

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

THE MILWAUKEE PROFESSIONAL POLICEMEN'S  
PROTECTIVE ASSOCIATION,

Complainant,

vs.

THE CITY OF MILWAUKEE BOARD OF  
FIRE AND POLICE COMMISSIONERS and  
THE CITY OF MILWAUKEE,

Respondents.

Case CXXXII  
No. 17247 MP-288  
Decision No. 13495

Appearances:

Gimbel, Gimbel & Boyle, Attorneys at Law, by Mr. Michael A. Loduha,  
appearing on behalf of the Complainant.

James B. Brennan, City Attorney, by Mr. Thomas E. Hayes, Assistant  
City Attorney, appearing on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

The Milwaukee Professional Policemen's Protective Association having, on October 12, 1973, filed a complaint with the Wisconsin Employment Relations Commission, wherein it alleged that the City of Milwaukee and the Milwaukee Board of Fire and Police Commissioners had committed prohibited practices within the meaning of the Wisconsin Municipal Employment Relations Act; and, pursuant to notice, hearing on said complaint having been held at Milwaukee, Wisconsin, on March 20, 1974, Commissioner, Zel S. Rice II being present; and the Commission having considered the evidence and arguments, and being fully advised in the premises, makes and issues the following Findings of Fact, Conclusion of Law and Order.

FINDINGS OF FACT

1. That the Milwaukee Professional Policemen's Protective Association, hereinafter referred to as the Complainant, is a labor organization having its principal offices at 1012 North Third Street (P.O. Box 738), Milwaukee, Wisconsin 53201; and that, at all times pertinent hereto, Robert B. Kliesmet has been an agent of the Complainant for the purposes of collective bargaining.

2. That the Respondent, City of Milwaukee, is a Wisconsin municipality having its principal offices at City Hall, Milwaukee, Wisconsin; that, among other municipal services, the Respondent maintains and operates a police department; and that the Milwaukee Board of Fire and Police Commissioners, hereinafter referred to as Respondent Board, acts for and on behalf of the Respondent City on certain matters, including the promotion of police personnel employed by the Respondent City in its Police Department.

3. That, at all times pertinent hereto, the Respondent City has recognized the Complainant as the exclusive collective bargaining representative of non-supervisory law enforcement personnel of Respondent City employed in its Police Department.

4. That the Complainant and the Respondent City were parties to a collective bargaining agreement, executed on July 28, 1972 and effective for the period from January 1, 1971 to November 3, 1972, which agreement contained the following provisions material herein:

"PART I

. . .

D. CONDITIONS AND DURATION OF AGREEMENT

. . .

3. Any matter which directly or indirectly relates to wages, hours or conditions of employment, or which relates to other matters, whether the same are specifically covered by this Agreement or not, will not be a subject for bargaining during the term of this Agreement, provided, however, this item is subject to the provisions of Part V, C of this Agreement.

. . .

H. SUBORDINATE TO CHARTER, ETC.

This Agreement shall in all respects, wherever the same may be applicable herein, be subject and subordinate to the provisions of the Milwaukee City Charter in effect at the time of the execution of this Agreement and shall also be subject to the rules and regulations of the Fire and Police Commission of the City of Milwaukee, within its statutory jurisdiction and shall further be subject and subordinate to the statutes of the State of Wisconsin and shall be subject and subordinate to the powers, functions, duties and responsibilities of the Chief of Police and the Fire and Police Commission as provided by state statutes and charter ordinances.

. . .

PART II

. . .

C. MANAGEMENT RIGHTS

1. The Association recognizes the right of the City and the Chief of Police to operate and manage its affairs in all respects in accordance with the laws of Wisconsin, ordinances of the City, Constitution of the United States and Section 111.70 of the Wisconsin Statutes. The Association recognizes the exclusive right of the Chief of Police to establish departmental rules and procedures in accordance with the laws of Wisconsin, ordinances of the City, Constitution of the United States and Section 111.70 of the Wisconsin Statutes.

. . .

7. Except as otherwise specifically provided in this Agreement, the City, the Chief of Police and the Fire and Police Commission shall retain all rights and authority to which by law they are entitled;

and that said agreement contained no provision pertaining to any procedures regarding promotions of non-supervisory law enforcement personnel.

