STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

FIRE FIGHTERS LOCAL 2051, INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, AFL-CIO, Complainant, vs. CITY OF BROOKFIELD, Respondent.	Case VIII No. 16166 MP-187 Decision No. 11406-A

Appearances:
Mr. Edward D. Durkin, International Vice President, for the Complainant.
Hayes & Hayes, Attorneys at Law, by Mr. Tom E. Hayes, for the Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Complaint of prohibited practices having been filed with the Wisconsin Employment Relations Commission in the above entitled matter and the Commission having appointed Howard S. Bellman, a member of the Commission's staff, to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and Orders as provided in Section 111.07(5), Wisconsin Statutes; and hearing having been held at Milwaukee, Wisconsin, on December 4, 1972 before the Examiner; and the Examiner having considered the evidence and arguments and being fully advised in the premises makes and files the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1.) That the City of Brookfield, referred to herein as the Respondent, is a municipal employer duly incorporated under the laws of the state of Wisconsin which operates, inter alia, a fire department; and that said Fire Department maintains two fire stations within the City of Brookfield.

2.) That Local #2051, International Association of Fire Fighters, AFL-CIO, referred to herein as the Complainant, is a labor organization having offices at 3300 Lilly Road, Brookfield, Wisconsin; and that the Complainant, since approximately 1967 and at all times material herein, has been the bargaining representative of certain employes of the Fire Department of the Respondent, who are stationed at the aforementioned two fire stations.

3.) That some employes in the aforesaid bargaining unit represented by the Complainant live within the City of Brookfield, whereas other such employes do not; that the geographic configuration of said City and the location of the aforesaid fire stations are such that it is possible, and in some instances the fact, that employes living outside said City may live closer to their assigned stations, than some employes living within the City live to their assigned stations.

4.) That Complainant and Respondent have, for several years been parties to collective bargaining agreements; that they were parties to such an agreement the term of which was the calendar year 1972, which they entered on August 29, 1972; and that said agreement provided, in material part, as follows:

> "The rules and regulations of the Brookfield Fire Department shall be established by the Fire Chief except that such shall not modify or contradict any provisions of this Agreement."
>
> "This Agreement shall become effective as of January 1, 1972, and remain in full force and effect to and including December 31, 1972. Any work regulations, ordinances, or rules in conflict with the terms of this Agreement shall be subordinate to and ineffective to alter the terms of this Agreement."

5.) That during June 1972, officials of the Respondent learned that certain members of the Common Council of the Respondent were considering enactment by said Common Council of an ordinance limiting the location of residency of employes of the Respondent; that on July 11, 1972, pursuant to such knowledge, officials of the Complainant attended a meeting of said Common Council for the purpose of opposing said residency proposal; that while attending said meeting two members of the said Common Council, one of whom was its Chairman, and both of whom were agents of the Respondent, informally advised said officials of Respondent that it would not be necessary to appear before said Common Council in opposition to said proposal because said proposal was going to be tabled and not enacted; and that on the basis of such advice Respondent's officials did not appear in opposition to the proposal which, in fact, was made and tabled.

6.) That, on approximately June 30, 1972, Complainant submitted to Respondent, in order to commence collective bargaining for a 1973 collective bargaining agreement, a set of proposals one of which stated as follows:

> "7) Article 15 shall provide for a minimum callback to duty of four firefighters, one Equipment Engineer, and one officer in any instance where a local emergency or emergencies require two or more engine companies to be in service at one time. If still additional assistance is required, efforts are to be made to contact off duty men for the report to duty prior to requesting non-professional assistance from any other community. Such shall not be interpreted to bar requests for mutual aid from other local neighboring communities when additional apparatus or equipment is deemed necessary."

