

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

THE MILWAUKEE PROFESSIONAL POLICEMEN'S
PROTECTIVE ASSOCIATION by its Board of
Trustees, Jerome J. Dudzik, Robert B.
Kliesmet, Donald J. Abbott, William M.
Gangler, George J. Cayo, Carl Hanneman,
Raphael E. Piontek, Kenneth Kosidowski
and Carl A. Hinz,

Complainants,

vs.

THE CITY OF MILWAUKEE, a municipal
corporation, Henry W. Maier, Mayor;
Allen R. Calhoun, Jr., City Clerk;
James A. McCann, City Comptroller;
Ald. Robert O. Ertle, Chairman; Ald.
Mark W. Ryan, Finance Committee;
Ald. Ben E. Johnson, Finance Committee;
James J. Mortier, City Labor Negotiator;
and Robert C. Garnier, City Personnel
Director, and Ald. John R. Kalwitz,
Vice-Chairman,

Respondents.

Case CXIX
No. 16160 MP-185
Decision No. 11854

Appearances:

Gimbel, Gimbel & Boyle, Attorneys at Law, by Mr. Gerald P. Boyle,
appearing on behalf of the Complainants.

Mr. Nicholas M. Sigel, Assistant City Attorney, appearing on
behalf of the Respondents.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The Milwaukee Professional Policemen's Protective Association having
filed a complaint of prohibited practices with the Wisconsin Employment
Relations Commission, alleging that the City of Milwaukee and certain of
its municipal officials committed prohibited practices within the meaning
of the Municipal Employment Relations Act, and a hearing on the matter
having been conducted on December 1, 1972, before Commissioner Zel S.
Rice II; and the Commission having considered the evidence, Briefs and
arguments of the parties, and being fully advised in the premises, makes
and files the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. That Milwaukee Professional Policemen's Protective Association,
hereinafter referred to as the Complainant, is a labor organization
representing municipal employes for the purposes of collective bargaining
and has its principal office at 1010 North Third Street, Milwaukee,
Wisconsin.

2. That the City of Milwaukee, hereinafter referred to as the Respondent, is a municipal corporation having its principal office at the City Hall, Milwaukee, Wisconsin.

3. That at all times material herein the Complainant has been, and is, the exclusive bargaining representative of approximately 1,900 law enforcement personnel employed in the Police Department of the Respondent; that during 1970 representatives of the Complainant and Respondent commenced negotiations on a collective bargaining agreement covering the wages, hours and working conditions of said law enforcement personnel for the years 1971 and 1972; that following a prolonged period of negotiations, including a strike, a fact finding proceeding, and mediation, prior to and subsequent to the issuance of the fact finder's recommendations, representatives of the parties on December 22, 1971 reached and executed a Memorandum of Understanding, which was intended to ultimately constitute a collective bargaining agreement covering the wages, hours and working conditions of said law enforcement personnel for the period from January 1, 1971 to November 3, 1972; that said Memorandum of Understanding contained, among other matters, a pay schedule, setting forth various pay ranges applicable to the law enforcement personnel intended to be covered by said Memorandum of Understanding, which negotiated schedule resulted in a general wage adjustment over and above the wages prevailing prior to January 1, 1971, which would result, in 1971, in an average increase of 12.8% in wages received prior to January 1, 1971, and an additional increase of 6.2% for the year 1972.

