

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Case XXVI
No. 16086 MIA-16
Decision No. 11573

The Eau Claire Professional Policemen's Association-Bargaining Group No. 1 (Non-Supervisory Sworn Personnel) having on October 10, 1972, filed a petition with the Wisconsin Employment Relations Commission requesting that the Commission initiate compulsory final and binding arbitration pursuant to Section 111.77(3)(b) of the Municipal Employment Relations Act, for the purpose of resolving an impasse arising in collective bargaining between the Petitioner and the City of Eau Claire on matters affecting the wages, hours and conditions of employment of non-supervisory sworn law enforcement personnel in the employ of said Municipal Employer; and the Commission, by Zel S. Rice II, Commissioner, having conducted an investigation on such petition at Eau Claire, Wisconsin, on October 23, 1972, and during the course of such investigation the parties having made known the facts material thereto, and the parties having filed briefs on the matter, and the Commission being fully advised in the premises, makes and files the following Findings of Fact, Conclusions of Law, Certification of Results of Investigation and Order Requiring Arbitration.

3. That the Petitioner at all times material herein has been and is the voluntarily recognized exclusive collective bargaining representative of the non-supervisory sworn law enforcement personnel in the employ of the Municipal Employer.

4. That on December 22, 1971, the Municipal Employer adopted a resolution with respect to negotiations with the Petitioner, had during the year, wherein an agreement was reached with respect to wages, hours and working conditions of the employees involved herein for the year 1972; that the resolution provided that the Personnel Rules and Regulations applying to the employees of the Municipal Employer would apply to the employees represented by the Petitioner, except as made final by the agreement reached in negotiations, specifically relating to vacations, sick leave, retirement contributions, pay for court appearances, health insurance premium contributions and a salary increase; and that said resolution was signed by representatives of the Petitioner and the Municipal Employer.

5. That on June 7, 1972, the Petitioner, by its President, sent the following letter to the President of the City Council of the Municipal Employer:

"In response to the request to have all proposals in by June 1, for the 1973 wage negotiations, I regret to say that we have not as yet solidified our proposal package, for a number of reasons, and as such cannot present them to the city council at this time.

We can appreciate the problem this presents for you but we can also recall that in 1971, we had our proposals in by June 1, only to have actual negotiations put off until early fall. Hopefully we can have them in by June 16.

As you are probably aware, a problem has also arisen across the state over the status of the police sergeant in labor negotiations. At the last association meeting it was decided to include the police sergeant with the command personnel and as such we will be negotiating for just the patrolmen for the year of 1973. This is mutually acceptable to both parties.

We apologize for any inconveniences these changes may have caused and look forward to a rapid settlement for 1973."

6. That on June 9, 1972, the Petitioner sent the following letter to the members of the City Council of the Municipal Employer:

"The following letter is submitted to initiate wage negotiations for Bargaining Unit # 1 of the Eau Claire Professional Policemen's Association. Our requests for 1973 fall into three specific categories; wages, fringes, and working conditions.

In the area of working conditions we feel certain specific improvements are essential.

There are many points we wish to cover in the area of fringe benefits which will provide increased protection for the Patrolmen of the Professional Policemen's Association.

A just wage increase will be essential to uphold the high quality of the Eau Claire Policemen.

It is anticipated that in our future meetings with our elected councilmen we will be able to elaborate on the above three areas. Once again Bargaining Unit # 1 of the Eau Claire Professional Policemen's Association looks forward to a rapid and just settlement of negotiations for 1973."

7. That on June 15, 1972, the Municipal Employer, by its Administrative Coordinator, sent the following letter to the President of the Petitioner:

"The City Council's Bargaining Committee wishes to set the first meeting with your group for Thursday, July 6th, at 3:00 p.m. in the City Hall Council Chamber, and I trust that this date and time will be satisfactory with your committee.

Council President Mills has requested that your specific requests be turned in to Mr. McAdams in order that he may complete the costing out in advance of the meeting."

8. That on July 1, 1972, representatives of the Petitioner and the Municipal Employer exchanged written proposals which each party desired to be incorporated as conditions of employment covering the employees involved for the year 1973; and that thereafter representatives of the parties met on various occasions between July 6, 1972, and September 27, 1972, in an attempt to reach an agreement on wages, hours and conditions of employment for the year 1972.

