

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

TOM H. RHODES, JR.,	:	
	:	
Complainant,	:	Case CLXII
	:	No. 20205 MP-583
vs.	:	Decision No. 14394-B
	:	
CITY OF MILWAUKEE (POLICE DEPARTMENT),	:	
	:	
Respondents.	:	
	:	

ORDER REVISING EXAMINER'S FINDINGS OF FACT
AND CONCLUSIONS OF LAW AND ORDER
AND AFFIRMING SAME AS REVISED

Examiner Sherwood Malamud having in the above-entitled matter, on September 20, 1977, issued Findings of Fact, Conclusions of Law and Order, and Memorandum Accompanying same, wherein said Examiner concluded that the above named Respondent did not commit a prohibited practice in violation of Sec. 111.70(3)(a)1 of the Municipal Employment Relations Act, as regards representation of Complainant at evaluation meetings with supervisors, and wherein said Examiner also concluded that the Respondent did commit a Section 111.70(3)(a)1 prohibited practice as regards representation of Complainant at a January 12, 1976 Board of Inquiry hearing conducted by the Police Department, and said Examiner having issued an Order including cease and desist, record expungement, and notice posting requirements, but not providing for back pay; and both of the above named parties having timely filed petitions with the Wisconsin Employment Relations Commission, pursuant to Sec. 111.07(5)., Stats., requesting the Commission to review and modify the Examiner's decision in certain respects; and the Commission having reviewed the entire record, the Examiner's decision, the petitions for review, and the briefs filed by the parties in support of their respective petitions and in opposition to those of the other party, makes and issues the following

ORDER

IT IS HEREBY ORDERED:

- A. That the Examiner's Findings of Fact Nos. 6, 7, 9 and 10 are hereby deleted.
- B. That the Examiner's Conclusions of Law Nos. 2, 3 and 4 are hereby deleted, and Conclusions of Law Nos. 1 and 5 are hereby renumbered 2 and 1, respectively, and former Conclusion No. 1 is revised to read as follows:

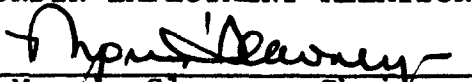
"2. In view of the foregoing, it is unnecessary to determine whether proper party- or parties-respondent have been named and/or served herein or whether an indispensable party-respondent has not been named and/or served herein."

- C. That part "II." of the Examiner's Order is hereby deleted.
- D. That the Examiner's Findings of Fact, Conclusions of Law and Order, as modified above, shall be, and hereby are, affirmed and made the Commission's Findings of Fact, Conclusions of Law, and Order.


Given under our hands and seal at the City of Madison, Wisconsin this 26th day of August, 1980.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION


By



Morris Slavney, Chairman



Herman Torosian, Commissioner



Gary L. Covelli, Commissioner

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MEMORANDUM ACCOMPANYING ORDER REVISING EXAMINER'S
FINDINGS OF FACT AND CONCLUSIONS OF LAW
AND ORDER AND AFFIRMING SAME AS REVISED

THE PLEADINGS

In a one-page handwritten complaint filed pro se by Complainant Tom H. Rhodes, Jr., Rhodes asserted that he requested and was denied Association representation in anticipation of a meeting with supervisors regarding the suggestion of supervision that Rhodes consider resigning from the Milwaukee Police Department so as to avoid dismissal. The Complaint named "Milwaukee Police Dept., 749 W. State, Milwaukee" as the Respondent.

The Examiner caused a notice of hearing, enclosing the complaint, to be served on the City Clerk of the City of Milwaukee at City Hall and on the "Milwaukee Police Department" at the State Street address above. Also, on his own motion, the Examiner caused the caption in the notice of hearing to identify the Respondent as "City of Milwaukee (Police Department)" rather than the designation stated in the original complaint. The Examiner also caused a courtesy copy of the notice and complaint to be mailed to the Milwaukee Policemen's Professional Protective Association (now known as Milwaukee Police Association).

A written Motion to Dismiss and Answer was filed by the City of Milwaukee. The Motion sought dismissal on the ground that ". . . the complaint itself lists as the respondent the Milwaukee Police Department, and that the Milwaukee Police Department does not constitute a legal entity, and no order could be entered against such department." In the Answer portion of its pleading, the City of Milwaukee alleged that the complaint should be dismissed because Complainant was discharged during his probationary period such that under rules promulgated by the Milwaukee Board of Fire and Police Commissioners and by the Chief of Police of the City of Milwaukee (pursuant to statutes empowering them to issue rules on such matters) he had no right to an appeal from his discharge during such probationary period.

