

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

RACINE COUNTY DEPUTY SHERIFFS'	:	
ASSOCIATION,	:	
	:	
Complainant,	:	Case XXIX
	:	No. 18236 MP-389
vs.	:	Decision No. 12973-D
	:	
COUNTY OF RACINE,	:	
	:	
Respondent.	:	

Appearances:
Schwartz, Schwartz & Roberts, Attorneys at Law, by Mr. Jay Schwartz, appearing on behalf of the Complainant.
Mr. Dennis J. Flynn, County Corporation Counsel, appearing on behalf of the Respondent.

ORDER DETERMINING MOTIONS AND
DISMISSING COMPLAINT WITH PREJUDICE

The above-named Complainant having filed a Complaint of prohibited practices with the Wisconsin Employment Relations Commission on August 21, 1974; and the Commission having appointed Marshall L. Gratz to act as Examiner and to make and issue findings of fact, conclusions of law and orders in the matter; and the Examiner, on September 4, 1974, having served the parties with a Notice of Hearing providing for a hearing date of September 19, 1974; and on September 18, 1974, Complainant's Counsel, Mr. Jay Schwartz, by his secretary, Ms. Janet Henrickson, having telephonically communicated a Motion to Reschedule Hearing to the Examiner and to Respondent's Counsel and Respondent having opposed said Motion; and upon the aforesaid Janet Henrickson's agreement on behalf of Complainant, inter alia, to reimburse Respondent for any witness fee or witness travel fee expense incurred by Respondent as a result of the rescheduling of the hearing pursuant to Complainant's Motion, the Examiner granted said Motion 1/ and rescheduled the hearing to October 2, 1974; and on September 23, 1974 Respondent having filed a Motion for Dismissal of the Complaint; and the Examiner having

1/ Dec. No. 12973-A (9/74).

denied said Motion to Dismiss in an Order dated September 25, 1974 ^{2/}; and the date for hearing having been rescheduled to October 9, 1974, pursuant to a request by Complainant as to which Respondent had no objection; and the matter having come on for hearing before the Examiner on October 9, 1974 at the Racine County Courthouse; and at the outset of the October 9 hearing, the Examiner having announced to the parties that the Commission would, upon request, provide transcripts to the parties at a rate of 96 cents per 40-line page for the first copy and 32 cents per 40-line page for each additional copy; and Counsel for Respondent having objected to said rates as arbitrary, discriminatory and excessive and having asserted that ". . . the fee should be approximately ten cents a page for the cost of copying"; and County Supervisor Dennis M. Kornwolf having been present from the outset of the October 9 hearing, having been called as a witness by Complainant and having given testimony and having testified that he was in attendance pursuant to a subpoena; and Counsel for Complainant having indicated that Complainant had caused said Kornwolf to be served with such subpoena; and during the early portion of his testimony said Kornwolf having informed the Examiner that he had not been paid or tendered witness fees or witness travel fees in connection with said subpoena; and several other persons attending the hearing having indicated to the Examiner that they were in attendance pursuant to subpoenas, and Counsel for Respondent having indicated that such persons had been subpoenaed by Respondent; and shortly before the adjournment of the October 9 hearing, Counsel for Respondent having requested that the Examiner immediately order Complainant to pay to witness Kornwolf such witness and travel fees as Kornwolf was entitled to receive; and Complainant having opposed said request and having requested that the Examiner cause the State to pay any such fees to said Kornwolf, citing Sec. 111.07 (2)(d) of the Wisconsin Statutes; and Counsel for Respondent having requested that the State pay each of Respondent's witnesses the witness and travel fees to which they are entitled; and the October 9 hearing having been adjourned until October 17, 1974; and by Order dated October 11, 1974^{2a/}, the Examiner having denied each of the parties' aforesaid motions concerning witness fees; and on the afternoon of October 15, 1974, Counsel for Complainant having informed the Examiner ex parte by telephone of Complainant's desire that the Complaint be dismissed on its merits and the Examiner having responded that such matter should be brought to the Examiner's attention in writing with a copy served upon the Respondent;

^{2/} Dec. No. 12973-B.