4. That at such time as the representatives of the Complainant and Respondent executed said Memorandum of Understanding said representatives were aware that it would be necessary to seek the approval of the Pay Board to implement the wage increases mutually agreed upon for the years 1971 and 1972; that in said regard representatives of the Complainant and the Respondent, on an undisclosed date prior to March 30, 1972 jointly submitted to the Pay Board a document setting forth the necessary information to obtain approval from the Pay Board for the monetary increases negotiated between the Complainant and the Respondent which were to be included in the collective bargaining agreement between the parties commencing in January 1971; that on March 30, 1972 the Pay Board issued a decision and order in regard to the matter, wherein the Pay Board approved the wage increases negotiated by the parties for the year 1971 but, however, refused to authorize the implementation of the proposed increases for the year 1972 until approval for same was received from the Pay Board; that thereafter and on May 4, 1972 the Respondent, by James J. Mortier, its labor negotiator, directed a letter to the Pay Board wherein the Complainant and Respondent joined in seeking an approval to implement the wage increases negotiated by the parties to become effective for the year 1972; and that thereafter, and on June 27, 1972, the Pay Board issued a decision and order which, in effect denied the request of the Complainant and Respondent with respect to implementing the negotiated increases for the year 1972, by limiting the increase in wages to 5.5% and increases in excludable fringe benefits to .7%, thus resulting in reducing the negotiated wage increase negotiated by the parties for the year 1972 from 6.2% to 5.5%.

5. That thereafter and on June 28, 1972 representatives of the Complainant and Respondent executed a formal collective bargaining agreement covering the wages, hours and working conditions of the law enforcement personnel in the employ of the Respondent effective from January 1, 1971 to November 3, 1972; that said agreement contained

among its provisions the wage schedule as modified by the Pay Board; that said collective bargaining agreement also provided for final and binding arbitration of grievances arising under said collective bargaining agreement, as well as the following provision material to the issue herein:

"PART V

. . .

C. SAVING CLAUSE

If any article or section of this Agreement or any addenda thereto as it relates to matters under the exclusive control of the Common Council of the City should be held invalid by operation of law or by any tribunal of competent jurisdiction, or if compliance with or enforcement of any article or section should be restrained by such tribunal, the remainder of this Agreement and addenda shall not be affected thereby and the parties shall enter into immediate collective bargaining negotiations for the purpose of arriving at a mutually satisfactory replacement for such article or section."

6. That on August 29, 1972, representatives of the Complainant met with representatives of the Respondent and on such date representatives of the Complainant requested that representatives of the Respondent negotiate a non-economic replacement, in accordance with the "Saving Clause" contained in the collective bargaining agreement existing between the parties, contending that the action of the Pay Board by denying the approval of the implementation of 6.2% wage increase for the year 1972, permitted the Complainant, and required the Respondent, to enter into immediate collective bargaining for the purpose of arriving at a mutually satisfactory replacement for the wages requested but not approved by the Pay Board; that the representatives of the Respondent refused to engage in such negotiations; that on October 4, 1972, the president of the Complainant directed a letter to the Respondent's labor negotiator specifically requesting that the Respondent enter into immediate collective bargaining to provide a satisfactory replacement of the alleged loss in wages as a result of the Pay Board's action; and that, however, at all times material herein the Respondent refused, and continues to refuse, to engage in such collective bargaining as requested by the Respondent.

7. That on October 26, 1972, the Complainant initiated the instant proceeding by filing a complaint of prohibited practices, wherein it alleged that the refusal of Respondent City to abide by its contractual duty to bargain with the Complainant Association, as previously requested, constituted a prohibited practice within the meaning of the municipal Employment Relations Act and, therein the Complainants requested the Wisconsin Employment Relations Commission to order the Respondents to "immediately engage in collective bargaining (with the Complainant) pursuant to the Saving Clause" in the collective bargaining agreement; that hearing in the matter was set for December 1, 1972, at Milwaukee, Wisconsin; that on November 24, 1972 the Respondents filed an answer wherein, among other things, admitted that the Respondents refused to reopen the collective bargaining agreement, denied that "any section of the labor agreement between Complainant and Respondent was held invalid by any tribunal, including the Federal Pay Board," and further materially alleged that the Complainants had no right to proceed against the Respondents by way of a prohibited practice proceeding since the labor agreement "was negotiated under Sec. 111.70 (Wis. Stats.) 1961, and Complainant under said law had no right to maintain any action against the Employer by way of prohibited practice charges. The employees represented by this complainant had only the right to proceed to fact finding

under said law and the employer invoked this right in an attempt to arrive at a settlement of the labor relations problems existing between complainant and respondents"; and that therefore Section 111.70(3)(a) 5 of the Municipal Employment Relations Act was not applicable or available to the Complainants as charged in the complaint.