At the hearing before the Examiner, Jerome Dudzik of the Association served as Rhodes' spokesperson. Preliminary discussions revealed that the Examiner would take the Motion to Dismiss under advisement; that Complainant alleged a violation of Sec. 111.70(3)(a)1, based on the rationale of the Weingarten decision of the United States Supreme Court 1/ and of WERC Examiner Schurke in the Schmidt I decision. 2/ In response to those citations, Respondent's Counsel noted in his opening statement that, after the time of the incidents referred to in the complaint, Rhodes was brought up on charges before a Department Board of Inquiry (BOI) at which he was permitted to have a representative present for consultation. Rhodes argued that his representative had not been permitted to address the BOI, or to question witnesses, such that Respondent could not validly claim that Rhodes had been provided with BOI representation within the intendment of the Schmidt I decision. Testimony was presented,

1/ NLRB v. Weingarten, Inc., 420 U.S. 251, 88 LRRM 2689 (1975).

2/ City of Milwaukee, Decision No. 13558-B (1/76).

as regards the nature of Rhodes' job performance, and the circumstances surrounding his BOI appearance, as well as regarding the circumstances surrounding the evaluation meetings referred to in the complaint. In his post-hearing brief to the Examiner, Rhodes argued that he had been denied full "representation" at the BOI in violation of Sec. 111.70(3)(a)1. Respondent's brief to the Examiner does not address that issue.

THE EXAMINER'S DECISION

In his September 20, 1977, decision, the Examiner denied the Motion to Dismiss on the grounds that service had been effected on the City of Milwaukee and on its Police Department; that the latter as well as the former is a "municipal employer" within the meaning of Sec. 111.70(1)(a), MERA, and that since the Chief of Police of the City of Milwaukee is an agent of the City of Milwaukee, a remedial order directed to Respondent City of Milwaukee will have legal effect upon its Chief of Police as agent of the city.

The Examiner then proceeded to determine both whether MERA had been violated by an alleged denial of Association representation at performance evaluation meetings between Rhodes and supervisors, and whether MERA had been violated by the limitations placed on the role of his representative at the Board of Inquiry proceeding on the charges thereafter brought against him, which charges ultimately led to his dismissal. The Examiner explained that he was deciding the latter issue because, although the parties had not addressed it in the pleadings, the parties ". . . fully litigated and briefed the nature and extent to which Complainant received representation at Complainant's January 12 Board of Inquiry hearing." 3/

The Examiner disposed of the first of those issues by concluding, based primarily on credibility, that no representation had been requested in connection with performance evaluation meetings involved. He therefore noted expressly that he did ". . . not reach the question of whether Rhodes had a right to representation at the evaluation meetings had complainant requested such representation." 4/

With regard to the role of the representative at a Board of Inquiry proceeding, the Examiner issued the following Conclusion of Law:

"3. That by prohibiting Complainant's representative from addressing the Board of Inquiry or asking questions of the witnesses called to appear before the Board of Inquiry on January 12, 1976 and by in fact restricting Ward's participation in said hearing, and by permitting him to speak only with Complainant, Respondent denied Complainant his right to representation at a pre-disciplinary Board of Inquiry hearing, thus Respondent interfered with Complainant's right guaranteed by Section 111.70(2) of MERA and thereby Respondent violated Section 111.70(3)(a)1 of MERA."

3/ Decision No. 14394-A at 13.

4/ Id. at 15, n. 11.

In reaching that Conclusion, the Examiner rejected Respondent's contentions that the Association had waived any and all rights to representation in meetings with supervisors by contract language, bargaining and legislative history; and that the WERC would exceed its authority and usurp statutory powers vested exclusively in the Chief of Police and the Board of Fire and Police Commissioners if it were to reverse or otherwise interfere with the Chief's discharge of this probationary officer.

