

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Respondent.

No. 12152-A

ARTICLE VIII
PROMOTIONS AND ASSIGNMENTS OF WORK

8.01 The City reserves the right to make promotions or assignments of work at all times except that any employee covered by this agreement having a grievance with said promotion or assignment may use the grievance procedure in Article III herein. Promotions and assignments shall be made with due consideration of qualifications and seniority. All vacancies and new positions shall be posted on the bulletin board in the City garage at least one week, and each employee desiring such position shall sign his name to said posting. The employee with the greatest seniority that can qualify shall be chosen. In the event there is a dispute in the seniority and/or qualifications in the employee chosen from the list, such dispute shall be settled by the grievance procedure outlined in this agreement. Promoted employees shall be advanced to the pay range of the new classification according to their seniority. Annually, thereafter, wages shall increase to the maximum of the new classification." (Emphasis added)

"APPENDIX A

January 1, 1973 - December 31, 1973

<u>Classification</u>	<u>Hiring Rate</u>	<u>After 6 Months</u>	<u>After 18 Months</u>
Foreman	\$3.63	\$3.81	\$3.99
Skilled Labor and Mechanic	3.53	3.70	3.87
Semi-Skilled Labor	3.41	3.58	3.75
Common Labor	3.16	3.31	3.46

In addition to the above, those employees who have sixty (60) continuous months of employment with the Employer shall receive a rate of pay one per cent (round to the nearest whole cent) above the rate for their classification; after one hundred and twenty months, two per cent; after one hundred and eighty months, three per cent; and after two hundred forty months, four per cent."

4. That on or about July 26, 1971, James N. Machkovich, a former employe of Respondent, employed in its Water Department, was injured on the job and has not been regularly employed by the Respondent since that date; that on August 6, 1973, the Respondent's Common Council passed Resolutions No. 344 and No. 345, creating the position of City Garage Watchman-Custodian and establishing a wage schedule therefore; that pursuant to the provisions of Article VIII Section 8.01 of the collective bargaining agreement set out above, and consistent with its practice in such matters, the Respondent posted a notice on August 14, 1973, in each of the departments employing employees represented by the Complainant, as well as in other city departments, which read as follows:

"N O T I C E

An opening will become available in the near future for the position of City Garage Watchman-Custodian. If you are interested, please sign your name below for consideration.

Please return this slip to the Finance Office by 5:00 P.M.
on August 20, 1973."

4. That on or about August 15, 1973, Machkovich signed a copy of the posting which was located in the Respondent's Street Department; that on August 20, 1973 Machkovich went to the City Clerk's Office to inquire about the position of City Garage Watchman-Custodian and again signed a copy of the posting which was located in that office; that during the posting period, which began August 15, 1973, and ended on August 20, 1973, no other person properly signed any of the posted notices.

5. That at the time that Resolutions No. 344 and No. 345 referred to above were passed, the Respondent had not yet established a detailed job description for the position of City Garage Watchman-Custodian but intended to do so before hiring anyone to fill said position; that the job in question was intended to be performed at the Respondent's City Garage and included the duties of acting as watchman and janitor and answering the telephone.

6. That on August 16, 1973, Darold O. Lowe, Complainant's District Representative, wrote a letter to Joseph Kastenmeier, President of the Respondent's Common Council and Chairman of its Personnel Committee and Robert Eberle, Chairman of the Respondent's Board of Public Works, which read in relevant part as follows:

"It has been brought to my attention that the City of Beaver Dam has created a position of 'garage watchman custodian' with a wage rate of \$2.10 per hour. I understand that the position will, or has been, posted for City Employees, but was possibly created for Mr. James Machkovich, a City employee who was injured about July, 1971 while laying sanitary sewer for the City of Beaver Dam.

Local 157, AFSCME, AFL-CIO, does not agree with the wage rate of \$2.10 per hour established for the position. We also believe that the City certainly should have some type of employment for Mr. Machkovich that would not result in a reduction of wages of about \$1.65 per hour.

We request a meeting with the appropriate committee or committees to reach an amicable solution to this problem. I await your response."

7. That on August 29, 1973 Herman D. Schacht, Respondent's City Attorney, wrote a reply to Lowe's letter of August 16, 1973 which read in relevant part as follows:

"Your letter of August 16, 1973 directed to Mr. Joseph Kastenmeier and Mr. Robert Eberle has been referred to me for a response.

