

APPLETON PROFESSIONAL POLICEMEN'S
ASSOCIATION,

vs.

CITY OF APPLETON,

Respondent.

Case LXXVII
No. 20446 MP-615
Decision No. 14615-A

Herrling, Hamilton, Swain & Drengler, Attorneys at Law, by Mr. Dennis W. Herrling, appearing on behalf of the Complainant. Mr. David G. Geenen, City Attorney, City of Appleton, appearing on behalf of the Respondent.

The above-named Complainant having on May 4, 1976, filed a complaint with the Wisconsin Employment Relations Commission alleging that the above-named Respondent committed a prohibited practice within the meaning of Section 111.70 of the Municipal Employment Relations Act, and the Commission having appointed Peter G. Davis, a member of its staff, to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and Orders as provided in Section 111.07(5) of the Wisconsin Statutes; and a hearing on said complaint having been held in Appleton, Wisconsin, on June 7, 1976, before the Examiner; and the Examiner, having considered the evidence and arguments of counsel, makes and files the following Findings of Fact, Conclusion of Law, and Order.

1. That the Appleton Professional Policemen's Association, herein Complainant, is a labor organization functioning as the collective bargaining representative of certain law enforcement personnel employed by the City of Appleton.

2. That the City of Appleton, herein Respondent, is a municipal employer.

3. That the parties' 1974-1975 and 1976 collective bargaining agreements contained the following provisions:

"ARTICLE XI - Leaves

A. Sick Leave

...

7. Any Police Officer who reaches retirement age may have year to year recertification until [sic] the age of [sic] sixty-five (65), at which time he must retire from the Police Force. At retirement the retired officer shall receive payment for his unused accumulated sick leave up to but not to exceed ninety (90) working days as compensatory time or cash payment, as the officer may choose, as a bonus for services given the City.

No. 14615-A

. . .

ARTICLE XXVIII - Function of Management

Except as herein otherwise provided, the management of the Department and the direction of the working forces, including the right to hire, promote, demote, layoff, suspend without pay, discharge for proper cause, transfer, determine the number of employees to be assigned to any job classification, and to determine the job classifications needed to operate the Employer's jurisdiction is vested exclusively in the Employer.

It is further agreed, except as herein otherwise provided, that the responsibilities of Management include, but are not limited to those outlined in this Agreement. In addition to any specified herein, the Employer shall be responsible for fulfilling all normal managerial obligations, such as planning, changing or developing new methods of work performance, establishing necessary policies, organizations and procedures, assigning work and establishing work schedules, and of applying appropriate means of administration and control. Provided, however, that the exercise of the foregoing rights by the City will not be used for the purpose of discrimination against any member of the Union or be contrary to any other specific provision [sic] of this Agreement, and provided that nothing herein shall be construed to abrogate the provisions of the grievance procedure."

4. That on June 30, 1974, the statutorily set normal retirement age for police officers covered by the Wisconsin Retirement Fund shifted from 60 years to 55 years ^{1/}; that shortly thereafter David F. Bill, Respondent's Director of Personnel, recommended that Respondent consider establishing a retirement policy which would respond to this statutory change; and that late in 1974 Respondent's Public Safety Committee began considering the possible content of such a policy.

5. That in late September 1975, Complainant and Respondent began negotiating a collective bargaining agreement for 1976; that until December 15, 1975, there was no discussion of any kind regarding the alteration of Article XI(A)7 or of the establishment of a new retirement policy; that on December 15, 1975, Complainant's representative, Attorney Dennis W. Herrling, had an informal conversation with David Bill, Respondent's Director of Personnel, wherein Herrling stated that he was aware that Respondent's City Council would be considering the Public Safety Committee's recommendation with respect to the establishment of a retirement policy, that he believed that such a policy should not be unilaterally adopted by Respondent, and that said policy should be bargained with the Complainant; that Bill responded by indicating that the Complainant should file a grievance if it believed that the adoption of said policy was improper.

6. That a retirement policy based upon the Public Safety Committee's recommendations was adopted by Respondent's City Council on December 17, 1975, and that said policy contained the following provisions:

"A. The compulsory retirement age for all City employees remain unchanged (65 years of age).

^{1/} In the record the parties appeared to indicate that the normal statutory retirement age prior to June 30, 1974, was 62 years. However examination of Chapter 41.02(23)2, Stats., reveals that the normal retirement age prior to said date was 60 years and the Examiner has therefore taken administrative notice of same.

