

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

CITY OF BURLINGTON,

Complainant,

vs.

BURLINGTON POLICEMEN'S BENEVOLENT
ASSOCIATION,

Respondent.

Case XXII

No. 18696 MP-421

Decision No. 13256-B

Appearances:

Mr. Joseph E. Boyle, City Attorney, appearing on behalf of the
Complainant.

Schwartz, Schwartz, Roberts & Cairo, Attorneys at Law, by Mr.
Jay Schwartz, appearing on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

The City of Burlington, Wisconsin, having, on January 7, 1975, filed a complaint with the Wisconsin Employment Relations Commission, wherein it alleged that the Burlington Policemen's Benevolent Association has committed prohibited practices within the meaning of the Wisconsin Municipal Employment Relations Act; and the Commission having consolidated the matter with proceedings on two complaints of prohibited practices filed by the Respondent herein against the City of Burlington; and the matter having come on for hearing at Burlington, Wisconsin on February 26, 1975; and, during the course of said hearing, the Respondent herein having withdrawn its complaints against the City of Burlington; and hearing having been held at that time and place in the captioned matter; and the Examiner having considered the evidence and arguments and being fully advised in the premises, makes and files the following Findings of Fact, Conclusion of Law and Order.

FINDINGS OF FACT

1. That the City of Burlington, Wisconsin, hereinafter referred to as the Complainant, is a municipal corporation existing under the laws of the State of Wisconsin; that the Complainant has its principal office at 300 North Pine Street, Burlington, Racine County, Wisconsin; that James C. McCourt, hereinafter referred to as McCourt, is an alderman of the City of Burlington; and that McCourt is the Chairman of the Finance Committee of the Common Council of the Complainant and, in such capacity, acts as the chief negotiator for the Complainant in collective bargaining with labor organizations representing employees of the Complainant.

2. That the Burlington Policemen's Benevolent Association, hereinafter referred to as the Respondent, is a labor organization engaged in representing municipal employees for the purposes of collective bargaining; that Jay Schwartz, of Racine, Wisconsin, hereinafter referred to as Schwartz, acts in the capacity of representative for the Respondent; and that the mailing address of the Respondent is c/o Schwartz, 704 Park Avenue, Racine, Wisconsin.

3. That, among other municipal services, the Complainant maintains and operates a police department and employs police officers; that the Complainant has recognized the Respondent as the exclusive collective bargaining representative of police officers employed by the Complainant.

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4. That McCourt is employed in private life as the Office Manager of a truck leasing firm and is familiar with the automotive parts and supplies market; that, on or before June 11, 1974, McCourt, acting in his capacity as Chairman of the Complainant's Finance Committee, noted that the Complainant had made purchases of automotive parts and supplies at prices above the lowest prices with which he was familiar in the then-current market for such parts and supplies; that McCourt then issued a directive to the Chief of Police of the Complainant to have members of the Complainant's Police Department check with McCourt prior to making any purchases of automotive parts and supplies; that, on or about June 11, 1974 a notice to that effect was posted in the offices of the Complainant's Police Department; that said directive was complied with for a short period of time, after which it was abandoned; and that no automotive parts or supplies were actually purchased by or from McCourt pursuant to such directive.

5. That the Complainant and the Respondent entered into negotiations for a collective bargaining agreement to be effective for the year 1975; that meetings were held between the parties for the purposes of collective bargaining on October 22, 1974, November 4, 1974, and November 20, 1974; that no agreement resulted therefrom; and that the wages, hours and conditions of employment of police officers employed by the City of Burlington for the year 1975 remained in dispute between the parties.

6. That, on or before November 25, 1974, Schwartz, while acting in his capacity as the representative of the Respondent, made a news release or other statement to the Journal-Times, a newspaper published and circulated in the City and County of Racine, Wisconsin, which became the basis for an article published in said newspaper on November 25, 1974, as follows:

"BURLINGTON POLICE FILE
UNFAIR LABOR CHARGE

The Burlington Policemen's Benevolent Association has filed an unfair labor practice charge against the City of Burlington, alleging [sic] bad faith bargaining on the part of the city, according to Jay Schwartz, attorney for the policemen.

