

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of

CITY OF SUN PRAIRIE

For a Declaratory Ruling

:
:
:
:
:
:
:

Case IV
No. 16591 DR(M)-41
Decision No. 11703-A

DECLARATORY RULING

City of Sun Prairie having on March 8, 1973, filed a petition requesting the Wisconsin Employment Relations Commission to issue a Declaratory Ruling on whether procedures relating to suspension or termination of law enforcement personnel are subject to final and binding arbitration pursuant to Section 111.77 of the Municipal Employment Relations Act; and the parties having waived hearing in the matter; and the Commission having considered the briefs filed by the parties and being fully advised in the premises, makes and files the following Findings of Fact and Declaratory Ruling.

FINDINGS OF FACT

1. That Drivers, Salesmen, Warehousemen, Milk Processors, Cannery, Dairy Employees and Helpers Union Local No. 695, hereinafter referred to as the Union is a labor organization that maintains its offices at Madison, Wisconsin.

2. That the City of Sun Prairie, hereinafter referred to as the Municipal Employer, has its offices at Sun Prairie, Wisconsin.

3. That the Union, at all times material herein, is the collective bargaining representative for all non-supervisory police personnel in the employ of said Municipal Employer.

4. That in the fall of 1972 the Union and the Municipal Employer engaged in negotiations with respect to wages, hours and working conditions of said non-supervisory law enforcement personnel; that on November 29, 1972 the Union filed a petition with the Wisconsin Employment Relations Commission requesting the initiation of final and binding arbitration on the last offers of the parties; that following the conduct of an informal investigation on such petition, the Commission on February 8, 1973 ordered the matter to final offer arbitration and on February 23, 1973 appointed the chairman of a three member arbitration board to issue an arbitration award in the matter; and that, however prior to the conduct of the arbitration hearing, the Municipal Employer filed the instant petition for declaratory ruling, requesting the Commission to determine whether procedures relating to suspension or termination of law enforcement personnel are proper subjects for final and binding arbitration pursuant to Section 111.77 of the Municipal Employment Relations Act.

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

No. 11703-A

DECLARATORY RULING

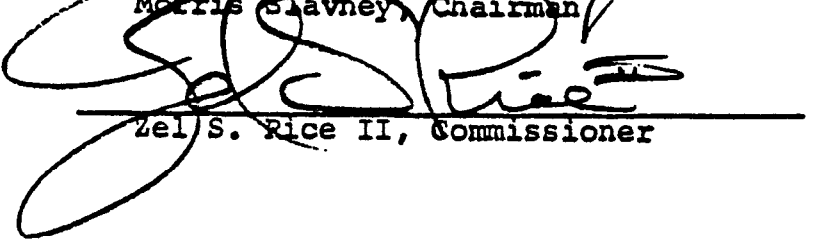
That, since the suspension or termination of law enforcement personnel are conditions of employment of said municipal employes, and therefore proper subjects of collective bargaining under the Municipal Employment Relations Act, procedures relating to suspension or termination of law enforcement personnel are subject to final and binding arbitration conducted pursuant to Section 111.77 of the Municipal Employment Relations Act.

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


Zel S. Rice II, Commissioner

MEMORANDUM ACCOMPANYING DECLARATORY RULING

The City and the Union, which is the collective bargaining representative of non-supervisory police officers in the employ of the City, commenced negotiations on the first labor agreement covering such employees. They were unable to reach an accord in their negotiations, and thereafter, and on November 29, 1972, the Union filed a petition with the Commission requesting the Commission to initiate final and binding arbitration on the last offers of the parties, pursuant to Sec. 111.77, Wis. Stats. Following the conduct of an informal investigation on the petition, the Commission issued an Order, on February 8, 1973, wherein it ordered the matter to final and binding final offer arbitration, and on February 23, 1973 it appointed Edward Krinsky of Madison as the Chairman of a three member Arbitration Board, the parties having each appointed one member to said Board. The final offers of the parties were submitted to Mr. Krinsky, who tentatively scheduled the arbitration hearing for March 15, 1973. However, prior to the latter date, the City filed its Petition for Declaratory Ruling initiating the instant proceeding, and as a result the arbitration hearing has been held in abeyance.

The parties waived hearing on the instant petition. The Commission, taking judicial notice of the final offers of the parties, which were submitted in the case involving the petition for final and binding arbitration, 1/ finds the Union's final offer with respect to grievances and the arbitration thereof to be as follows:

"ARTICLE XIV - GRIEVANCE PROCEDURE.

