

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

JAMES R. WOCKENFUS and CLINTONVILLE
PROFESSIONAL POLICEMEN'S ASSOCIATION,

Complainants,

vs.

CITY OF CLINTONVILLE,

Respondent.

Case I
No. 17180 MP-284
Decision No. 12186-B

Appearances:

Hoyt, Greene, Meissner & Walsh, S.C., Attorneys at Law, by Mr.
Ralph J. Ehlinger and Mr. Ronold P. Platner, appearing for
the Complainants.

Mr. Ralph M. Lauer, City Attorney, City of Clintonville, appearing
for the Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

James R. Wockenfus and Clintonville Professional Policemen's Association having, on September 19, 1973, filed a complaint with the Wisconsin Employment Relations Commission wherein they allege that the City of Clintonville has committed prohibited practices within the meaning of the Wisconsin Municipal Employment Relations Act; and the Commission having appointed Marvin L. Schurke, a member of its staff, to act as Examiner and 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 Waupaca, Wisconsin, on October 10, 1973, before the Examiner; 1/ and the Examiner having considered the evidence and the 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 James R. Wockenfus, hereinafter referred to as Complainant Wockenfus, is an individual residing in or about Clintonville, Wisconsin; and that, since November of 1966, and continuing to date, Complainant Wockenfus has been employed by the City of Clintonville as a police officer.

1/ The Complainants herein were also Petitioners in a Declaratory Ruling proceeding filed with the Commission under Section 111.70 (4)(b), Wisconsin Statutes, simultaneously with the filing of the complaint of prohibited practices herein. Said Declaratory Ruling case was docketed as City of Clintonville, Case II, No. 17181, DR(M)-49. By an Order dated September 28, 1973, the Commission consolidated the matters for the purposes of hearing, and both matters were heard on October 10, 1973. The Commission previously issued its Findings of Fact, Conclusions of Law and Declaratory Ruling in City of Clintonville, Case II, Decision No. 12187-A (May 6, 1974).

2. That Clintonville Professional Policemen's Association, hereinafter referred to as Complainant Association, is a labor organization having its principal offices at c/o James A. Krause, 258 Anne Street, Clintonville, Wisconsin.

3. That the City of Clintonville, hereinafter referred to as the Respondent, is a Wisconsin municipality having its principal offices at City Hall, Clintonville, Wisconsin; that, among other municipal services, Respondent maintains and operates a Police Department; that Frank Sinkewicz is the Mayor of the City of Clintonville; that Ralph M. Lauer is the City Attorney of the Respondent; that Norman O. Erickson is President of the Respondent's Board of Police and Fire Commissioners; and that Milford M. Bodoh is employed by the Respondent as Chief of the Clintonville Police Department.

4. That, at the time he was first employed by the Respondent, Complainant Wockenfus resided at a location outside of the city limits of the Respondent; that, at such time, the Respondent had no ordinance or regulation in effect requiring that employes of the Respondent reside within the city limits of the Respondent; that, however, shortly after Complainant Wockenfus commenced his employment with the Respondent, the then-Chief of Police of the Respondent asked Complainant Wockenfus to move to a residence within the city limits of the Respondent; and that, shortly thereafter, Complainant Wockenfus moved to a residence within the city limits of the Respondent.

5. That, on an unspecified date prior to May 7, 1968, Complainant Wockenfus became interested in moving to a rural residence outside of the city limits of the Respondent; that Complainant Wockenfus communicated his interest in that regard to the then-Chief of Police of the Respondent; that Complainant Wockenfus was referred to the Police and Fire Commission of the Respondent and asked said Commission for permission to move to a residence outside of the city limits of the Respondent; that the Police and Fire Commission of the Respondent referred said request to the Personnel Committee of the Common Council of the Respondent, which considered same and made a recommendation thereon to the Common Council of the Respondent; that the Common Council of the Respondent acted on the recommendation of its Personnel Committee, as reflected in the following excerpt from the Minutes of the meeting of the Common Council of the Respondent held on May 7, 1968 at 7:30 p.m.:

"The Personnel Committee recommended to the Council that James Wockenfus be permitted to reside outside of the City Limits and continue to be employed by the Police Force, providing there is no ordinance or law prohibiting such residency for Police Officers. The City Attorney ruled that there was no law prohibiting him from Living outside the City.

"Moved by Smith, seconded by Waite to accept the recommendation of the Personnel Committee. Ayes and nays called, all present voting aye. Motion carried.";

and that, thereafter, Complainant Wockenfus moved to a residence on County Highway C, approximately nine miles outside of the city limits of the Respondent, where said Complainant had a mailing address of Route #2, Clintonville, Wisconsin.