The City has created a position of garage watchman custodian and has set a wage rate for that position and has advertised it. Mr. James Machkovich has applied for the position at the beginning wage rate of \$2.10 per hour, which is all the City of Beaver Dam is interested in paying to fill that position.

You indicate that you do not agree with the wage rate, which is at best premature and at its worst offensive to management's rights to create a position. Accordingly, your request for a meeting on this issue is denied."

8. That thereafter on September 7, 1973 the Complainant filed the complaint herein wherein it alleged that the Respondent had committed a prohibited practice by refusing to meet with the Complainant for the purpose of discussing the wage rate for the position of City Garage Watchman-Custodian; that after receiving a copy of the complaint herein, the Respondent's Personnel Committee met and took certain action which is reflected in a letter from the Respondent's City Attorney to the Examiner with a copy to the Complainant, which reads in relevant part as follows:

"I have your notice of hearing set for October 30, 1973 at 10:00 A.M. at the City Hall in the City of Beaver Dam.

Upon receipt of this hearing notice the Personnel Committee of the City of Beaver Dam met on the 19th of September and reviewed the situation relative to the creation of the position of garage watchman, custodian.

The result of their review was to leave the position unfilled and recommend to the Council for action at their next scheduled meeting, which will be October 1, 1973, that the position of garage watchman-custodian be abolished.

I will inform your office and include a copy of the Resolution, if and when it is adopted, but I thought it provident to inform you of this action taken by the Personnel Committee.

I take this opportunity also to inform you that if there are any issues to be decided between the City of Beaver Dam and the Local that Tuesday, October 30, 1973 is an unacceptable date as I will be out of the State of Wisconsin from October 29 to November 12, 1973."

9. That thereafter, on October 1, the Respondent's Common Council took certain action with regard to the position of City Garage Watchman-Custodian, which is reflected in a letter from the Respondent's City Attorney directed to the Examiner with a copy to the Complainant, which reads in relevant part as follows:

"The City of Beaver Dam, by acts of the Common Council, abolished the position of Garage-Watchman-Custodian per a certified copy of the Resolution, which I enclose to you. I also report that this matter was discussed at a meeting between AFSCME and the Personnel Committee of the City of Beaver Dam on October 3, 1973 where the various positions of the parties were aired. The City took the position that until this job is filled with a union member, that the union has no right to negotiate for wages or other conditions of employment of the position, the employer, is creating.

The union's position was that the City should have discussed the issue rather than to refuse to negotiate and that until a definite decision was made, that they were entitled to presume that the position was going to be filled by a member of their bargaining unit.

This issue is not resolved as the language of the contract was not definitive as to newly created positions and as Attorney for the municipality, I will ask that such language be bargained into our new contract with AFSCME so as to foreclose any dispute of this nature arising again.

I indicated to you that I would not be available on October 30, 1973 as I will be out of the State of Wisconsin from October 29 to November 12, 1973 and I would ask that if you feel the hearing is still required on this matter, that it be rescheduled to a later date."

10. That at all times material herein, the Respondent has refused and continues to refuse to bargain with regard to the appropriate wage rate for the position of City Garage Watchman-Custodian even though the Complainant, through its representatives, has requested that the Respondent do so.

Based upon the above and foregoing Findings of Fact the Examiner makes and issues the following

CONCLUSION OF LAW

That, by refusing to bargain with the Complainant about the appropriate wage rate for the position of City Garage Watchman-Custodian a position included within the collective bargaining unit represented by the Complainant, the Respondent has refused, and is refusing, to bargain collectively within the meaning of Section 111.70(1)(d) concerning a mandatory subject of bargaining and has committed, and is committing a prohibited practice within the meaning of Section 111.70(3)(a)4 and 111.70(3)(a)1 of the Municipal Employment Relations Act.

Based upon the above and foregoing Findings of Fact and Conclusion of Law the Examiner makes and issues the following

ORDER

That the City of Beaver Dam, its officers and agents shall immediately:

1. Cease and desist from refusing to bargain collectively with the representatives of Beaver Dam City Employees Local 157, AFSCME, AFL-CIO, with regard to the appropriate wage rate for the position of City Garage Watchman-Custodian or any other mandatory subject of bargaining or otherwise interfering with the rights of the employees represented by it.

