutenant.

Upon the basis of the above and foregoing Findings of Fact the Commission makes and issues the following

#### CONCLUSIONS OF LAW

1. That the Municipal Employer was given proper legal notice under the provisions of Section 227 of the Wisconsin Statutes and the Rules of the Wisconsin Employment Relations Commission of the pendency of the petition herein and the hearing to be held thereon; that said notice afforded the Municipal Employer sufficient time prior to the hearing so as to have had reasonable opportunity to make such internal consultations and preparations as it deemed necessary; and that said notice was in substantial compliance with the requirements of administrative due process and fairness.

2. That the hearing in this case was properly held pursuant to the Order For Hearing which was issued by the Commission on August 3, 1970 on the basis of the original petition and the Commission was under no legal requirement to issue an amended or new order on the basis of the amended petition.

3. That the amended petition was in compliance with the requirements of Section 227.06 of the Wisconsin Statutes regarding verifications and states an adequate legal basis for the issuance of a declaratory ruling.

4. That the Commission has jurisdiction to determine the question of the alleged supervisory status of the police personnel of the Municipal Employer's Police Department holding the rank of Sergeant and Lieutenant under the provisions of Section 227.06 of the Wisconsin Statutes.

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

#### ORDER

1. That the objections of the Municipal Employer to the effect that it was not given proper legal notice of the proceedings herein, that the Order For Hearing was defective, that the amended petition was not properly verified, that the amended petition did not state an adequate basis for the issuance of a declaratory ruling, and that the Commission lacks jurisdiction to issue a declaratory ruling are overruled.

2. That the Municipal Employer's motion to dismiss that portion of the petition which alleges the non-supervisory status of the police personnel serving in the capacity of Lieutenant and its motion to dismiss the entire petition for lack of sufficient evidence on which to base a declaratory ruling be and the same hereby are denied.

3. That a further hearing on the petition herein be, and the same hereby is scheduled for March 2, 1971 at 1:00 p.m. at the Brown County Courthouse, Green Bay, Wisconsin, at which the Hearing Officer shall take additional evidence regarding the alleged supervisory status of police personnel holding the rank of Sergeant and Lieutenant in the employ of the Municipal Employer in its Police Department at Green Bay, Wisconsin.

Given under our hands and seal at the  
City of Madison, Wisconsin, this 1st  
day of February, 1971.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By

*Thomas Slaveney*  
Thomas Slaveney, Chairman

*Del S. Rice II*  
Del S. Rice II, Commissioner

*Jos. B. Kerkman*  
Jos. B. Kerkman, Commissioner

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

CITY OF GREEN BAY

Case XXIX  
No. 13982 DR(M)-14  
Decision No. 9834-A

1/ City of Green Bay (Police Department) (9363) 12/69.



During the negotiations concerning the Petitioner's requested changes or improvements in wages, hours and working conditions for the calendar year of 1971, the Municipal Employer contended that Sergeants and Lieutenants are supervisors and ought not to be included in the discussions, while the Petitioner has contended that Sergeants and Lieutenants are not supervisors and should be included in the bargaining unit for the purpose of collective bargaining, pursuant to Section 111.70(4)(j) and in any proceedings held pursuant to Section 111.70(4)(e)(f) and (g).

The Petitioner filed its original "petition" with the Commission on July 28, 1970. That "petition" indicated that the Petitioner and the Municipal Employer were unable to agree concerning the alleged supervisory status of Sergeants and Lieutenants and requested that the Commission issue a ruling on the dispute. It also indicated that the representative of the City of Green Bay for purposes of the petition was Donald VanderKelen, Labor Negotiator for the Municipal Employer. The Petitioner sent a courtesy copy of this "petition" to the Municipal Employer's Labor Negotiator which was received by him and given by him to the City Attorney. On August 3, 1970, the Commission issued its order that a hearing should be conducted on the "petition" on September 1, 1970 at Green Bay, Wisconsin. A copy of this Order For Hearing was sent to the Municipal Employer's Labor Negotiator on August 3, 1970, and received by him in the regular course of the mail. Shortly thereafter, the Labor Negotiator gave the order to the City Attorney. On August 13, 1970, the Commission sent, by certified mail, a copy of the "petition" to the Labor Negotiator which was received by him on August 14, 1970 and given by him to the City Attorney shortly thereafter.

