STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

WAUWATOSA FIRE FIGHTERS LOCAL 1923 INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, Complainant, vs. CITY OF WAUWATOSA, Respondent.	Case XXXVIII No. 18856 MP-438 Decision No. 13385-A

Appearances:
Mr. Edward Durkin, Vice President, International Association of Fire Fighters, appearing on behalf of the Complainant.
Mr. Harold Gehrke, City Attorney, appearing on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

Complaint of prohibited practices having been filed with the Wisconsin Employment Relations Commission in the above-entitled matter and the Commission having appointed George R. Fleischli, a member of its staff, to make and issue Findings of Fact, Conclusions of Law and Orders in the matter as provided in Section 111.07(5) of the Wisconsin Statutes; and hearing on said complaint having been held at Wauwatosa, Wisconsin on April 2, 1975 before the Examiner; 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 Wauwatosa Fire Fighters Local 1923, International Association of Fire Fighters, hereinafter referred to as the Complainant, is a labor organization having its offices at Wauwatosa, Wisconsin.

2. That the City of Wauwatosa, hereinafter referred to as the Respondent, is a municipal employer and operates a Fire Department wherein it employs firefighting personnel represented by the Complainant labor organization.

3. That the Complainant and Respondent have been, at all times material herein, parties to a collective bargaining agreement that contains the following provisions relevant herein:

"ARTICLE VII. Authority and Responsibility of the Employer.

Section 1. The City retains and reserves the sole right to manage its affairs in accordance with its responsibility and the powers or authority which have not been specifically abridged, delegated or modified by other provisions of this Agreement.

. . .

ARTICLE XXVI. Rules and Regulations

. . .

Section 2. Work rules, regulations and conditions of employment as established and enforced in 1972 may be applied without further action. The creation of any new work rule, regulation or condition established after January 1, 1973, or the modification or cancellation of a pre-existing rule, regulation or condition of employment as defined herein shall be subject to negotiation and mutual accord between the Chief and the Association's executive council prior to becoming effective.

Section 3. Nothing herein shall be construed to divest either party of any rights of collective bargaining per Section 111.70 of the Wisconsin Statutes. Disputes arising with regard to the application of any work rules, regulations or conditions of employment shall be subject to the grievance and arbitration procedures as set forth in this Agreement.

. . .

ARTICLE XXVII. Grievance Procedure:

Section 1. The Association and the City recognize that grievances involving interpretation, application or enforcement of the terms of this Agreement and the application of work rules, regulations and conditions of employment should be settled promptly and in a just manner.

Section 2. Any grievance by an Association member relative to the above must be submitted to the Chief within five (5) days of an alleged contract violation or within five (5) days of the aggrieved being aware of an alleged contract violation, but not more than thirty (30) days from the date of the actual occurrence of the incident complained of. Any grievance not filed within the stated time limits shall be invalid. Except where expressly referred to otherwise in this article, days for processing of grievances are to be consecutive days exclusive of Saturdays, Sundays and holidays. The filing of any grievance pertaining to non-fire and/or non-emergency functions, shall cause a stay of the ordered activity and possible resulting disciplinary action, pending the ultimate determination of the merits of the grievance providing that the executive board of the Association invokes such stay by including such in the filing of the grievance submitted to the Chief as hereinafter required. The right to grieve shall not be affected by any prior waiver of similar incidents or past practices by the party aggrieved or any other member of the Association. [Emphasis supplied].

. . .

ARTICLE XXVIII. Final and Binding Arbitration

. . .

Section 3. . . . The arbitrator shall have initial authority to determine whether or not the dispute is arbitrable under the terms of this Agreement, but only in the event that a challenge to such issue was duly made in writing prior to the selection of the arbitrator and served upon the other parties. Once it is determined that the dispute is arbitrable, the arbitrator shall proceed in accordance with this article to determine the merits of the dispute submitted to arbitration."

4. That the Respondent normally assigns 32 men to perform fire fighting and rescue operations on a given 24-hour shift; that prior to January 1, 1975, the Respondent had a policy with regard to minimum manning which called for the automatic call-back of off-duty fire fighters in the event that there were less than 27 fire fighters available to man the Respondent's four fire engines, two ladder trucks, and three rescue vehicles, because of absences due to various causes including vacations, personal holidays, sickness and leave of various types; that, pursuant to a decision of the Respondent's City Council to reduce its budget by reducing the money available for overtime in the Fire Department, the Respondent's City Administrator, J. William Little, directed the acting Chief of the Fire Department, Harold G. Rusch, to eliminate the practice of automatically calling back off-duty fire fighters when the actual manning on a given shift falls below 27 fire fighters; that since January 1, 1975, the Respondent has not automatically called back off-duty fire fighters on those days when the actual manning on a given shift falls below 27 fire fighters; that during the months of January, February and March, 1975, the actual manning fell below 27 fire fighters on approximately 20 days.

