

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MILWAUKEE PROFESSIONAL POLICEMEN'S
ASSOCIATION,

Complainant,

vs.

CITY OF MILWAUKEE, A MUNICIPAL
CORPORATION, HAROLD A. BREIER, CHIEF
OF THE MILWAUKEE POLICE DEPARTMENT,

Respondents.

Case CLX
No. 20003 MP-561
Decision No. 14251-B

Case CLXI
No. 20004 MP-562
Decision No. 14252-B

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

Examiner Stanley H. Michelstetter having, on December 8, 1976, issued his findings of fact, conclusion of law and order in the above entitled matters wherein he found that the Respondents had not committed any prohibited practices within the meaning of section 111.70(3)(a)5 of the Municipal Employment Relations Act (MERA) and dismissed the complaints therein; and the Complainants having on December 30, 1976 timely filed a petition for review of said findings of fact, conclusion of law and order pursuant to the provisions of section 111.07(5), Stats.; and the commission having reviewed the entire record in the matter, including the petition for review and being satisfied that the examiner's findings of fact, conclusion of law and order with accompanying memorandum be affirmed;

NOW, THEREFORE, it is

ORDERED

That pursuant to section 111.07(5) Stats., 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 matters as to findings of fact, conclusion of law and order with accompanying memorandum.

Given under our hands and seal at the
City of Madison, Wisconsin this 17th
day of May, 1977.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By

Morris Slavney
Morris Slavney, Chairman

Herman Torosian
Herman Torosian, Commissioner

Charles D. Hoornstra
Charles D. Hoornstra, Commissioner

No. 14251-B
No. 14252-B

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

In its complaints the complainant alleges that respondent Breier violated section 111.70 of the Wisconsin Statutes by unilaterally promulgating an order on September 3, 1975 precluding unit members from using attache cases for carrying personal effects while on duty and refusing complainant's request on September 12, 1975 to meet with him concerning the foregoing and the complainant's proposed rule to allow members of the bargaining unit involved in shooting incidents the right to consult with complainant prior to making any statements. At the outset of the hearing the respondents made a motion to dismiss which was based inter alia on the complainant's failure to state which provision of section 111.70 had been violated. In this regard the following exchange took place between the examiner and the complainant's counsel.

" . . . I have one question, Mr. Schaefer. Is your Complaint based on a violation under 111.70(3)(a)5?

MR. SCHAEFER: That's correct.

EXAMINER MICHELSTETTER: Is it also based on 111.70 (3)(a)4 for refusal to bargain?

MR. SCHAEFER: No. I see the Chief's action in both cases as arising under the Agreement and Rules and Regulations, as provided in the Contract.

EXAMINER MICHELSTETTER. So, this is strictly a contract case?

MR. SCHAEFER: That's correct." 1/

Thereafter the examiner effectively denied said motion by waiving the requirement of section ERB 12.02(2)(c) that the complaint state the specific provisions of the act alleged to have been violated. The balance of the hearing was devoted to admitting exhibits and presenting arguments with regard to the other aspects of the respondents' motion that the complaint be dismissed because (1) there was no collective bargaining agreement which governed the alleged violations and (2) if there was a collective bargaining agreement which governed the alleged violations the complainant had failed to exhaust the contractual grievance and arbitration procedure contained therein.

The examiner concluded, based on the record presented, that a hiatus existed between the expiration of the 1972-74 collective bargaining agreement on November 2, 1974 and the signing of a new 1974-76 collective bargaining agreement subsequent to the receipt of an interest arbitration award dated October 17, 1975 issued by Arbitrator Forsyth pursuant to section 111.70(4)(jm) of MERA. The examiner further concluded that the 1974-76 collective bargaining agreement, which the parties thereafter executed, closed that hiatus because it contained a general retroactivity clause. Finally, because the complainant and respondents were bound under section 111.70(4)(jm)13 to maintain the working conditions established by the expired agreement, including the grievance procedure,

1/ Transcript p. 7.

and because there were no changes negotiated or in issue before the arbitrator concerning the grievance procedure, or the provisions of the agreement relied upon by the complainant, the examiner concluded that the commission's policy of refusing to entertain questions of alleged contract violations where the complainant has not attempted to utilize the grievance and arbitration procedure should be followed.

PETITION FOR REVIEW:

In its petition for review the complainant argues that the commission should assert its jurisdiction to enforce the obligation of the respondents to bargain in good faith by ordering a hearing and finding a violation of section 111.70(3)(a)5 2/ because:

- (1) application of that policy in this case unfairly deprives the complainant of the protection of section 111.70(2) and 111.70(3)(a)4 and the commission's procedure for the enforcement of those provisions; and
- (2) the grievance and arbitration procedure is an inadequate substitute for the enforcement procedures of the commission for purposes of enforcing the duty to bargain.

DISCUSSION:

The commission is satisfied that the examiner correctly applied the commission's policy with regard to refusing to assert the commission's jurisdiction under section 111.70(3)(a)5 to enforce the terms of the collective bargaining agreement since the complainant made no effort either before or after the execution of the 1974-76 collective bargaining agreement to file or process a grievance or request arbitration.


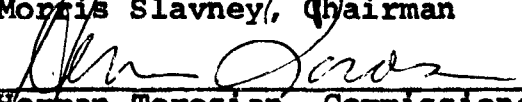

The commission cannot make an exception to its well established policy on the facts in this case by allowing the complainant to proceed on an entirely different theory than that relied on at the hearing before the examiner. The complainant asserted the claim that the respondents violated section 111.70(3)(a)5, and specifically disavowed any claim that there was a violation of section 111.70(3)(a)4. It did so with the specific foreknowledge that the respondents were asserting an affirmative defense of failure to exhaust the grievance procedure, and the hearing proceeded on that basis. To allow the complainant at this juncture to assert a claim of a violation of section 111.70(3)(a)4, under the guise of requesting the commission to waive its policy of requiring exhaustion of the grievance procedure and deferring to arbitration, would be patently unfair to the respondents. Furthermore such an exception is unwarranted since the complainant could easily have alleged a violation of both section 111.70(3)(a)4 and 5. Although

2/ A close reading of the petition for review reveals that that document, like the original complaints, is unclear as to which provision of the statute was violated. Because any other construction would be violative of the respondents' right to notice it is construed to allege a violation of section 111.70(3)(a)5.

the commission has, under appropriate circumstances, deferred processing a complaint pending the outcome of an arbitration proceeding, 3/ it has never refused to assert its jurisdiction to determine whether there has been a violation of another section of the statute when properly alleged, merely because the same conduct might also constitute a violation of a collective bargaining agreement. 4/

Dated at Madison, Wisconsin this 17th day of May, 1977.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By 
Morris Slavney, Chairman

Herman Torosian, Commissioner

Charles D. Hoornstra, Commissioner

3/ Milwaukee Elks (7753) 10/66; Milwaukee Board of School Directors and Steven A. Vrsata (10663-A) 3/72.

4/ Stanley-Boyd Area Schools (12504-B) 1/76.