2. Take the following affirmative action which the Examiner finds will effectuate the policies of the Municipal Employment Relations Act:

- (a) Recreate the position of City Garage Watchman-Custodian.
- (b) Immediately offer to bargain and, if requested, bargain with the representatives of Beaver Dam City Employees Local 157, AFSCME, AFL-CIO, concerning the appropriate wage rate for the position of City Garage Watchman-Custodian.
- (c) Notify the employees represented by the Beaver Dam City Employees Local 157, AFSCME, AFL-CIO, that it will not refuse to bargain collectively on subjects concerning wages, hours and working conditions or otherwise interfere with the rights of said employees by posting in a conspicuous place in each of the Departments wherein employees represented by the Complainant work, a copy of the notice attached hereto and marked "Appendix A". Said notices shall be signed by the Chairman of the Respondent's Personnel Committee and shall remain posted for sixty (60) days thereafter.

Reasonable steps shall be taken to insure that said notices are not altered, defaced or covered by any other material.

- (d) Notify the Wisconsin Employment Relations Commission in writing within twenty (20) days after the date of this Order what steps it has taken to comply herewith.

Dated at Madison, Wisconsin this 7th day of June, 1974.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By George R. Fleischli
George R. Fleischli, Examiner

APPENDIX A

NOTICE TO ALL EMPLOYEES

Pursuant to an Order of the Wisconsin Employment Relations Commission, and in order to effectuate the policies of the Municipal Employment Relations Act, we hereby notify our employees represented by Beaver Dam City Employees Local 157, AFSCME, AFL-CIO, that we will not refuse to bargain collectively about the appropriate wage rate for any newly created position within the collective bargaining unit represented by Beaver Dam City Employees Local 157, AFSCME, AFL-CIO, or any other mandatory subject of bargaining or otherwise interfere with the rights of said employees.

Dated this _____ day of _____, 19____.

Beaver Dam Personnel Committee

Chairman

THIS NOTICE MUST REMAIN POSTED FOR SIXTY (60) DAYS FROM THE DATE HEREOF AND MUST NOT BE ALTERED, DEFACED OR COVERED BY ANY MATERIAL.

MEMORANDUM ACCOMPANYING
FINDINGS OF FACT CONCLUSION OF LAW AND ORDER

In its complaint, the Complainant alleges that, by refusing to meet for the purpose of discussing the appropriate wage rate for the newly created position of City Garage Watchman-Custodian, the Respondent violated its duty to bargain in good faith as required by Section 111.70 (3)(a)4 of the Municipal Employment Relations Act, and requests that the Commission direct the Respondent to take appropriate action to bring about compliance with that Act. Although the Respondent did not file an answer, its legal position is set out in the letter of its City Attorney dated October 10, 1973, which is quoted in Finding of Fact #9 above.

There is no substantial issue of fact presented by the pleadings or evidence in this case. The sole issue presented is whether the Respondent has violated its duty to bargain by refusing to negotiate with regard to the wage rate for the position of City Garage Watchman-Custodian.

DUTY TO BARGAIN

Although the Respondent's action in refusing to bargain about the appropriate wage rate for the position was apparently based on a misunderstanding of the law, its refusal to bargain about the rate was a per se violation of its duty to bargain in good faith. The Respondent's position appears to be that there is no duty to bargain with the Complainant over the wage rate to be applied to a new position, regardless of the duties involved in the new position, until such time as the position is filled by a member of the Complainant's labor organization. 1/ In other words, the Respondent's decision to refuse to bargain with regard to the wage rate for the position in question was premised on its misconception of the Complainant's bargaining rights and duties. 2/

The question which was not raised by the Respondent, but which ought to have been raised, is whether the position of City Garage Watchman-Custodian is a position which is properly included in the collective bargaining unit represented by the Complainant. A search of the Commission's records indicates that the Commission has never conducted an election involving employees of the Respondent. On February 13, 1968, a petition was filed with the Commission requesting an election among "all employees of the Water Department Plant, excluding the Superintendent of the Water Department." That petition indicated that the number of employees involved was approximately eight. At the hearing on that petition, which was conducted on March 15, 1968, the Respondent

1/ See pp. 14 and 15 of the transcript.