6. That, during or about the month of October, 1968, certain law enforcement employes of the Respondent formed and joined Complainant Association; that, thereafter, the Respondent recognized Complainant

Association as the exclusive collective bargaining representative for non-supervisory law enforcement employees of the Respondent; that, at all times subsequent to such recognition, Complainant Association has continued to be the exclusive collective bargaining representative in the aforesaid unit; and that the Respondent and Complainant Association have been parties to a series of collective bargaining agreements.

7. That the collective bargaining agreement between the Respondent and Complainant Association for the year 1971 contained no provision regulating the residency of members of the aforesaid bargaining unit; and that, during the year 1971, three members of said bargaining unit, including Complainant Wockenfus, maintained their residences outside of the city limits of the Respondent.

8. That, on November 12, 1971, as the result of action taken by the Common Council of the Respondent on November 2, 1971 and publication thereof on November 11, 1971, the Respondent gave effect to its Ordinance No. 354, as follows:

"AN ORDINANCE CREATING SECTION 3.75 OF THE MUNICIPAL CODE OF ORDINANCES OF THE CITY OF CLINTONVILLE PRESCRIBING RESIDENCE REQUIREMENTS FOR EMPLOYEES OF THE CITY OF CLINTONVILLE

THE COMMON COUNCIL OF THE CITY OF CLINTONVILLE, WISCONSIN DOES ORDAIN AS FOLLOWS:

Section 1. Section 3.75 of the Municipal Code of Ordinances of the City of Clintonville is hereby created to read as follows:

3.75 Residence Requirements for City Employees. Except as hereinafter provided all persons employed by the City of Clintonville must be bona fide residents of the city.

a. Persons who are not residents of the City at the time of their employment must establish bona fide residence in the City of Clintonville on or before a date either (1) six months after the date of employment, or (2) 60 days following the date on which the probationary period of employment ends, whichever date is later.

b. Persons who are presently employees of the City of Clintonville and are not bona fide residents of the City must establish bona fide residence in the City in or before a date either (1) the date on which such employee completes his probationary period of employment, or (2) June 1, 1972 whichever date is later.

Section 2. Severability Clause. If any action, subsection, sentence, clause or phrase of this ordinance is for any reason held to be invalid, such decision shall not affect the validity (sic) of the remaining portions of this ordinance. The Common Council hereby declares that it would have passed this ordinance and each section, subsection, sentence, clause and phrase thereof, irrespective of the fact that any one or more sections, subsections, sentences, clauses and phrases be declared invalid or unconstitutional.

Section 3. Conflicts. Any ordinance or parts of ordinances inconsistent with this ordinance are hereby repealed.

Section 4. This ordinance shall be in force (sic) and take effect from and after its passage and publication.";

that the Respondent did not notify Complainant Association of the fact that said Respondent was considering adoption of a residence requirement

for members of the aforesaid bargaining unit, and did not offer to bargain thereon; that representatives of Complainant Association, including Complainant Wockenfus, learned of the nature of the proposal eventually adopted as Ordinance No. 354 and appeared at the November 2, 1971 meeting of the Common Council of the Respondent to oppose the adoption of Ordinance No. 354 on behalf of themselves and on behalf of Complainant Association.

9. That the collective bargaining agreement between the Respondent and Complainant Association for the year 1972 contained no provision regulating the residency of members of the aforesaid bargaining unit; that members of said bargaining unit then residing outside of the city limits of the Respondent, including Complainant Wockenfus, were advised by the Police and Fire Commission of the Respondent that promotions would be withheld and that they would be subject to termination of their employment unless they brought themselves into compliance with Section 3.75 of the Municipal Code of Ordinances of the Respondent; that the residence occupied by Complainant Wockenfus on County Highway C was totally destroyed by fire during the month of January, 1972; that, thereafter, Complainant Wockenfus moved to a residence within the city limits of the Respondent, thereby bringing himself into compliance with Section 3.75 of the Municipal Code of Ordinances of the Respondent; and that, on or before June 1, 1972, all members of said bargaining unit who resided outside of the city limits of the Respondent on and before November 12, 1971, moved to residences within the city limits of the Respondent or were terminated from employment for reasons not related to their residency.

10. That Harriet McCauley is employed by the Respondent as its City Librarian; that, both prior to and subsequent to June 1, 1972, McCauley has resided, and continues to reside, at Clover Leaf Lakes, a rural area outside of the city limits of the Respondent; that no action has been taken by the Respondent to enforce Section 3.75 of its Municipal Code of Ordinances with respect to McCauley; and that McCauley is not represented by any labor organization for the purposes of collective bargaining.