5. That, for a period of at least one and one-half years prior to September, 1972, the Respondent Board had under consideration a total revision of its rules and regulations; that, at a regular meeting of Respondent Board held on November 16, 1972, a proposed complete set of new rules were distributed, in rough draft form, to all persons present at said meeting, including Kliesmet; that, during the course of the same meeting, the Chairman of the Respondent Board announced that a public hearing would be held on said proposed rules on December 7, 1972; that Kliesmet advised that no representative of the Complainant would be able to attend said public hearing on the date scheduled; and that the Chairman of Respondent Board thereupon advised the Complainant that it would be afforded opportunity to discuss the proposed rules and to submit its own proposals at a meeting of Respondent Board to be held on December 19, 1972.

6. That the rules of the Respondent Board in effect theretofore provided assigned the following weights to the following segments of promotional examinations conducted by Respondent Board:

<u>Segment</u>	<u>Weight</u>
Written Examination	40%
Departmental Grade	30%
Oral Interview by Respondent Board	20%
Seniority	10%

that the proposed rules distributed by Respondent Board on November 16, 1972 provided that the weights assigned to the various segments of promotional examinations would be set at the time promotional examinations for specific positions were announced.

7. That, on December 19, 1972, representatives of the Complainant appeared before the Respondent Board and submitted a proposal concerning procedures for promotional examinations; that Respondent Board considered same and rejected the proposal of the Complainant as being impractical, in view of the number of applicants for promotion which would have to be personally interviewed under the proposal made by the Complainant; and that the Complainant made no specific proposal concerning weights to be assigned to various segments of the promotional examination.

8. On August 9, 1972 the Complainant and Respondent City entered into collective bargaining for an agreement to succeed the collective bargaining agreement referred to in Para. 4, supra; that during the course of said negotiations the Complainant submitted proposals concerning a promotional program; that prior to January 29, 1973 the parties reached an impasse in such collective bargaining, that on the latter date the Wisconsin Employment Relations Commission, following a stipulation entered into by the parties that they were at an impasse, designated an Arbitrator to issue a final and binding award with respect to the issues remaining in said negotiations; that during the course of the arbitration proceeding the Arbitrator considered certain proposals of the Complainant with regard to a promotional program; and that, following a lengthy hearing and consideration of the record, briefs, and argument of the parties, the Arbitrator issued his final and binding award on August 15, 1973.

9. That during the course of the arbitration proceeding, and on March 1, 1973, the Respondent Board, in the presence of the representative of the Complainant, and without objection from the Complainant, adopted the proposed rules distributed by it on November 16, 1972; that the rules pertaining weights to be assigned to the various segments of promotional examinations were again considered during the March 15, 1973

meeting of Respondent Board; that during the course of the latter meeting the Chairman of the Respondent Board announced that weights used in past examinations were not fixed and could be changed in the future, and that the representative of the Complainant, present at said meeting, expressed no position with respect thereto.

10. That, on April 19, 1973, while the arbitration proceeding was in progress, the Respondent Board, in the presence of a representative of the Complainant, and without objection from the Complainant, discussed the scheduling and conduct of a promotional examination for the position of police sergeant and that said examination was proposed to be conducted in the month of September, 1973.

11. That in his Arbitration Award, issued on August 15, 1973, as noted above, the Arbitrator denied any changes in the promotional procedures established by the Respondent Board; that in his award the Arbitrator stated, in part, "the Arbitrator has in effect deferred to the experience and judgment of the board of Fire and Police Commissioners on promotion issues raised by the Association"; that on September 6, 1973 Respondent Board scheduled the conduct of the promotional examination for the position of police sergeant; that in doing so the Respondent Board revised the weights to be considered in such promotional examination as follows:

<u>Segment</u>	<u>Weight</u>
Written Examination	40%
Departmental Grade	30%
Oral Interview by Respondent Board	25%
Seniority	5%

and that at that time no representative of the Complainant took a position in opposition to such change.

12. That the Complainant filed the complaint initiating the instant proceeding on October 12, 1973; that on October 15, 1973 the Complainant and the Respondent City entered into a Memorandum of Agreement, consistent with the award of the Arbitrator and therein incorporated the provisions to be included in a formal collective bargaining agreement to be effective from November 4, 1972 to November 2, 1974; that said Memorandum of Agreement contained no provisions relating to promotions of employes within the bargaining unit; and that said Agreement, however, contained the following provisions material to the issues herein:

"D. DURATION OF AGREEMENT

. . .

