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STATE OF WISCONSIN

MAY 23 1973

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION  
WISCONSIN EMPLOYMENT  
RELATIONS COMMISSION

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BROOKFIELD PROFESSIONAL POLICEMEN'S  
ASSOCIATION,

Complainant,

vs.

THE CITY OF BROOKFIELD, WISCONSIN,

Respondent.

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Case IX  
No. 16203 MP-189  
Decision No. 11426-A

Appearances:

Mr. John H. Lauerman, Attorney at Law, on behalf of Complainant Association.  
Hayes and Hayes, Attorneys at Law, by Mr. Thomas E. Hayes, Attorney at Law, on behalf of Respondent City.

ORDER DENYING MOTION TO DISMISS AND DEFERRING FURTHER PROCEEDINGS

Brookfield Professional Policemen's Association having, on November 13, 1972, filed a complaint with the Wisconsin Employment Relations Commission wherein it alleged that the City of Brookfield, Wisconsin had committed prohibited practices within the meaning of Section 111.70, Wisconsin Statutes; and the Commission having appointed Stanley H. Michelstetter II, a member of its staff, to act as Examiner; and on December 13, 1972, the City of Brookfield, Wisconsin having filed its Answer wherein it denied any violation of Section 111.70, Wisconsin Statutes; and hearing having been held before the Examiner December 14, 1972 whereat the City of Brookfield, Wisconsin appeared and moved to dismiss the complaint filed herein on the grounds that Brookfield Policemen's Protective Association failed to exhaust the grievance procedure of the parties' collective bargaining agreement, and the Examiner having considered the evidence and arguments and being fully advised in the premises, makes and files the following

ORDER

IT IS ORDERED:

1. That the motion to dismiss made by Respondent, City of

No. 11426-A

Brookfield, Wisconsin, and the same hereby is, denied.

2. That the City of Brookfield furnish the Examiner with any notice, record of proceedings, conciliation agreement, stipulation, or award hereinafter issued or entered into in connection with the grievance filed by letter dated September 23, 1972 addressed to Robert P. Thompson and signed by Dennis P. Koback on behalf of Brookfield Professional Policemen's Association.

3. That further proceeding with respect to the allegations of the complaint filed in this proceeding that the City of Brookfield, Wisconsin has violated Section 111.70(3)(a)(5) of the Wisconsin Statutes be, and hereby are deferred, and held in abeyance without any determination until the Examiner has the opportunity to review the proceedings had before the Common Council of the City of Brookfield, if such are requested, on the grievance filed by letter dated September 23, 1972 addressed to Robert P. Thompson and signed by Dennis P. Koback on behalf of the Brookfield Professional Policemen's Association.

Dated at Milwaukee, Wisconsin, this 22nd day of May, 1973.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Stanley H. Michelstetter II  
Stanley H. Michelstetter II  
Examiner

MEMORANDUM ACCOMPANYING  
ORDER DENYING MOTION TO DISMISS AND  
DEFERRING FURTHER PROCEEDINGS

PLEADINGS AND PROCEDURE

The Complainant filed its complaint in the instant matter on November 13, 1972. The Commission appointed the undersigned as Examiner on November 17, 1972. Notice of hearing was mailed to the parties specifying that Answer to the aforementioned complaint be made on or before December 11, 1972 and setting the hearing date as December 14, 1972. The Respondent by Answer received by this Commission December 13, 1972 denied the allegations of the complaint. At hearing, Respondent appeared and moved that the complaint be dismissed on the grounds that the Complainant failed to exhaust the grievance procedure provided in the parties' collective bargaining agreement which motion the Examiner took under advisement. Hearing was held on all issues involved, subject to Respondent's objection.

THE FACTS

The evidence presented by the parties established the following facts, among others:

The Brookfield Professional Policemen's Association, herein referred to as Complainant, at all times material herein, was the exclusive bargaining representative of certain police personnel employed by the City of Brookfield, Wisconsin, a municipal employer, herein referred to as Respondent. The parties are signatories to a collective bargaining agreement entered into on September 6, 1972 covering wages, hours and working conditions for the period January 1, 1973 to December 31, 1973 containing the following material provisions:

"VIII. HOURS OF WORK

1. The 24 consecutive hour period beginning with the employee's ordered report-in time shall constitute an employee's Duty Day.