5. That the Respondent operates three fire stations in the City of Wauwatosa; that Station No. 1 houses one fire engine, one ladder truck and one paramedic rescue vehicle, Station No. 2 houses two fire engines and one rescue vehicle, and Station No. 3 houses one fire engine, one ladder truck and one rescue vehicle; that on those occasions since January 1, 1975 where there were only 26 fire fighters available to perform firefighting and rescue operations, one of the two rescue vehicles at Stations No. 2 and 3 was assigned a two-man crew rather than a three-man crew; that on those occasions since January 1, 1975 where there were only 25 fire fighters available to perform firefighting and rescue operations, the rescue vehicles located at Stations No. 2 and 3 were assigned two-man crews rather than three-man crews; that on those occasions since January 1, 1975 where there were only 24 fire fighters available to perform firefighting and rescue operations, the rescue vehicles located at Stations No. 2 and 3 were assigned two-man crews rather than three-man crews and engine no. 2 at Station No. 2 was assigned a two-man crew rather than a three-man crew; that the record discloses that on only one occasion during January, February and March, 1975 were there only 23 fire fighters available to perform firefighting and rescue operations but that the record does not disclose which additional vehicle, if any, was assigned a two-man crew rather than a three-man crew on that occasion.

6. That, in conjunction with its policy of not automatically calling back fire fighters on days when there are less than 27 fire fighters available to perform firefighting and rescue operations, the Respondent has instituted certain policies with regard to the number of vehicles that respond to a firefighting or rescue operation, which policies are designed to insure that two crews (one three-man crew and one two-man crew) rather than one (two-man crew) respond if the situation requires a vehicle with a crew of three or more fire fighters; that the Respondent has directed the Chief to monitor the effects of the new manning policy and has authorized the Chief, in consultation with the City Administrator, to call back off-duty fire fighters in those situations where there is an unusally high rate of absenteeism or a major fire or other emergency.

7. That, at approximately 8:10 a.m. on January 1, 1975, the Complainant filed a grievance (grievance number 75-1) wherein it alleged that the Respondent was violating Sections 2 and 3 of Article XXVI by its action of failing on that date to call back a sufficient number of fire fighters to maintain a minimum manning level of at least 27 fire fighters and attempting to invoke the "stay" provision contained in Section 2 of Article XXVII; that sometime after filing grievance number 75-1 on January 1, 1975, the Complainant filed a second grievance (grievance number 75-2) wherein it alleged that the Respondent was

violating the "stay" provision contained in Section 2 of Article XXVII by failing to return to its policy of automatically calling back off-duty firefighting personnel pending disposition of grievance 75-1; that on January 2, 1975, the Complainant filed a grievance (grievance number 75-3) wherein it alleged that the Respondent had again violated Sections 2 and 3 of Article XXVI by failing to call back a sufficient number of fire fighters to maintain a minimum manning level of at least 27 fire fighters and again attempting to invoke the "stay" provision contained in Section 2 of Article XXVII.

8. That grievances 75-1 and 75-3 were denied by the Respondent on its claim that they related to the exercise of a management right not limited by Sections 2 and 3 of Article XXVI and were consequently not grievable or arbitrable under Article XXVII; that, in addition, the Respondent denied that the "stay" provision contained in Section 2 of Article XXVII was applicable to grievances 75-1 and 75-3 and refused to return to its policy of automatically calling back additional fire-fighting personnel pending disposition of grievances 75-1 and 75-3; that grievances 75-1 and 75-3 were processed through the established procedure and heard and decided by Arbitrator Robert J. Mueller; that although Arbitrator Mueller, pursuant to Section 3 of Article XXVIII, made a determination as to the arbitrability of grievances 75-1 and 75-3 and found them to be arbitrable, he dismissed both grievances on the merits by an award dated September 2, 1975.

9. That grievance 75-2 was processed through the grievance procedure along with grievances 75-1 and 75-3 and was denied by the Respondent but not appealed to arbitration; that, instead of appealing grievance 75-2 to arbitration the Complainant filed the complaint herein seeking a determination that the Respondent, by failing and refusing to return to its policy of automatically calling back additional firefighting personnel for the purpose of maintaining a minimum manning level of 27 fire fighters pending final disposition of grievances 75-1 and 75-3, had violated the "stay" provision contained in Section 2 of Article XXVII.

10. That, by agreeing to arbitrate grievances as defined in Section 1 of Article XXVII, the parties have agreed that the "stay" provision set out in Section 2 of Article XXVII, is enforceable through the grievance and arbitration procedure set out in Articles XXVII and XXVIII of the agreement.

Based on the above and foregoing Findings of Fact, the Examiner makes and enters the following

CONCLUSION OF LAW

That, on the facts presented herein, the Commission ought not assert its jurisdiction to determine whether or not the Respondent has violated the provisions of Section 2 of Article XXVII by failing and refusing to return to its policy of automatically calling back additional firefighting personnel for the purpose of maintaining a minimum manning level of 27 fire fighters.