- B. A normal retirement age of 55 be established for Police and Fire personnel with a provision that such employees who wish to work past age 55 provide the Employer with evidence that they are in good physical condition and able to fully perform the expected duties of an employee in their position in accordance with the following:
1. A physical examination be required at age 55 and annually thereafter.
 2. The physical be the same for all employees.
 3. The physical examination be done by the employee's family doctor at the employee's expense.
 4. It be a complete 'executive' type physical to include the examination and laboratory work specified in the accompanying form.
 5. The examining physician provide the information requested and forward the completed form to the Medical Consultant for the City.
 6. The Medical Consultant make the final determination regarding physical and medical eligibility for continued employment. In so doing, he:
 - a. May obtain such information about the employee's specific job activities and requirements as he may deem desirable or necessary.
 - b. Shall have the right to consult the examining physician, request additional tests or information, or conduct his own examination of the employee.
 - c. Should consider the employee's weight-height relationship in his determination.
 7. Release of medical information form be included with the examination form, and the Public Safety Committee and/or Director of Personnel draft an appropriate statement or cover letter to be provided to the examining physician.
 8. Utilizing the proposed physical examination form, with the addition of:
 - a. Tonometry - a screening test for glaucoma.
 - b. Urinalysis
- C. This policy to be effective January 1, 1976. Those employee's [sic] reaching their 55th birthday on or before April 30, 1976, shall have reports of their physical exam completed and submitted by April 30, 1976. Those personnel attaining their 55th birthday after April 30, 1976, the report of the physical exam is due befor [sic] they attain age 55.

- D. Those employees covered by the Wisconsin Retirement Fund who fail to comply with the above shall be recommended for retirement by the Director of Personnel to the Public Safety Committee.

Those employees covered by State Statutes 62.13 who fail to comply with the above shall be recommended for retirement by the Director of Personnel to the appropriate Pension Board."

7. That prior to December 17, 1975, Respondent's retirement policy consisted of an option to recertify individual police officers for continued employment when they reached normal retirement age; and that there is no evidence that this recertification policy was ever utilized or bypassed.

8. That after the December 15, 1975 conversation between Herrling and Bill the subject of the retirement policy was never discussed in any way by either party as negotiations for a 1976 collective bargaining agreement continued; that on February 3, 1976, the parties reached a tentative settlement regarding the terms of the 1976 bargaining agreement; and that said settlement was ratified by the Complainant in late February 1976, and by the Respondent on March 3, 1976.

9. That early in April 1976, all of Respondent's employees, including those represented by the Complainant, received copies of the retirement policy adopted by Respondent's City Council on December 17, 1975.

Based upon the foregoing Findings of Fact, the Examiner makes the following

CONCLUSION OF LAW

That Complainant has waived its right to bargain over the promulgation and implementation of a new retirement policy and that, as a result, Respondent did not violate Section 111.70(3)(a) 1 and 4 of MERA when it unilaterally promulgated and subsequently implemented said policy.

Based upon the foregoing Findings of Fact and Conclusion of Law, the Examiner makes the following

ORDER

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

Dated at Madison, Wisconsin this 21st day of January, 1977.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Peter G. Davis
Peter G. Davis, Examiner

MEMORANDUM ACCOMPANYING FINDINGS OF FACT,
CONCLUSION OF LAW AND ORDER

On May 4, 1976, the Complainant filed a prohibited practice complaint which alleged that the Respondent had violated its duty to bargain under the Municipal Employment Relations Act, (MERA) by unilaterally promulgating and ultimately implementing a new retirement policy during the term of the existing collective bargaining agreement. The Respondent denies said allegation and primarily asserts that under the terms of the applicable collective bargaining agreement it had no obligation to bargain with the Complainant prior to the promulgation or implementation of the retirement policy.

