

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Respondent.

Case XIX
No. 18493 MP-405
Decision No. 13176-B

Herman Torosian, Commissioner

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

The Petition for Review:

In its Petition for Review, the Employer took exception to that portion of the Examiner's decision wherein he found that the Employer had committed a prohibited practice by not fully compensating Stoesser for his work-related injury, contending that the Examiner had erred with respect to his Finding of Fact relating to the past practices of the parties in the application of Article XVII 1/ of the collective bargaining agreement existing between the parties. In addition, as a procedural defense the Employer argues that firefighter Stoesser did not invoke the contractual grievance procedure in the agreement, therefore implying that the Examiner should not have determined the issue regarding Stoesser's claim for the pay for the work-related injury.

The Failure to Exhaust the Grievance Procedure:

Since said argument may affect the exercise of the jurisdiction of the Commission to determine the issue on the merits, we shall initially discuss the Employer's contention that Stoesser failed to invoke the grievance procedure set forth in the collective bargaining agreement, and, specifically, that portion of the procedure wherein the collective bargaining agreement provides that the Wages, Salaries and Welfare Committee of the Common Council was empowered to issue final and binding decisions on grievances. It is to be noted that at no time prior to the hearing, nor during the course of the hearing, did the Employer make a claim that the alleged violation of the collective bargaining agreement should be referred to the contractual arbitration procedure. 2/ Where, in a complaint proceeding, the complaint and answer are devoid of allegations with respect to arbitration, and where the Employer raised no issue with respect to the jurisdiction of the Commission to proceed to determine whether a violation of the collective bargaining agreement occurred, and where the parties presented evidence with regard to the merits of the dispute, the Commission considers that the parties have waived the arbitration provision in the agreement, and, therefore, the merits of the dispute are fully litigated. 3/ In this proceeding the merits of the dispute were fully litigated before the Examiner, and, therefore, the Examiner properly exercised the jurisdiction of the Commission to determine whether the Employer violated the collective bargaining agreement with respect to the denial of full pay to Stoesser as a result of his work-related injury.

The Alleged Insufficiency of Evidence:

We have reviewed the entire record in this proceeding, and we are satisfied that the Union established by a clear and satisfactory preponderance of the evidence the intent and meaning, as well as the application of Article XVII of the collective bargaining agreement, and, therefore, we adopt the Examiner's Conclusion of Law in that regard.

-
- 1/ The applicable provision of the collective bargaining agreement.
- 2/ Said fact was referred to in footnote 2 appearing on page 9 of the Examiner's decision.
- 3/ City of Milwaukee (11854) 5/73.

Modification of Examiner's Memorandum:

As noted above the Examiner found that the Employer had not unlawfully interfered with the rights of employees by failing to pay firefighters Stoesser and Maass for attendance at a second fire drill. In his Memorandum, in his rationale with respect to such conclusion, the Examiner stated as follows:

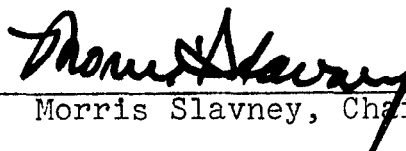
"Contrary to Respondent, the undersigned finds that the issue herein should be resolved in the present complaint proceeding. This is so because the contract does not provide for final and binding arbitration by a neutral party to the dispute. Rather, the contract only provides, as its penultimate step, that grievances can be submitted to Respondent's Wages, Salaries and Welfare Committee of the Common Council which, in turn, shall make a decision 'which shall be final and binding on both parties.' The Wages, Salaries and Welfare Committee, obviously, is not an impartial party to a dispute, since it in effect is a subordinate body of the Municipal Employer. Accordingly, and because said Wages, Salaries and Welfare Committee in any event has refused to pass upon the merits of the grievance herein on the ground that it was not arbitrable under the contract, and since Complainant here is asserting a violation of a statutory, rather than a contractual right, the undersigned finds that it is appropriate to decide the merits of this issue."

We do not agree with the Examiner that the Wages, Salaries and Welfare Committee of the Common Council could not issue a valid final and binding decision or an arbitration award involving grievances arising under the collective bargaining agreement existing between the parties. While said Committee may be a subordinate body of the Employer, such procedure was specifically agreed upon by the parties as a method of resolving the grievances arising under the agreement. To conclude that a decision of such Committee would not be "final and binding" would result in ignoring the specific agreement of the parties. However, we agree with the Examiner that the issue as to whether the refusal to pay the firefighters involved was based on an allegation that such refusal constituted unlawful interference of the rights of employees within the meaning of the Municipal Employment Relations Act, and, therefore, the contractual grievance procedure, in its entirety, need not be utilized by the employees or by the Union.

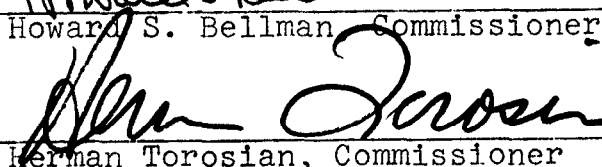
Dated at Madison, Wisconsin, this 16th day of January, 1976.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By


Morris Slavney, Chairman


Howard S. Bellman, Commissioner


Herman Torosian, Commissioner