A. Grievances

1. A Grievance is a complaint by an employee or group of employees for whom the Union is a Bargaining Agent, which involves the interpretation or application of any of the provisions of this Agreement. All Grievances must be presented in writing and all replies to Grievances given by Management shall likewise be in writing.

2. No Grievance shall be eligible for handling hereunder unless proceedings to that end shall be begun within five working days after Management has been initially consulted concerning the problem and has given a decision, which is not satisfactory to the Grievant.

3. Grievances shall be processed through the following procedure:

Step 1 - First level of supervision having jurisdiction over the situation and the authority to settle the Grievance. (Supervisor)

Step 2 - The Chief of Police.

Step 3 - The Police and Fire Commission.

1/ City of Sun Prairie III

4. Grievance meetings will be held within 15 working days after the receipt of either the original Grievance or an appeal from any one of the steps to a Grievance.

5. The Management agrees to provide the Union with a decision within 15 working days following a Grievance meeting. If the decision is not provided within this time limit, the Grievance will automatically be eligible for handling at the next step.

6. If the Grievance is not submitted by the Union to the next level within five working days following receipt of Management's decision, it will not be eligible for further appeal.

7. The time periods specified in this article may be modified by mutual consent.

8. A list of authorized Union representatives who may present a Grievance will be provided to Chief of Police by the Union.

B. Arbitration

1. Arbitration shall be limited to situations which involve a Grievance not settled at the third level, unless otherwise specified in this Agreement.
2. An arbitration shall not commence until the Grievance has been processed through the third level of the Grievance procedure and the disposition is not satisfactory to the dissatisfied Party. Notice of intent to arbitrate will be presented in writing to the Police and Fire Commission within 30 days of the date of Management's last answer.
3. A single arbitrator shall be used and shall be mutually selected by the City and the Union. If mutual agreement cannot be reached on an arbitrator, the arbitrator shall be selected in accordance with the then existing rules of the American Arbitration Association, and the arbitration shall be conducted under the then existing rules of the American Arbitration Association.
4. Each party shall bear the expense of preparing and presenting its own case. The compensation and expenses of the arbitration and the incidental expenses of the arbitration proceeding mutually agreed to in advance shall be borne equally by the City and the Union.
5. The arbitrator shall not possess authority to assess damage or punitive payments against either party to the other. In rendering the decision, the arbitrator shall confine the decision to the specific issue in question.

6. The arbitrator shall have no authority to add or to subtract from or reform the provisions of the contract between the parties."

The City's final offer with respect to the grievance and arbitration procedure is practically identical to the procedure proposed by the Union, except that the arbitration procedure to be contained in the collective bargaining agreement would not apply to "the suspension or removal of an employee who is subject to S. 62.13(5), Stats., or the suspension, discharge or non-retention of a probationary employee under Art. XVI" of the collective bargaining agreement. 2/

Positions of the Parties

The City's position, as summarized in its brief submitted to the Commission, is stated as follows:

"The grievance procedure proposed by the Union cannot be harmonized with sec. 62.13(5), Stats. Assuming a member of the unit was suspended or terminated by the Police and Fire Commission, under the grievance procedure a complaint could then be filed on behalf of the disciplined employee which would have to be processed through 3 steps: first, the immediate supervisor, second, the Chief of Police and the final step the Police and Fire Commission. This would mean that the supervisor at step one and the Chief of Police at step 2 of the grievance procedure could supersede the decision of the Police and Fire Commission. Further, under the grievance procedure, after step 3 the ultimate decision of the Police and Fire Commission would then be reviewed by an arbitrator whose decision would be final and binding. Under sec. 62.13(5)(1), Stats., the decision of the Police and Fire Commission is reviewable by appeal to the Circuit Court. If the order of the Board is sustained, it is final and conclusive. This, too, is part of state policy -- to make disciplinary proceedings involving police and fire personnel as speedy as possible so as to remove uncertainty as to appointments. State ex rel Kaczowski v. Fire & Police Commission (1966), 33 Wis. (2d) 488.

It is the public policy of the state as declared by the legislature that suspensions and termination of policemen shall only be accomplished pursuant to sec. 63.12(5), Stats. A city cannot contract away the jurisdiction of the police and fire commission.

If it is therefore respectfully submitted that the proposed grievance procedure culminating as it does in final and binding arbitration on decisions of the police and fire commission in matters of suspension and removal of police department employees is violative of the state's public policy as announced in sec. 62.13(5), Stats., and is void as a matter of law."