Subsequent to the above described events the Commission was informed by the City Attorney that the Municipal Employer might move for dismissal of the "petition" on the grounds it was deficient under the requirements of Section 227.06 of the Wisconsin Statutes. 2/

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2/ 227.06 Declaratory rulings. (1) Any agency may, on petition by any interested person, issue a declaratory ruling with respect to the applicability to any person, property or state of facts of any rule or statute enforced by it. Full opportunity for hearing shall be afforded to interested parties. A declaratory ruling shall bind the agency and all parties to the proceedings on the statement of facts alleged, unless it is altered or set aside by a court. A ruling shall be subject to review in the circuit court in the manner provided for the review of administrative decisions.

(2) Petitions for declaratory rulings shall conform to the following requirements:

(a) The petition shall be in writing and its caption shall include the name of the agency and a reference to the nature of the petition.

(b) The petition shall contain a reference to the rule or statute with respect to which the declaratory ruling is requested, a concise statement of facts describing the situation as to which the declaratory ruling is requested, the reasons for the requested ruling, and the names and addresses of persons other than the petitioner, if any, upon whom it is sought to make the declaratory ruling binding.

(c) The petition shall be signed by one or more persons with each signer's address set forth opposite his name, and shall be verified by at least one of the signers. If a person signs on behalf of a corporation or association, that fact also shall be indicated opposite his name.

(3) The petition shall be filed with the administrative head of the agency or with a member of the agency's policy board.

(4) Within a reasonable time after receipt of a petition pursuant to this section, an agency shall either deny the petition in writing or schedule the matter for hearing. If the agency denies the petition, it shall promptly notify the person who filed the petition of its decision, including a brief statement of the reasons therefor.

On August 21, 1970, the Commission advised the Petitioner by letter that the "petition" was deficient under Section 227.06 in that (1) it was not verified and (2) it did not specifically refer to the statute with respect to which the declaratory ruling was requested. In order to avoid unnecessary delay and to avoid the unnecessary expense to the Commission in conducting more than one hearing, it was suggested that the Petitioner correct such deficiencies. On August 25, 1970, the Commission received an amended petition from the Petitioner which petition was verified and referred to Section 111.70(4)(j) of the Wisconsin Statutes. The amended petition indicated that the appropriate persons to contact on behalf of the Municipal Employer were the Labor Negotiator and the City Clerk.

On August 25, 1970, copies of the original "petition", the Order For Hearing issued by the Commission pursuant to that "petition" and the amended petition were sent by certified mail to the City Clerk, City Attorney and Labor Negotiator of the Municipal Employer. These items were received by the Labor Negotiator on August 26, 1970, and by the City Clerk and City Attorney on August 27, 1970. The Commission directed George R. Fleischli, a member of its staff, to act as Hearing Officer and hear the case at Green Bay on September 1, 1970.

At the hearing the Municipal Employer entered a special appearance and objected to the conduct of the hearing on the petition for the following reasons:

1. The Municipal Employer contends that it did not receive adequate notice of the hearing on the petition because notice of the hearing and a copy of the petition was not received by the City Clerk until August 27, 1970, which was only five days before the hearing. It contends in this regard that such notice is deficient under the provisions of Section 269.31 of the Wisconsin Statutes <sup>3/</sup> which requires that the notice of any motion in a civil action must be served eight days before the time appointed for the hearing unless otherwise fixed by statute or the rules of Court and the Commission's Rule ERB 11.05 <sup>4/</sup> which provides for the serving of notice seven days prior to conducting a hearing on an election petition. The Municipal Employer contends that such lack of adequate notice deprived it of sufficient time to allow its City Attorney to consult with the Personnel Committee

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3/ 269.31 Time of notice of motion. When a notice for motion is necessary, unless the time be fixed by statute or the rules of court, it must be served eight days before the time appointed for the hearing; but the court or judge may, by an order to show cause, prescribe a shorter time.

4/ ERB 11.05 Notice of Hearing. (1) WHEN ISSUED: CONTENTS. Following the filing of a petition, if it appears to the board that further proceedings are warranted, the board shall issue and serve upon each of the parties and upon any known labor organizations claiming to represent any employees directly affected, a notice of hearing, at a place fixed therein, and, except by agreement of the parties or in unusual circumstances, at a time not less than 7 days after the service of such notice. A copy of the petition shall be served with such notice of hearing.

(2) WITHDRAWAL OR AMENDMENT. Any such notice of hearing may be withdrawn or amended before the close of the hearing by the board.

of the City Council regarding the position that the Municipal Employer desired to take at the hearing.