9. That on October 10, 1972, the Petitioner filed a petition with the Wisconsin Employment Relations Commission, hereinafter referred to as the Commission, requesting the Commission to initiate final and binding arbitration pursuant to Section 111.77, Wisconsin Statutes, with regard to an alleged impasse existing between the parties in their collective bargaining with respect to wages, hours and working conditions of the employees involved for the year 1973; that on October 23, 1972, the Commission, by Commissioner Zel S. Rice II, conducted an informal investigation on said petition, during which he attempted to mediate the issues existing between the parties; and that, however, the parties were unable to reach an accord with regard to said issues and remain at impasse with respect thereto.

10. That at no time material herein has the Petitioner filed any notice advising the Commission, as set forth either in Section 111.77(1)(c) or (2), Wisconsin Statutes, that an impasse exists.

11. That the parties have not established any mutually agreed upon procedures for the final resolution of disputes arising in collective bargaining, and further, the parties have not mutually agreed that the arbitration should not be limited to the last and final offers of each of the parties.

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

CONCLUSIONS OF LAW

1. That the notice requirements set forth in Section 111.77(1)(a) and (2) and in rules ERB 30.03(2) and (4) are directory rather than mandatory, and the failure of the Petitioner to file the 30-day notice to the Commission as required in Section 111.77(1)(c) or (2) does not

operate to deprive the Wisconsin Employment Relations Commission of its jurisdiction to initiate compulsory final and binding arbitration between the Petitioner and Municipal Employer herein to resolve the impasse involved in their collective bargaining for wages, hours and working conditions for the year 1973 covering non-supervisory sworn law enforcement personnel in the employ of the Municipal Employer.

2. That an impasse, within the meaning of Section 111.77(3), Wisconsin Statutes, exists between the Eau Claire Professional Policemen's Association-Bargaining Group No. 1 and the City of Eau Claire with respect to negotiations leading toward a collective bargaining agreement for the year 1973 covering the conditions of employment for non-supervisory sworn law enforcement personnel employed in the Police Department of the City of Eau Claire.

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

CERTIFICATION

IT IS HEREBY CERTIFIED that the conditions precedent to the initiation of compulsory final and binding arbitration as required by Section 111.77 of the Wisconsin Statutes with respect to negotiations between the Eau Claire Professional Policemen's Association-Bargaining Group No. 1 and the City of Eau Claire on issues of wages and other conditions of employment of non-supervisory sworn law enforcement personnel employed in the Police Department of the City of Eau Claire, have been met.

NOW, THEREFORE, it is

ORDERED

1. That compulsory final and binding final offer arbitration be, and the same hereby is, initiated for the purpose of issuing a final and binding award to resolve the impasse existing between the Eau Claire Professional Policemen's Association-Bargaining Group No. 1 and the City of Eau Claire.

2. That the Eau Claire Professional Policemen's Association-Bargaining Group No. 1 file, in written form, its final offer as of October 23, 1972, on the issues remaining in said negotiations with the City of Eau Claire, with the Wisconsin Employment Relations Commission on or before February 12, 1973, and at the same time serve a copy thereof on the City of Eau Claire.

3. That the City of Eau Claire file, in written form, its final offer as of October 23, 1972, on the issues remaining in said negotiations with the Eau Claire Professional Policemen's Association-Bargaining Group No. 1, with the Wisconsin Employment Relations Commission on or before February 12, 1973, and at the same time serve a copy thereof on the Eau Claire Professional Policemen's Association-Bargaining Group No. 1.

4. That the parties each select a single arbitrator, or a board of arbitration, within ten (10) days after the issuance of this Order in a manner mutually agreed upon by the parties, to resolve said impasse; and that the parties notify the Commission within fifteen (15) days of the issuance of this Order as to whether they have selected an arbitrator or a board of arbitration, as the case may be.

