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-B

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

Examiner George R. Fleischli having, on October 20, 1975, issued Findings of Fact, Conclusion of Law and Order, with Accompanying Memorandum, in the above entitled proceeding, wherein the above named Respondent was found not to have committed any prohibited practice within the meaning of the Municipal Employment Relations Act and wherein the Examiner dismissed the complaint filed herein; and the above named Complainant having, pursuant to Section 111.07, Wisconsin Statutes, timely filed with the Commission a petition requesting the Commission to review the decision issued herein by the Examiner; and thereafter said Complainant having filed a brief in support of its petition for review and said Respondent having filed a brief in opposition thereto; and the Commission, having reviewed the decision of the Examiner, the record, the petition for review and the briefs filed in support of and in opposition thereto, being satisfied that the Findings of Fact, Conclusion of Law and Order, as well as the Memorandum accompanying, issued by the Examiner should be affirmed;

NOW, THEREFORE, it is

ORDERED

That, pursuant to Section 111.07(5) of the Wisconsin Statutes, the Wisconsin Employment Relations Commission hereby adopts the Examiner's Findings of Fact, Conclusion of Law and Order, with Accompanying Memorandum, issued in the above entitled matter as its Findings of Fact, Conclusion of Law and Order, with Accompanying Memorandum.

Given under our hands and seal at the City of Madison, Wisconsin, this 16th day of December, 1975.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Morris Slavney
Morris Slavney, Chairman

Howard S. Bellman
Howard S. Bellman, Commissioner

Herman Torosian, Commissioner

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

In characterizing the complaint filed herein the Examiner, in his Memorandum, stated as follows:

> "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 fire-fighting 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 record disclosed that in the collective bargaining agreement involved, the parties had agreed that any claim involving the interpretation, application or enforcement of the terms of the agreement constituted a grievance, and further, that all grievances were subject to final and binding arbitration. The Complainant filed a grievance that the Respondent violated the collective bargaining agreement by refusing to comply with the Complainant's request for a "stay" with regard to call back of firefighting personnel as described in the above quoted paragraph.

The Examiner concluded that the alleged failure to comply with the "stay" provision constituted a grievance which was subject to final and binding arbitration, and, therefore, that the Commission would not exercise jurisdiction to determine whether the Respondent had violated the agreement "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," and as a result, the Examiner dismissed the complaint.

In its petition for review the Complainant indicated that it was dissatisfied with the decision of the Examiner, contending that the issue with regard to the "stay" provision should have been determined by the Commission in order to obtain an early equitable solution without delays and expenses incurred in an arbitration proceeding, and the Complainant specifically argues that "where any portion of the grievance procedure is being denied which is an essential element of that procedure and not merely technically procedural, a direct action of original jurisdiction should be available for the employee to seek a rememdy (sic) with the Wisconsin Employment Relations Commission."

In its brief filed in support of its petition, the Complainant expanded on the argument made in its petition for review and, in addition, contends that where an employer repudiates the grievance procedures in the contract, the Commission has exercised its jurisdiction to make a determination on the merits and that it should have done so in the instant proceeding. It further materially argues that "if the arbitration proceedings are going to be a handicap to the employees because a stay provision will not be invoked for such a long period of time, and only after rulings to whatever defenses the City might entertain, the Union is better off to eliminate such articles and send everything to the WERC for determination . . ."

In its brief filed in support of the Examiner's decision the Respondent supports the reasoning of the Examiner, specifically pertaining to the conclusion that the "stay provision in the collective bargaining agreement was properly subject to arbitration."

Discussion:

We completely agree with the Examiner's decision and his rationale therefor set forth in the Memorandum accompanying same. It is obvious that, on the face of the agreement, any alleged violation of the "stay" provision is subject to the grievance and arbitration procedure. The argument that an arbitration award as to whether such provision had been violated would cause undue delay is opposite to our experience. Absent an arbitration provision, the Complainant would have a right to file a complaint with the Commission, and the Commission would make a determination on the merits of the grievance. In such cases, the Commission appoints an Examiner to take the hearing and to issue Findings of Fact, Conclusions of Law and Order. The Examiner's decision may be appealed to the Commission within twenty days of its issuance, on the mere grounds that one or the other party is "dissatisfied" with the decision of the Examiner. 1/ The full Commission then reviews the decision and in that regard, it may affirm, modify or reverse the Examiner. The decision of the Commission is subject to appeal to the courts.

Generally, arbitration hearings can be scheduled and conducted in less time than it would take an Examiner to schedule and to conduct the hearing. The award of an arbitrator is appealable on only limited grounds, as set forth in Chapter 298, Wisconsin Statutes, such as (1) the arbitrator exceeding his jurisdiction and (2) a charge that the arbitrator is guilty of fraud or collusion, etc. Therefore, in the long run, a determination by an arbitrator as to whether the collective bargaining agreement has been violated is usually issued in a shorter period of time than it would take the Commission to review a decision of an Examiner.

Where the parties voluntarily, in their collective bargaining, agree to proceed to arbitration on all issues arising over the interpretation and application of all of the provisions of their collective bargaining agreement, the Commission will honor such an obligation, and if the employer refuses to so proceed to arbitration, the Commission will not make a determination on the merits but will order the employer to proceed to arbitration, except in those cases where the employer has shown an utter disregard of the grievance and arbitration procedures set forth in the agreement. 2/ The Examiner's conclusion that the Commission would not exercise its jurisdiction in this matter was determined on the procedure agreed upon by the parties in their collective bargaining agreement, and, since the record does not establish that the Respondent had shown an utter disregard of the grievance and arbitration provisions of the collective bargaining agreement, we see no reason to make an exception to that long-established policy of this Commission.

Dated at Madison, Wisconsin, this 16th day of December, 1975.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Morris Slavney
Morris Slavney, Chairman

Howard S. Bellman
Howard S. Bellman, Commissioner

Herman Torosian, Commissioner

1/ Section 111.07, Wisconsin Statutes.

2/ Mews Ready Mix Corporation (6683) 3/64 (Affirmed 29 Wis. 2d 44, 11/65).