2. The Municipal Employer contends that the original petition herein and the order issued pursuant to that petition are both deficient because of (a) the lack of verification of the original petition, (b) the failure of the original petition to refer to Section 111.70(4)(f) of the Wisconsin Statutes, and (c) the failure of the original petition to state that it sought to bind the Municipal Employer by the petition. The Municipal Employer contends that the Commission therefore lacked jurisdiction to conduct a hearing on the amended petition without amending its Order For Hearing or issuing a new Order after the amended petition was filed.

3. The Municipal Employer contends that the amended petition is deficient because (a) it is not properly verified in accordance with Section 263.25 of the Wisconsin Statutes 5/ and (b) it fails to state a cause of action for a declaratory ruling in that the third paragraph refers to the need for a determination of the appropriate bargaining unit for the purposes of negotiating the 1970 contract, which contract has already been negotiated.

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5/ 263.25 Form of verification. (1) The verification must be to the effect that the same is true to the knowledge of the person making it, except as to those matters stated on information and belief and as to those matters that he believes it to be true, and must be by the affidavit of the party, or if there be several parties united in interest and pleading together by one at least of such parties acquainted with the facts, if such party be within the county where the attorney resides and capable of making the affidavit. The affidavit may be made by an agent or attorney if no such party be within the county where attorney resides, or if the action or defense be found upon a written instrument in such attorney's possession, or if all the material allegations of the pleading be within his personal knowledge or belief.

(2) When the pleading is verified by any person other than a party he shall set forth in the affidavit his knowledge or the grounds of his belief on the subject and the reason why it is not made by the party, and if made on knowledge shall state that the pleading is true to his knowledge, and if on his belief, that he believes it to be true.

(3) When a corporation is a party the verification may be made by any officer thereof. In actions wherein the state or any officer thereof in his official capacity is a party, verification of pleadings shall not be required by either the state or any one in its behalf or by any such officer, but all pleadings made by other parties in actions wherein the state or any such officer is a party shall be verified as provided in this section. In all actions wherein the state is the sole party plaintiff and in an unverified answer shall be interposed and the demand of the complainant is for money judgement, judgement may be taken by fault within the same force and in the same manner as though the complaint were duly verified.

4. Finally the Municipal Employer contends that the Wisconsin Employment Relations Commission has made a prior determination of the issues raised by the petition and that therefore the Commission lacks jurisdiction to review its own prior determination under Section 227.06 of the Wisconsin Statutes. The Municipal Employer cites the case of Wisconsin Fertilizer Association v Carnes, 39 Wis (2d) 95, (1967) as authority for its position in this regard.

In response to the objections entered by the Municipal Employer, the Petitioner contends that the Municipal Employer has had actual knowledge of the pendency of the petition herein since at least August 3, 1970, and was also aware that the hearing thereon was to be held on September 1, 1970. The Petitioner argues that even if it were decided that the Municipal Employer has in fact had only 5 days of legal notice, there was insufficient showing of prejudice so as to require a postponement of the hearing. In this regard, the Petitioner pointed out that it was currently attempting to negotiate with the Municipal Employer involving the police personnel whose status is in dispute and argues that the purpose of the Municipal Employer's objection was dilatory and not based on any actual surprise or lack of opportunity to prepare its case. It is the Petitioner's contention that the Commission has never made a final determination of the status of the Sergeants and Lieutenants who are alleged to be supervisors and that the parties specifically reserved the right to review the composition of the bargaining unit at some future time.

The Petitioner moved that paragraph 3 of the amended petition be amended so as to reflect that the Petitioner's Representative had been retained by the Petitioner for the purpose of negotiating the employment contract for the year 1971 rather than 1970. The motion was granted by the Hearing Officer.

The Hearing Officer, after considering the arguments presented by the Municipal Employer and the Petitioner regarding the conduct of the hearing after what the Municipal Employer alleged was only 5 days notice, entered an interim ruling that there was not a sufficient showing on the part of the Municipal Employer that it was prejudiced by the length of notice which it had received in this case. The Hearing Officer's ruling did not concern the question of whether there had been strict adherence to any statutory and regulatory rules regarding notice that might apply to this case. It was limited to the question of whether the Municipal Employer had been afforded a reasonable time and opportunity to become apprised of the issues in the proceeding and to be prepared to participate in the hearing.

