STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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| GREEN BAY FIRE FIGHTERS LOCAL 141, Complainant, vs. CITY OF GREEN BAY, Respondent. | Case XLIII No. 17559 MP-317 Decision No. 12411-B |

ORDER MODIFYING EXAMINER'S FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

Examiner Amedeo Greco having, on December 20, 1974, issued Findings of Fact, Conclusion of Law and Order with Accompanying Memorandum in the above entitled matter, wherein he concluded that the above named Respondent had violated its duty to bargain in good faith under Section 111.70(3)(a)4 of the Municipal Employment Relations Act (MERA) by refusing to bargain collectively with the above named Complainant with respect to Respondent's decision to lay off certain firefighter personnel, and further wherein the Examiner ordered the Respondent to cease and desist from such action and to take certain affirmative action with regard to the prohibited practice found to have been committed; and the Respondent having timely filed a petition pursuant to Section 111.07(5) of the Wisconsin Statutes requesting the Commission to review the Examiner's decision; and the Commission having reviewed the entire record, the petition for review and the Respondent's brief filed in support thereof, being satisfied that the Examiner's Findings of Fact, Conclusion of Law and Order be modified;

NOW, THEREFORE, it is

ORDERED

That, pursuant to Section 111.07(5) of the Wisconsin Statutes, the Wisconsin Employment Relations Commission hereby:

1. Modifies paragraph 3 of the Examiner's Findings of Fact to read as follows:

> "3. That the Respondent has recognized Complainant as the collective bargaining representative for certain of Respondent's firefighting personnel; that the Complainant and Respondent are parties to a collective bargaining agreement in effect from January 1, 1973 through at least December 31, 1973; and that said agreement contains among its provisions the following material herein:
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> 'Article 3 -- Management Rights
>
> (A) The City retains all rights, powers or authority that it has prior to this contract as modified by this contract.
>
> (B) The powers, rights and/or authority herein claimed by the City are not to be exercised in a manner that will undermine the Union or as an attempt to evade the pro-

visions of this agreement or to violate the spirit, intent or purposes of this Agreement.'

. . .

'Article 5 -- Grievance Procedure and Arbitration

. . .

(c) It is not the intention of the parties hereto to circumvent or contravene any city ordinance or state law. If there is any conflict or amibiguity [sic] insofar as any phase, [sic] sentence or paragraph of this contract is concerned, then the ordinance or state law shall apply.

(d) Nothing herein shall limit any employee from his rights to a hearing pursuant to Section 62.13 of the Wisconsin Statutes, in case formal charges are being filed against him.'"

2. Modifies the Examiner's Conclusion of Law as follows:

CONCLUSION OF LAW

That by its decision in Case XXXIX (Decision No. 12307-A) the Commission has not made a prior determination as to whether the Respondent has met its duty to bargain collectively with the Complainant with regard to its decision to lay off the four firefighting personnel in question; and the matter is therefore not res judicata; and that the Respondent has refused, and is refusing, to bargain with Complainant over its decision to lay off said firefighters and that, therefore, Respondent has committed a prohibited practice within the meaning of Section 111.70 (3)(a)4 of the Municipal Employment Relations Act.

3. Modifies the Examiner's Order to read as follows:

ORDER

IT IS ORDERED that the City of Green Bay, its officers and agents, shall immediately:

1. Cease and desist from:

(a) Refusing to bargain with Complainant regarding its decision to lay off firefighters within the collective bargaining unit.

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

(a) Offer to reinstate laid-off employes Jack Ollman, Michael Lison, Roger Tuckey and Gerald Scheller to their former or substantially similar positions without prejudice to their seniority or other rights or privileges, and make them whole for any loss of pay they may have suffered by reason of Respondent's prohibited practice, by payment to each of them of a sum of money, including all benefits, which they would have received from the time of their termination to the date of an unconditional offer of reinstatement, less any amount of money that they earned or received (including unemployment compensation) that they otherwise would not have earned or received. Any

offset for unemployment compensation received should be remitted to the Unemployment Compensation Division of the Department of Industry, Labor and Human Relations of the State of Wisconsin.

(b) Upon request, bargain collectively with Complainant regarding any proposed decisions to lay off bargaining unit personnel.

