

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-D

ORDER AFFIRMING EXAMINER'S FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND ORDER AND  
MODIFYING EXAMINER'S MEMORANDUM

Examiner Sherwood Malamud having on April 5, 1974, issued his Findings of Fact, Conclusions of Law and Order, with Accompanying Memorandum, wherein the above named Respondent was found not to have committed any prohibited practice within the meaning of Section 111.70(3)(a)5 of the Municipal Employment Relations Act; and on April 23, 1974, the Examiner having denied a motion of the Complainant to reopen hearing in the matter; and on May 14, 1974, the above named Complainant having timely filed a petition for review in the matter, 1/ as well as a brief in support thereof, wherein the Complainant alleged that the Examiner's Conclusions of Law and Order were erroneous; and the Commission having reviewed the Examiner's Findings of Fact, Conclusions of Law and Order, with Accompanying Memorandum, as well as the petition for review and the brief in support thereof, and being satisfied that the Findings of Fact, Conclusions of Law and Order, with Accompanying Memorandum, as well as his denial of the motion to reopen hearing in the matter, should be affirmed;

NOW, THEREFORE, it is

ORDERED

That, pursuant to Section 111.07(5) of the Wisconsin Statutes, the Wisconsin Employment Relations Commission hereby adopts the Examiner's Findings of Fact, Conclusions of Law and Order, with

---

1/ On April 24, 1974, the Commission issued an Order Extending Time for Filing Petition for Review.

Accompanying Memorandum, as modified herein, issued in the above entitled matter, as its Findings of Fact, Conclusions of Law and Order, with Accompanying Memorandum, as well as the Examiner's Order Denying Motion to Reopen Hearing, with Accompanying Memorandum.

Given under our hands and seal at the City of Madison, Wisconsin, this 23rd day of October, 1974.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Thomas Slavney  
Morris Slavney, Chairman

Zel S. Rice II  
Zel S. Rice II, Commissioner

Howard S. Bellman  
Howard S. Bellman, Commissioner

MEMORANDUM ACCOMPANYING  
ORDER AFFIRMING EXAMINER'S FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND ORDER AND  
MODIFYING EXAMINER'S MEMORANDUM

In the brief supporting the petition for review the Complainant alleges that the Examiner's conclusion that the failure of the Complainant to request arbitration would have required the Complainant to engage in a "meaningless, futile act" and "to require a specific formal demand for arbitration within this context would be over-technical" since throughout the grievance procedure the Respondent contended that the grievance involved was "not a valid grievance." The Examiner issued his decision on April 5, 1974. On April 22, 1974, the Complainant filed a motion to reopen the hearing for the purpose of including a letter dated October 3, 1973, into the record, such letter, addressed to the Respondent, containing a request to arbitrate a grievance. The Examiner denied such motion.

It should be noted that the complaint instituting the instant proceeding was filed on August 6, 1973. Hearing in the matter was conducted on September 24, 1973, and said hearing was closed on said date. In his Memorandum accompanying his decision the Examiner made reference to the letter of October 3, 1973, and indicated therein that he would not consider that letter as part of the record since the record was closed on September 24, 1973. The Examiner further noted in his Memorandum accompanying his Order denying the motion that "If the employer refuses to proceed to arbitration after the October 3 letter, that matter is for another proceeding."

Normally, issues as to whether a labor organization has complied with the grievance procedure are issues which are subject to arbitration. 2/

The Commission has further held, where an agreement provided that "grievances not settled may be appealed to arbitration", (emphasis supplied) that the use of the word "may" obliges one party to proceed to arbitration if the request is made by the other party. 3/

The Examiner, in his Memorandum, erroneously stated, "The Commission has consistently held that a complaining party must exhaust the contractual remedies available before the Commission will order the parties to arbitration." As stated above, this proposition is contrary to prevailing law in that questions of procedural arbitrability, i.e. whether the party seeking arbitration has complied with the contractual grievance procedures preliminary steps, are strictly for the arbitrator to determine. Further, the cases cited in support of the proposition by the Examiner are completely inapposite. Lake Mills Joint School District (Decision No. 11529-A) and American Motors Corp. (Decision No. 7798), respectively, involved the need to utilize advisory arbitration and processing a grievance where there is no arbitration, prior to a ruling by the Commission on the merits of a grievance.

---

2/ Dunphy Boat Corp., 267 Wis. 2d 316, 6/54; Seaman-Andwall Corp., (5910), 1/62; Racine Motor Hotel, Inc., (10751-A, B) 6/72.

3/ Dickten and Masch Mfg. Co., (4529), 5/57.

The Examiner also stated that "There is every indication from the record that an appropriate demand on the Employer to proceed to arbitration will be honored." This statement was intended to distinguish the instant case factually from P & J Contracting Co., Inc. (Decision Nos. 10876-A and 11536-A). However, we find nothing noted in the Examiner's Findings of Fact that support the statement.

Nonetheless, even in its brief in support of its petition for review herein, the Complainant does not argue that any of its actions prior to the instant complaint constituted a demand for arbitration.

Step Four of Article IV of the collective bargaining agreement material herein provides, in part, "If a satisfactory settlement is not reached as outlined in STEP THREE, either party may request that the matter be submitted to arbitration, . . ." The Complainant made no request for arbitration to the Respondent until after the hearing had been closed.

Attention is directed to Section 111.07(2)(a), Wisconsin Statutes, which states, in part, as follows:

"Only one such complaint shall issue against a person with respect to a single controversy, but any such complaint may be amended in the discretion of the commission at any time prior to the issuance of a final order based thereon."

Section 111.07(5), Wisconsin Statutes, permits the Commission to authorize an examiner to make findings and orders. At no time following the filing of the complaint herein has the Complainant filed an amended complaint or a new complaint, wherein it has alleged that it had made a demand upon the Employer to arbitrate. Therefore, in light of the above, we have affirmed the Examiner's Findings of Fact, Conclusions of Law and Order, as well as his Order Denying Motion to Reopen Hearing.

Dated at Madison, Wisconsin, this 23rd day of October, 1974.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Morris Slavney  
Morris Slavney, Chairman

Zel S. Rice II  
Zel S. Rice II, Commissioner

Howard S. Bellman  
Howard S. Bellman, Commissioner