8. That prior to the conduct of the hearing, which was held on December 1, 1972, the Complainant Association on November 6, 1972 filed a petition with the Wisconsin Employment Relations Commission requesting final and binding arbitration pursuant to Section 111.70(4)(jm), wherein Complainant alleged that the 1971-1972 collective bargaining agreement, referred to above, had expired on November 4, 1972; that collective bargaining sessions had been held between representatives of the Complainant and Respondent and that the parties were unable to reach an agreement with respect to the terms and conditions of the successor collective bargaining agreement; and subsequently, the Commission being satisfied that an impasse existed between the parties, on January 29, 1973, issued an order appointing an arbitrator to issue a final and binding award in the matter.

9. That the transcript of the hearing in the instant proceeding was mailed to the parties on January 5, 1973; that counsel for the Complainants filed their brief on March 9, 1973; and that counsel for the Respondents filed their brief on April 18, 1973; that in the Respondents' brief, and for the first time since the filing of the complaint initiating the instant proceeding, the Respondents attempted to raise an additional issue by alleging in their brief that since the Complainants alleged that the Respondents violated the collective bargaining agreement, and since the collective bargaining agreement contained a provision for final and binding arbitration with respect to questions arising as to the meaning and application of the terms of the collective bargaining agreement, that the Wisconsin Employment Relations Commission, in effect, should not exercise its jurisdiction to determine whether the collective bargaining agreement was violated since the Complainants did not proceed to arbitration with regard to the subject matter involved in the instant complaint proceeding.

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

CONCLUSIONS OF LAW

1. That, since the issue as to whether the Respondents, the City of Milwaukee, et al, have violated the collective bargaining agreement existing between parties, arose following the effective date of the Municipal Employment Relations Act, the Wisconsin Employment Relations Commission has jurisdiction to determine matters relating to said issue.

2. That since the pleadings herein contained no allegations with respect to the contractual arbitration procedure, and since no evidence was introduced into the record with regard to the demand for arbitration, or the refusal to proceed to arbitration, and since the merits of the issues raised in the pleadings were fully litigated during the course of the hearing herein, the Wisconsin Employment Relations Commission hereby exercises its jurisdiction to determine the instant matter on the merits.

3. That, since the Pay Board did not declare any provision of the collective bargaining agreement executed on June 28, 1972 by the Complainant, Milwaukee Professional Policemen's Protective Association

and Respondent, City of Milwaukee, invalid or incapable of compliance or enforcement, the Respondents, City of Milwaukee, et al, by refusing to engage in negotiations with Complainants, Milwaukee Professional Policemen's Protective Association et al, at the request of said Complainants on October 29, 1972 and thereafter, the Complainants, City of Milwaukee, et al, have not committed any prohibited practices within the meaning of Section 111.70(3)(a)4 or 5, or any other provisions of the Municipal Employment Relations Act.

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

ORDER

That the complaint filed in the instant matter be, and the same hereby is, dismissed.

Given under our hands and seal at the City of Madison, Wisconsin, this 15th day of May, 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 AND ORDER

In the complaint filed herein the Complainants alleged that the Respondents violated an existing collective bargaining agreement by refusing to negotiate with Complainants following a determination by the Pay Board which resulted in a .7% "loss" of wages in the second year of the agreement, thus falling within the conditions set forth in the "Saving Clause" of the collective bargaining agreement. In that regard the Complainants allege that the Respondent committed prohibited practices within the meaning of the Municipal Employment Relations Act and requested the Commission to order the Respondents to engage in collective bargaining "to find a suitable replacement for the said loss".

In the answer the Respondents alleged that the action of the Pay Board did not constitute an activity so as to require the implementation of the procedure set forth in the "Saving Clause" of the agreement, and therefore there was no obligation upon the Respondents to engage in any negotiations for any "replacement clause". The Respondents, by way of affirmative defense, further alleged that the parties (1) were bound by the decision of the Pay Board, and (2) that since the labor agreement was "negotiated" under Section 111.70, Wis. Stats., (1961) that the Complainants had no right to proceed to fact finding to resolve the issues existing between the parties and therefore Section 111.70(3)(a)5 of the Municipal Employment Relations Act is not applicable in the instant proceeding.

