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-B

ORDER DENYING PETITION FOR LEAVE TO AMEND ANSWER AND AFFIRMING EXAMINER'S FINDINGS OF FACT AND CONCLUSIONS OF LAW AND ORDER

Examiner Howard S. Bellman, having, on July 27, 1973 issued his Findings of Fact, Conclusions of Law and Order, with Accompanying Memorandum in the above entitled proceeding wherein the above named Respondent was found to have committed and was committing prohibited practices within the meaning of the Municipal Employment Relations Act, and wherein the Respondent was ordered to take certain affirmative action with respect thereto; and a petition for leave to amend answer and to review the Examiner's decision having been timely filed by the Respondent; and the Commission having reviewed the entire record in the matter, the Examiner's Findings of Fact, Conclusions of Law and Order, with Accompanying Memorandum, and the petition for leave to amend answer and to review, and the Commission being satisfied that the Findings of Fact and Conclusions of Law and Order with Accompanying Memorandum, issued by the Examiner should be affirmed; and the Commission being satisfied that the petition for leave to amend answer be denied and that the Findings of Fact, Conclusions of Law and Order with the Accompanying Memorandum should be affirmed.

NOW, THEREFORE, it is

ORDERED

That the petition for leave to amend answer in the above entitled matter be, and the same hereby is, denied, and

IT IS FURTHER ORDERED that the Wisconsin Employment Relations Commission hereby adopts the Examiner's Findings of Fact, Conclusions of Law and Order, with Accompanying Memorandum issued in the above entitled matter as its Findings of Fact, Conclusions of Law and Order, with Accompanying Memorandum; and therefore, the Respondent, City of Brookfield, shall notify the Wisconsin Employment Relations Commission within ten (10) days of receipt of a copy of this Order as to what steps it has taken to comply therewith.

Given under our hands and seal at the City of Madison, Wisconsin, this 26th day of September, 1973.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Morris Slavney, Chairman

Joel S. Rice II, Commissioner

MEMORANDUM ACCOMPANYING ORDER DENYING PETITION FOR LEAVE TO AMEND ANSWER AND AFFIRMING EXAMINER'S FINDINGS OF FACT AND CONCLUSIONS OF LAW AND ORDER

The instant proceeding was initiated by the Complainant by the filing of a complaint with the Commission on November 3, 1972. Thereafter, and on November 8, 1972, the Commission issued an order appointing Howard Bellman as Hearing Examiner of the matter. Pursuant to notice, hearing was conducted on said complaint by said Examiner on December 4, 1972. The Examiner issued his Findings of Fact, Conclusions of Law and Order on July 27, 1973. On August 13, 1973, the Respondent, by its city Attorney, timely filed a petition for review of the Examiner's decision and requested leave to amend its answer which had been previously filed on November 27, 1972.

Petiton For Leave To Amend Answer

Respondent's petitioned for leave to amend answer pursuant to ERB 22.03(5), to allege that on December 5, 1972 Respondent's Common Council repealed the ordinance involved.

It should be noted that the above alleged action occurred on the date following the closing of the hearing, and further, that at no time prior to July 27, 1973, the date on which the Examiner issued his decision, did the Respondent move to amend its answer in any respect.

ERB 22.03(5) provides, in effect, that a respondent may amend his answer any time prior to the hearing, or during the hearing, and "prior to the issuance of the order. . ."

The Order appointing the Examiner was issued by the Commission on November 8, 1972 authorized him "to conduct the hearing on said complaint, and to make and issue Findings of Fact, Conclusions of Law and Order in the matter, as provided in Section 111.70(4) and 111.07 of the Wisconsin Statutes." The Respondent now attempts to amend its answer after the Order of the Examiner has been issued. We deem that any amendment to the answer is untimely since the Examiner has issued his Order.