7.) That collective bargaining meetings between Complainant and Respondent for a 1973 collective bargaining agreement did not commence until October 2, 1972 at which time the Chief of Respondent's Fire Department, an agent of the Respondent, stated with regard to the above-quoted proposal No. 7, that he was opposed to said proposal, and that if the Complainant was successful in achieving said proposal, he would make efforts to bring about enactment of an ordinance limiting residency.

8.) That on approximately October 17, 1972, the Respondent, without further notice to the Complainant, with which it was at that time engaged in negotiations for a 1973 collective bargaining agreement, enacted an ordinance covering the employes in the bargaining unit represented by the Complainant, as well as other employes of the Respondent which provides as follows:

"PART I. There is hereby created Section 1.12 of the Municipal Code of the City of Brookfield to read as follows:

"1.12 EMPLOYEES REQUIRED TO RESIDE IN CITY.

(a) It is hereby declared to be the policy of the City of Brookfield that all employees in the classified service, and in the police service and fire service, shall be residents of the City of Brookfield.

(b) All present employees who are not residents of the City shall become a resident of the City of Brookfield within one (1) year after the adoption of this ordinance.

(c) Any newly appointed employee who is not a resident of the City shall become a resident of the City of Brookfield within one year after the completion of his probationary period.

(d) The Common Council shall have the authority to grant an extension for an additional six months in cases involving practical difficulty or unusual hardship.

(e) Failure to comply with the requirements of this ordinance shall result in the termination of an employee's service."

PART II. All ordinances or parts of ordinances contravening the provisions of this ordinance are hereby repealed.

PART III. This ordinance shall take effect and be in force from and after passage and publication."

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

CONCLUSIONS OF LAW

1.) That the ordinance enacted by the Respondent on October 17, 1972 by limiting residency of the employes in its Fire Department affected a condition of employment of said employes.

2.) That the Respondent, by its authorized agents, since October 17, 1972, and at all times thereafter, has, by unilaterally imposing a limitation upon the residency location of the aforesaid employes employed in its Fire Department, without notifying the Complainant that it was contemplating said change in order to afford Complainant an opportunity to request collective bargaining on the matter, has engaged in, and is engaging in, prohibited practices within the meaning of Section 111.70(3)(a)(4) and (1) of the Municipal Employment Relations Act.

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

ORDER

IT IS ORDERED that the City of Brookfield, its officers and agents, shall immediately:

1. Cease and desist from:

(a) Interfering with, restraining or coercing its employes in the exercise of their rights guaranteed by the Municipal Employment Relations Act.

(b) Refusing to bargain collectively by unilaterally changing conditions of employment of employes without notice to the bargaining representative of said employes that such changes were contemplated.

2. Take the following affirmative action which the Examiner finds will effectuate the policies of the Municipal Employment Relations Act.

(a) Reinstate, to the status pertaining prior to its enactment of October 17, 1972, the condition of employment of the employes of the Respondent in the bargaining unit represented by the Complainant regarding residency location.

(b) Upon request, bargain collectively with Complainant with respect to residency limitations to be imposed upon the employes represented by Complainant.

(c) Notify all Fire Department employes, by posting, in conspicuous places on its premises, where notices to all such employes are usually posted, copies of the notice attached hereto and marked "Appendix A". Appendix A shall be signed by the Chief of the Fire Department.

(d) Notify the Wisconsin Employment Relations Commission, in writing, within twenty (20) days following the date of this Order, as to what steps have been taken to comply herewith.

Dated at Madison, Wisconsin, this 27th day of July, 1973.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Howard S. Bellman
Howard S. Bellman, Examiner

APPENDIX "A"

NOTICE TO ALL FIRE DEPARTMENT EMPLOYES

Pursuant to an Order of an Examiner of the Wisconsin Employment Relations Commission, and in order to effectuate the policies of the Municipal Employment Relations Act, we hereby notify our employes that:

1. WE WILL reinstate to the status pertaining prior to the enactment of the residency limitation ordinance of October 17, 1972, the condition of employment regarding employe residency location.