(c) Notify all employes, by posting in conspicuous places in its offices where employes are employed, copies of the notice attached hereto and marked "Appendix A". That notice shall be signed by Respondent and shall be posted immediately upon receipt of a copy of this Order and shall remain posted for thirty (30) days thereafter. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced or covered by other material.

(d) Notify the Wisconsin Employment Relations Commission, in writing, within ten (10) days following the date of this Order, as to what steps have been taken to comply herewith.

Given under our hands and seal at the City of Madison, Wisconsin this 20th day of April, 1976.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Howard S. Bellman
Howard S. Bellman, Commissioner

Herman Torosian, Commissioner

I DISSENT:

Morris Slavney, Chairman

APPENDIX A

Notice to All Employes

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 employes that:

1. WE WILL immediately offer to reinstate employes Jack Ollman, Michael Lison, Roger Tuckey and Gerald Scheller to their former or substantially equivalent positions and we will make them whole for any loss of pay they suffered as a result of their layoffs.

2. WE WILL, upon request, bargain with Green Bay Fire Fighters Local 141 about any proposed decision to lay off bargaining unit personnel.

3. WE WILL NOT in any other or related matter interfere with the rights of our employes, pursuant to the provisions of the Wisconsin Employment Relations Act.

CITY OF GREEN BAY

By_____
Thomas Atkinson, Mayor

Dated this_____day of_____, 1970.

THIS NOTICE MUST REMAIN POSTED FOR THIRTY (30) DAYS FROM THE DATE HEREOF AND MUST NOT BE ALTERED, DEFACED OR COVERED BY ANY MATERIAL.

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

In its petition for review, the Respondent argues:

1. That the Examiner's Conclusion of Law that the Respondent has refused to bargain with the Complainant over its decision to lay off certain firefighters is erroneous as a matter of law since it is contrary to the findings of the Commission in a prior case and that the issue is therefore res judicata;

2. That the Examiner's Finding of Fact that the City has refused to bargain with the Complainant over its decision to lay off certain firefighters is contrary to the evidence.

In reviewing the Examiner's decision in this case, the Commission has reviewed the arguments which were raised by the parties before the Examiner as well as those raised by the Respondent in its petition for review. Inasmuch as the undersigned Commissioners agree with the factual and legal conclusions reached by the Examiner and most of his rationale, therefore, the discussion herein will be limited to those issues raised by the petition for review and those aspects of the Examiner's rationale with which we disagree.

RES JUDICATA

After the Examiner had conducted the hearing on the instant complaint, the Commission issued a decision in Case XXXIX 1/ involving the same parties herein wherein the Commission certified that the conditions precedent to arbitration under Section 111.77 of MERA had been met and ordered the parties to arbitration. In its brief in support of its petition for review, the Respondent quotes the following three sentences from the memorandum in that case:

> "The Union filed the petition initiating the instant proceeding on November 19, 1973, wherein it described the issues at impasse between the parties as: 'Layoffs - Wages - Pension Payment - Sick Leave - Holiday Pay.'
>
> . . .
>
> The City offered to bargain layoff procedures for inclusion in the 1974 agreement of the parties, but took the position that the layoff of four employes on or before December 31, 1973 was not a proper subject for final and binding arbitration concerning a collective bargaining agreement for 1974.
>
> . . .
>
> At the close of the informal investigation the parties were at impasse on issues involving the four layoffs, minimum manning, wage increases, pension contributions, benefits improvement and overtime pay."

As our memorandum in that case indicates the complaint herein was filed on January 14, 1974 which was approximately one month after

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1/ City of Green Bay (Decision No. 12307-A) 2/20/74.

the last mediation meeting conducted by the Commission's Investigating Officer. After making the statements quoted above, the Memorandum goes on to reflect that the City objected to the Complainant's request that the question of the layoffs be submitted to arbitration since they were accomplished during the term of the prior collective bargaining agreement. The Commission accepted the City's contention that the layoffs were not a proper subject for arbitration of the terms of the 1974 agreement with the following language:

> "The Commission is satisfied that the issues involved in Case XLIII are not to be considered in this final and binding arbitration proceeding, since the case involves an activity occurring under the agreement which expired December 31, 1973; and further that the Commission, and not the Arbitrator, has jurisdiction to determine the mandatory subjects of bargaining and as whether there has been a violation of the duty to bargain.
>
> Section 111.77 of MERA contemplates that only impasses arising in negotiations of a 'new contract or a contract containing the proposed modifications' 2/ of an existing contract are subject to final and binding arbitration. Nothing in Section 111.77 contemplates that impasses, involving law enforcement and fire fighter personnel, which occur other than in negotiations of a new contract, or of proposed modifications of an existing contract, are subject to arbitration pursuant to Section 111.77. Thus, for example, impasses which occur in the processing of contractual grievances, or with respect to collective bargaining, during the term of an agreement, on matters not covered by said agreement, are not within the purview of said Section. Of course there is nothing in the statute to prevent the implementation of arbitration procedures voluntarily agreed upon by the parties for the resolution of such matters."

We find nothing in the Commission's decision in Case XXXIX which constitutes a "finding" that the Respondent had met its obligation to bargain over layoffs. On the contrary, the memorandum indicates that, consistent with its initial position herein, the Respondent contended that it had the right under the management rights clause of the 1973 collective bargaining agreement to lay the employes off without offering to bargain or actually bargaining. The Respondent apparently concludes that the reference to the existence of an "impasse" on the layoffs constitutes a "finding" that the Respondent had met its obligation to bargain about the layoffs. On the contrary the Commission in that case concluded that, because of the pending complaint proceeding, the parties were "at impasse with regard to wage increases, pension contributions, benefit improvements and overtime pay with respect to the collective bargaining agreement for the year 1974."

## The Refusal to Bargain

The Respondent contends that the Examiner's conclusionary facts are contrary to the preponderance of the credible evidence. The Examiner specifically notes in his Memorandum that there was conflicting testimony regarding certain material facts and that it was therefore necessary to make credibility findings based upon the "demeanor of witnesses", "material inconsistencies", the "inherent probability of testimony", and "totality of evidence". Utilizing the Examiner's credibility findings on conflicting evidence, we conclude that the record does support the Examiner's factual findings relating to the Respondent's refusal to bargain as to the lay-offs involved.

EFFECT OF EXISTING AGREEMENT

As set forth in the Examiner's Memorandum, layoffs of employes are generally mandatory subjects of collective bargaining. However, a labor organization's right to bargain, and an employer's duty to bargain, over an employer's decision, made during the term of a collective bargaining agreement to lay off employes, and/or the impact thereof, may be waived by the employe organization and the employer in their collective bargaining agreement. In this proceeding the Respondent contended that such a waiver existed, as reflected in Article 3 of the collective bargaining agreement.

The Examiner, in interpreting said Article, concluded that the language therein cannot be interpreted as to constitute a waiver of either the Complainant's right, or the Respondent's duty, to bargain with respect to the layoffs in issue. In support of such conclusion, the Examiner stated that the management rights clause "refers only to the contractual rights and obligations which both parties possess as a result of their collective bargaining agreement."

While we agree with the Examiner's Conclusion that the language contained in Article 3 does not support a finding of contractual waiver of the duty to bargain on the layoffs, we do not base our conclusion on the Examiner's construction of the provision in question. In our view, the Examiner's interpretation of the clause in question is strained and distorts the apparent meaning of the language employed. We read this clause as preserving all rights, powers and authority possessed by the City as affected by MERA prior to the execution of the agreement except as those rights, powers, or authorities are modified by the terms of the agreement. Unlike our dissenting colleague, we do not find this language or the language contained in Article 5, Sections (C) and (D) to constitute a contractual waiver of the duty to bargain about layoffs during the term of the agreement.

