

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Case CXX
No. 16171 ME-856
Decision No. 11434

The City of Milwaukee, by its City Attorney, having filed a petition with the Wisconsin Employment Relations Commission requesting that the Commission amend and create certain rules relating to elections conducted by the Wisconsin Employment Relations Commission pursuant to Section 111.70(3)(d) of the Municipal Employment Relations Act; and the Commission having considered the petition and arguments in support thereof, and being satisfied that the request to change and create rules, as requested in the petition, be denied and that the petition be dismissed.

ORDERED

Given under our hands and seal at the
City of Madison, Wisconsin, this 22nd
day of November, 1972.

By

~~Morris Slavney, Chairman~~

~~Zel S. Rice II, Commissioner~~

MEMORANDUM ACCOMPANYING ORDER DENYING PETITION
REQUESTING CHANGES IN CERTAIN RULES PERTAINING TO ELECTIONS
CONDUCTED PURSUANT TO SECTION 111.70(3)(d) OF THE
MUNICIPAL EMPLOYMENT RELATIONS ACT

On November 1, 1972, the City of Milwaukee filed a petition with the Commission, pursuant to Section 227.015, Wisconsin Statutes, for certain changes in the procedural rules adopted by the Commission with respect to the conduct of elections to determine bargaining representatives for supervisory law enforcement or supervisory firefighter personnel, pursuant to Section 111.70(3)(d) of the Municipal Employment Relations Act, and further for the creation of certain rules with respect to the latter section. In its petition the City specifically set forth the following:

- "(a) An amendment of ERB 17.01, 17.02, 17.04 and 17.07 of the Wisconsin Employment Relations Commission rules by changing the designation 'collective bargaining representative' to the proper and lawful statutory designation 'representative' when it appears in ERB 17.01, 17.02, 17.04 and 17.07 of the Wisconsin Employment Relations Commission rules.
- (b) By changing the designation 'bargaining units' to the proper and lawful statutory designation 'unit' when it appears in ERB 17.01 of the Wisconsin Employment Relations Commission rules.

- (c) By changing the designation 'labor organization' to the proper and lawful statutory designation 'representative' when it appears in ERB 17.02 and 17.05 of the Wisconsin Employment Relations Commission rules.
- (d) By removal of reference to elections in ERB 17.01 and deleting the phrase in ERB 17.02[1] 'a collective bargaining representative or' as it appears.
- (e) By repealing ERB 17.02[3][d], [e] and [f].
- (f) By repealing ERB 17.04, 17.05, 17.07, 17.08, 17.09, 17.10 and 17.11 in their entirety.

- (g) Create by rule the specific levels of supervisors to be included in a unit of law enforcement or firefighting supervisors for purposes of negotiating with their municipal employer and delete from ERB 17.01 the entire second sentence: 'The determination as to the levels of law enforcement and firefighting supervisors to be included in bargaining units, as set forth in sec. 111.70[3][d], Wis. Stats., will be determined on a case-to-case basis, because of a variance of the duties and responsibilities assigned to supervisory officers in law enforcement and firefighting services in the various municipalities throughout the state.'

- (h) By rule establish definitions for the words 'confidential,' 'managerial' and 'executive' used in the third sentence of ERB 17.01, Wisconsin Employment Relations Commission rules."

In support of its petition the City set forth the following argument:

- "(a) Petitioner, City of Milwaukee, is a municipal corporation in the state of Wisconsin, to-wit: A city of the first class operating under a special charter with its principal offices at 200 East Wells Street, Milwaukee, Wisconsin 53202.
- (b) Petitioner was notified by the Wisconsin Employment Relations Commission of a public hearing to be conducted by the Wisconsin Employment Relations Commission In the Matter of the Petition of the Milwaukee Police Supervisors Organization Involving Certain Employees of the City of Milwaukee, Case No. CIX, No. 14816, ME-687, said hearing to be held July 23, 1971, in the City of Milwaukee, at the Milwaukee State Office Building, a hearing on the matter having been held on July 23, 1971, and the commission holding the matter in abeyance at the request of the petitioner who on December 24, 1971, filed a new petition pursuant to the newly enacted Municipal Employment Relations Act and the commission dismissing the former petition recognizing that supervisory police personnel had no right under Sec. 111.70, Wis. Stats., as it existed when the petition was filed and at the time of said hearing of July 23, 1971. As to the petition filed on December 24, 1971, the commission notified this petitioner by notice of hearing that a public hearing would be conducted on February 2, 1972, In the Matter of the Petition of Milwaukee Police Supervisors Organization Involving Certain Employees of the City of Milwaukee, Case No. CXI, No. 15168, ME-737, said hearing was commenced on February 2, and adjourned indefinitely by the commission until after the commission has adopted the rule required by state law. The hearings were resumed on October 4, 1972, whereupon the employer advised the commission that it was the city's position that the necessary prerequisite rule had not been developed by the Wisconsin Employment Relations Commission in accordance with the legislative intent and declarations.