DISCUSSION:

Section 111.70(3)(a) 4 of MERA establishes the Municipal Employer's obligation to bargain in good faith with the collective bargaining representative of its employees with respect to said employee's wages, hours, and conditions of employment. Pursuant to said obligation, the Municipal Employer must bargain with the employees' bargaining representative before altering a policy during the term of the bargaining agreement which primarily affects employees' wages, hours, and conditions of employment or which will have an impact thereupon when implemented. 2/ However, the Municipal Employer's duty to bargain and the Union's right to same may be waived by the terms of the parties' bargaining agreement and/or pertinent bargaining history. 3/

In the instant situation a specific policy regarding the retirement or continued employment of police officers reaching the age of 55 was promulgated by the Employer during the term of the parties' 1974-1975 bargaining agreement and subsequently implemented during the term of the 1976 agreement. Inasmuch as a retirement policy has a substantial effect upon the wages, hours, and conditions of employment of bargaining unit employees, the Examiner concludes that both the content of such a policy and its impact upon employees are currently mandatory subjects of bargaining under MERA. 4/ It should be noted, however, that this conclusion could conceivably be altered in the future by legislative action which might make a police officer's retirement compulsory at a certain age or establish statutory procedures and criteria for continued employment. Thus, the Respondent violates Section 111.70(3)(a) 4 of MERA if it fails to bargain in good faith before establishing or implementing a new retirement policy unless the Complainant has in some manner waived its right to bargain over said subject. The threshold question to be resolved herein is whether the retirement policy promulgated and implemented by the Respondent constituted a change from past retirement policy. If said question is answered affirmatively, the issue then becomes one of determining whether Respondent fulfilled its duty to bargain with the Complainant prior to said change or whether the Complainant waived its right and the Respondent's duty to bargain with respect to said action.

The record reveals that prior to the June 30, 1974 statutory reduction of the normal retirement age for police officers covered by

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- 2/ City of Beloit, (11831) 9/74; aff'd in relevant part, Nos. 144-272 and 144-406 (Dane Co. Cir. Ct.) 1/31/75; app'd to Wis. Sup. Ct.; aff'd 6/2/76 Oak Creek-Franklin Joint City School District No. 1, (11827) 9/74; aff'd, No. 144-473 (Dane Co. Cir. Ct.) 11/75.
- 3/ City of Madison, (15095) 12/76; Middleton Joint School District No. 3, (14680-A, B) 6/76; City of Green Bay, (12411-A, B) 4/76; Milwaukee County, (12734-A, B) 2/75.
- 4/ Inland Steel Co., 77 NLRB 1, 21 LRRM 1310, enforced 170 F.2d 247, 22 LRRM 2505 (CA7 1448) certs. denied 336 4596, 24 LRRM 2014 (1449).

the Wisconsin Retirement Fund, the Respondent's retirement policy with respect to said individuals consisted basically of compliance with what it perceived to be the existing statutory requirements under Section 41, Stats. for the recertification of officers who reached the then higher retirement age and who wished to continue their employment. Pursuant to said policy, an individual police officer who wished to work beyond normal retirement age needed to receive formal recertification from Respondent's City Council before he could continue his employment. This recertification policy is reflected in the language of Article XI(A)7 which has existed in the parties' bargaining agreement since at least 1973, and which states:

"Any Police Officer who reaches retirement age may have year to year recertification until the age of sixty-five (65), at which time he must retire from the Police Force."

Inasmuch as said language refers to "any Police Officer" the Examiner, given the absence of any evidence to the contrary, must conclude that this formal recertification policy also applied to all officers, if any, who were not covered by the Wisconsin Retirement Fund and thus fell under the jurisdiction of Police Pension Board, Section 62.13, Stats.

The Complainant has asserted that, despite the contractual language, individuals who reached the then existing retirement age were automatically allowed to continue their employment and were not in fact subject to any recertification process. In order to establish this proposition, the record would have to indicate both that no one ever went through the recertification process and that there were officers who continued to work beyond the then higher retirement age who thus would have been subject to said policy. While there is no evidence that the recertification retirement policy was ever actually utilized, the Complainant failed to prove that any individual ever reached the then higher normal retirement age prior to June 30, 1974, and wished to continue his employment. Absent such a showing the Examiner must reject the Complainant's assertion and conclude that the policy did in fact exist although it was never utilized or specifically bypassed.

Triggered by the statutory drop in the normal retirement age to age 55, the Respondent began considering the adoption of a comprehensive retirement policy. During the period of such consideration, which stretched from June 30, 1974, to December 17, 1975, three bargaining unit members reached or passed the new normal retirement age of 55 years and continued to work. Said individuals were not recertified in any manner, conceivably because Respondent was in the process of altering the policy. The parties' two year 1974-1975 bargaining agreement retained the same relevant retirement and recertification language as was contained in the 1973 bargaining agreement.