In a number of decisions, this Commission has indicated that it will not find a waiver of the statutory duty to bargain concerning a particular subject absent clear and unmistakable language requiring that result. 2/ A waiver of a substantial legal right should be explicit and specific and should not be lightly inferred. The language in question makes it clear that the Respondent reserved all of those rights and prerogatives which it enjoyed prior to entering into the agreement. For purposes of interpreting the other provisions of the agreement, that much is clear. However, in our view, nothing contained in the quoted language evidences an intent on the part of the Union to waive its statutory right to bargain about the exercise of those rights. Agreements frequently contain provisions which specify that management has the right to layoff under certain conditions during its term or specifically state that the Union waives its right to bargain about matters not covered by the agreement during the term of the agreement. Absent such a clause or other evidence that the parties actually bargained about the question of layoffs, the undersigned are compelled to the conclusion that although the Respondent may have retained the right to lay employes off during the term of the agreement, that right is not unqualified under MERA and the Union never relinquished its statutory right to insist that the Respondent bargain about the decision to lay off the four employes before such decision was implemented.

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2/ City of Brookfield (11406-A and B) Aff'd Waukesha County Cir. Ct. 6/74; Fennimore Jt. School Dist. (11865-A and B); Madison Jt. School Dist. (12610); Village of Shorewood (13024); City of Menomonie (12674-A & B) City of Milwaukee (13495); Milwaukee County (12739-A).

## EXAMINER'S ORDER

The Examiner's Order indicates that, in computing the back pay due and owing the four employes who were laid off, the Respondents should follow the formula set out in his memorandum. While the Commission does not wish to foreclose the possibility of utilizing the particular formula described in the Examiner's Memorandum in the event the parties are unable to agree on the appropriate amount of back pay, if any, due and owing the four employes, that portion of his order has been deleted inasmuch as the Commission does not deem it necessary to adopt a standard formula for such computations. We have also modified the order to take into account the possibility that the employes in question may have received unemployment compensation benefits.

Dated at Madison, Wisconsin this 30th day of April, 1976.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Howard S. Bellman
Howard S. Bellman, Commissioner

Herman Torosian, Commissioner

MEMORANDUM SUPPORTING DISSENT

A review of statutory provisions relating to firefighters and the material provisions of the collective bargaining agreement, in my opinion, throws some light on the intent of the parties in agreeing to Paragraph (A) of Article 3 of the collective bargaining agreement. Section 62.13(4)(a) provides as follows:

> "The chiefs shall appoint subordinates subject to approval by the board. Such appointments shall be made by promotion when this can be done with advantage, otherwise from an eligible list provided by examination and approval by the board and kept on file with the clerk."

Article 6 of the collective bargaining agreement requires posting of vacancies with seniority being first considered as a basis to fill the vacancy provided the firefighters involved "have the necessary qualifications and ability as determined by the Chief." Further, the Article provides that permanent transfers will be based on Department seniority providing the firefighter involved has the necessary qualifications and ability as determined by the Chief. Still further, the provision provides for in-department transfers based on seniority and a definition of seniority. Thus, it is apparent that the parties, in their collective bargaining agreement, have "modified" the power of the Chief, as expressed in Section 62.13(4)(a) with respect to promotions. There is no provision for transfers, as such, in Section 62.13. Section 62.13(5)(a) through (i) establishes a due process procedure involving disciplinary actions against firefighters, which actions could include suspensions, reductions in rank, or in termination of employment. While Paragraph (D) of Article 5 of the collective bargaining agreement permits a firefighter to utilize such statutory due process procedure, in Paragraphs (A) and (B) of Article 5 the parties have agreed to a final and binding arbitration procedure should any firefighter "feel that his rights and privileges have been violated . . . ." The question then arises as to what rights and privileges did the parties intend to cover. I am satisfied that those rights set forth in the collective bargaining agreement are so covered, and while the agreement contains no provisions with respect to suspension, reduction in rank, or termination from employment, the actions relating to employe status are subject to the grievance and arbitration provision; otherwise Paragraph (D) of Article 5 would not have to have been included in the agreement.

Section 62.31(5m) relating to duties and powers of the Board of Police and Fire Commissioners with respect to "Dismissal and Re-employment" states, as follows:

> "(5m) DISMISSALS AND RE-EMPLOYMENT. (a) When it becomes necessary, because of need for economy, lack of work or funds, or for other just causes, to reduce the number of subordinates, the emergency, special, temporary, part-time, or provisional subordinates, if any, shall be dismissed first, and thereafter subordinates shall be dismissed in the order of the shortest length of service in the department, provided that, in cities where a record of service rating has been established prior to January 1, 1933, for the said subordinates, the emergency, special, temporary, part-time provisional subordinates, if any, shall be dismissed first, and thereafter subordinates shall be dismissed in the order of the least efficient as shown by the said service rating.
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> (b) When it becomes necessary for such reasons to reduce the number of subordinates in the higher positions or offices, or to abolish any higher positions or offices in the department,

the subordinate or subordinates affected thereby shall be placed in a position or office in the department less responsible according to his efficiency and length of service in the department.