The Union's position as set forth in a portion of its brief is as follows:

-
- 2/ It should be noted that Art. XVI of the Union's proposal excluded supervision or discharge during the probationary year from arbitration.

"Consolidated School Joint School District Muskego-Norway v. WERB, 35 Wis. 2d 540, points to the answer in this case. There, the School Board argued that it had the authority under Sections 40.40 and 40.41, Wis. Stats. to refuse to rehire a teacher for any reason whatsoever, notwithstanding Section 111.70. The Wisconsin Supreme Court affirmed this Commission's rejection of this argument, holding that Section 111.70 placed limitations on this authority.

Similarly, the Wisconsin Legislature could place limitations on Section 62.13(5) when it enacted Sections 111.70 and 111.77. But, in fact, there is no conflict between Section 62.13(5) and Sections 111.70 and 111.77. Under Section 62.13(5), policemen, unlike teachers under Sections 40.40 and 40.41, may only be discharged for cause. Section 62.13(5) provides a forum for a policeman who is disciplined to challenge this discipline. An arbitration clause in a contract provides another forum. The existence of alternative forums neither is unusual nor creates a conflict. For example, alternative forums exist in this state in actions arising under collective contracts in private and public employment (this Commission and Courts); and, most pertinent here, a policeman discharged for union activities (this Commission and the Police and Fire Commission). Since a patrolman under the proposed contract language may continue to exercise his statutory right to a hearing before the Fire and Police Commission and seek prompt judicial review or may, together with Local 695, proceed to final and binding arbitration, accommodation between Section 62.13(5) and the Teamster proposal therefore is not only possible; it is actually built into the proposal."

. . .

"Here, too, it would be most "incongruous" to attribute to the Wisconsin Legislature an intent to preclude the parties for providing in their contract a final and binding procedure governing the most fundamental aspect of the policemen's relationship with the City -- his continued right to his job."

Discussion

It should be noted that, while the Union contends that a police officer would have the choice of proceeding either under Sec. 62.13(5) or arbitration under the agreement, the final offer of the Union, as reflected in the proposed agreement, does not provide for such alternative forums. Even assuming that the Union's proposal provided for alternative forums, such a proposal would not be dispositive of the issue involved in this Declaratory Ruling.

Sec. 62.13 was enacted long prior to the enactment of Sec. 111.77, which provides for final and binding arbitration to resolve disputes arising in collective bargaining involving police and firefighters. Our Supreme Court has stated that existing statutes may be modified by subsequent statutes. ^{3/} The pertinent provisions of Sec. 62.13(5), pertaining to disciplinary actions against police and firefighters are as follows:

3/ Muskego-Norway School District No. 9, 35 Wis 2d 540

"(5) DISCIPLINARY ACTIONS AGAINST SUBORDINATES. (a) A subordinate may be suspended as hereinafter provided as a penalty. He may also be suspended by the commission pending the disposition of charges filed against him.

(b) Charges may be filed against a subordinate by the chief, by a member of the board, by the board as a body, or by an elector of the city. Such charges shall be in writing and shall be filed with the president of the board. Pending disposition of such charges, the board or chief may suspend such subordinate.

(c) A subordinate may be suspended for cause by the chief or the board as a penalty. The chief shall file a report of such suspension with the commission immediately upon issuing the suspension. No hearing on such suspension shall be held unless requested by the suspended subordinate. If the subordinate suspended by the chief requests a hearing before the board, the chief shall be required to file charges with the board upon which such suspension was based.

(d) Following the filing of charges in any case, a copy thereof shall be served upon the person charged. The board shall set date for hearing not less than 10 days nor more than 30 days following service of charges. The hearing on the charges shall be public, and both the accused and the complainant may be represented by an attorney and may compel the attendance of witnesses by subpoenas which shall be issued by the president of the board on request and be served as are subpoenas under ch. 885.

(e) If the board determines that the charges are not sustained, the accused, if he has been suspended, shall be immediately reinstated and all lost pay restored. If the board determines that the charges are sustained, the accused, by order of the board, may be suspended or reduced in rank, or suspended and reduced in rank, or removed, as the good of the service may require.

(f) Findings and determinations hereunder and orders of suspension, reduction, suspension and reduction, or removal, shall be in writing and, if they follow a hearing, shall be filed within 3 days thereof with the secretary of the board.

(g) Further rules for the administration of this subsection may be made by the board.

(h) No person shall be deprived of compensation while suspended pending disposition of charges.