3. Any matter which directly or indirectly relates to wages, hours, or conditions of employment, or which relates to other matters, whether the same are specifically covered by this Agreement or not, will not be a subject for bargaining during the term of this Agreement, provided, however, this item is subject to the provisions of Part V, C of this Agreement.

. . .

H. SUBJECT TO CHARTER

In the event that the provisions of this Agreement or application of this Agreement conflicts with the legislative authority which devolves upon the Common Council of the City of Milwaukee as more fully set forth in the provisions of the

Milwaukee City Charter, the Special Laws of the State of Wisconsin, Chapter 586 of the Laws of 1911 and amendments thereto, pertaining to the powers, functions, duties and responsibilities of the Chief of Police and the Board of Fire and Police Commissioners or the municipal budget law, Chapter 65, Wisconsin Statutes, 1971, or other applicable laws or statutes, this Agreement shall be subject to such provisions.

PART II

. . .

C. MANAGEMENT RIGHTS

. . .

7. Except as otherwise specifically provided in this Agreement, the City, the Chief of Police and the Fire and Police Commission shall retain all rights and authority to which by law they are entitled.

. . .

PART V

A. AID TO CONSTRUCTION OF PROVISIONS OF AGREEMENT

. . .

4. The provisions of this Agreement are binding upon the parties for the term thereof. The Association having had an opportunity to raise all matters in connection with the negotiations and proceedings resulting in this Agreement is precluded from initiating any further negotiations for the term thereof relative to matters under the control of the Chief of Police, the Common Council or the Board of Fire and Police Commissioners, including rules and regulations established by the Chief of Police and the Board of Fire and Police Commissioners.
5. During the term of this Agreement prior to the establishment of new rules or regulations or changes in existing rules or regulations, the Association shall be afforded the opportunity to negotiate with the Chief of Police in accordance with the procedures agreed upon between the Association and the Chief of Police and set forth in departmental rules provided such new rules or regulations or changes in existing rules or regulations do not fall within the Chief of Police's unfettered management functions.
6. Any rules or regulations of the Chief of Police affecting wages, hours or conditions of employment promulgated by the Chief of Police after negotiation but without agreement may be tested relative to whether they violate the specific provisions of this Agreement as well as the propriety of their application in accordance with the provisions of this Agreement pertaining to grievances and arbitration.
7. For purposes of construction and interpretation of the various provisions this Agreement shall be considered to have been executed on October 5, 1973."

On the basis of the above and foregoing Findings of Fact, the Commission makes the following

CONCLUSION OF LAW

That the Respondents, City of Milwaukee and its Board of Fire and Police Commissioners, under the circumstances noted in the Findings of Fact, did not violate its duty to bargain with the Complainant, Milwaukee Professional Policemen's Protective Association, with respect to changes in weights of the various segments considered in examinations for promotions of bargaining unit personnel, within the meaning of Section 111.70(3)(a)4 of the Municipal Employment Relations Act.

On the basis of the above and foregoing Findings of Fact, Conclusion of Law, the Commission makes the following

ORDER

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

Given under our hands and seal at the City of Madison, Wisconsin this *3rd* day of April, 1975.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By *Norris Slavney*  
Norris Slavney, Chairman

*Howard S. Bellman*  
Howard S. Bellman, Commissioner

*Herman Torosian*  
Herman Torosian, Commissioner

THE CITY OF MILWAUKEE BOARD OF FIRE AND POLICE COMMISSIONERS and THE CITY OF MILWAUKEE, CXXXII, Decision No. 13485

MEMORANDUM ACCOMPANYING FINDINGS OF FACT,  
CONCLUSION OF LAW AND ORDER

PLEADINGS AND PROCEDURE:

In its complaint filed on October 12, 1973, the Association contends that the City and Board of Fire and Police Commissioners, hereinafter referred to as Board, refused to bargain and thereby violated Section 111.70(3)(a)4 of the Municipal Employment Relations Act (MERA) by a unilateral change, alleged to have occurred on September 6, 1972, of the weight accorded to seniority in promotional examinations for sergeant conducted by the Milwaukee Board of Fire and Police Commissioners. Notice was issued on October 16, 1973, setting November 7, 1973 as the date for hearing in the matter and setting November 1, 1973 as the date for the filing of an answer. The City filed an answer on November 1, 1973, wherein it denied that any unilateral change occurred on September 6, 1972, denied any violation of MERA, and alleged affirmatively that the City and the Board were not under any duty to bargain with the Association on the matters alleged in the complaint. After several postponements, the matter was heard at Milwaukee, Wisconsin, on March 20, 1974. Counsel for both parties made oral argument at the conclusion of the hearing.

POSITION OF COMPLAINANT:

The Association contends that the City refused to bargain and committed a prohibited practice by unilaterally changing the weight accorded to seniority in promotional examinations. Relying particularly on Section 111.70(4)(jm)1.d. of MERA, the Association contends that the promotional program is a mandatory subject for bargaining between these parties. Responding to the arguments of the City, the Association contends that the management rights clause of the collective bargaining agreement does not allow the City to make unilateral changes without collective bargaining, that the refusal of the Arbitrator to act in the area of promotional procedures left the matter for collective bargaining between the parties, and that the facts show no effort to negotiate the change in dispute before its implementation.

POSITION OF RESPONDENTS:

The City and Board contend that the contract between the parties and the award of the Arbitrator appointed to resolve the impasse in bargaining for the 1972-74 contract clearly establish the right of Respondents to continue to manage its promotional program through the Board and therefore there existed no obligation to negotiate with the Association on the matters in dispute herein.

DISCUSSION:

On its face, the complaint filed to initiate the instant proceeding appeared to contain a jurisdictional defect, since it was filed more than one year after the date on which the alleged refusal to bargain was alleged to have occurred. The answer filed by the City put the dates of various relevant events in issue, and the evidence adduced by the City at the hearing supported its contentions as to the relevant dates. The City's witness was the Executive Secretary of the Board, and her testimony was based on the official minutes of that body. The Commission finds the evidence presented by the City concerning dates of events involved established the exact dates on which they occurred, which dates fell within one year of the filing of the Complaint.

It should be noted that the actual change in the weights assigned to the various segments involved in the promotional examinations for the position of sergeants were not made until September 6, 1973, approximately three weeks following the issuance of the final and binding award by the Arbitrator, wherein the Arbitrator did not disturb the right of the Board to, in effect, continue its past "managerial right", as reflected in the previous agreement, to establish procedures for promotions affecting unit personnel.

The Memorandum of Agreement executed on October 15, 1973, the provisions of which were later included in the formal collective bargaining agreement, preserved the powers of the Board with respect to promotional examinations and the procedures involved therein. In effect, it is to be noted that Part V, para. A. 4 of the Memorandum of Agreement specifically sets forth that the Association "having had an opportunity to raise all matters in connection with the negotiations in proceedings resulting in this Agreement is precluded from initiating any further negotiations for the term thereof relative to matters under the control of the . . . Board of Fire and Police Commissioners, including rules and regulations established by the . . . Board of Fire and Police Commissioners".

Further para. A. 5 of Part V specifically affords the Association the opportunity to negotiate with the Chief of Police prior to the establishment of new rules and regulations or changes of existing rules or regulations by the Chief of Police, and there is no mention of a right to negotiate the establishment of new rules or regulations or changes in existing rules and regulations with the Board. Therefore, it is clear that under that final and binding Arbitration Award, issued prior to the date on which the Board changed the weight factors and the resultant memorandum of understanding, reflecting the Award, the Board had the right to unilaterally establish changes in the segments relating to promotional examinations and, therefore, the Respondents did not commit any prohibited practice in unilaterally changing the weights given to the segments involved in promotional examinations.

Dated at Madison, Wisconsin this *3rd* day of April, 1975.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

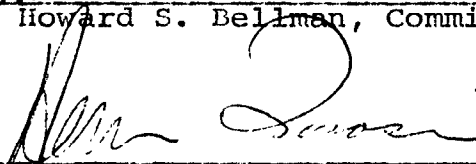
By



Morris Slavney, Chairman



Howard S. Bellman, Commissioner



Herman Torosian, Commissioner