STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

APPLETON PROFESSIONAL POLICEMEN'S ASSOCIATION, Complainant, vs. CITY OF APPLETON, Respondent.	Case LXXVII No. 20446 MP-615 Decision No. 14615-C

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

Examiner Peter G. Davis having, on January 21, 1977, issued his Findings of Fact, Conclusion of Law and Order, with Accompanying Memorandum, in the above-entitled matter, and pursuant to Section 111.07(5), Wisconsin Statutes, the Wisconsin Employment Relations Commission, on February 10, 1977, on its own motion, notified the parties of the Commission's determination to review the entire record in the matter, as well as the decision issued by the examiner; and the Commission being satisfied that the examiner's Findings of Fact should be affirmed, but an additional Finding is necessary and that his Conclusion of Law and Order should be reversed;

NOW, THEREFORE, it is

ORDERED

1. That the Findings of Fact issued by the examiner in the above-entitled matter be, and the same hereby are, affirmed.

2. That in addition to the examiner's findings there shall be added the following:

> 10. That, by the terms of the collective bargaining agreement, Complainant waived its right to bargain over the implementation of reasonable conditions pursuant to which Respondent could exercise its option whether to recertify individual officers for continued employment beyond their normal retirement age, but that Complainant did not thereby waive its right to bargain over the imposition of the cost of said reasonable conditions.

3. That the Conclusion of Law and Order contained in the examiner's decision be reversed and that the following Conclusions of Law and Order be substituted therefor:

CONCLUSIONS OF LAW

> 1. That the Respondent, City of Appleton, by the establishment of a new retirement policy, for police officers who reach the age of 55, requiring an annual demonstration of physical fitness in order to be recertified for continued employment, and by imposing on the officers involved proof of such physical fitness through his or her own physician, subject to an independent review by said Respondent, did not commit a prohibited practice within the meaning of Section 111.70(a)(4) of the Municipal Employment Relations Act.

2. That the Respondent, City of Appleton, by imposing the cost on police officers for proving physical fitness for recertification to active employment, without bargaining with respect to such cost, with the Complainant, Appleton Professional Policemen's Association, has committed a prohibited practice within the meaning of Section 111.70(a)(4) of the Municipal Employment Relations Act.

ORDER

IT IS ORDERED that the Respondent, City of Appleton, its officers and agents immediately:

1. Cease and desist from refusing to bargain with the Complainant, Appleton Professional Policemen's Association, with regard to imposing the cost of physical fitness on any police officer who seeks recertification to active employment after reaching his or her normal retirement age.

2. Take the following affirmative action which the Commission finds will effectuate the policies of the Municipal Employment Relations Act:

(a) Bargain collectively with the Complainant, Appleton Professional Policemen's Association, with respect to imposing the cost of proving physical fitness for recertification to active employment after reaching his or her normal retirement age.

(b) Reimburse any police officer, if any, who has been required to pay his or her own physician for an examination to establish proof of physical fitness for recertification to active employment after reaching his or her normal retirement age.

(c) Notify the Wisconsin Employment Relations Commission, in writing, within twenty (20) days from the date of this Order as to what steps it has taken to comply herewith.

Given under our hands and seal at the City of Madison, Wisconsin, this 3rd day of January, 1978.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Morris Slavney, Chairman

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Herman Torosian, Commissioner

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Charles D. Hoornstra, Commissioner

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

The Commission, on February 10, 1977, on its own motion, noticed this case for review. The examiner, on January 21, 1977, after making Findings of Fact, concluded that the Complainant had waived its right to bargain over certain unilateral changes made by the Respondent, and entered an order dismissing the complaint. Subsequent to the Commission's notice of review, the Complainant indicated its desire to appeal the examiner's decision, and thereafter filed a brief.

The complaint alleged that the Respondent, by issuing its new policy relative to recertification of police officers beyond normal retirement age, violated both the collective bargaining agreement and its duty to bargain before making such unilateral changes without bargaining. Respondent answered on the grounds that its action resulted from a change in the law, that the labor agreement "specifically reserves the right to adopt a retirement policy as a right of management", that the Complainant entered said agreement with full knowledge of the adopting of the new policy, and that Respondent did discuss the new policy during negotiations for the new agreement.

The examiner concluded, and we affirm, that inasmuch as retirement policy has a substantial effect upon wages, hours and conditions of employment of bargaining unit employes, both the content of such a policy and its impact are mandatory subjects of bargaining. The examiner in considering the parties' bargaining history, found that the union, on December 15, timely demanded to bargain over the retirement policy by indicating to the City that they should not unilaterally adopt their proposed retirement policy without first bargaining over the matter. Respondent's Director of Personnel responded to this bargaining request by indicating Respondent's belief that the grievance procedure was the appropriate area for any challenge to the impending action. Two days later Respondent adopted the new retirement policy and in April 1976, said policy was implemented.

The examiner concluded that the City had refused to bargain but that such refusal did not violate the statutory duty to bargain, concluding that the Union had contractually waived the City's duty in that regard. In reaching such conclusion, the examiner relied on provisions of the collective bargaining agreement pertaining to leaves (Article XI, A, 7) and the Functions of Management (Article XXVIII). In the opinion of the examiner, Article XI grants the City the option of permitting employes to work beyond their normal retirement age and thus continued employment is not a matter of right. The examiner further concluded that in the Functions of Management provision, which sets forth that "the employer shall be responsible for fulfilling all normal managerial obligations, such as . . . establish necessary policies . . ." the City retained the ability to establish and/or alter the criteria and procedures which it would utilize in deciding whether an individual would be retained in active employment beyond his normal retirement age.