Furthermore, Sec. 111.70[3][d], Wis. Stats., specifically states: '* * *the commission shall by rules establish procedures for certification of such units of supervisors and the levels of supervisors to be included.' The commission by its rules has exceeded the authority given to the Employment Relations Commission by the legislature when it created rules for the determination of a collective bargaining representative of a bargaining

unit and in permitting labor organizations to be representatives for purposes of negotiations and to hold formal elections for purposes of determining the representative. ERB 10.05 of the commission's rules specifically states: That 'Words or phrases used herein which are defined in Sec. 111.70[1], Wis. Stats., have the meaning therein set forth.'"

The statutory provisions in the Municipal Employment Relations Act pertinent to the issues involved herein are as follows:

"111.70 MUNICIPAL EMPLOYMENT"

(1) Definitions. As used in this subchapter:

. . . .

(b) 'Municipal employe' means any individual employed by a municipal employer other than an independent contractor, supervisor, or confidential, managerial or executive employe.

. . . .

(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 or 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 functions 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.

(e) 'Collective bargaining unit' means the unit determined by the commission to be appropriate for the purpose of collective bargaining.

. . . .

(g) 'Election' means a proceeding conducted by the commission in which the employes in a collective bargaining unit cast a secret ballot for collective bargaining representatives, or for any other purpose specified in this subchapter.

. . . .

(j) 'Labor organization' means any employee organization in which employees participate and which exists for the purpose, in whole or in part, of engaging in collective bargaining with municipal employers concerning grievances, labor disputes, wages, hours or conditions of employment.

. . .

(o) 'Supervisor' means:

1. As to other than municipal and county firefighters, any individual who has authority, in the interest of the municipal employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or to adjust their grievances or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

2. As to firefighters employed by municipalities with more than one fire station, the term 'supervisor' shall include all officers above the rank of the highest ranking officer at each single station. In municipalities where there is but one fire station, the term 'supervisor' shall include only the chief and the officer in rank immediately below the chief. No other firefighter shall be included under the term 'supervisor' for the purposes of this subchapter.

(2) RIGHTS OF MUNICIPAL EMPLOYEES. Municipal employees shall have the right of self-organization, and the right to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection, and such employees shall have the right to refrain from any and all such activities except that employees may be required to pay dues in the manner provided in a fair-share agreement. Such fair-share agreement shall be subject to the right of the municipal employer or a labor organization to petition the commission to conduct a referendum. Such petition must be supported by proof that at least 30% of the employees in the collective bargaining unit desire that the fair-share agreement be terminated. Upon so finding, the commission shall conduct a referendum. If the continuation of the agreement is not supported by at least the majority of the eligible employees, it shall be deemed terminated. The commission shall declare any fair-share agreement suspended upon such conditions and for such time as the commission decides whenever it find that the labor organization involved has refused on the basis of race, color, creed or sex to receive as a member any employee of the municipal employer in the bargaining unit involved, and such agreement shall be made subject to this duty of the commission. Any of the parties to such agreement or any municipal employee covered thereby may come before the commission, as provided in s. 111.07, and ask the performance of this duty.

(3) PROHIBITED PRACTICES AND THEIR PREVENTION.

. . .

(d) Nothing in this subchapter shall preclude law enforcement or firefighting supervisors from organizing separate units of supervisors for purposes of negotiating with their municipal employers. The commission shall by rule establish procedures for certification of such units of supervisors and the levels of supervisors to be included. The commission may require that the representative in a supervisory unit shall be an organization that is a separate local entity from the representative of the employees but such requirement shall not prevent affiliation by a supervisory representative with the same parent state or national organization as the employee representative.

. . . "

"111.71 GENERAL PROVISIONS.

(1) The commission may adopt reasonable rules relative to the exercise of its powers and authority and its proceedings thereunder.

. . . "

In response to the City's contention that the Commission has exceeded its statutory authority by creating rules for the determination of a collective bargaining representative in units of supervisory police and firefighter personnel for the purposes of collective bargaining, and in permitting a labor organization to represent such personnel for the purposes of negotiations, and to hold formal elections for the purposes of determining such representatives, it is emphasized that the rules so adopted are procedural rules and do not create any substantive rights. Only "municipal employees" have the right of self-organization and the right to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in negotiations for the purposes of collective bargaining. Since supervisors are excluded from the term "municipal employee", supervisory personnel, whether they are employed in firefighter, law enforcement or other public functions, do not have such rights under the statute, nor are they protected in the exercise of any activity in that regard. However, Section 111.70(3)(d) of the Municipal Employment Relations Act permits law enforcement and firefighting supervisors to organize separate units of supervisors for the purposes of negotiating with their municipal employers. In other words, the statute permits, but does not require, a municipal employer to bargain collectively with a unit of supervisors. Said section further provides that the Commission shall by rule establish procedures for the determination of units of supervisors and the level of supervisors to be included, and therefore the rules established by the Commission in ERB 17 were adopted pursuant to the mandate above noted.

