

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

TEAMSTERS LOCAL 563,	:	
	:	
Complainant,	:	
	:	Case X
vs.	:	No. 15211 MP-108
	:	Decision No. 10716-B
CITY OF NEENAH,	:	
	:	
Respondent.	:	
	:	

ORDER AFFIRMING EXAMINER'S FINDINGS OF FACT,
AMENDING EXAMINER'S CONCLUSIONS OF LAW AND
REVERSING EXAMINER'S ORDER

Teamsters Local 563 having on January 7, 1972 filed a complaint with the Wisconsin Employment Relations Commission wherein it alleged that the City of Neenah had committed prohibited practices within the meaning of the Wisconsin Municipal Employment Relations Act, by refusing to comply with an arbitration award where previously the parties had agreed to accept such award as final and binding upon them; and Marvin L. Schurke, Hearing Examiner, having on May 23, 1972, issued Findings of Fact, Conclusions of Law and Order in the matter, wherein he dismissed the complaint filed herein; and Teamsters Local 563 having, pursuant to Section 111.07(5), Wisconsin Statutes, filed a petition for review of the Examiner's Order and counsel for both Teamsters Local 563 and the City of Neenah having filed briefs with the Commission with respect to the petition for review; and the Commission having reviewed the entire record, the decision of the Examiner, the petition for review and the briefs filed in support and opposition thereto, and being fully advised in the premises, makes and issues the following

FINDINGS OF FACT

1. That Teamsters Local 563, hereinafter referred to as the Complainant, is a labor organization having its principal offices at 1366 Appleton Road, Menasha, Wisconsin.

2. That the City of Neenah, hereinafter referred to as the Respondent, is a Municipal Employer with offices at the City Hall, Neenah, Wisconsin.

3. That at all times pertinent hereto the Respondent has recognized the Complainant as the exclusive collective bargaining representative in a bargaining unit including employees of the Street and Sanitation Department of the City of Neenah; and that the Complainant and Respondent are parties to a collective bargaining agreement effective for the period January 1, 1969 to and including December 31, 1970, which among its several provisions contains the following which are material herein:

"ARTICLE 11 - DISCHARGE OR SUSPENSION

The Employer shall not discharge or suspend any employee without just cause and shall give at least one warning notice of the complaint against such employee to the employee in writing and a copy of same to the Union except that no warning notice need be given to an employee before his discharge if the cause of such discharge is dishonesty, drunkenness, or drinking while on duty, recklessness, endangering others while on duty, or the carrying of unauthorized passengers in city-owned vehicles while on duty. The warning notice as herein provided shall not remain in effect for more than one-hundred and eighty (180) days from date of issuance.

Discharge or suspension of an employee must be by proper written notice, registered mail, return receipt, sent to the last known address of the employee with a copy to the Union. Any employee may request an investigation as to his discharge. Should such investigation prove that an injustice has been done, the employee shall be reinstated and compensated at his usual rate of pay while he has been out of work.

Appeal from discharge must be taken within five (5) days by written notice to the Superintendent of the Department and a meeting held between the Employer and the Union within fifteen (15) days after the appeal is filed. A decision must be reached within five (5) days from the date of this meeting.

The employee may be reinstated under other conditions agreed upon by the Employer and the Union or pursuant to the terms or an arbitration award. Failure to agree shall be cause for the matter to be submitted to arbitration as provided in Article 15 of this Agreement.

. . .

ARTICLE 15 - ARBITRATION

Section A.

Any grievance relative to the interpretation or application of this Agreement, which cannot be adjusted by conciliation between the parties, may be referred by either party hereto, within five (5) days to the Wisconsin Employment Relations Commission for the appointment of an arbitrator from its staff.

Section B.

The arbitrator shall, in so far as possible, within five (5) days of his appointment conduct hearings and receive testimony relating to the grievance and shall submit his findings and decisions. The decision of the arbitrator shall be final and binding on both parties to this Agreement.

Section C.

The expense of the arbitrator shall be divided equally between the parties to this Agreement.

Section D.

It is understood that the arbitrator shall not have the authority to change, alter or modify any of the terms or provisions of this Agreement.

