STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

DRIVERS, SALESMEN, WAREHOUSEMEN, MILK PROCESSORS, CANNERY, DAIRY EMPLOYEES AND HELPERS UNION LOCAL #695, AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, Complainant, vs. CITY OF ST. FRANCIS, Respondent.	Case XVIII No. 17069 MP-270 Decision No. 12097-A

Appearances:

Goldberg, Previant & Uelmen, Attorneys at Law, by Mr. Thomas J. Kennedy, appearing on behalf of the Complainant.

Mr. Harwood H. Staats, City Attorney, appearing on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Local #695 having, on August 6, 1973, filed a complaint with the Wisconsin Employment Relations Commission, wherein it alleged that the City of St. Francis had committed prohibited practices within the meaning of the Wisconsin Municipal Employment Relations Act, by refusing to proceed to arbitration pursuant to a collective bargaining agreement existing between the parties; and the Commission having appointed Sherwood Malamud, a member of its staff, to act as Examiner to make and issue Findings of Fact, Conclusions of Law and Order as provided in Section 111.07(5) of the Wisconsin Employment Peace Act; and pursuant to Notice, hearing on said complaint having been held at Milwaukee, Wisconsin, on September 24, 1973, before the Examiner; and the Examiner having considered the evidence and arguments 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 Drivers, Salesmen, Warehousemen, Milk Processors, Cannery, Dairy Employees and Helpers Union Local #695, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, hereinafter referred to as Complainant, is a labor organization within the meaning of Section 111.70(1)(j) of the Wisconsin Statutes, with its principle office located at 1314 North Stoughton Road, Madison, Wisconsin 53714; Complainant is the exclusive bargaining representative for certain Law Enforcement personnel employed by Respondent, and that, at all times pertinent hereto, Glen N. Van Keuren has been assistant secretary-treasurer of Complainant Local #695 and the business representative charged with the administration of the contract between Complainant and Respondent.

2. That the City of St. Francis, hereinafter referred to as Respondent, is a Municipal Employer within the meaning of Section 111.70(1)(a), Wisconsin Statutes, with its principle office located at City Hall, 4235 South Nicholson Avenue, St. Francis, Wisconsin 53207; that James G. McManus was chairman of the bargaining committee of the Respondent at all times pertinent hereto.

3. On or about March 1, 1973, the parties entered into a collective bargaining agreement effective from January 1, 1973 to December 31, 1974; that said collective bargaining agreement contains a Grievance Procedure. The material terms of same are as follows:

"ARTICLE IV - GRIEVANCE PROCEDURE

Section 1. Any grievance or misunderstanding which may arise between the Employer and an Employee (or Employees) or the Employer and the Union, shall be handled in the following manner. All grievances shall be in writing at all steps.

STEP ONE: The aggrieved Employee, shall submit his grievance in writing to the Shift Commander of his shift.

STEP TWO: If a satisfactory settlement is not reached within one (1) week, the aggrieved employee, the Union Committee/Union Steward shall present the grievance to the Chief of Police.

STEP THREE: If a satisfactory settlement is not reached as outlined in STEP TWO, within two (2) weeks the Union Committee and/or Union Steward shall present the grievance, in writing, to the City Council, or its designate. A meeting shall be held within two (2) weeks of receipt of written request from the other party.

STEP FOUR: If a satisfactory settlement is not reached as outlined in STEP THREE, either party may request that the matter be submitted to arbitration, one arbitrator to be chosen by the Employer, one by the Union, and a third to be chosen by the first two, and he shall be the Chairman of the Board. If the two cannot agree on the selection of a third, the parties shall request the Wisconsin Employment Relations Commission to name the third member. The Board of Arbitration shall, by a majority vote, make the decision on the grievance, which shall be final and binding on both parties.

Section 2. The time limits mentioned above may be extended by mutual consent of the parties involved.