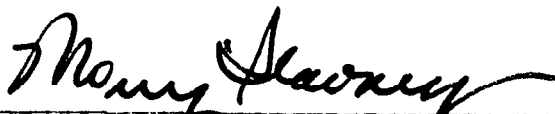
5. That if the parties select one or more arbitrators said parties should then notify the Commission as to the identity of said arbitrator or arbitrators in order that the Commission may issue an order officially appointing said individual or individuals as the arbitrator or board of arbitration to conduct a compulsory arbitration proceeding and make a final and binding resolution of the dispute involved.

6. That if the parties have not selected an arbitrator or board of arbitration the Commission shall then order each party to select one arbitrator, and if these two arbitrators cannot in five (5) days select a neutral arbitrator, the Commission must be notified of same within eight (8) days of the issuance of the supplemental order; that thereupon the Commission shall issue a further supplemental order, and therein submit a panel of five (5) neutral arbitrators, from which the parties shall, within three (3) days of the receipt thereof, alternately strike four of the members of said panel; that thereupon the parties or either of them, shall notify the Commission in writing as to the neutral arbitrator so selected, and the Commission shall then issue an order appointing same neutral arbitrator as chairman of the board of arbitration, and at the same time, shall serve copies thereof on the parties and the neutral arbitrator, and also at the same time serve a copy of the certification of the results of the investigation upon said neutral arbitrator.

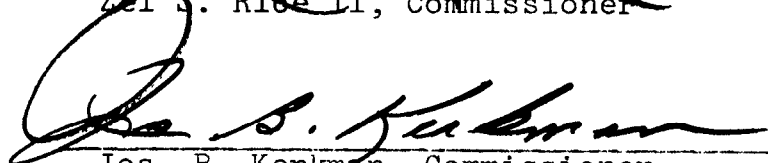
Given under our hands and seal at the
City of Madison, Wisconsin, this 31st
day of January, 1973.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By


Morris Slavney, Chairman


Zel S. Rice II, Commissioner


Jos. B. Kerkman, Commissioner

MEMORANDUM ACCOMPANYING
FINDINGS OF FACT, CONCLUSIONS OF LAW, CERTIFICATION OF
RESULTS OF INVESTIGATION AND ORDER REQUIRING ARBITRATION

Following the filing of a petition by the Petitioner requesting final and binding arbitration of the impasse existing between the Petitioner and the Municipal Employer with respect to an impasse arising out of collective bargaining on wages, hours and working conditions for law enforcement personnel in the employ of the Municipal Employer for the year 1973, the Municipal Employer raised an issue as to whether the Petitioner could utilize compulsory final and binding arbitration as provided in Section 111.77, Wisconsin Statutes, since the Petitioner failed to notify the Wisconsin Employment Relations Commission of the existence of a dispute as required in the notice requirements set forth in said section. The facts relative to this proceeding are set forth in the Findings of Fact.

While an issue arose as to whether a collective bargaining agreement existed between the parties with respect to conditions of employment for said law enforcement personnel for the year 1972, we have found that, although there was no formal collective bargaining agreement executed, the resolution adopted by the City Council and signed by representatives of the Municipal Employer and of the Petitioner constituted a collective bargaining agreement, and, therefore, that notice requirements, if any, under Section 111.77(1)(c) applies in the instant matter. However, even assuming that a collective bargaining agreement did not exist, we shall also determine herein whether the notice requirements set forth in Section 111.77(2) must be met before the Commission can issue an order requiring a municipal employer and an organization representing law enforcement or firefighter personnel to proceed to final and binding arbitration over impasses arising in collective bargaining.

Since the disposition of the issue herein would have an effect on other municipalities and other organizations representing law enforcement and firefighter personnel, the Commission invited interested parties to file briefs amicus with the Commission. In addition to the brief filed by the Municipal Employer, the Petitioner, on behalf of itself and the Appleton Professional Policemen's Association, as well as on behalf of the Wisconsin Professional Policemen's Association, filed a single brief. A second brief was filed on behalf of Teamsters Union Local No. 695.

PERTINENT STATUTORY PROVISIONS

In November 1971 the legislature enacted Chapter 124, Laws of 1971, which contained the following pertinent declaration of policy with respect to collective bargaining in municipal employment:

"111.70

. . . .