. . . ."

4. That Robert Robbins was employed by the Respondent in April, 1967, as a garbage man in the Street and Sanitation Department; that in September 1970 Robbins moved to Menasha, Wisconsin; that on October 27, 1970 the Respondent notified Robbins and the Complainant, by letter, that Robbins' residence outside of the City of Neenah was in violation of the Neenah Code of Ordinances, Section 2.05(12), which states:

"2.05 CONDITIONS OF EMPLOYMENT.

. . . .

(12) RESIDENCE OF EMPLOYEES. As a resident of Neenah will normally have more interest in his job and City than will a non-resident, it is expected that all employees of the City of Neenah live in the City. Any exceptions to the following controls require the authorization of the Finance Committee. The following controls shall be practiced:

(a) The City Clerk-Comptroller shall be kept informed of the address of all City employees. Changes in address should be reported promptly.

(b) Employees living outside of the City of Neenah at the time of hire who do not reside in the City limits one year from their date of hire shall be removed from the payroll.

(c) Employees moving out of the City limits shall be removed from the payroll.";

that Robbins was advised in the aforementioned letter that if he wished to remain an employee of the Respondent he would have to establish residency within the City of Neenah by December 31, 1970; that on December 23, 1970 the Respondent notified the Complainant and Robbins that Robbins' employment would be terminated as of December 31, 1970 because of failure or refusal to comply with the aforesaid City ordinances; that Robbins' employment was terminated on December 31, 1970.

5. That the Complainant filed a written grievance alleging that the Respondent violated the collective bargaining agreement by its discharge of Robbins; that, pursuant to Article 15 of the collective bargaining agreement, the parties submitted the grievance to Arbitrator John T. Coughlin for a final and binding decision; and that on December 9, 1971 Arbitrator Coughlin entered an award on said grievance, with accompanying opinion, which award reads as follows:

"AWARD

For the aforementioned reasons, the arbitrator concludes that the City of Neenah violated the Grievant's right to procedural due process as guaranteed by the 14th Amendment of the United States Constitution and by so doing unjustly discharged the Grievant thereby violating Section 11 of the collective bargaining agreement and that therefore the following affirmative actions be undertaken by the Employer:

(1) Reinstate the Grievant with full back pay and seniority from the time of his discharge to the receipt of this award.

(2) That if the Employer determines that it intends to terminate the Grievant because of his failure to comply with Section 2.05(12)(c) of the City of Neenah ordinances that the following procedures be followed:

(a) A statement of the reasons why the Employer intends to terminate the Grievant be given to said Grievant.

(b) A reasonable time be provided during which the Grievant would have an opportunity to comply with the Employer's request to adhere to the aforementioned ordinance.

(c) Notify the Grievant in writing that a hearing is to be held at which time he may respond to the stated reasons for his pending termination.

(d) A hearing be scheduled concerning the Grievant's termination and the possibility, if any, that he may be exempted from the ordinance's residency requirement.

(e) That such a hearing be in fact held if the Grievant appears at the appointed time and place and that at said hearing the Grievant be given reasonable opportunity to submit evidence concerning his discharge or potential exemption from the ordinance requirement in question.

. . . "

6. That the Respondent refused and continues to refuse to implement the decision and award of Arbitrator Coughlin.

On the basis of the above and foregoing Findings of Fact, the Commission makes the following

AMENDED CONCLUSION OF LAW

That Arbitrator John T. Coughlin, in issuing his award on December 9, 1971, with respect to the grievance of Robert Robbins, exceeded his jurisdiction in determining whether Robert Robbins was denied constitutional due process by the City of Neenah in discharging Robert Robbins,

and further that Arbitrator John T. Coughlin did not issue a final and binding award with respect to the issue presented to him in said arbitration proceeding, as contemplated in Section 298.10(1), Wisconsin Statutes, and therefore the arbitration award issued by Arbitrator John T. Coughlin on December 9, 1971, is not a final and definite award which the Wisconsin Employment Relations Commission will enforce pursuant to Section 111.70(3)(a)(5) of the Municipal Employment Relations Act.