Section 3. Costs: Each party shall bear the costs of its chosen arbitrator. The cost of the third arbitrator and any other expenses shall be shared equally by the parties."

4. On June 15, 1973, Sergeant Wayne O. Cameron and Patrolman Lee Heidemann, two members of the bargaining unit, filed a written grievance concerning the enforcement of Ordinance #324 of Respondent requiring all municipal employes to reside within the City limits of Respondent; grievants Heidemann and Cameron requested an indefinite extension of time to comply with said ordinance on the grounds that they could not find adequate housing within Respondent's City limits.

5. That in response to the grievance filed on June 15, 1973, Mr. James G. McManus, chairman of the bargaining committee of Respondent directed a letter to Mr. Blumenberg, the bargaining representative of Complainant, which in material part provides as follows:

"June 28, 1973

Dear Mr. Blumenberg:

This refers to the letter of Sgt. Wayne Cameron and Patrolman Lee Heidemann, dated June 15, regarding their request for an indefinite extension of residency in the City of St. Francis.

In a letter dated May 30, 1973, Glen Van Keuren, Assistant Secretary Treasurer Local 695, wrote a letter to the City of St. Francis requesting a meeting to review this matter. At a meeting held on June 14, 1973, the City Council, meeting as a committee of the whole, advised you the City intends to enforce ordinance #324.

The City disagrees with the letter of Sgt. Cameron and Patrolman Heidemann wherein they state ordinance #324 is a violation of present and previous contracts.

The City maintains this is not a valid grievance and insists that Officers Cameron and Heidemann should abide by the city ordinances of the City of St. Francis and move immediately into the City of St. Francis. Their request for a further extension is denied.

This letter is being addressed to you because you are the bargaining representative for these men.

Yours truly,

James G. McManus /s/
James G. McManus
Chairman Bargaining Committee"

6. Up to August 6, 1973, the date on which the complaint in the above matter was filed, no demand was made by the Complainant to the Respondent to proceed to arbitration on the June 15 grievance submitted by Sergeant Cameron and Patrolman Heidemann.

On the basis of the above and foregoing Findings of Fact, the Examiner makes the following

CONCLUSIONS OF LAW

1. That the presentation of the demand to proceed to arbitration is a condition precedent to the contractual obligation of the employer to proceed to arbitration.

2. The Respondent was under no obligation to proceed to arbitration because no demand was made upon it to so proceed, and therefore, Respondent has not violated Section 111.70(3)(a)5 of the Wisconsin Statutes, and has not committed prohibited practices within the meaning of the Municipal Employment Relations Act.

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

ORDER

IT IS ORDERED that the complaint initiating the instant matter be, and the same hereby is, dismissed.

Dated at Madison, Wisconsin, this 5th day of April, 1974.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Sherwood Malamud
Sherwood Malamud, Examiner

CITY OF ST. FRANCIS, XVIII, Decision No. 12097-A

MEMORANDUM ACCOMPANYING
FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Introduction

In its complaint, Local #695 alleges that the City of St. Francis enacted a residency ordinance on July 20, 1971, and soon thereafter a grievance was filed against said ordinance; the common council of Respondent maintained that the grievance was premature in that the employes of the City were given one year from passage of the ordinance to establish residency within the City limits. That grievance did not proceed any further. Sergeant Cameron and Patrolman Heidemann filed a grievance on June 15, 1973; Complainant alleges that Respondent refused to process this grievance to arbitration. Complainant requests the Commission direct Respondent to submit the June 15, 1973 grievance to arbitration. 1/ Respondent admits that the grievance was submitted, but alleges that Complainant made certain procedural errors in the processing of its grievance and Respondent avers that no request was made upon Respondent to proceed to arbitration.

Normally, the Examiner need only determine whether the party seeking arbitration is making a claim which on its face is covered by the collective bargaining agreement and subject to the dispute settlement mechanism established by the collective bargaining agreement. All substantive and procedural 2/ claims and defenses would not be determined by the Examiner but would be left for the arbitrator's determination. Here, the Examiner need not determine whether the claim, on its face, is covered by the collective bargaining agreement because the Union failed to demand of Respondent that it proceed to arbitration.