11. That negotiations between Complainant Association and the Respondent for a collective bargaining agreement for 1973 were commenced at a meeting of the representatives of the parties held on November 29, 1972; that, during the course of said meeting, Complainant Association advanced a proposal concerning residence as follows:

"ASSOCIATION PROPOSAL

ARTICLE XXIII - RESIDENCY OF POLICE OFFICER'S (sic)

It is requested that the City adopt a policy whereby members of the Police Department be permitted to reside outside the City limits, but within the Clintonville School District.";

and that the representatives of the Respondent made no response thereto at that time.

12. That, on December 7, 1972, representatives of the Respondent again met with representatives of Complainant Association for the purposes of collective bargaining for 1973; that, during the course of said meeting, Sinkewicz, acting on behalf of the Respondent, advised Complainant Association that the foregoing proposal concerning residence was contrary to the City ordinance and the bargaining committee of the Respondent had no authority to negotiate any change thereof; and that, at all times subsequent thereto, the Respondent has failed and refused to bargain collectively with Complainant Association concerning modification of the residence requirement imposed upon members of the aforesaid bargaining unit.

13. That, on May 14, 1973, Complainant Association and the Respondent entered into a collective bargaining agreement for the year 1973; that said collective bargaining agreement contains no provision regulating the residence of members of the aforesaid bargaining unit; that said collective bargaining agreement contains no grievance procedures or procedures leading to the final and binding resolution of disputes concerning the interpretation or application thereof; that said agreement contains no provision for employment security for members of said bargaining unit; and that, in that regard, Complainant Association recognized the authority of the Police and Fire Commission of the Respondent to make determinations concerning cause for disciplinary actions against members of the bargaining unit.

14. That, on or about May 19, 1973, Complainant Wockenfus entered into a contract for the purchase of certain real estate located at Clover Leaf Lakes, a rural area approximately six miles outside of the city limits of the Respondent; that, at or about the same time, Complainant Wockenfus was also considering the purchase of a residence within the city limits of the Respondent; that Complainant Wockenfus communicated his intentions in this regard to Bodoh; that Bodoh reminded Complainant Wockenfus of the existence of Section 3.75 of the Municipal Code of Ordinances of the Respondent; and that, believing that ownership of a residence within the city limits of the Respondent would suffice to establish a "bona fide residence" for Complainant Wockenfus within the meaning of Section 3.75 of the Municipal Code, Bodoh did not, at that time, advise Complainant Wockenfus that the purchase of a residence at Clover Leaf Lakes would be considered grounds for termination of the employment of Wockenfus.

15. That, thereafter, Complainant Wockenfus abandoned his plans for the purchase of two residences and, in substitution therefor, rented an apartment within the city limits of the Respondent, with the intention of maintaining a residence in said apartment for his use during off-duty hours between consecutively scheduled work days; that, under said arrangement, Complainant Wockenfus intended that his family reside at Clover Leaf Lakes and that he join his family at the Clover Leaf Lakes residence during his scheduled days off, vacations and holidays; that certain other members of the bargaining unit maintain residences within the city limits of the Respondent, but spend a substantial portion of their off-duty time at locations outside of the city limits of the Respondent; that, on or before June 21, 1973, Complainant Wockenfus requested from Lauer an opinion concerning the sufficiency of an arrangement whereby said Complainant would maintain both a residence at Clover Leaf Lakes and an apartment within the city limits of the Respondent; and that, on June 21, 1973, Lauer responded to said request, by letter, wherein he stated, inter alia:

"Although it may be technically possible for a person to have two place (sic) of residence, it is my opinion that the use of the word 'bona fide' in the ordinance requires a narrow definition of the word residence. Under such a definition it is my opinion that residence in the strict sense means the place where he and his family reside and intend to reside on a permanent basis at the time the residency was established. Under such a definition I do not believe that it is in compliance with the ordinance to have a home outside the corporate boundaries of the City of Clintonville at which the municipal employee's family resides and to which the employee intends to return and attempt to avoid the effect of the ordinance by renting temporarily a room or other living quarters within the corporate boundaries."

16. That, on July 12, 1973, Complainant Wockenfus directed a letter to the Police and Fire Commission of the Respondent, wherein

he advised said Commission of his plans to move his family to a residence outside of the city limits of the Respondent, and requested that the city ordinance regulating residence of police officers be abolished; that, at or about the same time, Bodoh inquired concerning the date on which Complainant Wockenfus intended to move into his residence at Clover Leaf Lakes; that Complainant Wockenfus informed Bodoh that the transactions would be completed on or about July 19, 1973; that Bodoh transmitted said information to Erickson and to Lauer; that Lauer prepared a letter of suspension for signature by Erickson, and delivered same to Bodoh for execution and service; that Bodoh delivered said letter of suspension to Erickson; and that Erickson executed same and returned it to Bodoh.