In announcing the filing, Schwartz leveled criticism at Ald. James McCourt, chairman of the Burlington City Council's Finance Committee.

'Evidently the City of Burlington is the victim of boss rule and the one-man show set up by a man named McCourt.' Schwartz said.

Schwartz charged that McCourt could care less about good law enforcement and is more interested in feeding his own vanity.

He also said McCourt has ordered all automotive parts for the Police Department to be purchased through him. McCourt, reached this morning by the Journal Times Burlington Bureau, denied the charge.

Schwartz said McCourt cares only for revenue from traffic tickets 'to the detriment of safety of every citizen in Burlington.' The Racine attorney said Burlington policemen cannot be free to do their duties because they are hamstrung by political bossism on the part of their employer.

'It is the same old pattern,' Schwartz said. 'Civilian amateurs love the power of politically interfering with basic police work. In the City of Racine, it's the Police and Fire Commission and the Mayor's Crime Commission. In the county, it's the Civil Service Board, which is more political than civil. And in Burlington, it's McCourt. The men who risk their lives for the safety of the community will just have to take on one more fight so they can be an adequate police department.'

In a letter to McCourt, Schwartz wrote, 'It has come to my attention that the Burlington Police Department has been ordered to purchase automotive parts through you and that you, as an elective, not administrative, official, 'have some way of getting them cheaper' for the city.'

Schwartz said McCourt may have a conflict of interest and asked McCourt to make a public disclosure on the source of the parts and whether he receives a commission or other form of benefit from the purchase.

McCourt said today he had not received the letter, nor was he aware of the unfair labor practice charge.

He said when the bills for parts were presented, he suggested shopping around for better prices. McCourt said he quoted prices from suppliers he knows but did not; [sic] suggest buying parts form [sic] him.";

and that, on November 27, 1974, the Respondent herein filed a complaint with the Commission wherein it alleged that the Complainant herein had refused to bargain in violation of the Municipal Employment Relations Act. 1/

7. That, thereafter, the Complainant demanded that the Respondent and Schwartz make a retraction of the statements attributed to Schwartz in the newspaper article set forth in paragraph six hereof; that, on December 13, 1974, the Respondent herein filed a second complaint with the Commission wherein it alleged that the Complainant herein had refused to bargain in violation of the Municipal Employment Relations Act; 2/ and that, on or before December 14, 1974, Schwartz, while acting in his capacity as the representative of the Respondent, made a news release or other statement to the Journal-Times which became the basis for an article published in said newspaper on December 14, 1974, as follows:

"POLICE GROUP FILES CHARGE
AGAINST CITY OF BURLINGTON

The Burlington Police Benevolent Association has filed unfair labor practice complaint [sic] against the City of Burlington charging that the city refuses and has refused to bargain in good faith with the police assoc. over wages, hours, and working conditions.

1/ Docketed as Case XX, No. 18524, MP-408.

2/ Docketed as Case XXI, No. 18597, MP-411.

The complaint was filed by Jay Schwartz, Racine attorney representing the police assoc., with the Wisconsin Employment Relations Commission.

The city has until Dec. 30 to file an answer to the complaint and the WERC has set Tuesday, Jan. 7 at 10 a.m. at the Racine County Court House for a public hearing.

In a news release, Schwartz, chief negotiator for the police assoc., charged that, 'The City of Burlington will not meet with the Burlington Police Benevolent Association until the union's negotiator is replaced or until he gives up a deep seated belief that an alderman named McCourt is engaged in activities which are at least immoral if not illegal.'

Schwartz continued, 'and he must so signify by giving a formal apology to a man whom the unions [sic] negotiator believes the antipathy of all that is decent in political life.'

Alderman James McCourt, (Fourth Ward) Chairman of the City Council Finance Committee, said he would not comment on the statements made by Schwartz and that the Burlington city attorney is handling the unfair labor practice complaint.

City Attorney Joseph Boyle said he would not comment on the press release by Schwartz.

He also said that it has not been determined yet whether a written answer to the official complaint will be made by the city."