(c) The name of a subordinate dismissed for any cause set forth in this section shall be left on an eligible re-employment list for a period of two years after date of dismissal. If any vacancy occurs, or if the number of subordinates is increased, in the department, such vacancy or new positions shall be filled by persons on such list in the inverse order of the dismissal of such persons."

The collective bargaining agreement herein contains no provision with respect to layoffs or dismissals.

Section 62.13(6)(a)(1) grants the Board of Fire and Police Commissioners the power to prescribe rules and regulations for the control and management of fire departments. The collective bargaining agreement, in Article 6, provides for negotiation of work rule changes. Thus, the parties in their agreement have modified the statutory right of the Board of Fire and Police Commissioners to unilaterally prescribe work rules. Section 62.13(7) requires the City Council to fix the compensation of firefighters. Again, the agreement indicates a negotiated "Wage Schedule" in Article 16.

Section 62.13(10) requires cities to provide pensions for firefighters, and for the administration of same. In Article 16 the parties negotiated the portion to be paid by the City for such pension. Section 66.191 establishes special death and disability benefits for firefighters, as well as for other certain public employes. The parties, in Article 17 set forth matters for the computation thereof and matters relating to benefits for survivors. Section 62.135 provides "for the security" of pensions.

Article 14, among other things, establishes hours in the "workday" and in the "work week." As noted previously, there are provisions relating to other matters, including extra hours, wages, pensions, disability benefits, and health, life and accident insurance.

It is indeed significant that the collective bargaining agreement does not contain any provision with respect to layoffs and recall. It is to be noted that Section 62.13(5m) provides a detailed procedure for layoffs and for the recall of those employes laid off.

The conclusion of my fellow colleagues that the collective bargaining agreement contains no language which could be interpreted as constituting a contractual waiver of the duty to bargain with respect to layoffs during the term of the collective bargaining agreement, in my opinion, renders Paragraph (A) of Article 3 meaningless. Furthermore, it should be noted that Paragraph (C) of Article 5, in part, provides that:

> "If there is any conflict or amibiguity [sic] insofar as any phase, [sic] sentence or paragraph of this contract is concerned, then the ordinance or state law shall apply."

If there is any ambiguity as to the meaning of Paragraph (A) of Article 3, that ambiguity is dispelled by Paragraph (C) of Article 5, wherein the parties have agreed that "state law" shall apply. There is no question but that Section 62.13 of the Wisconsin Statutes, relating to the operation of police and fire departments, has been in existence for a number of years, and especially at the time the instant collective bargaining agreement was executed.

It has been well established that the Commission, in administering the Municipal Employment Relations Act, must attempt to harmonize the provisions of said Act with those statutory provisions granting municipal employers certain rights and powers with respect to the employes in their employ. I am of the opinion that my interpretation of the "Management Rights" clause constitutes a harmonization between provisions of the Municipal Employment Relations Act and the pertinent provisions of Section 62.13, Wisconsin Statutes. Therefore, I would conclude that the Complainant, in Article 3 of the collective bargaining agreement, specifically waived its statutory right to bargain with regard to layoffs, and it, therefore, follows that the Respondent retained its statutory right to lay off firefighter personnel, pursuant to the procedures set forth in Section 62.13(5m). I, therefore, would conclude that the Respondent, by refusing to bargain with the Complainant, with respect to the contemplated layoffs, did not violate Section 111.70(3)(a)4 of the Municipal Employment Relations Act. 3/

Dated at Madison, Wisconsin this 30th day of April, 1976.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By 
Morris Slavney, Chairman

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3/ I concur with my fellow Commissioners on the conclusion that the decision rendered in Case XXXIX is not res judicata of the issue.