17. That, on July 18, 1973, Complainant Wockenfus completed and closed transactions for the sale of his residence within the city limits of the Respondent and for the purchase of the aforesaid residence at Clover Leaf Lakes; and that, on July 20, 1973, Bodoh served Complainant Wockenfus with a letter, on the stationery of the Respondent, as follows:

"This is to advise you that pursuant to the provisions of Section 62.13 (5) (c) of the Wisconsin Statutes, you are hereby suspended, effective immediately upon service of this letter upon you from your position as a police officer of the City of Clintonville.

This suspension is based upon the fact that you have removed from the City of Clintonville and are no longer a bona fide resident of the City of Clintonville as required by Section 3.75 of the Municipal Code of Ordinances of the City of Clintonville.

You are further advised that this suspension will continue until you re-establish bona fide residency within the City of Clintonville as provided in Section 3.75 of the Municipal Code of Ordinances of the City of Clintonville. You are further advised that the suspension will become permanent and you will be terminated as a police officer of the City of Clintonville unless such bona fide residency is re-established on or before a date 90 days after the service of this notice upon you, or such longer time as shall be granted to you by the Board upon your application presented to the Board setting forth grounds for an extension deemed by the Board to warrant an extension thereof.

BY ORDER OF THE BOARD OF POLICE AND FIRE
COMMISSIONERS OF THE CITY OF CLINTONVILLE

Norman Erickson /s/
Norman Erickson, President"

18. That on July 20, 1973, Complainant Wockenfus filed a written request for a hearing before the Police and Fire Commission of the Respondent concerning his suspension from employment; that a hearing was held before said Commission; that, on August 21, 1973, the Police and Fire Commission of the Respondent directed a letter to Complainant Wockenfus, as follows:

"The Board of Police and Fire Commissioners finds and determines as follows:

1. That on the 20th. day of July 1973, at 10:30 o'clock A.M., at the City of Clintonville, a notice of suspension was duly served on Officer James R. Wockenfus.

2. That James R. Wockenfus requested a hearing on that suspension and that the matter is properly before this Board.

3. That James R. Wockenfus is not a bona fide resident of the City of Clintonville as required by Section 3.75 of the Municipal Code of Ordinances of the City of Clintonville.

4. That James R. Wockenfus was properly suspended from duty.

5. That the suspension is confirmed and Officer James R. Wockenfus must re-establish residence on or before ten (10) days after service of a copy of this order upon him and in the event of his failure to do so, the suspension shall become permanent and he shall be terminated.

Dated August 21, 1973.

BY ORDER OF THE BOARD OF POLICE
AND FIRE COMMISSIONERS OF THE
CITY OF CLINTONVILLE, WISCONSIN

Norman O. Erickson /s/
Norman O. Erickson, President";

that Complainant Wockenfus was subsequently reinstated to his employment pursuant to an Order of the Circuit Court for Waupaca County, issued in a proceeding initiated by the Complainants herein against the Respondent herein, wherein the plaintiffs allege that Section 3.75 of the Municipal Code of Ordinances of the City of Clintonville is unconstitutional on its face and in its application to Complainant Wockenfus; that Complainant Association filed a grievance alleging that the Respondent violated the collective bargaining agreement between Complainant Association and the Respondent by its termination of the employment of Complainant Wockenfus; and that the Respondent has failed or refused to bargain with Complainant Association concerning said grievance.

19. That Complainant Association served notice on the Respondent to terminate the collective bargaining agreement between said parties for 1973 and to commence negotiations for a successor agreement; that said parties entered into negotiations for a collective bargaining agreement for 1974; that, in such negotiations, Complainant Association advanced a proposal to the effect that members of the bargaining unit be permitted to reside outside of the city limits of the Respondent but within the Clintonville School District; and that, at all times subsequent thereto, Respondent refused, and continues to refuse, to bargain collectively with Complainant Association concerning the imposition of and continuation of a residence requirement for members of the bargaining unit.

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

CONCLUSIONS OF LAW

1. That the City of Clintonville, Wisconsin, is a municipal employer within the meaning of Section 111.70(1)(a) of the Municipal Employment Relations Act 2/; and that, at all times pertinent hereto,

2/ Pursuant to Section ERB 18.10, WIS. ADM. CODE, the findings and conclusions on these matters are bound by the decision of the Commission in City of Clintonville, Case II, Decision No. 12187-A, (5/74).

Frank Sinkewicz, Ralph M. Lauer, Norman O. Erickson and Milford M. Bodoh were agents of said Municipal Employer, acting within the scope of their authority.