2. WE WILL NOT refuse to bargain collectively with Fire Fighters Local 2051, International Association of Fire Fighters, AFL-CIO, by unilaterally changing working conditions of employes represented by said labor organization without notifying said labor organization that such changes are contemplated; or in any other manner, interfere with, restrain or coerce our employes in the exercise of the rights guaranteed by the Municipal Employment Relations Act.

City of Brookfield

By_____
Chief, Fire Department

Dated this day of , 1973.

THIS NOTICE MUST REMAIN POSTED FOR SIXTY (60) DAYS FROM THE DATE HEREOF AND MUST NOT BE ALTERED, DEFACED OR COVERED BY ANY MATERIAL.

CITY OF BROOKFIELD, VIII, Decision No. 11406-A

MEMORANDUM ACCOMPANYING
FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The instant complaint was filed on November 3, 1972. Hearing was held on December 4, 1972 and the transcript thereof issued on March 22, 1973. Briefs were received by the Examiner until May 24, 1973.

Complainant contends, contrary to the Respondent, that the residency limitation set forth in the ordinance in question is a condition of the employment of the employes which it represents which the Respondent may not modify without engaging in collective bargaining as defined by the Municipal Employment Relations Act; that by enacting the ordinance the Respondent did modify said alleged condition of employment without such collective bargaining; and that thereby, the Respondent committed a prohibited practice under Section 111.70(3)(a)(4). That subsection declares it prohibitive for a Municipal Employer "to refuse to bargain collectively with a representative of a majority of its employes in an appropriate collective bargaining unit."

Section 111.70(1)(d) defines collective bargaining as follows:

> "(d) 'Collective bargaining' means the performance of the mutual obligation of a municipal employer, through its officers and agents, and the representatives of its employes, to meet and confer at reasonable times, in good faith, with respect to wages, hours and conditions of employment with the intention of reaching an agreement, or to resolve questions arising under such an agreement. The duty to bargain, however, does not compel either party to agree to a proposal to require the making of a concession. Collective bargaining includes the reduction of any agreement reached to a written and signed document. The employer shall not be required to bargain on subjects reserved to management and direction of the governmental unit except insofar as the manner of exercise of such function affects the wages, hours and conditions of employment of the employes. In creating this subchapter, the legislature recognizes that the public employer must exercise its powers and responsibilities to act for the government and good order of the municipality, its commercial benefit and the health, safety and welfare of the public to assure orderly operations and functions within its jurisdiction, subject to those rights secured to public employes by the constitutions of this state and of the United States and by this subchapter."

The determination that, as a general proposition, residency requirements constitute a "condition of employment" and therefore a subject of mandatory bargaining was made by the Commission in Milwaukee Sewerage Commission (Decision No. 11228-A).

Much of the Respondent's argument in the instant case goes to this general proposition, and the Examiner has carefully studied that argument, including the cited authorities. However, the Examiner finds no basis, in his role, or in the Respondent's position, for rejection of the Commission's ruling in Milwaukee Sewerage Commission;

nor does he believe it necessary to supplement or reiterate herein the rationale offered for that ruling by the Commission.

Of course, the employment setting in the instant case, a fire department, differs obviously from that in Milwaukee Sewerage Commission, and the question of whether such difference should require a different holding on bargainability is raised.

In that regard, the Respondent contends that the emergency nature of much of the service provided by the fire department is pertinent and should be determinative. However, the Examiner rejects this contention on the basis that there is no showing that the emergency services cannot be sufficiently provided without the residency limitation. In fact, the record indicates that a fire fighter may live closer to his station although he lives outside the City, than if he lived therein; and that there are other personnel practices and aspects of the employment relationship which can be adjusted to provide for more personnel on duty. There obviously is real merit in providing for a large number of available fire fighters at all times, and there may be economy and expediency in attempting to realize this value by imposing a residency limitation, but it is not established that in order for the Respondent to meet its obligations to provide the emergency service in question a residency limitation must be imposed. Therefore, it is concluded that the argued emergency service distinction does not obtain, and that the ruling in Milwaukee Sewerage Commission is determinative herein.