At the hearing on September 1, 1970 the Hearing Officer permitted the Petitioner to present its evidence with the understanding that, if it developed during the course of the hearing that there was in fact some showing of surprise or prejudice to the Municipal Employer, the hearing would be adjourned so as to give the Municipal Employer adequate time to prepare to meet the Petitioner's evidence. At the outset of the hearing, the Petitioner attempted to call Captain Loyal Nelson of the Municipal Employer's Police Department. Captain Nelson, who is in charge of the training and personnel bureau of the Police Department, had been present in the hearing room throughout the hearing up to the point where the Hearing Officer entered his interim ruling. During a recess, which occurred shortly after that interim ruling, Captain Nelson was directed by the Chief of Police to return to duty. Although requested to do so, the Municipal Employer refused to voluntarily make Captain Nelson available as a witness for the Petitioner.

During the course of the hearing the Petitioner called three witnesses, all of whom are employed in the Municipal Employer's Police Department, two in the rank of Sergeant and one as a Patrolman. After the first of these witnesses testified, the Petitioner attempted to call the Chief of Police who also had been present at the hearing up until the time that the Hearing Officer entered his interim ruling, but absented himself from the hearing room thereafter. The Hearing Officer requested that the Municipal Employer make the Chief of Police available as a witness for the Petitioner but the Municipal Employer declined to do so voluntarily. At this point the Hearing Officer offered to allow the Petitioner's counsel to move for an adjournment, but the Petitioner declined stating that he felt that he could present sufficient evidence by calling the two additional witnesses.

After the Petitioner presented the testimony of its three witnesses and rested, the Municipal Employer declined to offer any evidence and moved in the alternative for a dismissal of that portion of the petition relating to the status of Lieutenants and the entire petition on the respective grounds that no evidence had been presented with respect to Lieutenants and that there was insufficient evidence for the Commission to make a decision with regard to Sergeants or Lieutenants.

Prior to offering the Municipal Employer an opportunity to present evidence the Hearing Officer made it clear that the Municipal Employer's previous cross-examination of the Petitioner's witness and the presentation of any direct evidence by the Municipal Employer would not be taken as a waiver of its special appearance and the objections which it had entered when it made its special appearance. Even so the Municipal Employer declined to enter any evidence at the hearing.

#### NOTICE

The Municipal Employer's contention that it did not receive adequate notice in this case is without merit. It has been aware of the Petitioner's contentions regarding the status of Sergeants and Lieutenants for some time. Its Labor Negotiator, who is the statutory agent for representing the Municipal Employer in conferences and negotiations under the provisions of Section 111.70(5), had been aware of the Petitioner's contentions in this regard since at least December 8, 1969, when the Petitioner and the Municipal Employer entered into a stipulation agreeing that all the Lieutenants and Captains were supervisors and that Sergeants should be treated as non-supervisors for the purpose of the fact finding petition filed during the negotiations for the 1970 contract year. 6/ In fact, it specifically reserved the right to assert that Sergeants were supervisors in any subsequent proceedings.

The Municipal Employer's Labor Negotiator received: (1) a courtesy copy of the original petition from the Petitioner at the time petition was filed; (2) a copy of the Commission's Order For Hearing 28 days before the date of the hearing; (3) a second copy of the original petition 18 days before the hearing and (4) a third copy of the original petition, a second copy of the Order For Hearing and a copy of the amended petition, 6 days before the hearing. The Municipal Employer's City Attorney received from its Labor Negotiator: (1) his

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6/ City of Green Bay (Police Department) (9363) 12/69.

courtesy copy of the original petition; (2) his copy of the Commission's Order For Hearing and (3) his second copy of the original petition. The City Attorney also received a copy of the original petition, Order For Hearing and amended petition 5 days before the hearing. The City Clerk likewise received a copy of the original petition, Order For Hearing and amended petition 5 days before the hearing.

In spite of this plethora of notice, the Municipal Employer contends that it did not receive notice of the petition or of the hearing until its City Clerk received a copy of the original petition, Order For Hearing and amended petition on August 27, 1970, basing its contention on the argument that the statutory agent for service of notice is the City Clerk.

It is true that Section 262.06(4)(a)(3) of the Wisconsin Statutes provides that the service of process in civil actions against a city should be made on the Mayor, City Manager or Clerk. However, administrative proceedings are not civil actions; the nature of the proceeding herein is that of an administrative hearing under Section 227 of the Wisconsin Statutes. The issues raised by the petition are akin to those raised by an election petition or a petition for the clarification of a bargaining unit both of which are non-adversary proceedings. The Commission has previously held that an election petition was properly served on a County Highway Committee where the petition involved highway employees with whom the Highway Committee had the power to enter into contracts of employment. 7/ There would seem to be no reason why service of notice of a hearing on a petition for a declaratory ruling could not be properly served on the City's Labor Negotiator, who is its designated bargaining agent under Section 111.70(5), when the petition involves questions over which he had legal responsibility and he was at the time, in charge of the negotiations out of which the controversy arose.