2. That a unit of all law enforcement personnel employed by the City of Clintonville, excluding supervisors, constitutes a unit appropriate for the purposes of collective bargaining within the meaning of Sections 111.70(1)(e) and 111.70(4)(d)(2)(a) of the Municipal Employment Relations Act; and that, at all times material hereto, Clintonville Professional Policemen's Association has been, and is, the exclusive representative of the employes in said unit for the purpose of collective bargaining within the meaning of Sections 111.70(1)(d) and 111.70(4)(d)(1) of the Municipal Employment Relations Act. 2/

3. That Section 3.75 of the Municipal Code of Ordinances of the City of Clintonville, prescribing residence requirements for employes represented by the Clintonville Professional Policemen's Association in the aforesaid appropriate collective bargaining unit, imposes on such employes a condition of employment within the meaning of Section 111.70(1)(d) of the Municipal Employment Relations Act; and that the requirement that employes in the aforesaid appropriate collective bargaining unit reside within the City of Clintonville is subject to collective bargaining within the meaning of Sections 111.70(1)(d), 111.70(2), and 111.70(3)(a)4 of the Municipal Employment Relations Act. 2/

4. That the City of Clintonville, by refusing to bargain with Clintonville Professional Policemen's Association concerning a requirement that employes in the aforesaid appropriate collective bargaining unit reside within the city limits of the City of Clintonville, has refused, and continues to refuse, to bargain collectively with Clintonville Professional Policemen's Association and has committed, and is committing, prohibited practices within the meaning of Section 111.70(3)(a)(4) and (1) of the Municipal Employment Relations Act.

5. That the City of Clintonville, by refusing to respond to the grievance filed by Clintonville Professional Policemen's Association concerning the termination of the employment of James R. Wockenfus, has refused, and continues to refuse, to bargain collectively with Clintonville Professional Policemen's Association and has committed, and is committing, prohibited practices within the meaning of Section 111.70(3)(a)(4) and (1) of the Municipal Employment Relations Act.

6. That the termination of the employment of James R. Wockenfus does not violate any specific term or provision of the 1973 collective bargaining agreement between the City of Clintonville and Clintonville Professional Policemen's Association; and that the City of Clintonville has not committed prohibited practices within the meaning of Section 111.70(3)(a)5 of the Municipal Employment Relations Act.

7. That the complaint initiating the instant prohibited practice proceeding before the Wisconsin Employment Relations Commission was not timely filed within the meaning of Section 111.07(14) of the Wisconsin Employment Peace Act with respect to conduct occurring prior to September 19, 1972.

2/ Ibid.

Upon 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 City of Clintonville, its officers and agents shall immediately:

1. Cease and desist from:
 - (a) Refusing to bargain collectively with Clintonville Professional Policemen's Association as the exclusive collective bargaining representative of all law enforcement personnel employed by the City of Clintonville, excluding supervisors, or with any other labor organization said employes may select as their exclusive collective bargaining representative.
 - (b) Taking any action to terminate the employment of James R. Wockenfus or any similarly situated member of the aforesaid collective bargaining unit, or giving effect to any previous decision to terminate the employment of James R. Wockenfus, until such time as the City of Clintonville shall have fulfilled its duty and obligation to bargain collectively with Clintonville Professional Policemen's Association concerning any residence requirement to be imposed upon members of the aforesaid collective bargaining unit on and after January 1, 1973.
2. Take the following affirmative action which the Examiner finds will effectuate the policies of the Municipal Employment Relations Act:
 - (a) Make James R. Wockenfus whole for any loss of pay and benefits he may have suffered by reason of the prohibited practices engaged in by the City of Clintonville, by payment to him of the sum of money equal to that which he normally would have earned or received as an employe, from the date of his suspension to the date of his reinstatement made pursuant to the Order previously issued by the Circuit Court for Waupaca County, less any earnings he may have received during said period, and less the amount of unemployment compensation, if any, received by him during said period, and, in the event that he received unemployment compensation benefits, reimburse the Unemployment Compensation Division of the Wisconsin Department of Industry, Labor and Human Relations in such amount.
 - (b) Upon request, bargain collectively with Clintonville Professional Policemen's Association as the exclusive representative of all employes in the aforesaid appropriate collective bargaining unit with respect to wages, hours and other terms or conditions of employment, and, if an understanding is reached, embody such understanding in a written and signed agreement.
 - (c) Notify all employes, by posting, in conspicuous places on its premises where notices to all employes are usually posted, copies of the notice attached hereto

and marked "Appendix A". Said notice shall be signed by the Mayor of the City of Clintonville and by the President of the Board of Police and Fire Commissioners of the City of Clintonville immediately upon receipt of a copy of this Order, and shall remain posted for sixty (60) days thereafter. Reasonable steps shall be taken by the Respondent, its officers and agents, to insure that said notices are not altered, defaced or covered by other material.