8. That, on and after November 25, 1974, the Respondent has not refused to meet and confer with the representatives of the Complainant for the purposes of collective bargaining; that, during the same period, the Respondent has not threatened nor carried on against the Complainant any concerted activity, including any activity in the nature of a disruption or stoppage of work, for the purpose of securing the removal of McCourt as the chief negotiator of the Complainant; that, of their own volition, the Complainant and the Respondent met on February 25, 1975, to resume collective bargaining for a collective bargaining agreement for the year 1975; and that the totality of the Respondent's conduct does not evidence bad faith or a desire to avoid agreement with the Complainant in collective bargaining.

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

CONCLUSION OF LAW

That the Respondent, Burlington Policemen's Benevolent Association, has not refused to bargain with the duly authorized officers and agents of the City of Burlington and has not committed, and is not committing, prohibited practices within the meaning of Section 111.70(3)(b)3 of the Municipal Employment Relations Act.

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

ORDER

IT IS ORDERED that the complaint filed in the instant matter be,
and the same hereby is, dismissed.

Dated at Madison, Wisconsin this 13th day of August, 1975.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By


Marvin L. Schurke, Examiner

MEMORANDUM ACCOMPANYING FINDINGS OF FACT,
CONCLUSION OF LAW AND ORDER

BACKGROUND TO THE PRESENT DISPUTE:

It appears that the leadership of the Respondent came to suspect that the City's chief negotiator, Alderman McCourt, was engaged in or had been engaged in illegal conflicts of interest. In addition to the posted notice requiring consultation with McCourt prior to the purchase of automotive parts and supplies, mention was made during the course of the hearing herein of a van purchased by the City from McCourt's employer and an engine allegedly purchased by the City from McCourt's employer. None of the police officers in the bargaining unit made an arrest of Alderman McCourt and there is no evidence here that any of the "evidence" or suspicions held by the leadership of the Respondent was ever turned over to other appropriate authorities for further investigation or prosecution of McCourt. The evidence adduced at the hearing in this matter would indicate that the June 11, 1974 memorandum evolved from a concern that purchases be reviewed by McCourt before being made so as to take advantage of his knowledge of the marketplace and to assure that the City would obtain the best price, rather for any pecuniary profit to Alderman McCourt. McCourt has no direct or indirect financial interest in his employer's business, and the evidence concerning the purchase of a van from McCourt's employer appears to the Examiner to fall a long way short of proof of action in conflict of interest. The Respondent failed to adduce evidence that an additional transaction involving an engine ever took place.

The parties held three negotiation sessions within a period of approximately one month. In the last of those sessions, the City, through McCourt, described its offer then on the bargaining table as its last offer or as its final offer, indicating that it did not anticipate a further change of its positions in bargaining unless there were to be some change of the circumstances on which those positions were based. Within five days thereafter the Respondent's representative, Schwartz, mailed a complaint of prohibited practices to the Commission for filing and launched the verbal attack on McCourt which is recorded in the first of the two newspaper articles to which offense has been taken by the City. It is apparent in this record that the City responded to the Respondent's attack on McCourt by conditioning further bargaining on a retraction and apology from Schwartz. Schwartz responded to that move with the second complaint of prohibited practices and the second release to the newspapers. Schwartz apparently remained steadfast in his refusal to retract his statements, and no bargaining occurred between the parties until the eve of the date set for consolidated hearing on the instant case and the two complaints by the Respondent against the City. At the outset of the hearing, the Association advised the Examiner that the relief sought in its complaints had been obtained through the voluntary return of the City to the bargaining table with the Association, and the Association therefore withdrew its complaints.

POSITION OF THE CITY:

The City does not allege that the statements made by Schwartz are libelous, but alleges here that those statements are patently offensive to the person to whom they were directed and so inflammatory as to undermine or destroy "the atmosphere of rapprochement" which is essential to successful collective bargaining. The City claims that the statements made by Schwartz were without basis in fact and evidence

of bad faith on the part of the Association. As evidence of the "devastating effect" of the newspaper stories on the bargaining process, the City points to the action of its own Common Council to condition further bargaining on a retraction, and the long delay in bargaining which ensued.