2/ The bargaining rights established under Section 111.70 of the Wisconsin Statutes are not limited to "members only". On the contrary, a labor organization which represents employees for purposes of collective bargaining in an appropriate bargaining unit is the exclusive bargaining representative for all employees in that bargaining unit, regardless of their membership or nonmembership in the labor organization. The Complainant not only has the right but the duty to represent all employees in the collective bargaining unit fairly, without regard to membership or nonmembership in its organization. Northwest General Hospital (10599-B and 10600-B) 1/73; City of Racine (Police Department) (12637-A) 5/74.

extended voluntary recognition to an organization known as the Independent Employees, Beaver Dam Water Department, in said bargaining unit. 3/ No other petition has been filed with the Commission for an election involving employees of the Respondent. Therefore, it must be assumed that the collective bargaining unit set out in Article II of the collective bargaining agreement, is based on voluntary recognition.

Because the origin of the Complainant's bargaining status is the result of voluntary recognition, it is arguable that the Respondent had reason to believe that the Complainant's bargaining rights were limited to "members only" even though such a limitation would necessarily require a complainant to violate the law. However, the recognition clause of the current collective bargaining agreement clearly indicates that the Complainant represents all employees in the Street Department, Water Department, Parks Department, and Sanitary Sewer Department, except those employees specifically excluded. Although a detailed job description for the position in question has not been prepared, it is clear from the general outline of duties that the position is a non-clerical position in the Street Department. There is no indication that the job would be supervisory or confidential within the meaning of the law.

It is also clear from the wage rates set out in Appendix A that the provisions in the collective bargaining agreement are not limited to "members only", but extend to all employees represented by the Complainant, whose work fits within the classifications listed. In his letter dated August 16, 1973, Darold O. Lowe, District Representative for the Complainant seems to imply that the position in question is that of a "semi-skilled laborer" and covered by the already established wage schedule. Although this is an understandable position for the Complainant to take, the Respondent is obviously under no obligation to agree with that position since it is a new classification and the Respondent is free to take the position that the classification ought to have its own wage rate.

The Complainant does not contend that the Respondent was under a duty to bargain on the question of whether or not to establish the position in question and concedes that to be a prerogative of management. However, once the decision was made that the position would be created and it was clear that the position in question was included in the collective bargaining unit represented by the Complainant, the Complainant contends that the Respondent came under a duty to bargain on the question of the proper wage rate for the position.

Although the Examiner has not been able to find any Commission case on point, the Complainant's contention in this regard would appear to be sound and supported by the decisions of the National Labor Relations Board. Wages are clearly a mandatory subject of bargaining, and the appropriate wage rate for new positions created within the bargaining unit is clearly a matter for collective bargaining. 4/

REMEDY

Although the decision as to whether the position in question should be created or not is one which, by the Complainant's own argument, belongs to management, it is clear that the abolition of that position on October 1, 1973 was motivated by a desire to avoid bargaining with the

3/ City of Beaver Dam (8444) 3/68.

4/ LeRoy Machine Company, Inc., 147 NLRB 1431, 56 LRRM 1369 (1964).

Complainant. If the Employer could utilize its otherwise lawful prerogatives to defeat its bargaining obligation, the Complainant's bargaining rights could be effectively nullified. Therefore, the Examiner has concluded under the circumstances of this case, that it is appropriate to order the Respondent to recreate the position in question and bargain with the Complainant with regard to the appropriate wage rate for that position. Only by requiring the Respondent to return to the status quo ante will it be possible to attempt to overcome the effects of the Respondent's refusal to bargain in good faith. If, after meeting with the Complainant's representatives and making a good faith effort to reach agreement with regard to the wage rate for the position in question, the Respondent is unable to do so, it will be free to establish a wage rate unilaterally, or, if justified by reasons unrelated to the Complainant's assertion of its bargaining rights, it may decide not to fill the position in question. 5/

Dated at Madison, Wisconsin this 7th day of June, 1974.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By George R. Fleischli
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5/ It is evident on the record presented that the position in question may have been created with a partially disabled applicant like Machkovich in mind and that the Respondent, therefore, may have legitimate reasons for not wanting to pay a higher rate than that which was established unilaterally. Such an argument can be properly asserted in the negotiations with the Complainant. The Complainant does not assert and the evidence would not support a finding that the abolition of the position was retaliation against Machkovich for exercising any of his protected rights.