IT IS FURTHER ORDERED that the portions of the complaint filed in the instant matter alleging that the City of Clintonville violated the 1973 collective bargaining agreement between the City of Clintonville and Clintonville Professional Policemen's Association, as such agreement was executed by the parties and separate and apart from any agreement which may result from collective bargaining conducted pursuant to foregoing portions of this Order, and thereby violated Section 111.70 (3)(a)(5) of the Municipal Employment Relations Act, be, and the same hereby are, dismissed.

IT IS FURTHER ORDERED that the portions of the complaint filed in the instant matter alleging that the City of Clintonville violated Section 111.70(3)(a)(4) of the Municipal Employment Relations Act with respect to conduct occurring prior to September 19, 1972 be, and the same hereby are, dismissed.

Dated at Madison, Wisconsin this 15th day of July, 1974.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Marvin L. Schurke
Marvin L. Schurke, Examiner

APPENDIX "A"

NOTICE TO ALL EMPLOYEES

Pursuant to an Order of an Examiner appointed by the Wisconsin Employment Relations Commission, and in order to effectuate the policies of the Municipal Employment Relations Act, we hereby notify our employes that:

1. WE WILL, upon request, bargain collectively with Clintonville Professional Policemen's Association as the exclusive representative of all law enforcement personnel employed by the City of Clintonville, excluding supervisors, with respect to the imposition and enforcement of a residence requirement as a condition of employment and with respect to all other wages, hours and conditions of employment.
2. WE WILL make James R. Wockenfus whole for any loss of pay and benefits he may have suffered by reason of the prohibited practices engaged in by the City of Clintonville.
3. WE WILL NOT take any action to terminate the employment of James R. Wockenfus or any similarly situated member of the aforesaid collective bargaining unit, or give effect to any previous decision to terminate the employment of James R. Wockenfus, until such time as the City of Clintonville has fulfilled its duty and obligation to bargain collectively with Clintonville Professional Policemen's Association concerning any residence requirement to be imposed upon members of the aforesaid collective bargaining unit on and after January 1, 1973.
4. WE WILL NOT interfere with, restrain or coerce our employes in the exercise of their right of self-organization, to form labor organizations, to join or assist Clintonville Professional Policemen's Association or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or any mutual aid or protection.

All our employes are free to become, remain, or refrain from becoming members of Clintonville Professional Policemen's Association or any other labor organization.

City of Clintonville

By _____
Mayor

By _____
President, Board of Police and
Fire Commissioners

Dated this _____ day of _____, 197_____.

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, CONCLUSIONS OF LAW AND ORDER

PLEADINGS AND RELATED PROCEEDINGS

The complaint initiating the instant proceeding was filed with the Commission on September 19, 1973. On the same date, the Petitioner herein filed a petition with the Commission requesting a Declaratory Ruling on the question of whether the residency requirement imposed by Section 3.75 of the Municipal Code of Ordinances of the City of Clintonville is subject to collective bargaining under the provisions of MERA. On September 28, 1973, the Commission consolidated the matters for purposes of hearing and, on the same date, notices were issued setting October 10, 1973 as the date for hearing and October 8, 1973 as the date for filing of the Answer. No responses were filed by or on behalf of the City of Clintonville. At the outset of the hearing on October 10, 1973, the City Attorney appeared before the Examiner and moved for the dismissal of the proceedings, stating three lines of argument in support of said motion. Following the arguments of counsel, the Examiner denied the City's motion to dismiss the prohibited practices complaint filed herein and also denied the motion to dismiss the Petition for Declaratory Ruling. The Commission issued its Findings of Fact, Conclusions of Law and Declaratory Ruling in City of Clintonville, Case II, on May 6, 1974. In the Memorandum Accompanying Declaratory Ruling attached thereto, the Commission fully discussed the question of jurisdiction and concluded that the Commission had jurisdiction in the matter. The Examiner herein takes notice of the Commission's decision and the discussion of jurisdiction set forth therein is hereby incorporated herein by reference. The Examiner finds no preemption of jurisdiction by the pendency of the proceedings in the Circuit Court, and finds that the Commission and its Examiner have jurisdiction to proceed to a decision in the instant case.

VIOLATION OF CONTRACT

The Complainants assert two lines of argument going to the proposition that there has been a violation of Section 111.70(3)(a)5. Taking those arguments in relation to the chronology of the events on which they are based, the Complainants first argue that the City violated an express covenant made between the City of Clintonville and Wockenfus in May of 1968, when the City Council formally approved Wockenfus' request to move out of the City. The Respondent failed to participate in the hearing and filed no brief or argument in its defense.

The Examiner feels that he is obligated to limit his findings of violations to situations where, under relatively orthodox principles of labor law, the evidence shows a violation to have occurred. In this regard, the Examiner notes that the Clintonville Professional Policemen's Association was not formed until some five months after the City Council action in question here, and that the evidence discloses no "collective" aspect to the request made by Wockenfus or to the agreement made by the City Council. The statutes 3/ and previous decisions of the Commission 4/ distinguish between individual contracts relating to employment and collective bargaining agreements. Only the violation of a collective bargaining agreement is subject to

3/ Section 111.70(3)(a)4.