(6) DECLARATION OF POLICY. The public policy of the state as to labor disputes arising in municipal employment is to encourage voluntary settlement through the procedures of collective bargaining. Accordingly,

it is in the public interest that municipal employees so desiring be given an opportunity to bargain collectively with the municipal employer through a labor organization or other representative of the employees' own choice. If such procedures fail, the parties should have available to them a fair, speedy, effective and, above all, peaceful procedure for settlement as provided in this subchapter."

Further said Chapter in Section 111.77(4)(e) states as follows:

"(e) Strikes Prohibited. Nothing contained in this subchapter shall constitute a grant of the right to strike by any county or municipal employee and such strikes are hereby expressly prohibited."

Chapter 247, Laws of 1971, effective April 21, 1972, in pertinent part, contains the following provisions:

"111.77 SETTLEMENT OF DISPUTES IN COLLECTIVE BARGAINING UNITS COMPOSED OF LAW ENFORCEMENT PERSONNEL AND FIREFIGHTERS. In fire departments and city and county law enforcement agencies municipal employers and employees have the duty to bargain collectively in good faith including the duty to refrain from strikes or lockouts and to comply with the procedures set forth below:

(1) If a contract is in effect, the duty to bargain collectively means that a party to such contract shall not terminate or modify such contract unless the party desiring such termination or modification:

(a) Serves written notice upon the other party to the contract of the proposed termination or modification 180 days prior to the expiration date thereof or, if the contract contains no expiration date, 60 days prior to the time it is proposed to make such termination or modification. This paragraph shall not apply to negotiations initiated or occurring in 1971.

(b) Offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications.

(c) Notifies the commission within 30 days after the notice provided for in par. (a) of the existence of a dispute.

(d) Continues in full force and effect without resorting to strike or lockout all terms and conditions of the existing contract for a period of 60 days after such notice is given or until the expiration date of the contract, whichever occurs later.

(e) Participates in mediation sessions by the commission or its representatives if specifically requested to do so by the commission.

(f) Participates in procedures, including binding arbitration, agreed to between the parties.

(2) If there has never been a contract in effect, the union shall notify the commission within 30 days after the first demand upon the employer of the existence of a dispute provided no agreement is reached by that time, and in such case sub. (1) (b), (e) and (f) shall apply.

(3) If the parties have no procedures for the final disposition of the dispute and an impasse has been reached, either party may petition the commission to initiate compulsory final and binding arbitration of the dispute. On receipt of the petition, the commission shall investigate to determine if an impasse has been reached. If it so determines, it shall issue an order requiring arbitration and requesting the parties to select one or more arbitrators. If the parties within 10 days after the issuance of the order have not selected an arbitrator or a board of arbitration, the commission shall then order each party to select one arbitrator, and if these 2 arbitrators cannot in 5 days select a 3rd neutral arbitrator, the commission shall submit a list from which the parties may alternately strike names until a single name is left who shall be appointed by the commission as arbitrator. Costs of each party's appointee shall be paid by the party, and the costs of the proceedings otherwise shall be shared equally between the parties."

PERTINENT COMMISSION RULES

Following the effective date of Chapter 247, the Commission adopted the following rules with respect to the administration of Section 111.77:

"ERB 30.02 Policy. The policy of the state being primarily to promote the prompt, peaceful and just resolution of labor disputes arising in collective bargaining affecting wages, hours and conditions of employment of firefighting and law enforcement personnel in the employ of the applicable municipal employers, and where proceedings are initiated pursuant to this chapter by one or both parties, the commission shall, where an impasse exists, require the parties involved to proceed to final and binding arbitration on the issue or issues at impasse, and in that regard may furnish to the parties a panel of arbitrators, from which they may select an arbitrator or arbitrators to be appointed by the commission to issue a compulsory final and binding award to resolve such issue or issues at impasse.

ERB 30.03 Petition to initiate final and binding arbitration.

. . .

(2) TIME FOR FILING. A petition to initiate such compulsory final and binding arbitration shall be entertained by the commission provided the parties comply with the provisions set forth in section 111.77 (1) and (2), Wis. Stats.

. . .

(4) CONTENTS. The petition shall include the following:

. . .

(f) Relevant facts pertaining to compliance, by the parties, with the provisions set forth in section 111.77 (1) and (2), Wis. Stats.