However, assuming arguendo that the Labor Negotiator was not a proper agent for service of the notice herein, the Municipal Employer has failed to show that the notice given the City Clerk was legally deficient under any statute or regulation. It cites Section 269.31 of the Wisconsin Statutes which requires that notice of motions in civil actions must be served eight days before any hearing. This statute is clearly inapplicable to administrative proceedings such as the one at hand. The Commission's own rule ERB 11.05 indicates that seven days should normally transpire after service of notice before conducting a hearing on an election petition. Under the second proviso of ERB 10.08(2) the time of notice by mail is measured from the day that the notice was placed in the mails, when the day of the hearing is set in the notice. Therefore the Municipal Employer did receive seven days of notice under ERB 11.05. In addition ERB 11.05 provides that a hearing can be held in less than seven days after notice in municipal election cases where there are unusual circumstances. The circumstances extant in this case would be more than sufficient to make an exception under ERB 11.05 if such an exception were necessary.

The Commission therefore concludes that the Petitioner received adequate legal notice in this case. In addition the Commission affirms the Hearing Officer's interim ruling that the Municipal Employer had ample time to make any preparations it deemed necessary to participate in the hearing. It is of special significance in this regard that the Municipal Employer at no time prior to the hearing moved for a delay

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7/ Buffalo County (Highway Department) (6031) 6/62.

or postponement and this is true before and after the City Clerk had received his notice. Rather, the Municipal Employer chose to wait until the day of the hearing, to enter its objection even though it was aware of the Commission's desire to avoid the unnecessary expense and delay of holding more than one hearing on the petition. It should also be noted that the Order For Further Hearing herein renders the Municipal Employer's notice argument moot since the Municipal Employer will be provided an additional opportunity to present evidence and argument.

#### VALIDITY OF COMMISSION'S ORDER

The Municipal Employer's contention, that the Order For Hearing which was issued on the basis of a petition which was procedurally defective is likewise defective, is also without merit. Such a conclusion would exalt form over substance and ignore the fact that the original petition and amended petition were the same in most substantive respects. The Commission's Order For Hearing was issued on the basis of the substantive content of the petition which set out sufficient allegations to satisfy the Commission that a hearing ought to be held on the question of the alleged supervisory status of Sergeants and Lieutenants. The amended petition was properly filed with the Chairman of the Commission and no useful purpose would have been served by issuing an additional Order after the petition was made to conform to the formalities of Section 227.06 of the Wisconsin Statutes.

#### ALLEGED DEFICIENCIES OF THE AMENDED PETITION

The Municipal Employer's contention that the amended petition is deficient for lack of a proper verification is without merit as well. Section 227.06 merely states that the petition must be verified by at least one of the signers; it does not require that the verification conform to the requirements of verifications in civil actions. It is doubtful that the Legislature intended to impose a requirement that such verifications conform to the strict requirements of the Code of Civil Procedure. A simple statement that the signer swears to the truth of the matter asserted in the petition made before a Notary Public ought to suffice in administrative proceedings. Even so, the verification of the amended petition does conform to the requirements of Section 263.25.

Section 263.25 of the Wisconsin Statutes <sup>8/</sup> provides that verifications in civil actions should be made by a party to the action. An attorney is allowed to make the verification if the party he represents does not reside in the county wherein he resides or if all the allegations of the pleading are within his personal knowledge or belief. In the latter case the attorney is required to set forth his knowledge or the grounds of his belief and why it is not made by the party. If made on his own knowledge or belief he should state that it is true to his knowledge or belief.

The verification on the amended petition reads as follows:

"The above said Gordon Myse being first duly on oath deposes and says that he is an attorney for the Green Bay Police Bargaining Unit, that he has read the foregoing Petition and knows the same to be true based on records and materials within his possession, that he has been authorized to sign the Petition on behalf of the Green Bay Police Bargaining Unit."

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<sup>8/</sup> Supra, footnote 5.



The verification could be based either on the fact that the attorney's residence which is set out in paragraph 3 of the petition is in a different county than the county in which the Petitioner has its principal office. If that were the case the verification might not be in strict compliance with the statute since it fails to specifically state that diverse residence is the reason for the attorney's verification. On the other hand the attorney's verification could be based on the personal knowledge of the attorney. In that case the verification clearly complies since it recites that the attorney "knows the same to be true", that this knowledge is based on "records and materials in his possession" and "that he has been authorized to sign the petition" by the Petitioner.