^{2a/} Dec. No. 12973-C.

and on the morning of October 16, 1974, Complainant's Counsel having appeared before the Examiner on another matter at the Racine County Courthouse and having handed a document to the Examiner (a copy of which is attached hereto and labeled Appendix "A") and having served a copy of said document on Respondent's Counsel's office and having stated ex parte to the Examiner that regardless of whether a hearing were held in the instant matter on the following day Complainant would not appear at same; and throughout the afternoon of October 16, the Examiner having attempted without success to reach Respondent's Counsel to determine his position concerning the necessity for further hearing in view of the filing of the document in Appendix "A"; and late in the afternoon on October 16, the Examiner, on his own motion, having informed Respondent's Counsel's office that the hearing scheduled for 9:00 a.m. on October 17, 1974 was cancelled and that if Respondent considered additional hearing necessary in the matter he should so inform the Examiner within a reasonable period of time; at 9:30 a.m. on October 17 Respondent's Counsel having phoned the Examiner at the Commission's Milwaukee office and having asserted that he alone had been present at the time and place appointed for the October 17 hearing and that such hearing ought not have been cancelled and that it should be conducted immediately; and the Examiner having replied that the hearing would be convened that afternoon and having attempted without success to so inform Complainant's Counsel and having convened the hearing in Racine that afternoon; and during the October 17 hearing, Respondent's Counsel having made or renewed the following requests:

- (1) that before an ultimate decision with legal effect is issued in the instant matter, the Commission cause the State to pay witness and witness travel fees to witness Dennis Kornwolf (in accordance with the pro se petition therefor filed by him with the Commission) and to the seven witnesses subpoenaed by Respondent and attending the October 9 hearing;
- (2) that a new Examiner be substituted in the instant matter;
- (3) that such new Examiner ignore the Appendix "A" document filed by Complainant and issue findings, conclusions and orders consistent with that affirmative defense of Respondent that alleges that the Water Safety Patrol positions at issue herein ". . . were

not and are not within the ambit or jurisdiction of Complainant Association . . .";

- (4) that the Complainant be found in contempt on account of its nonappearance at hearing on October 17;
- (5) that Complainant be ordered to make payments to Respondent in accordance with its agreement (noted in the Examiner's September 25, 1974 Order) to reimburse Respondent for any traveling expense fee incurred by Respondent as a result of the rescheduling of the September 19, 1974 hearing; and
- (6) that a copy of the transcript in the instant matter be made available to the parties at a lesser rate than that announced by the Examiner at the outset of the hearing;

and the Examiner having reserved ruling on the foregoing requests; and the Examiner having referred the question of a substitution of examiner to the Commission; and the Commission, on November 20, 1974, having informed the Examiner and the parties in writing that the requested substitution was not granted; and the Examiner having considered the record and the above-noted requests and motions of the parties and being fully advised in the premises;

NOW, THEREFORE, it is

ORDERED

1. That in view of the Commission's response thereto, Respondent's October 17 request that a new examiner be substituted for the Examiner herein shall be, and hereby is, denied;

2. That Respondent's October 17 requests that the ultimate decision having legal effect in the instant matter not be issued until witness Kornwolf is paid in accordance with his pro se petition and until the seven witnesses caused to be subpoenaed by Respondent are paid their witness and travel fees in connection with the October 9 hearing shall be, and hereby are, denied;

3. That Respondent's October 17 request that witness Kornwolf be paid witness fees and witness travel fees with respect to the October 9 hearing, insofar as such request seeks issuance of an order in connection with the determination of the instant Complaint proceeding, shall be, and hereby is, denied;

4. That Respondent's October 17 request that the seven witnesses caused to be subpoenaed by Respondent and who attended the October 9 hearing be paid witness fees and witness travel fees for said attendance, insofar as such request seeks issuance of an order in connection with the determination of the instant Complaint proceeding, shall be, and hereby is, denied;