. . ."

POSITIONS OF THE PARTIES

The Municipal Employer takes the position that Section 111.77(2) imposes mandatory duties upon the Petitioner, including the giving of timely notice of dispute to the Commission, the fulfillment of which duties is a condition precedent to the Commission's jurisdiction and authority to order compulsory final and binding arbitration in the instant matter; that the legislature intended such arbitration to be used only as a last resort after the processes outlined in Sections 111.77(1) and (2) have been exhausted without a settlement; that the Commission's own rules support the foregoing position, to wit: ERB 30.02 and 30.03(4)(f); that under the latter rule, Petitioner's petition is incomplete and cannot be considered by the Commission; that the "substantial compliance" provision in Section 111.07(12) of the Wisconsin Employment Peace Act does not apply to the instant case, since the requirement of notice in Section 111.77(2) is imposed upon the Petitioner itself and not upon the Commission; and that by Section 111.77(2) the legislature intended to require that a party inform the Commission at an early stage in negotiations and that where a petitioner has failed to do so, the Commission loses jurisdiction in the matter.

The Petitioner, et al, argue that Section 111.77(1) [and presumably (2)] constitute(s) a limitation on the conditions under which contracts may be terminated, but does not limit the jurisdiction of the Commission to issue an order for compulsory final and binding arbitration; that the conditions stated in subsections (1) and (2) are unrelated to the provisions in subsection (3) of Section 111.77; that, in any event, the doctrine of inclusio unius est exclusio alterius would eliminate all duties outlined in Section 111.77(1) or (2) as conditions precedent to a Commission order under Section 111.77(3), except for the provision in Section 111.77(1)(f) which was expressly included in subsection (3) as a condition precedent to such an order; that it would be an absurd result and contrary to the basic purposes of Section 111.70 if the Commission were to lose jurisdiction to order compulsory final and binding arbitration upon one or another party's technical failure to bargain in good faith; and that the legislative history of Section 111.77 indicates that it was intended to provide an effective strike substitute for settling disputes in the protective occupations, which purpose would not be served if the Municipal Employer's position were to prevail in the instant matter.

Amicus Curiae argue that Petitioner's failure to notify the Commission of a dispute does not create a bar to the Commission's duty to issue an order requiring compulsory final and binding arbitration, once the three requirements of Section 111.77(3) are met; that those three requirements are that (1) the parties have no procedures for a final settlement, (2) that one party petitions for binding arbitration, and (3) that the Commission determines that there is an "impasse." The Amicus argues further that a party's mere failure to notify the Commission does not necessarily imply that an impasse

exists; and consequently, that a party's failure to comply with Section 111.77(1)(c) does not preclude the Commission from ordering initiation of compulsory final and binding arbitration under Section 111.77(3).

DISCUSSION

We have found that a collective bargaining agreement existed between the parties for the year 1972 and therefore Section 111.77(1) and its various subsections are applicable to the issues involved herein. While there seems to be no dispute with respect to the timeliness of the Petitioner's request to modify the existing agreement, there is also no dispute with respect to the fact that at no time did the Petitioner, prior to the filing of its petition, file any notice with the Commission relating to the dispute between the parties. Section 111.77(1) sets forth what constitutes "the duty to bargain collectively" and requires that a party to a collective bargaining agreement cannot terminate or modify such an agreement unless the party desiring such termination or modification complies with subsections (a) through (f) of Section 111.77(1). There was no evidence adduced during the course of the investigation that the Petitioner terminated or modified the 1972 agreement, and probably it did not do so since its petition for arbitration was filed in October of 1972, during the contract year. However, even assuming that the contract was terminated or modified, does the failure to notify the Commission, as provided in subsection 1(a), preclude the Commission from ordering final and binding arbitration of the existing impasse? It should be noted that Section 111.77(3) does not condition final and binding arbitration on the failure of a Petitioner to notify the Commission of the dispute as required in Section 111.77(1)(c) or (2).

The issue boils down as to whether such notice requirement is directory or mandatory. If it is directory, the failure to serve the notice does not preclude the Commission from ordering arbitration. On the other hand, if it is mandatory, the Commission would not have jurisdiction to order arbitration.