In Part I of his Order, the Examiner dismissed the allegations of denial of representation at evaluation meetings with supervision. Part II of that Order provided as follows:

"II. IT IS FURTHER ORDERED that the Respondent, City of Milwaukee (Police Department), its officers and agents, shall immediately:

1. Cease and desist from:
 - (a) Refusing to permit persons chosen by individual police officers to represent them at pre-disciplinary Board of Inquiry hearings from asking questions of witnesses and addressing the Board of Inquiry at its hearings concerning the discipline of such officers.
 - (b) Giving effect to Order No. 7233 or any decision or recommendation made by or on the basis of the Board of Inquiry hearing on January 12, 1976 in connection with the dismissal of Tom H. Rhodes, Jr.
2. Take the following affirmative action which the Examiner finds will effectuate the policies of the Municipal Employment Relations Act:
 - (a) Expunge from the employment records of Tom H. Rhodes, Jr., any and all reference to his dismissal and to any decision made on the basis of the January 12, 1976 Board of Inquiry hearing and to the Board of Inquiry hearing itself.
 - (b) Withdraw Order No. 7233, and offer to provide Complainant with a Board of Inquiry hearing at which he is permitted to appear with the representative of his choice and permit said representative to consult with Complainant, ask questions of witnesses called to testify before the

Board and present argument to the Board. And only after Respondent has afforded Complainant with the right to such a hearing, and if Complainant chooses to be represented at such hearing, permit such representative to ask questions of witnesses, to address objections and make argument to the Board, and then any decision concerning Complainant's employment status must be made on the basis of the evidence presented at such hearing. However, if Respondent offers to convene the Board but Complainant indicates that he does not desire such hearing, then a Board hearing need not be convened.

- (c) Post the notice attached hereto (Appendix A) in all places where employe notices are posted, and it shall remain posted for a period of sixty (60) days thereafter.
- (d) Notify the Wisconsin Employment Relations Commission, in writing, within twenty (20) days following the date of this Order as to what steps have been taken to comply herewith."

The body of the notice, ordered by the Examiner to be posted, which was to be signed by "Harold Breier, Chief of Police, City of Milwaukee Police Department", read as follows:

"NOTICE TO ALL EMPLOYES

Pursuant to an Order of the Wisconsin Employment Relations Commission, and in order to effectuate the policies of the Municipal Employment Relations Act, we hereby notify all employes that:

WE WILL afford all employes, represented by the Professional Policemen's Protective Association, and charged with violations of Departmental rules promulgated by the Chief of Police or regulations of the Board of Fire and Police Commissioners of the City of Milwaukee, and directed to appear before a Board of Inquiry for the purpose of investigating a charge which might result in disciplinary action, with the opportunity to be represented by a representative of his/her own choosing, and that representative will be permitted to ask questions of witnesses appearing before said Board, raise objections and present argument to said Board."

The Examiner explained that he was not ordering back pay because (apparently judging from the substantial evidence going to the merits of the dismissal that was received at the hearing),

" . . . the examiner found there was no relationship between Complainant's request for representation and his termination. There is no showing here that Respondent acted intentionally to deprive Complainant of his right to representation or that it acted in bad faith when it established the ground rules for Ward's participation in the hearing. Finally, the violation found here is a technical one. Any back pay order under the above circumstances would constitute a windfall to Complainant, and as a result a make-whole remedy was not ordered." 5/

THE PETITIONS FOR REVIEW

Two timely petitions for Commission review were filed. One was filed on October 11, 1977 on behalf of Rhodes (and the Association) asserts that "The examiner erred in refusing to award back pay to the complainant." The other, filed on behalf of "The City of Milwaukee and its Police Department" on October 10, 1977, asserts that the Examiner's decision is erroneous in numerous respects.

The latter Petition claims that the Examiner erroneously found "that the Association did not, in fact, demand in negotiation of both contracts . . . that the union in fact demanded the right to have union representation at the Board of Inquiry . . . "; exceeded his jurisdiction in invading the statutory rights of the Board of Fire and Police Commissioners to certify applicants for positions, and of the Chief to terminate any employe without hearing during the probationary period; in changing the defendants without serving any new defendants; in issuing an order against the Chief of Police when he was not a party to the proceeding; in ordering the City to take an action which it is powerless to carry out; in finding that Complainant, through his duly recognized labor organization, had not waived the rights held to have been violated; in concluding in effect that the Chief of Police is a municipal employer, contrary to prior Commission caselaw; in assuming that a probationary employe had some type of constitutional right to hearing contrary to law; and in failing to rule on whether the Police Department was a legal entity for purpose of suit where as a matter of law it is not. On those bases, "The respondent City of Milwaukee and its Police Department" requested that the Commission "reverse the finding of the hearing examiner on a basis of fact and law."