The City, in contending that the Commission should create by rule the specific levels of supervisors to be included in the unit of law enforcement or firefighter unit and to establish, by rule, definitions for the terms "confidential", "managerial" and "executive", is either naive or has intentionally filed a frivolous request in that regard. Nowhere in the statute is there a directive that the Commission, by rule, define the terms "confidential", "managerial"

and "executive". Furthermore, Section 111.70(3)(d) does not require the Commission to establish a rule defining the levels of supervisors to be included in a law enforcement or firefighter supervisory units. Rather the statute requires the Commission, by rules, to establish procedures for certification of such units of supervisors and the levels of supervisors to be included. The Commission has, in its view, fulfilled this statutory obligation in adopting the procedural rules set forth in ERB 17.

By the use of the term "collective bargaining representative" appearing in ERB 17.01, 17.02, 17.04 and 17.07, rather than the term "representative" the Commission has not granted organizations representing supervisory law enforcement or firefighter personnel the rights set forth in Section 111.70(2). Furthermore, the term "representative" is not defined in the statute.

By the use of the term "bargaining units" appearing in ERB 17.01 the Commission has utilized the common terminology for a unit involved in collective bargaining or negotiations, which terms the Commission deems have the same meaning. Furthermore, neither the terms "unit" or "negotiations" are defined in the statute.

The same rationale can be applied to the City's request that the Commission in ERB 17.02 and 17.05 change the designation "labor organization" to the term "representative". The term "representative" is not defined in the statute while the term "labor organization" is defined, and said term includes any employee organization in which employees participate and which exists for the purpose of collective bargaining. The use of the term "labor organization" in rule ERB 17.02 and 17.05 does not convert supervisory law enforcement and firefighter personnel to "municipal employees" under the Act.

The City did not specifically set forth the basis of its request that the Commission repeal ERB 17.02(3)(d), (e) and (f). The Commission denies such request for the reason that it deems that the petition should contain such data to permit any other parties having an interest in the matter to be apprised thereof, and to give some indication to the Commission as to the nature of the issue involved. The City's motion to repeal ERB 17.04, 17.05, 17.07, 17.08, 17.09, 17.10 and 17.11 in their entirety, is most astonishing, especially in light of the fact that Section 111.70(3)(d) requires the Commission to establish procedures for the certification of units of supervisors and the level of supervisors to be included and said rules provide the most orderly procedure for certification of units of supervisors and the selection of their bargaining representative.

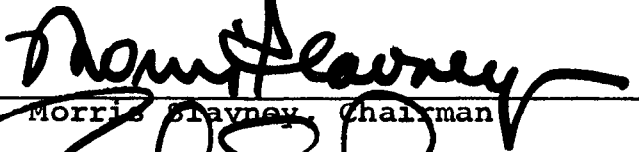
It should be noted that approximately six weeks after the Municipal Employment Relations Act became effective the Milwaukee Fire Department Management Organization and the Milwaukee Police Supervisors Organization individually claiming to represent supervisory firefighter and law enforcement personnel in the City of Milwaukee filed petitions with the Commission requesting the conduct of elections to determine the appropriate bargaining unit and the bargaining representative for supervisory firefighter and law enforcement personnel in the employ of the City. Hearings on the petitions have been delayed to afford the City and both organizations to possibly reach an agreement on the make-up of the units involved. By the filing of the petition herein, it appears to the Commission that the City of Milwaukee wishes to delay its decision as to whether it will or will not engage in negotiations with organizations representing supervisory firefighter and law enforcement personnel in the employ of the City of Milwaukee. It has a right not to engage in negotiations

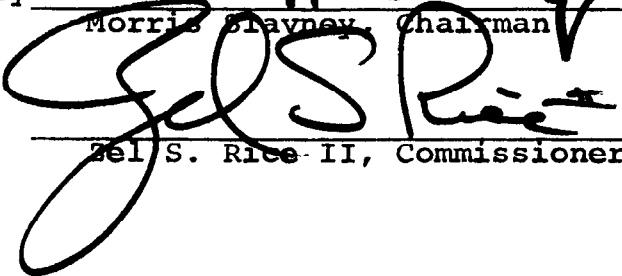
with organizations representing supervisory firefighter and law enforcement personnel. If it intends not to negotiate, it should so state to said organizations which claim to represent firefighter and supervisory law enforcement personnel and not have burdened the Commission's continually increasing case load by filing the petition involved.

Dated at Madison, Wisconsin, this 22nd day of November, 1972.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By


Morris Flayney, Chairman


J. S. Rice II, Commissioner