. . . .

IX. OVERTIME

1. Effective pay period 1, 1972, overtime shall be:
  - a. All authorized time worked by an employee beyond eight (8) hours within any of said

employee's 24 hour duty days, as defined in VIII hereof;

2. All overtime shall be paid in cash provided however that an employee may elect to take compensatory time off for up to three (3) days for accumulated overtime of not more than 24 hours.

3. All overtime defined in item 1 above shall be compensated as follows:

- a. At the rate of time and one-half (1-1/2) for all authorized time worked by the employee beyond eight (8) hours within any of said employee's 24 hour duty days, provided that up to one (1) hours of overtime worked beyond the eight (8) hours by said employee and continuous with his regular shift shall be paid as straight time. When such overtime amounts to one (1) hour or more, the employee shall be compensated for all overtime worked at a rate of time and one-half (1-1/2), including the initial one hour.

## XXII. GRIEVANCE AND ARBITRATION PROCEDURE

1. As used in this paragraph, the term "grievant" shall mean an employee who desires to or who has filed a grievance pursuant to this paragraph, and the term "representative" shall mean that member of the Brookfield Professional Police-men's Association appointed by its Board of Directors to fulfill the functions enumerated in this paragraph.

2. All written grievances and grievance appeals shall set forth the provisions of this Agreement under which the grievance was filed and no grievance may be made unless it is founded upon an alleged breach of the terms and conditions of this Agreement. All appeals of duly filed grievances not submitted by the grievant or representative within the time limit specified shall be termed abandoned grievances and as such shall be considered as being resolved in favor of the City.

3. All grievances must be in writing and cite the provision of this Agreement relied upon. A written grievance shall be presented to the grievant's Commanding Officer within five (5) days of the incident leading to the grievance. Thereafter the grievant, his representative and grievant's Commanding Officer shall meet and discuss the grievance in a friendly manner and shall make every effort to resolve the grievance. Following said meeting, the Commanding Officer shall answer the grievance in writing, setting forth the

reasons for his decision, and shall submit same to the grievant and his representative within five (5) days of receipt of the written grievance.

If the written answer of the Commanding Officer does not result in a resolution of the grievance, the representative shall submit the written grievance to the Grievance Committee. Thereafter, the Grievance Committee, by its chairman, may within ten (10) days of receipt of the written answer of the Commanding Officer, appeal the grievance to the Chief of Police. Failure to appeal said answer within this prescribed time period shall constitute a settlement of the grievance. Such appeal shall be in writing and contain therein a request for a meeting between the Chief of Police, the grievant and the Chairman of the Grievance Committee. At the meeting, to be held at a mutually agreeable time, the parties shall discuss the grievance and the written answer of the Commanding Officer in good faith in an attempt to resolve the grievance. Within ten (10) days of such meeting, unless the time period is mutually extended by the parties, the Chief shall, in writing, advise the grievant and the Chairman of the Grievance Committee as to the Chief's decision with respect to the grievance.

If the written answer of the Chief of Police does not result in a resolution of the grievance, final and binding arbitration may be initiated by serving upon the City a notice in writing of an intent to further appeal such grievance. Said notice shall identify the Agreement provisions, the grievance and the employee(s) involved. Within seven (7) calendar days following receipt of such written notice, the Grievance Committee of the Association and the Personnel Committee of the Common Council shall convene to consider such grievance. Within ten (10) days of such meeting, the Personnel Committee shall deliver to the Grievance Committee its written decision.

If this written decision does not resolve the dispute, it may be appealed, within thirty (30) days of delivery of such decision, by submission to the Common Council as a whole. The action of the Common Council shall be final and conclusive.