The Respondent contends, at least by implication, that Section 62.13(4)(d), Wisconsin Statutes, being more particular than the definition of collective bargaining provided at Section 111.70(1)(d) Municipal Employment Relations Act, the former should govern where in conflict with the latter. (See Ashland Board of Education vs. WERC, 52 Wis. 2d 625, 1971.) Section 62.13(4)(d) deals specifically with the examinations given to potential police and fire personnel and provides in material part as follows:

> "The examination shall be free for all citizens of the U.S. over 21 and under 55 years of age, with proper limitations as to residence, health, habits and character."

This contention is rejected on the basis that 1) the MERA was enacted subsequent to Section 62.13(4)(d) (See Muskego-Norway Joint School District v. WERB, 35 Wis. 2d 540, 1967.); 2) The term "proper limitations as to residence" is no more particular than the terms of the aforesaid statutory definition of collective bargaining; 3) Section 62.13(4)(d) governs entrance examination procedures, whereas the ordinance in question would govern continued employment as well.

This is not to hold that residency limitations cannot be imposed upon fire fighters, only that where such fire fighters are subject to collective bargaining under the MERA, the Act cannot be ignored in imposing said limitations.

The Commission has also determined that it is a violation of Section 111.70(3)(a)(4) for a municipal employer to unilaterally change a condition of employment when the employes in question are represented for the purposes of collective bargaining. 1/ (City of

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1/ The Respondent's citation of Milwaukee County (Dec. No. 11306) is inappropriate because that case was governed by Section 111.70 prior to its November 11, 1971 amendments which added the prohibited practice alleged by the instant complaint.

Wisconsin Dells, Decision No. 11646, 1973). 2/

The Respondent, by its Counsel, agrees (See transcript page 6) that there was no bargaining on the subject of residency limitations prior to the enactment of the ordinance in issue, but urges that the Respondent had no duty to engage in same because no request for such bargaining was made by the Complainant. Of course, demands for bargaining normally should originate with the employes' bargaining representative, and the failure to make a timely demand may constitute a waiver, but in cases such as the instant matter, such demands normally follow notice to the bargaining representative that a change is being considered. 3/ Furthermore, in the instant matter, throughout the period that preceded the enactment of the ordinance, the Complainant relied upon advice of agents of the Respondent that it need not anticipate any residency limitation.. Therefore, it would be improper to rule that Complainant was remiss in not demanding bargaining on that subject and the Respondent's contention must be rejected.

Likewise, it would be completely inconsistent with the orthodoxies of collective bargaining in the municipal sector to hold that a municipal employer may notify bargaining representatives of considered changes in conditions of employment by enacting enforceable ordinances making such changes. Such enactments normally occur at the completion of bargaining and even if enforcement is withheld, the fait accompli nature of such enactment is contrary to the open-minded attitude that is essential to good-faith bargaining.

The 1972 collective bargaining agreement also provided that "Off duty hours shall be free of City control except for the customary emergency callbacks". This appeared in the context of an Article mainly concerned with the scope of the Respondent's authority over its employes. For example, this Article limited the scope of the Chief's power to make rules and regulations by the language set forth at Finding of Fact No. 4, and restricted the types of work assignments to be made to the employes, and the Respondent's authority over the employes "outside employment". The Complainant contends that the above-quoted provision also limited the Respondent's prerogatives regarding the residency of the employes. However, the significance of this interpretation is not clear to the Examiner because there is no allegation of violation of the collective agreement here; unless it is being urged that the Respondent, by enacting the residency ordinance after receiving the Complainants proposals for the 1973 agreement, which proposals implicitly and by omission demanded that the aforesaid provision be maintained, made its unilateral change in the face of a demand to the contrary. Given the Complainants interpretation of the provision, such argument may be made. However, the argument is unnecessary because the enactment was improper, as explained elsewhere herein, on other grounds.