POSITION OF THE ASSOCIATION:

Schwartz freely admitted making the statements attributed to him in the newspaper articles. The Examiner notes that the complaint filed with the Commission and docketed as Case XXI contains language virtually identical to the statement attributed to Schwartz in the December 14, 1974 newspaper article. The Respondent sought to show that each of the statements attributed to Schwartz was accurate or an accurate reflection of his opinion. Further, the Respondent disputes the authority of the Commission to "gag" its representatives from public statements concerning political figures, citing constitutional principles.

DISCUSSION:

There can be little doubt that the statements made by Schwartz were inflammatory. Comments made by Attorney Schwartz during his extensive closing argument before the Examiner, with respect to police officer resentment of civilian control of the police department, would seem to indicate the potential for, if not the existence of, a bitter collective bargaining relationship between these parties. It should be evident to any reasonable person that further inflammation of an already charged situation would not be conducive to quick settlement of differences in bargaining or to building of a harmonious relationship, but the Examiner finds no authority for the proposition that such statements, made in this context, were, per se, a refusal to bargain.

Two lines of cases are worthy of note here. The evidence indicates that the Association never refused to come to the bargaining table and that the lengthy hiatus in bargaining which did occur resulted from the action of the City. The complaint filed by the Association in Case XXI asserted that the City's action to condition further negotiations on the retraction of Schwartz' statements constituted an illegal refusal to bargain. The Commission does not recognize a "clean hands" defense to prohibited practices, 3/ and the City would not have been able to defend its apparent refusal to bargain with the Association on the basis of the claimed refusal to bargain by the Association. Viewing the same coin from the opposite side, the Examiner does not view the possibly illegal response of the City 4/ as persuasive evidence that the Association did something which was illegal. Looking to the totality of the Association's conduct, nothing other than the statements made by Schwartz would support the Complainant's proposed conclusion that the Association desired to frustrate agreement between the parties.

The second line of cases looked to by the Examiner in deciding the instant case concerns coercion of an employer by a union with respect to the employer's selection of its own bargaining representative. Refusals to meet with the employer's designated representative have

3/ City of Portage (8378) 1/68; St. Francis School District (9546-A, L) 10/71.

4/ See: Lapham Nursing Home (5660-B) 7/61.

long been held to be illegal conduct on the part of a union. Extensions of the same principle have been found where unions have engaged in strikes against employers 5/ threats of strikes 6/ picketing of the employer's premises 7/ direct demands for the removal of the negotiator 8/ and unspecified threats of "trouble" on the employer's job site 9/. In such cases the Union's conduct is found to be illegal if any part of its motivation is the coercion of the employer in the selection of its bargaining table representative, regardless of whether another objective of the same actions is to enforce the union's demands at the bargaining table through otherwise legal weapons of economic warfare. 10/ The blasts leveled by Schwartz at McCourt are such as to raise a serious question here as to whether a violation of like kind should be found. The Examiner's decision to answer that question in the negative, and to find no violation, is based largely on the complete absence in this record of any evidence of action threatened or taken by the Association or its members to disrupt the work of the police department during the long hiatus in bargaining, leading to the conclusion that the attacks were personally directed at McCourt and were not a part of a pattern of conduct on the part of the Association against the City to force the City to remove McCourt as its negotiator.

Dated at Madison, Wisconsin this 13th day of August, 1975.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By

Marvin L. Schurke
Marvin L. Schurke, Examiner

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- 5/ Helen Rose Co. (NLRB) 46 LRRM 1235; Compton vs. Carpenters (U.S. Dist. Ct.) 53 LRRM 2967; Roofers Local 36 (NLRB) 69 LRRM 1300 (1968).
- 6/ Teamsters Local 294 (NLRB) 45 LRRM 1277, (enf. CA-2, 1960) 47 LRRM 2089.
- 7/ Teamsters Local 986 (NLRB) 55 LRRM 1205 (1964).
- 8/ Plasterers Union Local 2 (NLRB) 57 LRRM 1448 (1964).
- 9/ Plumbers Local 798 (NLRB) 79 LRRM 1446 (1972).
- 10/ Helen Rose, supra, footnote five.