4. The Brookfield Professional Policemen's Association shall furnish the City with a current list of its members who are appointed to the Grievance Committee, the Chairman of the Grievance Committee and its representative appointed pursuant to item 1 above of this paragraph.

5. Employees who are required to attend any of the meetings and/or hearings which may be required pursuant to this paragraph shall be excused from work to attend such meetings and/or hearings. Employees so excused shall have no time deducted from their regularly scheduled off days, vacation days or holidays.

6. Any and all attorney's fees which may result from proceedings had under this paragraph shall be borne exclusively by the party incurring such expense. Either party may obtain

the service of an attorney at any stage of the proceedings under this paragraph."

On or about September 9, 1972 a disagreement arose as to whether or not police personnel were entitled to overtime pay at straight-time rates for the daily, quarter-hour period known by the parties as report-in time. At that time, Complainant discussed such disagreement with the Police Chief who refused to make any written decision or become in any way involved. The Police Chief recommended that Complainant take the matter up with "the City". By letter dated September 23, 1972 addressed to Robert P. Thompson, Chairman of Respondent's (Common Council) Finance Committee, signed by Dennis P. Koback, Complainant submitted a grievance concerning such disagreement. By letter dated September 27, 1972, Respondent's Finance Committee denied Complainant's grievance. Respondent at all relevant times continues to deny the aforementioned grievance. Complainant contends that statements by Alderman Thompson indicated that the Respondent (Common Council) reviewed and denied said grievance. However, Complainant at no time attempted to appeal said grievance to Respondent (Common Council).

#### POSITIONS OF THE PARTIES

Complainant contends that, if it does have any duty to exhaust the instant grievance procedure, it has done so. Its processing through the grievance procedure at all but the last step constitutes substantial compliance with it. After Complainant's having thus processed the grievance, Alderman Thompson made statements which indicated that there would be no further use in appealing the decision of the Finance Committee (acting for the Personnel Committee) to the Common Council as a whole. This act effectively undermined the last step. Therefore the Examiner should exercise the jurisdiction of the Commission to determine the merits of the complaint.

Respondent contends that the grievance procedure contains a provision for final and binding resolution of the dispute which procedure the Complainant has not used. Therefore, in accordance with its policy, the Commission should not exercise its jurisdiction to determine the merits of the instant complaint. Should the Commission undertake to decide the merits, the Complainant failed to comply with grievance procedure's requirements and by the collective bargaining agreement terms, the grievance is resolved in favor of the City.

## DISCUSSION

Section 111.70(3)(a)<sup>1/</sup> makes it a prohibited practice for a municipal employer "to violate any collective bargaining agreement previously agreed upon by the parties . . . , including an agreement to arbitrate questions arising as to the meaning or application of the terms of a collective bargaining agreement. . . ." Section 111.70(3)(b)<sup>4</sup> makes it a prohibited practice for a municipal employe, individually or in concert with others to do the same. Section 111.70(4)(a) provides that the Wisconsin Employment Relations Commission has the jurisdiction to determine whether a prohibited practice has been committed and remedy a violation, if any is found. <sup>2/</sup>

The Commission has encouraged the final resolution of grievance disputes by following a policy of deferral to collectively bargained grievance procedures containing final and binding arbitration <sup>3/</sup> and by reserving to such arbitration any and all issues over which the arbitrator arguably has authority to resolve. <sup>4/</sup> The entire policy as it is applied under the Wisconsin Employment Peace Act both in cases involving concurrent federal jurisdiction under Section 301, Labor Management Relations Act and decided under State Law alone was summarized in Rodman Industries, Inc. (9650-A)9/70 at p. 13, affd. by the Commission (9650-B) 11/70 as follows:

" . . . that this Commission has consistently refused to assert its jurisdiction to decide complaints that one party has violated the terms of a collective bargaining agreement where the agreement provides for the final disposition of such questions. This policy is consistent with the body of law which has been applied by the federal courts under section 301 of the Labor-Management Relations Act."