5. That Respondent's request that Complainant be found in contempt on account of its nonappearance on October 17, 1974 shall be, and hereby is, denied;

6. That Complainant, Racine County Deputy Sheriffs' Association, its officers and agents, shall immediately:

- a. cause Respondent Racine County to be reimbursed for any witness fee or witness travel fee expense incurred by Respondent as a result of the rescheduling of the September 19, 1974 hearing in the instant matter;
- b. notify the Wisconsin Employment Relations Commission within twenty (20) days of receipt of a copy of this Order as to what steps it has taken to comply with 6.a. above.

7. That Respondent's October 17, 1974 request that the parties be offered copies of the transcript of the instant proceeding at a rate lower than 96 cents per 40-line page for the first copy and 32 cents per 40-line page for each additional copy shall be, and hereby is, denied;

8. That the Complaint in the instant matter shall be, and hereby is, dismissed with prejudice; and

9. That Respondent's October 17, 1974 request that a more detailed adjudication of the instant Complaint than that set forth in paragraph 8 above shall be, and hereby is, denied.

Dated at Milwaukee, Wisconsin, this 30th day of May, 1975.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By

Marshall L. Gratz

Marshall L. Gratz
Examiner

MEMORANDUM ACCOMPANYING ORDER DETERMINING MOTIONS AND
DISMISSING COMPLAINT WITH PREJUDICE

The Pleadings

The Complainant, in its Complaint, alleged that Respondent

" . . . unilaterally established an auxiliary water patrol to the department in violation of the recognition clause of the agreement and refusing [sic] to negotiate in good faith over wages, hours and working conditions in violation [sic] of Wis. Stats. Sec. 111.70(1)(d) and 111.70 (3)(5) [sic]."

Respondent, in its Answer, denied the above-quoted allegation and pleaded affirmative defenses as follows:

"1. Complainant has not availed itself of its remedy under Section XX of the 1974 Labor Agreement [3/] between Racine County and the Deputy Sheriff's Association and, therefore, is not entitled to a forum before this Commission.

2. Complainant has had no determination by the Wisconsin Employment Relations Commission or in past practice relations between the parties which would establish that the employment positions under the Water Safety Patrol are covered by the Complainant's Labor Association. Absent such a finding or past practice, Respondent would assert that the Commission does not have jurisdiction to hear the instant Complaint.

3. Respondent established a Racine County Water Safety Patrol pursuant to Ordinance . . . [citation omitted] Respondent alleges that the Water Safety Patrol positions were not then and are not now within the ambit or jurisdiction of Complainant Association."

Dismissal of Complaint with Prejudice

Both of the parties to the instant proceeding have taken the position that the instant Complaint should be dismissed. Complainant has

3/ Neither Section XX nor the parties' 1974 Labor Agreement in its entirety is contained either in the Answer or elsewhere in the Record.

done so through the filing of the document a copy of which is contained in Appendix "A". It is true, as is noted by Respondent, that said document does not ". . . set forth with particularity the grounds . . ." ^{4/} on which the request for dismissal is based, does not contain a title identifying the nature of the document, misstates the case number of the instant proceeding and does not expressly state whether the dismissal requested is on the merits or with leave to replead. Yet, said document clearly does not request the right to withdraw the Complaint without prejudice, and it does clearly indicate Complainant's desire that a dismissal of the Complaint be issued. Respondent has also requested that the Complaint be dismissed, though it has requested that such dismissal not issue until payments of witness fees and witness travel fees have been made to witness Kornwolf and to seven other witnesses in attendance at the October 9 hearing. The Examiner has decided to issue the instant determination without regard to the question of payment of said witnesses because such witnesses may, as witness Kornwolf has, seek such payments as they believe themselves entitled to under Sec. 111.07(2)(d) of the Wisconsin Statutes outside of and separate from the determination concerning the instant Complaint. ^{5/}

For the foregoing reasons, the Examiner has dismissed the Complaint. The instant dismissal has been made "on the merits" because Complainant had the opportunity to prove the allegations in the Complaint and because it put Respondent to the inconvenience and expense of filing an Answer and of fully preparing for and participating in hearing on those allegations. Under the circumstances here present, it would be inequitable and would not serve the underlying purposes of the Municipal Employment Relations Act to dismiss the Complaint in a manner that would allow Complainant to put Respondent to such inconvenience and expense again with respect to the same allegations.