Discussion

The Employer is under no obligation to proceed to arbitration until a demand is made upon it to submit the dispute to an arbitrator. The Commission has consistently held that a complaining party must exhaust the contractual remedies available before the Commission will order the parties to arbitration. 3/ In this regard, the Complainant maintains that Respondent by its letter of June 20, 1973 repudiated the grievance procedure, a procedure whose final step is arbitration, and, Complainant maintains that the imposition of a requirement that it make a formal demand upon Respondent to proceed to arbitration is to require Complainant to undertake a futile act. Recently, in P. & J. Contracting

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1/ Complainant cites the Steelworkers Trilogy in support of its position, i.e., that Respondent be directed to submit the dispute to arbitration, United Steelworkers of America vs. Warrior and Gulf Navigation Co., 363 U.S. p. 582; United Steelworkers of America vs. American Manufacturing Company, 363 U.S. 567, 568; and United Steelworkers vs. Enterprise Wheel and Car Corp., 363 U.S. 593. Complainant accurately reflects the Commission's policy which adopts the Federal policy of deferring procedural and substantive issues to the Arbitrator: Seaman-Andwall Corp., (5910), 1/62; The Kroger Company, (7583-A), 9/66; Milwaukee Lodge 46 of Elks, (7753), 10/66; Super Valu Stores, Inc. Green Bay Retail Outlets, (9559-B), 8/70; Frito-Lay, Inc., (9513-B), 7/70; Rodman Industries, (9650-B), 11/70; Plymouth Plastics, Division of Ametek, Inc., (9720-B), 3/71.

2/ Oostburg Joint School District No. 14, (11196-A), 10/72; Seaman-Andwall Corp., (5910), 1/62.

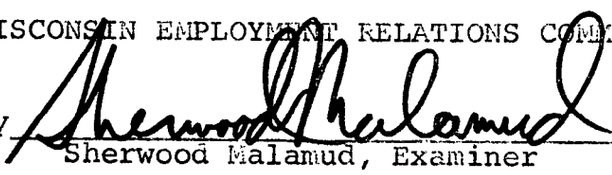
3/ Lake Mills Joint School District No. 1 (11529-A), 7/73; American Motors Corp., (7798), 11/66.

Company, Inc., Decision Nos. 10876-A, 6/72 and 11536-A, 2/73, the Commission did not impose on the petitioning Union the requirement that it make a formal demand upon the Employer to proceed to arbitration, because the conduct of the employer demonstrated that such demand would not receive any response, and would be a futile act. In this case, Respondent's letter of June 28, 1973 is a response to the grievance filed by Heidemann and Cameron; Respondent assumed the position, in its response, that the issue submitted was not arbitrable. It is clear to the Examiner, that Respondent in its June 28, 1973 letter, did not repudiate the grievance procedure or refuse to proceed to arbitration. There is every indication from the record that an appropriate demand on the employer to proceed to arbitration will be honored. 4/

Since Complainant failed to demand of Respondent that it proceed to arbitration, Respondent was under no obligation to proceed to arbitration, until it was requested so to do. The employer has not violated Section 111.70(3)(a)5 of the Municipal Employment Relations Act, and therefore, the Examiner has dismissed the complaint.

Dated at Madison, Wisconsin, this 5th day of April, 1974.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By 
Sherwood Malamud, Examiner

4/ The Examiner notes that in a letter dated October 3, 1973, after the close of the hearing, Counsel for Complainant Union made a formal demand upon the Employer to proceed to arbitration. The Examiner cannot consider that letter as part of this record since the record was closed on September 23, 1973. The Examiner's decision is based solely on the record presented at the hearing. If the employer refuses to proceed to arbitration after the October 3 letter, that matter is for another proceeding.