Upon the basis of the above and foregoing Findings of Fact and Amended Conclusion of Law, the Commission makes the following

ORDER

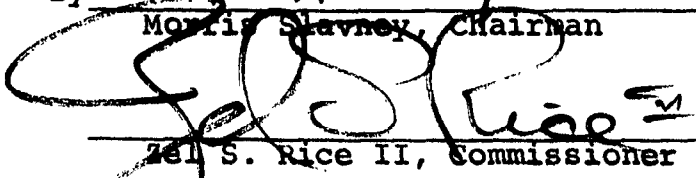
That the arbitration proceeding involved be, and the same hereby is, remanded to Arbitrator John T. Coughlin for further hearing for the purpose of issuing a final and definite award as to whether the City of Neenah terminated the employment of Robert Robbins on December 31, 1970, for just cause, pursuant to the collective bargaining agreement in effect between Teamsters Local 563 and the City of Neenah, effective January 1, 1969 through and including December 31, 1970.

Given under our hands and seal at the City of Madison, Wisconsin, this 13th day of October, 1972.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By


Morris Slavney, Chairman


Zel S. Rice II, Commissioner


Jos. B. Kerkman, Commissioner

MEMORANDUM ACCOMPANYING ORDER AFFIRMING EXAMINER'S
FINDINGS OF FACT, AMENDING EXAMINER'S
CONCLUSIONS OF LAW AND REVERSING
EXAMINER'S ORDER

On December 9, 1971, Arbitrator John T. Coughlin issued his arbitration award involving a grievance of Robert Robbins alleging that the City of Neenah discharged Robbins without just cause under a collective bargaining agreement existing between the City and Teamsters Local 563. The basis for the Arbitrator's award rested on his conclusion that the City violated the grievant's "right to procedural due process as guaranteed in the 14th Amendment of the United States Constitution." The City refused to comply with said award and subsequently a complaint was filed with the Commission alleging that the City committed a prohibited practice by not complying with said award. Marvin L. Schurke, an Examiner appointed by the Commission, conducted a hearing on said complaint and on May 23, 1972, issued Findings of Fact, Conclusions of Law and Order, wherein he found that the Arbitrator exceeded his powers by going outside the collective bargaining agreement in reaching his award and therefore as a result dismissed the complaint alleging that the City refused to comply with the award.

The Commission adopts the Findings of Fact as found by the Examiner and the Commission agrees with the Examiner that the Arbitrator exceeded his jurisdiction in issuing his award, and in addition the Commission concludes that the Arbitrator imperfectly executed his award since no final and definite award was issued, as contemplated in Section 298.10(1) of the Wisconsin Statutes.

The discharge clause in the collective bargaining agreement provides that an employee cannot be discharged, except in certain stated circumstances, not applicable herein, without receiving a written warning notice. While no transcript of the arbitration proceeding was had, an examination of the brief submitted by the Union to the Arbitrator refers to certain factual situations relied upon by the Union in support of the Union's argument that the application of the ordinance to the grievant was contrary to the application of the ordinance to other employees who resided outside of the City of Neenah in an apparent violation of the basic provisions of the ordinance. The evidence before the Arbitrator indicates that, some two and one half months prior to his termination, the grievant, in writing, received a notification that the City intended to apply the ordinance with respect to the grievant and indicated to him that he would be given an extension of time to return to Neenah as a resident before it would take formal action on the ordinance. A copy of such notification was sent to the representative of the Union.

Under the collective bargaining agreement, if in the opinion of the Union, it felt that such "warning" notice was not justified or improper it could have, prior to the actual termination of the grievant, filed a grievance protesting the issuance of such warning notice. However, the Union did not take the opportunity to do so, although there was some correspondence exchanged between the Union representative and the representative of the City with respect to the matter.