Based on the above and foregoing Findings of Fact and Conclusion of Law, the Examiner makes and enters the following

ORDER

That the complaint herein be, and the same hereby is, dismissed.

Dated at Madison, Wisconsin this 20th day of October, 1975.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By George R. Fleischli
George R. Fleischli, Examiner

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

The Complainant seeks a determination that the Respondent has violated the "stay" provision contained in Section 2 of Article XXVII by refusing to return to its policy of automatically calling back off-duty firefighting personnel for the purpose of maintaining a minimum manning level of 27 fire fighters pending arbitration of the two grievances wherein the Complainant alleged that the Respondent violated the collective bargaining agreement by changing said policy. The record clearly establishes that the Respondent changed its manning policy on January 1, 1975 and that it refused to reinstate its prior manning policy pending arbitration of the two grievances.

The Respondent alleges that the change in manning policy involves the exercise of a management right which is not covered by Sections 2 or 3 of Article XXVI and is therefore not subject to the grievance or arbitration procedure including the "stay" provision. In the alternative, the Respondent argues that the "stay" provision in question was intended to prevent the enforcement of orders or directives (other than those involving fires or emergencies), the violation of which might be a basis for disciplinary action, and does not prevent the Respondent from changing its manning policy since it has not ordered or directed any firefighting personnel to do anything.

The definition of a grievance contained in Section 1 of Article XXVII includes any claim involving the interpretation, application or enforcement of the terms of the agreement. There is nothing in the definition of a grievance or the other provisions of the grievance and arbitration procedure that could be construed as excluding the provisions of the grievance and arbitration procedure from the agreed-to enforcement mechanism. The Complainant in this case filed a grievance alleging that the Respondent had violated Section 2 of Article XXVII when it refused to comply with its request for a "stay". That claim would appear to be a proper grievance under the terms of the agreement.

In its brief, the Complainant indicates that it recognizes that its request that the Commission enforce the "stay" provision is contrary to the Commission's usual practice of refusing to assert its jurisdiction to interpret or enforce the provisions of a collective bargaining agreement where the parties have agreed that the terms of the agreement are enforceable through final and binding arbitration. It is the Complainant's contention that if it is required to proceed to arbitration to enforce the "stay" provision, the Respondent can, in effect, "negate" or "destroy" the provision in question.

Because the agreement clearly provides that all of the terms of the agreement are to be interpreted and enforced through arbitration, the Commission ought not assert its jurisdiction to interpret or apply the "stay" provision unless there is a sound policy basis for doing so. If it could be said that the Respondent has totally and unjustifiably rejected the agreed-to grievance procedure, it might be appropriate for the Commission to interpret and apply the "stay" provision of the agreement. 1/ However, the Respondent's refusal to honor the Complainant's request for a "stay" arises out of its contention that the "stay" provision is inapplicable to the facts in this case.

1/ See for example, Mews Redi-Mix Corp., (6683) 3/64, aff'd 29 Wis. 2d 44 (1965).

Although the Complainant could have pursued grievance 75-2 alleging a violation of the "stay" provision to arbitration, it chose not to do so. Its contention is, to a large extent, interwoven with the merits of the two grievances presented before the Arbitrator and it could have insisted on a determination of that issue by the Arbitrator. If the Arbitrator had found that the Respondent violated the provisions of Sections 2 or 3 of Article XXVI, the Arbitrator could have fashioned a remedy which took into account any obligation the Respondent might have had to honor the Complainant's request for a "stay" pending disposition of the grievances.

This is not a case involving a break-down of the grievance procedure itself. 2/ There is every indication in the record that the agreed-to procedure is capable of resolving the question of the Respondent's alleged violation of the "stay" provision and remidying any violation found. There is no showing of irreparable harm or other equitable considerations which might justify the Commission's intervention in the matter. 3/ Although one of the Complainant's arguments before the Arbitrator presumably was that the alleged change in working conditions affected the safety of the fire fighters and the community, the record also discloses that the Respondent has taken certain measures intended to protect the fire fighters and community. It is not necessary or appropriate to deal with the issue of safety herein except to note that there is no showing of irreparable harm on the record established herein. 4/

For the above and foregoing reasons the Examiner concludes that the Commission ought not assert its jurisdiction to determine whether the Respondent has violated the "stay" provision contained in Section 2 of Article XXVII on the facts in this case and has accordingly dismissed the complaint.

Dated at Madison, Wisconsin this 20th day of October, 1975.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By George R. Fleischli
George R. Fleischli, Examiner

2/ See for example, Milwaukee Board of School Directors (12028-A & 12028-B) 5/74 and 9/74.

3/ See for example, Typographical Union vs. Publishers Association 82 LRRM 2332 (6th Cir. 1972) where the court refused to judicially enforce a contractual stay provision pending arbitration of the underlying dispute.

4/ It is also noted in this regard that Honorable William R. Moser refused to issue a temporary restraining order on January 13, 1975 in Milwaukee Circuit Court Case No. 427-189 involving the same parties and subject matter.