4/ Joseph H. Waxer (9351) 12/69.

remedy under Section 111.70(3)(a)5 of MERA. The Examiner concludes that the arrangement between Wockenfus and the City Council made in May of 1968 was, at best, an individual contract of a type not enforceable under the Municipal Employment Relations Act. Ordinance No. 354 specifically repeals prior ordinances to the extent that they are in conflict with the provisions of Ordinance No. 354. The Examiner finds that the violation of the 1968 agreement is subject to remedy, if at all, only in the courts on a conventional contract theory, and not before the Commission as a collective bargaining agreement.

The second line of argument advanced by the Complainants concerning violation of contract is directed towards violation of the 1973 collective bargaining agreement between the City and the Association. The arguments relating to the 1973 agreement can be subdivided into two separate lines. Inferred, but not fully developed, is the argument that the City's implementation and enforcement of Section 3.75 of the Code of Municipal Ordinances is discriminatory against Union members. The complaint does not specifically allege a violation of Section 111.70(3)(a)3 of MERA. It does, however, generally allege a violation of the agreement and thereby, of Section 111.70(3)(a)5. Article II, Section 2 of the 1973 agreement states:

"2. The CITY agrees that there shall be no discrimination by the CITY against any employee covered by this Agreement because of his membership or activities in the ASSOCIATION, nor will the CITY interfere with the right of such employees to become members of the ASSOCIATION."

The evidence indicates that the City Librarian, Harriet McCauley, resided outside of the city limits prior to the enactment of Section 3.75 of the Municipal Code and continued to so reside up to the date of the hearing in this matter. There is no evidence of any attempt by the City of Clintonville to enforce its residency requirements against McCauley. McCauley is not known to be a member of any labor organization and, in any case, she is not represented by any labor organization for the purposes of collective bargaining. These facts tend to establish that there has been some discrimination. They do not establish, without more, that the discrimination has been "because of membership or activities in" the Association. On the record made here, the Examiner could not, in good conscience, find a violation of Section 111.70(3)(a)3 were one alleged, and does not find a violation of the "no discrimination" clause of the contract.

Citing a number of cases, the Complainants asserted that a standard of dismissal of employees only for cause is an implied term of the collective bargaining agreement. The cases cited originated in the Federal District Courts, the Federal Court of Appeals and our own Supreme Court, and might be considered persuasive except for evidence of record which indicates that a different result should obtain. Unlike private sector employees and most other municipal employees, many law enforcement employees in Wisconsin are covered by a "for cause" standard under the Statutes which create boards of police and fire commissioners. The City of Clintonville has such a Board, and it is charged with making determinations as to whether action against a police officer (such as suspension or discharge) is for cause. The decision of the Commission in City of Sun Prairie, (11703), 1973, establishes that matters within the jurisdiction of a police and fire commission can be subjected to collective bargaining. However, the testimony of the Union President indicates that, in this case, the Association accepted the jurisdiction of the Police and Fire Commission on matters of discipline and discharge. Under these circumstances, the Examiner cannot conclude that an employment security standard of cause and neutral arbitration thereof was implied by these parties in their

1973 agreement. Some of the evidence adduced by the Complainants during the hearing goes to the proposition that dismissal of Wockenfus is arbitrary and not for cause. Based on the foregoing conclusions that no cause standard exists in the contract, this evidence appears to have no further probative value in the case.

REFUSAL TO BARGAIN

The allegations of the Complainant in this case relate to a history of transactions which date back to 1966. Section 3.75 of the Municipal Code of Ordinances of the City of Clintonville resulted from action taken by the City Council on November 2, 1971 and publication thereof on November 11, 1971, making the Ordinance effective on November 12, 1971. The Municipal Employment Relations Act took effect on November 11, 1971 and, since the Ordinance in question was not effective until after the effective date of MERA, the City of Clintonville arguably had a duty to bargain on the adoption and implementation of this new condition of employment. In Green Bay Board of Education, (10722-B) 8/72, the Commission found that, where action by the municipal employer to subcontract certain work formerly performed by bargaining unit employes was completed prior to the effective date of MERA and only the effects of that decision remained to occur on and after the effective date of MERA, the municipal employer had no duty to bargain on its decision to subcontract the work. The decision in that case may be distinguishable on the basis that the action taken here on November 2, 1971 was only one of two actions required on the part of the City of Clintonville to give effect to Ordinance No. 354. However, all of this is found to have no impact on the decision of the case, since the entire transaction occurred prior to the timely period established by the date of filing of the complaint herein. Section 111.07(14) establishes a one-year "statute of limitations" on the filing of complaints of prohibited practices. The complaint herein was filed on September 19, 1973, and the Examiner concludes that conduct occurring on September 19, 1972 cannot be considered for the purposes of a finding of a violation.