The aforementioned policy has been adopted for the Municipal Employment Relations Act with respect to complaints to compel arbitration, where the Respondent raises procedural defenses. <sup>5/</sup>

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<sup>1/</sup> All citations to statutes herein are to Wisconsin Revised Statutes (1971) unless otherwise noted.

<sup>2/</sup> Section 111.70(4)(a) provides: "Section 111.07 shall govern procedures in all cases involving prohibited practices under this subchapter. . . ."

Section 111.07 provides for the submission of disputes concerning prohibited practices to the Commission, the procedure therefor and remedy thereof.

<sup>3/</sup> Amity Nursing Home (8425) 2/68 River Falls Cooperative Creamery (2311) 2/50.

<sup>4/</sup> Seaman-Andwall Corporation (5910) 1/62.

<sup>5/</sup> Oostburg Joint School District No. 14 (11196-A) 11/72 affirmed by the Commission.

Assuming that the policy as a whole applies to cases under the Municipal Employment Relations Act, the aforementioned policy does not apply to the instant grievance procedure in that, although the final step is final and binding and is called "arbitration" by the parties, Respondent itself makes the final and binding determination of the issues. Such determination is merely the unilateral determination by one of the parties and, in that sense, does not further the process of dispute resolution which the aforementioned policy is designed to encourage. 6/

The Commission has also required that complainants comply with collectively bargained grievance procedures (even those lacking final and binding arbitration) which the parties intended be exhausted prior to filing a complaint on the merits of such dispute. 7/ The purpose of this policy is to encourage the voluntary resolution or settlement of grievances by the parties by means of the collectively bargained procedure. 8/ It is clear from the nature of the grievance procedure created by the parties that it is an exclusive grievance procedure, one wherein the parties required the submission and processing of a grievance prior to seeking any other form of remedy for that grievance. The grievance procedure contains a time limit for original filing of grievances, failure to comply with which results in the grievance being resolved in favor of Respondent. 9/ Where a grievance is resolved by operation of the grievance procedure, the Commission will not hear the merits. 10/ Thus, failure to use the instant grievance procedure results in losing the right to have the merits heard by the Commission and, thereby, requires submission of all disputes as a prerequisite to obtaining Commission review of the merits.

The undisputed evidence discloses that while Complainant arguably complied with all steps of the grievance procedure except the final step, no attempt was made to appeal to Respondent (Common Council) in that step. Complainant, therefore, could not rely on any statements of Alderman Thompson as to whether Respondent (Common Council) had

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6/ Cf. Sections 111.70(4)(1)2, 111.70(6), 111.70(1)(d).

7/ Milwaukee Athletic Club (10292-A) 4/72.

8/ Section 111.70(6), Section 111.70(1)(d).

9/ Quality Aluminum Casting Company (4498-A) 1/58.

10/ Milwaukee Athletic Club (10292-A) 4/72.



reviewed the instant grievance. The collectively bargained grievance procedure, while providing for a final and binding determination of the grievance by Respondent (Common Council), also, by providing for that appeal, contractually reserved to Respondent the right to have the dispute submitted to it. This submission creates an opportunity, for Respondent, to review its own position, as well as that of the Complainant, and in that light possibly to seek a resolution of the dispute. Clearly, Complainant is obligated to honor its own agreement to give Respondent one last opportunity to resolve the dispute before seeking a determination of the merits by this Commission.

INTERLOCUTORY DISPOSITION

The Examiner notes that hearing in this matter covered all issues in dispute and Respondent has submitted its brief on the merits of the complaint. In the interests of not unduly complicating the instant matter with redundant proceedings, should resolution of the dispute not be accomplished, the Examiner will follow established procedure in such situations and defer further proceeding in this matter until the Complainant uses the final step of the grievance procedure. 11/ Accordingly, Respondent's motion to dismiss is denied, and further proceedings will be held in abeyance.

Dated at Milwaukee, Wisconsin, this 22nd day of May, 1973.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Stanley H. Michelstetter II  
Stanley H. Michelstetter II  
Examiner

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11/ Milwaukee Board of School Directors and Stephen A. Vrsata  
(10663-A) 3/72.