We agree with the examiner's conclusion that the City refused to bargain with the Union with respect to its retirement policy. We also agree with the examiner that in order to determine whether the City has violated its statutory duty to bargain over the subject of criteria and standards, a determination is necessary as to whether the Union has contractually waived its right to bargain over same. Normally, the Commission will not assert its jurisdiction where an alleged prohibited practice also involves an interpretation of the parties' collective bargaining agreement where such agreement provides for final and binding arbitration of disputes arising thereunder. Here, however, both parties have submitted the contractual question to the Commission, not only in their pleadings, but also in their opening statements. At no time did either party take the position that the Commission should refuse to assert jurisdiction and defer the contractual issue to arbitration.

Given the above, the Commission concludes that it should assert jurisdiction to determine whether a prohibited practice has been committed by the City even though such determination is dependent on contractual provisions of the collective bargaining agreement. Under the circumstances, in the opinion of the Commission, deferral would not best serve the purposes of MERA.

As to the issue of contractual waiver, the Commission has held in numerous cases that a waiver of the right to bargain on mandatory subjects of bargaining must be clear and unmistakable, and that a finding of such waiver must be based on specific language in the agreement or the history of bargaining. 1/

Here the relevant contractual provision states:

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

This provision on its face is susceptible to differing interpretations as to its meaning: (1) that the words "may have," together with other surrounding evidence, such as past practice, entitles a police officer to annual recertification as a matter of right; (2) that the word "may" grants to the employer the absolute discretion whether to recertify and to establish standards governing the exercise of that discretion; or (3) that the word "may," under all the facts and circumstances, grants the employer only a reasonable but limited amount of discretion under reasonable standards.

Since the agreement is susceptible to competing constructions, it is appropriate to refer to the parties' past practice and understanding of the agreement as a guide in its interpretation. The record clearly establishes that under the relevant contractual provision employes could work beyond their normal retirement age and receive recertification without meeting any specific criteria or standards. David F. Bill, City Personnel Director, specifically testified that there were no previous criteria or standards similar to the one adopted in December 1975. In that regard, Complainant's counsel asked Bill the following question: "[B]efore a guy could work until age 65 by staying on the job, right?" Bill responded, "Right." Bill further testified that the criteria and standards unilaterally adopted by the City changed the past policy, and that such policy was changed due to the statutory reduction of the retirement age from 60 to 55. The policy change, therefore, was brought about by a statutory change not anticipated by either party at the time the contract language was negotiated. Moreover, it is noteworthy that subsequent to June 30, 1974, and prior to December 17, 1975, three bargaining unit members reached or passed the new normal retirement age of 55 and were allowed to continue working pending the development and adoption of the City's new retirement age policy.

Thus, the key facts of past practice and previous understanding are that a police officer could expect recertification past the normal retirement age as at least semi-automatic, the previous city policy contained no standards or criteria, and the catalyst for a new and different policy was an unanticipated event.

With this understanding of past practice and previous understanding, we then turn to the alternative interpretations of the agreement. The first, that the officer had an automatic right to annual recertification,

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1/ City of Brookfield, (11406-B) 7/73.

is unreasonable. Although officers in fact were believed to be able simply to keep on working, construing the provision as giving the officers an absolute right would mean that however disabled they might become, the City could not decline recertification.

The second interpretation, that the City has absolute power to recertify, also is unacceptable. The fact that the provision was included in the agreement indicates the officers were to have some rights, however qualified or conditional. For in the absence of such a provision, the management rights clause, together with the relevant statutory powers, would give the City the power to retire employes at their normal retirement age. The management rights clause provides that "Except as herein otherwise provided," the City enjoys certain managerial prerogatives, including the right to "hire, promote, demote, layoff, suspend without pay, discharge for proper cause" and of "fulfilling all normal managerial obligations." Further, sec. 41.11(1), Wis. Stats., provides that an employe "shall be retired" at the normal retirement date "unless . . . his employment is continued by his employer or his appointing authority."

Consequently, inclusion of the language itself as well as the past practice and previous understanding of the parties militates against an absolutist construction in favor of the City. In short, recertification, although not an absolute right in favor of the employe, was the norm to be expected in ordinary circumstances, except that the City could exercise discretion on reasonable grounds to decline to recertify. Consequently, we believe the third construction, that the City's discretion was limited, but could be exercised on reasonable grounds, is the more reasonable construction of the contractual provision involved.

We now consider whether the authority in the agreement fairly contemplated the establishment of the new criteria imposed in December 1975. The new policy essentially does three things: (1) it conditions recertification on an annual demonstration of physical fitness; (2) it imposes on the employe the proof of fitness through his/her own physician, subject to an independent city review; and (3) it imposes on the employe the annual cost of proving fitness.

Unquestionably the first feature of the policy fairly falls within the City's authority to establish reasonable grounds with respect to recertification. We also conclude that imposing the burden on the employe through his physician to produce the evidence of physical fitness likewise is reasonable. However, the imposition on the employe of the financial cost of the examination does not relate to the reasonable grounds which the employer may establish, and the Union did not, by the contractual language, clearly and unmistakably agree that the employer could impose such costs without bargaining.

Dated at Madison, Wisconsin this 31st day of January, 1978.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Morris Slavney, Chairman

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Herman Torosian, Commissioner

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Charles D. Hoornstra, Commissioner