Form of Dismissal

A necessary element of Complainant's case (on either a contract violation or refusal to bargain theory) would have been that the Water

^{4/} Commission Rule ERB 10.11 reads, in pertinent part, as follows:

"Motions (1) Presentation. All motions shall be made in writing . . . and shall briefly state the order, ruling or action sought and shall set forth with particularity the grounds therefor."

^{5/} For that same reason, the Examiner has denied Respondent's requests for orders in connection with the instant proceeding such as would cause said witnesses to be paid witness fees or witness travel fees.

Safety Patrol positions in question herein were within the bargaining unit represented by Complainant at the time the alleged prohibited practice(s) took place. The instant dismissal of the Complaint "with prejudice" has the same effect as would the issuance of a particular finding or conclusion that such positions were not in said bargaining unit at said time. Therefore, issuance of a particular finding or conclusion such as that sought by Respondent (that such positions ". . . were not and are not within the ambit or jurisdiction of Complainant Association . . .") is not necessary, and Respondent's request for same has been denied.

Appropriateness of Announced Rate for Copies of Transcript

The rate that the Commission charges any party for a copy of the transcript of a Commission proceeding is established by Sec. 111.09 of the Wisconsin Statutes as amended effective August 5, 1973 by Ch. 90, Laws of 1973. In pertinent part, that amended section reads as follows:

"111.09 . . . transcripts. The commission shall, upon request, provide transcripts of proceedings to any party to the proceeding at a rate of 60 cents per 25-line page for the first copy and 20 cents per 25-line page for each additional copy."

The rate announced to the parties by the Examiner at the outset of the hearing herein was 96 cents per 40-line page for the first copy and 32 cents per 40-line page for each additional copy. Those announced rates are identical, on a per line basis, with the rates set forth in Sec. 111.09 above and are, therefore, in the Examiner's view, consistent with the rates established by statute. Therefore, the Examiner has denied Respondent's request that copies of the transcript of the instant proceeding be made available to the parties at a lesser rate.

Reimbursement of Respondent by Complainant for Certain Expenses Pursuant to Agreement

The date originally noticed for hearing of the instant matter was September 19, 1974. A telephonic request for rescheduling was made by Complainant's Counsel's secretary, Ms. Janet Henrickson, under the unusual circumstances noted in the Examiner's Order granting said request. ^{6/} Said request was granted on condition, inter alia, that

^{6/} Dec. No. 12973-A (9/74).

Complainant reimburse Respondent for witness fee and witness travel fee expenses incurred by Respondent by reason of the rescheduling of the September 19, 1974 hearing. Ms. Henrickson agreed on behalf of Complainant to so reimburse Respondent. Such commitment was reiterated in writing in a document filed with the Examiner on September 19, 1974.

The Complainant has been ordered herein to fulfill said commitment.

Dated at Milwaukee, Wisconsin, this 30th day of May, 1975.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Marshall L. Gratz
Marshall L. Gratz
Examiner

APPENDIX "A"

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

RACINE COUNTY DEPUTY SHERIFFS'
ASSOCIATION,

Complainant,

-vs-

COUNTY OF RACINE,

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WISCONSIN EMPLOYMENT
RELATIONS COMMISSION
MILWAUKEE

Now comes the Complainant, above captioned, by their
duly authorized attorney, Schwartz, Schwartz & Roberts, by Jay
Schwartz, to respectfully request the above action be dismissed.

Dated this 16th day of October, 1974.

Respectfully submitted,

JAY SCHWARTZ
Attorney for Racine County
Deputy Sheriffs' Association