(i) Any person suspended, reduced, suspended and reduced, or removed by the board may appeal from the order of the board to the circuit court by serving written notice thereof on the secretary of the board within 10 days after the order is filed. Within 5 days thereafter the board shall certify to the clerk of the circuit court the record of the proceedings, including all documents, testimony and minutes. The action shall then be at issue and shall have precedence over any other cause of a different nature pending in said court, which shall

always be open to the trial thereof. The court shall upon application of the accused or of the board fix a date of trial, which shall not be later than 15 days after such application except by agreement. The trial shall be by the court and upon the return of the board, except that the court may require further return or the taking and return of further evidence by the board. The question to be determined by the court shall be: Upon the evidence was the order of the board reasonable? No costs shall be allowed either party and the clerk's fees shall be paid by the city. If the order of the board is reversed, the accused shall be forthwith reinstated and entitled to his pay as though in continuous service. If the order of the board is sustained it shall be final and conclusive.

(j) The provisions of pars. (a) to (i) shall apply to disciplinary actions against the chiefs were applicable. In addition thereto, the board may suspend a chief pending disposition of charges filed by the board or by the mayor of the city."

The pertinent provisions of Sec. 111.77 are as follows:

"(6) In reaching a decision the arbitrator shall give weight to the following factors:

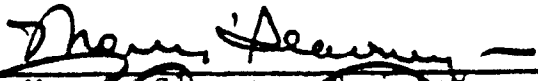
- (a) The lawful authority of the employer.
- (b) Stipulations of the parties.
- (c) The interests and welfare of the public and the financial ability of the unit of government to meet these costs.
- (d) Comparison of the wages, hours and conditions of employment of the employees involved in the arbitration proceeding with the wages, hours and conditions of employment of other employees performing similar services and with other employees generally:
 - 1. In public employment in comparable communities.
 - 2. In private employment in comparable communities.
- (e) The average consumer prices for goods and services, commonly known as the cost of living.
- (f) The overall compensation presently received by the employees, including direct wage compensation, vacation, holidays and excused time, insurance and pensions, medical and hospitalization benefits, the continuity and stability of employment, and all other benefits received.
- (g) Changes in any of the foregoing circumstances during the pendency of the arbitration proceedings.
- (h) Such other factors, not confined to the foregoing, which are normally or traditionally taken into consideration in the determination of wages, hours and conditions of employment through voluntary collective bargaining, mediation, fact-finding, arbitration or otherwise between the parties, in the public service or in private employment."

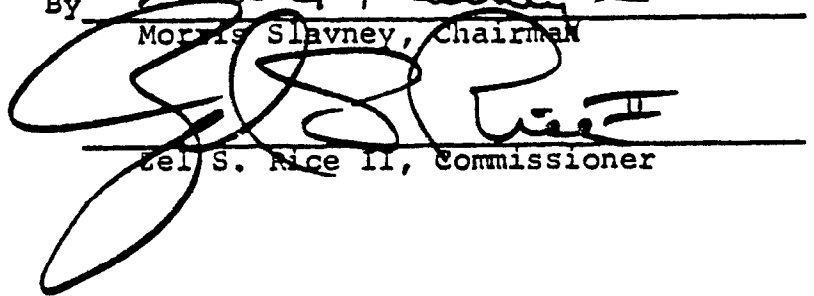
It is clear to the Commission that the authority granted to Police and Fire Commissions, pursuant to Sec. 62.13(5) with respect to discipline, suspension and/or termination of police and firefighters cannot be harmonized with those provisions in Sec. 111.77, relating to the authority of the arbitrators performing their function under the latter statutory provision. Secs. 111.77(d) and (h) specifically refer to "conditions of employment" and ss. (f) among other matters, refers to "the continuity and stability of employment". Discipline, suspension or termination from employment affects an employee's working conditions, and most certainly has an effect on the stability of one's employment. Had the Legislature intended to exclude matters coming within the jurisdiction of Police and Fire Commission pursuant to Sec. 62.13(5) from those matters subject to final and binding arbitration in police and firefighter negotiations, it could have included such an exception in Sec. 111.77. Since the latter statutory provision was adopted subsequent to Sec. 62.13(5) it modifies Sec. 62.13(5), at least with respect to the authority of an arbitrator, appointed pursuant to Sec. 111.77, to issue a final and binding award containing a provision providing for arbitration of discipline, and suspension or termination of police and/or firefighters, or any other conditions affecting the stability of their employment.

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

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By


Morris Slavney, Chairman


Del S. Rice II, Commissioner