The question before the Commission in City of Clintonville, Case II, was whether the imposition and enforcement of a residence requirement such as that contained in Section 3.75 of the Municipal Code of Ordinances of the City of Clintonville is a subject for collective bargaining. The Commission found that the residence requirement is a subject for collective bargaining and, pursuant to Section ERB 18.10 WIS. ADM. CODE, that Declaratory Ruling is binding on all parties on all facts and issues found and determined in the Declaratory Ruling proceeding. The parties would not have been entitled to relitigate those matters in this proceeding even if a separate hearing had been held in this proceeding. The Examiner therefore incorporates herein, by reference, the discussion set forth in the Memorandum Accompanying Declaratory Ruling, Decision No. 12187-A, and the result reached in that case. Turning from the question of whether the subject is bargainable to the question of whether there has been a refusal, the evidence indicates that the Employer has consistently refused to bargain on the subject of a residence requirement since the proposal of the Association was first advanced on November 29, 1971. Such conduct is clearly in violation of Section 111.70(3)(a)4 of MERA.

Following the termination of Complainant Wockenfus by the Police and Fire Commission, the Association filed a "grievance" under the collective bargaining agreement. No formal grievance procedures were contained in the 1973 agreement. However, the absence of a formalized grievance procedure does not relieve an employer of the duty to bargain during the life of a collective bargaining agreement on matters arising under that agreement. Indeed, formalized grievance procedures are better viewed as a structure for such bargaining than as

a grant of rights to such bargaining. The City had, and has, a duty to respond to the "grievance" filed by the Association. Its failure to do so, taken together with the other refusals to bargain demonstrated by the evidence, indicates a complete repudiation by the City of the collective bargaining process as it relates to residency. This conduct contributes to the conclusion that the Employer has violated Section 111.70(3)(a)4 of MERA.


REMEDY

The Declaratory Ruling case docketed as City of Clintonville, Case II, was not a case of first impression. As noted in the decision therein, similar results were reached on similar issues in Sewerage Commission of the City of Milwaukee (11228-A) 10/25/72, and in City of Brookfield (11406-A, B) 9/73, affirmed, Waukesha Co. Cir. Ct., 6/74. There is a well known legal adage to the effect that ignorance of the law is no excuse. The Examiner finds that, through the exercise of some reasonable diligence, the City of Clintonville could have known of the decision of the Commission in the Milwaukee Sewerage case issued more than a month prior to the date on which the Clintonville Professional Police-men's Association first advanced a proposal concerning residence. Thus the City could have known of the bargainability of residence requirements well in advance of the first of the refusal to bargain violations found and to be remedied here. If this situation had occurred in private sector collective bargaining under the Labor Management Relations Act or the Wisconsin Employment Peace Act, the employer's illegal refusal to bargain might have precipitated an unfair labor practice strike. Such a strike would have been regarded as protected concerted activity and, under appropriate circumstances, the employes engaging in such strike might have been entitled to reinstatement with back pay. Section 111.70(4) (1) of MERA specifically prohibits strikes, and the Commission has previously concluded that there is no "unfair labor practice strike" or "prohibited practice strike" under MERA. Deforest Area Schools (11492-A) 10/73. The purpose of a remedy order is to attempt, as much as possible, to put the parties back in the position which they held prior to the illegal conduct. It is apparent that the City and the Association have never fully completed their bargaining for a 1973 agreement. The City is therefore ordered to return to the bargaining table, if requested to do so by the Union, and to bargain over the issue of a residence requirement for inclusion in their 1973 agreement. By completing all of the procedures of collective bargaining and incorporating any agreement reached in a written and signed agreement the City will now fulfill the duties it has previously refused to perform. Although some delay has occurred since the execution of the collective bargaining agreement between the parties for 1973, the Examiner finds that neither the delay nor the execution of that agreement should prevent the parties from making an amendment to their 1973 agreement, if such amendment results from the collective bargaining conducted pursuant to this Order. Complainant Wockenfus and the other members of the Clintonville Police Department bargaining unit have maintained their compliance with the provisions of MERA by refraining from strike activities in the face of prohibited practices committed by the City. Complainant Wockenfus cannot be placed in the same position in which he would have been prior to the prohibited practices unless he is reinstated with back pay pending completion of the bargaining process. Such reinstatement and backpay is made a part of this Order.

Dated at Madison, Wisconsin this 15th day of July, 1974.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By


Marvin L. Schurke, Examiner