PETITION FOR REVIEW

In its petition for review, Respondent alleges that the facts as found by the Examiner are erroneous in two respects, namely (a) there was no finding that the "proposed ordinance did not become effective because of defective publication," and (b) "that no employee has been directed to change his residence, nor has any employee been threatened with loss of employment or had lost employment by reason of his non-residency." A review of the record indicates that the Examiner would have erred in making such findings, since there was no proof introduced to establish such "facts". Assuming, arguendo, that such "facts" were established and made part of the Findings of Fact, we conclude that it would have not resulted in an opposite Conclusion of Law.

The ordinance, whether duly enacted or not, occurred as a result of unilateral action by the Respondent without fulfilling its duty to bargain on a condition of employment with the bargaining representative.

Also, assuming arguendo, that it had been established in the record that no employe had been directed to change his residence or been threatened with loss of employment by reason of his non-residency, such facts would not result in Conclusions of Law other than concluded by the Examiner, since the lack of application of the "defective" ordinance does not excuse the failure of the Respondent to bargain such condition of employment with the exclusive bargaining representative.

The Respondent further contends, in effect, that (a) a residency requirement does not constitute a condition of employment; (b) that the Complainant was unaware that the Respondent was contemplating restriction on residence; (c) that the Complainant was not denied an opportunity to request collective bargaining as to residence; and (d) that the Respondent did not engage in any prohibitive practice. We adopt the Examiner's rationale in his Memorandum accompanying his decision with respect to the above contentions of the Respondent.

The Respondent further contends that the Examiner engaged in "prejudicial procedural error" in ruling that "the residency ordinance was ineffective because of defective publication, was nevertheless enforced until rescinded." Page five of the Transcript discloses the following statements by the Examiner, which, the Respondent alleges, constitutes "prejudicial procedural error."

> "EXAMINER BELLMAN: Let's go back on the record. Okay. I have learned from off the record discussion that what Mr. Hayes was indicating was that he feared that the ordinance was invalid but in fact the ordinance remains on the books for whatever effect it might have, if any. And Mr. Durkin has told me that at one council meeting that was attended by members of the complainant there was a motion to rescind, which motion failed, with regard to this ordinance.
>
> Is that correct, Mr. Durkin?1/
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> MR. DURKIN: Prior to the motion to rescind that intent is correct.
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> EXAMINER BELLMAN: Okay. Well, we'll proceed then. And if, for some reason, during the pendency of this case the motion -- the ordinance in question is rescinded, then I suppose if that comes to my attention, this will have to be handled at the appropriate time. But at this

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1/Mr. Edward Durkin appeared for the Complainant in the proceeding.

time I will just assume that it's in effect. Although there is a theory that it may be effective on some basis, that it's of no particular interest to the Commission anyway or may be of no particular interest.

All right. Could you make a statement with regard to the employer's position as to the peculiarities of the emergency status of these employes?"

We cannot agree with the allegation of the Respondent that the Examiner ruled that the residency order was "enforced until rescinded." Furthermore, while in his Findings of Fact, the Examiner referred to the Ordinance, he made no finding or conclusions as to the validity of said ordinance, apparently, since there was no evidence adduced concerning the validity of the ordinance.

With respect to the allegation that the Memorandum of the Examiner indicated "a bias and prejudice and the absence of a judicial frame of mind," which the Respondent alleges are reflected in the Examiner's comments in the last paragraph of his memorandum, it appeares to the Commission that the Examiner merely reflected his own opinion with regard to the failure of the Respondent's to establish certain facts to support its assertions made during the course of the hearing and in its brief filed with the Examiner, as well as the Respondent's representations respecting the position of the Complainant.

It should be noted that the Respondent filed its brief with the Examiner on April 18, 1973, and in its petition for review it alleges that it rescinded the ordinance involved on December 5, 1972. It appears to the Commission that had the Respondent filed its amendment to its answer shortly after the hearing alleging that, in fact, it had rescinded the ordinance, the matter involved might have been adjusted, and thus the instant matter might have been resolved without the necessity of filing briefs and the issuance of a decision.

We have today issued an Order affirming the decision of the Examiner rendered in the instant matter.

Dated at Madison, Wisconsin this 26th day of September, 1973.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Morris Slavney, Chairman

Zel S. Rice II, Commissioner