The verification is in compliance with the requirements of Section 227.06 and Section 263.25 if those latter requirements apply to verifications under Section 227.06 of the Wisconsin Statutes.

The Municipal Employer's claim that the amended petition fails to state a sufficient basis for a declaratory ruling is based on a clerical error in the third paragraph of the amended petition wherein the Petitioner refers to negotiations for the year 1970 instead of 1971. This error was not present in the original petition and the Petitioner made a timely motion at the hearing to amend its petition to correct this error which was properly granted.

#### ALLEGED PRIOR DETERMINATION

The Municipal Employer's claim that the Commission lacks jurisdiction to review a prior determination in the proceeding under Section 227.06 of the Wisconsin Statutes based on the claim that the Commission has entered a prior determination on the matter in dispute. The Commission deems it unnecessary to determine this defense since it has never entered a determination of whether the Sergeants and Lieutenants are supervisors. The Petitioner and the Municipal Employer entered into a stipulation in the prior proceeding on the petition for fact finding for the employment year of 1970. 9/

#### MOTION FOR DISMISSAL

The Petitioner produced very little evidence that might establish the non-supervisory status of the Lieutenants at the time of the hearing. On that basis the Municipal Employer made a motion to dismiss that portion of the petition which alleges that Lieutenants are not supervisors.

The Municipal Employer also made a motion to dismiss the entire petition for lack of sufficient evidence on which to base a decision. It is true that there is insufficient evidence of record on which to base a decision as to the alleged supervisory status of some of the Sergeants and all of the Lieutenants. The evidence might have been developed better if the Municipal Employer had cooperated with the Petitioner and Hearing Officer by making the two sequestered witnesses available at the hearing and participated by introducing evidence of

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9/ City of Green Bay (Police Department) (9363) 12/69.



its own. The Municipal Employer was afforded a full opportunity to participate in the hearing which it exercised to the extent of cross-examining the Petitioner's witnesses, but it declined the invitation to produce any evidence of its own.

The Municipal Employer's motion to dismiss is premised on the assumption that this is an adversary proceeding and that therefore the Petitioner ought to be nonsuited for failure to establish its case. This is a misconstruction of the nature of the instant proceeding. The petition, which was filed in the form of a petition for a declaratory ruling, is in its nature akin to an election petition or petition for clarification of a bargaining unit, both of which are non-adversary, administrative determinations. The hearing in such a case is in the form of an investigation by the Commission to obtain facts on which the Commission can base its decision. In such cases it is not uncommon for the Hearing Officer to call and interrogate witnesses and to explore avenues with respect to matters not raised, or only partially raised, by the parties.

Because of the Municipal Employer's refusal to cooperate with the Petitioner or the Hearing Officer, it was impossible for the Hearing Officer to establish sufficient evidence of record for the Commission to make a determination of the alleged supervisory status of police personnel serving in the capacity of Traffic Sergeant, Juvenile Sergeant, Training and Personnel Sergeant, Records Sergeant, Photo and Identification Sergeant, and Lieutenant. If this proceeding were an adversary proceeding the Commission might be inclined to grant the motion insofar as it related to the above enumerated positions and issue a declaratory ruling on the positions for which the evidence is sufficient. However, such a ruling would not settle the underlying dispute and would be inconsistent with the Commission's legislative mandate to promote the peaceful adjustment of labor disputes. The question could arise again if the Petitioner chooses to file a petition for fact finding in a unit, which includes the disputed positions. Therefore the Commission has entered an order denying both of the Municipal Employer's motions to dismiss and is ordering that a further hearing be held for the purpose of taking additional evidence. In an effort to insure that the Municipal Employer has had an adequate opportunity to prepare and present any evidence or argument that it deems relevant the order provides that the Hearing Officer shall take evidence on all disputes positions.

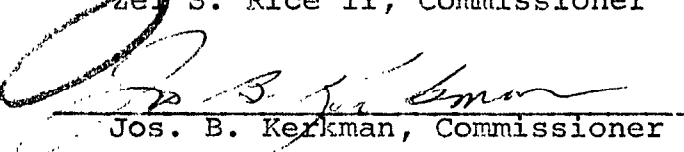
Dated at Madison, Wisconsin, this 1st day of February, 1971.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By

  
Morris Slayney, Chairman

  
Zel S. Rice II, Commissioner

  
Jos. B. Kerkman, Commissioner