DISCUSSION:

We have affirmed the Examiner in his dismissal of the complaint allegations relating to an alleged violation of Sec. 111.70(3)(a)1, in connection with evaluation meetings with supervision. Neither party has taken issue with the Examiner's finding (based in part on credibility of the witnesses who gave conflicting testimony on the point) that Rhodes did not request representation in connection with the evaluation meetings involved. Rhodes' argument that a request by the employe for representation ought not be a condition precedent to a right to such representation is rejected for reasons set forth in greater detail in the Memorandum accompanying our decision issued this date in City of Milwaukee, Cases CLXV, CLXVI and CLXVII.

5/ Id., at 20.

Although neither party has taken issue with the Examiner's view that the issue of the nature and extent of a right to representation at a Board of Inquiry hearing was fully litigated by the parties herein, we do not agree.

We do not share the Examiner's view that he should have proceeded to determine the additional issue as to whether Sec. 111.70 (3)(a)1 was violated when Rhodes' representative was not permitted to address the Board of Inquiry or to question witnesses during the Board of Inquiry hearing. The complaint, as written, focused solely on the evaluation meetings. The Answer, while asserting that the Association waived a wide range of representation rights, does not refer to the Board of Inquiry proceeding. And the parties' opening statements prior to the calling of witnesses at the hearing do not clearly effect an amendment of the complaint to include an independent allegation that Sec. 111.70(3)(a)1 was violated by the limitations placed on the role of the Association before the Board of Inquiry. Although the question of sufficiency of a whisper-in-the-ear representation was mentioned in the opening comments, it arose only incidentally. Respondent's counsel asserted, by way of a defense to the claim of a denial of representation at the evaluation meetings, that any possible illegality in that regard had been cured by the fact of representation at the Board of Inquiry proceeding. That defensive assertion gave rise to Rhodes' Counsel's comments that the decision of Examiner Schurke in Schmidt I rendered earlier that year required in Rhodes' opinion, that the Association be permitted to address the Board of Inquiry and question witnesses as well as advise the accused. But those comments went to the validity of Respondent's defense, not to an independent alleged violation. Although Rhodes' brief to the Examiner fully argued a contention that "Rhodes was improperly denied union representation at the Board of Inquiry," the Respondent's brief is entirely silent on the matter. While it can be argued that Respondent was on fair notice that the issue was before the examiner for determination, we believe that a better course is available for the determination of the merits of the Board of Inquiry representation issue.

Specifically, the allegation involved was expressly included in another complaint pending before the Commission, 6/ as one of several similar allegations concerning BOI appearances and representation issues. The parties in that proceeding, at the suggestion of the Examiner in that case, agreed to delete from the complaint therein the allegation that Rhodes was unlawfully denied representation in connection with his January 12, 1976 Board of Inquiry appearance "since a separate WERC complaint proceeding deals with the identical subject matter." Thereafter, however, the parties to that proceeding further agreed that said allegation would be reincluded for determination therein if the instant proceeding did not deal with the merits of that allegation and that the instant case record would be available as an evidentiary basis for the resolution of any disputed matters of fact.

Since the other cases are a more appropriate vehicle in our view for addressing the novel issue presented herein, the Commission has deleted the Examiner's Findings, Conclusions and Order portions related to the Board of Inquiry situation. Since the merits of the deleted matters have not been determined herein, it follows that they are reincluded in the matters for determination in the consolidated cases noted above. It is in the decision in the latter, rendered today by the Commission, that the issues addressed herein by the Examiner are addressed by the Commission. The argu-

6/ City of Milwaukee, Cases CLXV, CLXVI, CLXVII.

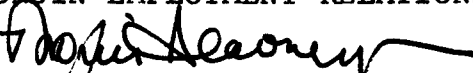
ments made herein by the parties regarding, inter alia, appropriate remedy, waiver, and probationary status, and conflicts with general powers statutes have been considered in deciding those issues in the consolidated cases. The issues regarding proper parties and service are not presented therein. The named respondents therein are the City of Milwaukee and Harold A. Breier, Chief of Police of the City of Milwaukee.

The foregoing disposition herein would appear to obviate the need to address here any of the other issues raised in the Petitions for Review filed herein.

Given under our hands and seal at the City of Madison, Wisconsin this *26th* day of August, 1980.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By



Morris Slavney, Chairman



Herman Torosian, Commissioner



Gary L. Covelli, Commissioner

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Appearing on behalf of the City of Milwaukee (Police
Department):

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Assistant City Attorney
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Appearing on behalf of Tom H. Rhodes, Jr.:

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