In essence, based upon the foregoing, the Examiner concludes that the Respondent's retirement policy prior to December 17, 1975, consisted of an Employer option to recertify individual employees for employment beyond normal retirement age pursuant to criteria and procedures which the record does not reveal and which may never have existed inasmuch as the policy never became operative.

The December 17, 1975 policy adopted by Respondent's City Council retains the existing Employer option to continue employment beyond normal retirement age but in addition sets forth the procedures and criteria which will be utilized by the Employer when exercising said option, including a mandatory physical exam at employee expense. Employees who fail to meet the criteria set forth in the policy or who fail to submit to the specified procedures will be recommended for retirement. Given the establishment of said procedures and criteria, there can be no doubt that the December 17, 1975 policy constitutes a change from the Employer's past policy and, given the previously discussed impact upon

the wages, hours and conditions of employment of affected employees, the Respondent was required to bargain with the Complainant prior to the promulgation or implementation of said policy unless the Complainant waived its right to so bargain.

The evidence reveals that the Respondent did not bargain with the Complainant prior to the adoption or implementation of the new retirement policy. On December 15, 1975, two days prior to the adoption of the new retirement policy by Respondent's City Council, Herrling told Respondent's Director of Personnel that Respondent should not adopt the new policy before bargaining with the Complainant. Through said statement the Complainant made a timely demand for bargaining on the subject of retirement policy. Respondent's Director of Personnel responded to this bargaining request by indicating Respondent's belief that the grievance procedure was the appropriate arena for any challenge to the impending action. Two days later Respondent adopted the new retirement policy and in April 1976, said policy was implemented. Given Respondent's failure to bargain after the Complainant's timely demand, it must be found to have committed a prohibited practice unless the Complainant, as apparently urged by Respondent, waived its right to so bargain.

The Commission has consistently indicated that it will not find a waiver of the statutory right to bargain on a mandatory subject of bargaining absent clear and unmistakable language requiring that result. ^{5/} In this case the Respondent appears to assert that the combination of the specific retirement language of Article XI(A)7 and the general managements rights language of Article XXVII found in both the 1974-1975 and 1976 bargaining agreements constitutes a waiver by the Complainant of its right to bargain over the promulgation and implementation of a new retirement policy.

The specific language of Article XI(A)7 which states "Any Police Officer who reaches retirement age may have year to year recertification until the age of sixty-five (65), at which time he must retire from the Police Force" indicates that at one point in their relationship the parties bargained over the subject of retirement. The use of the phrase "may have year to year recertification" reveals that the parties intended to give the Respondent the option of allowing an employee to work beyond retirement age and thus that continued employment beyond normal retirement age was not a matter of right. Furthermore, the language of Article XI(A)7 indicates that the retirement policy created by the parties did not establish any contractual criteria which the Respondent would utilize when making the retirement decision. The managements rights language of Article XXVII states that, except as provided in the bargaining agreement, "the management of the Department . . . is vested exclusively in the Employer" and that "the Employer shall be responsible for fulfilling all normal managerial obligations, such as . . . establishing necessary policies" Pursuant to this language the Respondent, in the absence of specific contrary contractual provisions, has retained the ability to establish and/or alter the criteria and procedures which it will utilize when deciding whether an individual will be allowed to continue his employment upon reaching retirement age. Having concluded that the Respondent has contractually established control over the retirement decision in Article XI and retained the ability to establish the criteria which will be utilized when making said decision in Article XXVII, the

^{5/} City of Milwaukee, (13495) 4/75; City of Menomonie, (12674-A, B) 10/74; Fennimore Jt. School Dist., (11865-A, B) 7/74; Madison Jt. School Dist., (12610) 4/74; City of Brookfield, (11406-A, B) Aff'd Waukesha County Cir. Ct. 6/74.

Examiner finds that said contractual language constitutes clear and unmistakable evidence that Complainant waived its statutory right to bargain over the promulgation and implementation of the December 17, 1975 retirement policy. Therefore, the Employer did not violate Sections 111.70(3)(a)1 and 4 of MERA when it unilaterally promulgated and subsequently implemented said policy.

Dated at Madison, Wisconsin this 21st day of January, 1977.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By



Peter G. Davis, Examiner