Our Supreme Court in Worachek v. Stephenson Town School Dist. 1/ articulated the following test as to whether a statutory provision is mandatory or directory:

"There is no well-defined rule by which directory provisions in a statute may, in all circumstances, be distinguished from those which are mandatory. In the determination of this question, as of every other question of statutory construction, the prime object is to ascertain the legislative intention as disclosed by the terms of the statute, in relation to the scope, history, context, provisions, and subject matter of the legislation, the spirit or nature of the act, the evil intended to be remedied, and the general object sought to be accomplished."

In Muskego-Norway vs. WERB 2/ our Supreme Court stated as follows:

1/ 270 Wis 116 (1955)

2/ 32 Wis 2d 485 at page 485d (1967)

"The overall purpose of ch. 111, Stats., which must be given overriding consideration, is the promotion of industrial peace through the maintenance of fair, friendly and mutually satisfactory employment relations. This purpose is to be accomplished by the maintenance of suitable machinery for the peaceful adjustment of controversies."

As has been noted previously in this Memorandum, Section 111.70 sets forth the policy of the State in municipal employment labor relations, as does the Commission's rules set forth in ERB 30.02. If the Commission were to adopt the Municipal Employer's rationale that the notice requirements set forth in Section 111.77 are mandatory, the application of such a principle would conflict with the policy of the State with respect to the resolution of disputes arising in municipal employment bargaining, and especially those involving law enforcement and firefighter personnel. The notification period set forth in the statute is intended to apprise the Commission of the dispute existing between law enforcement or firefighter personnel and their municipal employer of a dispute in collective bargaining, and thus such notices would afford the Commission an opportunity to proffer its mediation services to the parties in order to resolve the dispute in the most expeditious and desirable means possible. The parties may not desire, or may waive mediation by the Commission, where they file a stipulation requesting arbitration under the statute. Where neither party requests mediation, after a petition for arbitration has been filed, the Commission conducts an informal investigation on said petition, as it did in this matter, during which it attempts to mediate the dispute.

Unless the parties agree otherwise, the Commission's policy is not to order such a dispute to final and binding arbitration until it has attempted to mediate the dispute involved, and has determined that the parties are at impasse, for the best resolution of such disputes are those which the parties themselves resolve rather than having a settlement imposed upon the parties through final and binding arbitration. Where mediation is not successful, the legislature has seen fit to permit the parties to proceed to final and binding arbitration for the final resolution of the dispute rather than permitting either of the parties to engage in self-help, which may result in a violation of the statute and which would, no doubt, create issues which were not present at the time of impasse.


To conclude that the notice requirements set forth in Section 111.77(1)(c)(2) were mandatory rather than directory would not effectuate the policy of this State to promote peaceful labor relations in collective bargaining involving law enforcement and firefighter personnel, nor would a determination that the rules established by the Commission, as set forth previously herein with reference to notice requirements and reference thereto in the petition requesting arbitration are mandatory, effectuate the policies of the Act or of our own rules. We conclude that such notice requirements in the rules are directory rather than mandatory. Therefore, the failure to give notice to the Commission as set forth in Section

111.77(1)(c) and (2), or in the Commission's rules, does not deprive the Commission of its jurisdiction to issue an order requiring arbitration to resolve impasses in collective bargaining involving law enforcement and firefighter personnel, and being satisfied that an impasse exists in collective bargaining between the Municipal Employer and the Petitioner herein, we have ordered the parties to proceed to arbitration.

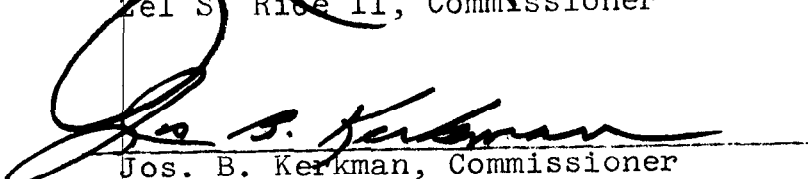
Dated at Madison, Wisconsin, this 31st day of January, 1973.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By


Morris Slawney, Chairman


Mel S. Rice II, Commissioner


Jos. B. Kerkman, Commissioner