It was after the employe was terminated that the Union exercised its right to proceed under the collective bargaining agreement to file a grievance with respect to the termination, and upon the failure to resolve such grievance, initiated an arbitration proceeding, which was not opposed by the City, and arbitration was had before a staff member of the Commission who was appointed as the Arbitrator. The arbitration hearing constituted a due process proceeding mutually agreed upon by the parties in their collective bargaining. In the case relied upon by the Arbitrator in reaching the conclusion in his award, namely, Roth vs. The Board of Regents of State Colleges, rendered by the Honorable James Doyle, District Judge of the Western District of Wisconsin, there existed no established procedure providing an opportunity to the non-tenured professor involved to be apprised of the reason for the non-renewal of his teacher contract, nor the opportunity to answer or to rebut the reasons or reason relied upon by his employer to not renew his teaching contract. In that decision Judge Doyle held that

"minimal procedural due process includes a statement of the reasons why the university intends not to retain the professor, notice of a hearing at which he may respond to the stated reasons, and a hearing if the professor appears at the appointed time and place. At such a hearing the professor must have a reasonable opportunity to submit evidence relevant to the stated reasons. The burden of going forward and the burden of proof rests with the professor. Only if he makes a reasonable showing that the stated reasons are wholly inappropriate as a basis for decision or that they are wholly without basis in fact would the university administration become obliged to show that the stated reasons are not inappropriate or that they have a basis in fact." 1/

The grievance and arbitration provision in the collective bargaining agreement involved herein provides greater due process than that set forth in Judge Doyle's decision. The agreement provides for a warning notice, it provides for grievance meetings, it provides for arbitration should the grievance not be settled informally, it provides for a hearing by a neutral, and it further provides that the award of the neutral should be final and binding. While Judge Doyle's decision indicates that the burden of proof to establish that the professor's teaching contract should have been renewed was on professor, in the arbitration proceeding involved herein the burden of proof was on the City to establish that there was just cause for the termination of the employment of the grievant.

Furthermore, the Arbitrator did not issue a final and definite award on the issue presented to him, namely, "Did the Employer discharge the Grievant for just cause?". The award did not determine with finality whether the discharge was for cause under the collective bargaining agreement. While the award did require the Employer to re-

1/ On January 2, 1972, the United States Supreme Court reversed Judge Doyle's decision, not on the basis of his rationale, but on the basis that the professor involved had no right to procedural due process since neither his "liberty" and "property", as contemplated by the 14th Amendment, were involved. (71-162)

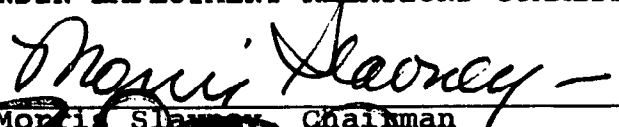
instate the Grievant, pursuant to the award the Employer, could after the hearing ordered by the Arbitrator, "re-discharge" the Grievant, and under the collective bargaining agreement, the parties could very well be back in arbitration over said "re-discharge".

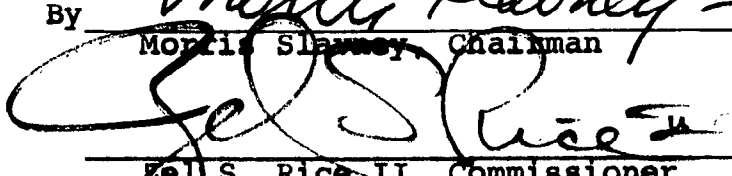
In order to effectuate the policies of the Municipal Employment Relations Act and the obligations of the parties under their collective bargaining agreement involved herein, we deem that the rights of the parties, including the employe, under the collective bargaining agreement should not be left undetermined as a result of our conclusion to set aside the award of the Arbitrator, and to reverse the Order of the Examiner. Therefore we have ordered that the matter be remanded to the Arbitrator for the purpose of issuing an arbitration award which is final and definite, and shall be binding on the parties.

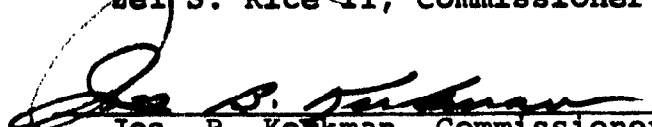
Dated at Madison, Wisconsin, this 13th day of October, 1972.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By


Morris Slawney, Chairman


Zel S. Rice II, Commissioner


Jos. B. Kerkman, Commissioner