2/ Also see NLRB v. Katz, 369 U.S. 736, 50 LRRM 2177 (1962); NLRB v. American Mfg. Co., 351 F 2d 74, 60 LRRM 2122 (CA5, 1965); NLRB v. Mid-West Towel and Linen Service, Inc., 339 F 2d 958, 57 LRRM 2433 (CA7, 1964); NLRB v. Wonder State Mfg. Co., 344 F 2d 210, 59 LRRM 2065 (CA8, 1965); NLRB v. Zelrich, 341 F 2d 1011, 59 LRRM 2225 (CA5, 1965); McLean v. NLRB, 333 F 2d 84, 56 LRRM 2475 (CA6, 1964); NLRB v. Citizens Hotel Co., 326 F 2d 501, 55 LRRM 2135 (CA5, 1964); NLRB v. Central Illinois Public Service Co., 324 F 2d 916, 54 LRRM 2586 (CA7, 1963).

3/ U.S. Lingerie Corp., 170 NLRB No. 77, 67 LRRM 1482 (1968).

Ignoring, for the purposes of discussion, that the ordinance in issue was enacted without collective bargaining at a time when contract negotiations were pending, the Respondent's conduct may also be examined in the light of the duty to bargain during the term of a collective bargaining agreement. This duty precludes unilateral, changes without prior collective bargaining "as to subjects which were neither discussed nor embodied in any of the terms or conditions of the contract." (NLRB v. Jacobs Mfg. Co., 196 F 2d 680, 30 LRRM 2098, CA2, 1952).

The City contends that certain provisions of the 1972 collective bargaining agreement which was in effect throughout the year obviated the necessity to bargain under this doctrine before imposing a residency limitation. In its reply brief it refers in this regard to the two provisions quoted at Finding of Fact No. 4. It is contended that these provisions constituted so-called "zipper" clauses which waive the duty to bargain over matters not covered by the agreement.

The first provision, quoted above, which refers to rules and regulations established by the Chief and not to ordinances, is interpreted, given no evidence to the contrary, to refer to work rules which do not effect material changes in "conditions of employment", as that term is defined by MERA. It is presumed that a waiver of such a right would be explicit.

The second provision quoted has as its obvious purpose, given no evidence to the contrary, the reconciliation of the collective bargaining agreement and the regulations, ordinances and rules. It arguably may be construed to allow for the passage of reconcilable ordinances during the term of the collective bargaining agreement. However, it is held to contemplate enactments in existence at the time that the collective bargaining agreement was entered, and, as in the case of the first provision, to be insufficiently explicit, to constitute a waiver of significant bargaining rights.

Thus, in analogous cases, the National Labor Relations Board, in administering the Labor-Management Relations Act, has held that it will not readily infer a waiver of the right to bargain on a mandatory subject of bargaining, and that such waivers must be "clear and unmistakable". (See NLRB v. Item Co., CA5, 1955, 35 LRRM 2709; cert. den. U.S. Sup. Ct. 1955, 36 LRRM 2716; Tide Water Assoc'd Oil Co., NLRB, 1949, 24 LRRM 1518). Findings of such waivers must be based upon specific language in the agreement or history of bargaining.

The Examiner notes that both parties have referred in their briefs to facts that are not in evidence. Particularly, the Respondent, which chose to call no witnesses in its own behalf, makes assertions regarding the validity of the ordinance in question, the problems facing the Fire Department due to the location of its employes residences, and describing the positions taken by the Complainant, that are without foundation in the record. There is, of course, a tolerance for hyperbole in argumentation, but misrepresentation is, at the least, inappropriate.

Dated at Madison, Wisconsin, this 27th day of July, 1973.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Howard S. Bellman
Howard S. Bellman, Examiner