As indicated in the Findings of Fact, the Respondents, following the close of the hearing, in their briefs filed as late as April 18, 1973, for the first time alleged that the Commission should not exercise its jurisdiction to determine whether the collective bargaining agreement was violated, contending that the Complainants should have proceeded in accordance with the grievance procedure set forth in the collective bargaining agreement.

The facts material to the disposition of the issues raised herein are set forth in the Findings of Fact and need not be reiterated in this Memorandum.

The Issue With Respect To The Application Of MERA

The collective bargaining agreement was formally executed on June 28, 1972, long after November 11, 1971, the effective date of the Municipal Employment Relations Act. The alleged refusal to bargain, in accordance with the Saving Clause, occurred at a time following August 29, 1972 when representatives of the Respondent Association requested representatives of the Complainant to negotiate a non-economic replacement for the "loss" of wages as a result of the action of the Pay Board in not approving the joint wage request for the year 1972. The contention of the Respondent that the only relief available to the Complainants is a fact finding proceeding has no merit whatsoever. The collective bargaining agreement was executed after the effective date of MERA and the alleged violation thereof subsequently occurred, and therefore the Commission has jurisdiction to determine whether, in fact, the Respondents violated the collective bargaining agreement and/or refused to bargain in good faith with the Complainants.

The Issue With Respect To Arbitration

The Respondents at no time prior to the close of the hearing raised any defense to the effect that the Complainants should proceed to utilize the grievance and arbitration provisions in the collective bargaining agreement with regard to the alleged violation thereof. It has long been the policy of the Commission that where in a complaint proceeding the complaint and answer are devoid of allegations with respect to arbitration, and where no evidence was introduced into the record to a demand to proceed to arbitration or refusal with respect to such demand, and where the parties have presented evidence with regard to the merits of the dispute, the Commission considers that the parties have waived the arbitration provision in their agreement and therefore, where the merits of the dispute were fully litigated before the Commission, the Commission will determine the dispute on its merits. 1/ Therefore, in this proceeding the Commission has determined to exercise its jurisdiction to make a determination on the merits involved as to whether the collective bargaining agreement was violated.

Issue As To The Alleged Violation Of The Agreement

The Complainants allege, by virtue of the action of the Pay Board, by not approving the wages agreed upon by the parties for the second year of the agreement, the Complainants, in accordance with the "Saving Clause" in the agreement have the right to request Respondents to commence negotiations of a replacement provision, and the refusal of the Respondents to engage in negotiations thereon constituted a violation of the agreement. However, it should be noted that the collective bargaining agreement, as executed on June 28, 1972 actually contained the wage scale as finally approved by the Pay Board, and therefore no provision of the executed agreement was held invalid by any operation of the law or a tribunal of competent jurisdiction. It is true that the wage schedule in the executed agreement was not identical to the wage schedule in the Memorandum of Understanding. However, the action of the Pay Board in not approving the agreed wage scale for the second year of the agreement was made known to the parties prior to the execution of the written collective bargaining agreement. At that time the Complainants could have requested the Respondents to negotiate a "replacement clause" because of the action of the Pay Board. However, for some reason, not disclosed in the record, the Complainants failed to do so.

The Pay Board's action of not approving the wage schedule as agreed upon by the parties was included as the wage schedule in the collective bargaining agreement, and, as indicated above, no provision in the executed agreement was changed by the Pay Board, and therefore there was no obligation upon the Respondents to bargain a replacement clause, assuming that the Pay Board was such a tribunal as contemplated in the Saving Clause.

Dated at Madison, Wisconsin, this 15th day of May, 1973.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By


Morris Slavney, Chairman


Earl S. Rice II, Commissioner


Jos. B. Kerkman, Commissioner

1/ Pet Milk Co. (6209) 1/63.