

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MILWAUKEE POLICE ASSOCIATION,

Complainant,

vs.

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

Respondents.

Case CLXXX
No. 23469 MP-889
Decision No 16549-A

Appearances:

Murray & Moake, Attorneys at Law, by Kenneth J. Murray, appearing
on behalf of the Complainant.

Mr. John F. Kitzke, Assistant City Attorney for the City of
Milwaukee, Appearing on behalf of the Respondents.

FINDINGS OF FACT, CONCLUSION
OF LAW AND ORDER

Milwaukee Police Association having filed a complaint on September 1, 1978, with the Wisconsin Employment Relations Commission, alleging that the City of Milwaukee and Harold A. Breier had committed certain prohibited practices within the meaning of Sections 111.07(3)(a)1 and 4 of the Municipal Employment Relations Act; and the Commission having appointed Stephen Schoenfeld, a member of its staff, to act as Examiner, and to make and issue Findings of Fact, Conclusions of Law and Order as provided in Section 111.07(5), Wis. Stats; and hearing on said complaint having been held in Milwaukee, Wisconsin, on October 30, 1978, before the Examiner, and briefs having been filed by both parties with the Examiner; and the Examiner having considered the arguments, evidence and briefs and being fully advised in the premises, makes and files the following Findings of Fact, Conclusion of Law and Order.

FINDINGS OF FACT

1. That the Milwaukee Police Association, hereinafter referred to as Complainant, is a labor organization; that Complainant is the exclusive bargaining representative of certain non-supervisory law enforcement employees of the Milwaukee Police Department.
2. That the City of Milwaukee, hereinafter referred to as Respondent, is a Municipal Employer; that Harold A. Breier is employed by Respondent as its Chief of Police and functions as its agent.
3. That at all times material herein, Complainant and Respondent were signators to a collective bargaining agreement covering wages, hours and other conditions of employment of certain law enforcement personnel in the employ of Respondent; that said collective bargaining agreement contained the following provisions relative hereto:

PREAMBLE

PART II

C. MANAGEMENT RIGHTS

1. The Association recognizes the right of the City and the Chief of Police to operate and manage their 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 and maintain departmental rules and procedures for the administration of Police Department during the term of this Agreement provided that such rules and procedures do not violate any of the provisions of this Agreement.
2. The City and the Chief of Police have the exclusive right and authority to schedule overtime work as required in the manner most advantageous to the City. The City and the Chief of Police shall have the sole right to authorize trade-offs of work assignments.
3. It is understood by the parties that every incidental duty connected with operations enumerated in job descriptions is not always specifically described; nevertheless, it is intended that all such duties shall be performed by the employee.
4. The Chief of Police and the Fire and Police Commission reserve the right to discipline or discharge for cause. The City reserves the right to lay off personnel of the department.
5. The City and the Chief of Police shall determine work schedules and establish methods and processes by which such work is performed.
6. The City and Chief of Police shall have the right to transfer employees within the Police Department in a manner most advantageous to the City.
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.
8. The City shall have exclusive authority to transfer any or all of the operations of the Milwaukee Police Department now conducted by it to another unit of government and such transfer shall not require any prior negotiations or the consent of any group, organization, union or labor organization whatsoever.
9. The City shall have the authority without prior negotiations to consolidate the operations of two or more departments, or the operations within a department, or to reorganize within departments.

10. The Association recognizes that the City has statutory and charter rights and obligations in contracting for matters relating to municipal operations. The right of contracting or subcontracting is vested in the City.
11. The Association pledges cooperation to the increasing of departmental efficiency and effectiveness. Any and all rights concerning the management and direction of the Police Department and the police force shall be exclusively the right of the City and the Chief of Police unless otherwise provided by the terms of this Agreement as permitted by law.

PART V

- A. AID TO CONSTRUCTION OF PROVISIONS OF AGREEMENT
 1. It is intended by the parties hereto that the provisions of this Agreement shall be in harmony with the duties, obligations and responsibilities which by law devolve upon the the Common Council, the Chief of Police and the Fire and Police Commission and these provisions shall be interpreted and applied in such manner as to preclude a construction thereof which will result in an unlawful delegation of powers unilaterally devolving upon them.
 2. The Association recognizes the powers, duties and responsibilities of the Chief of Police as set forth in Chapter 586, Session Laws of 1911 and that pursuant thereto the Chief of Police and not the Common Council of the City of Milwaukee has the authority to establish rules and regulations applicable to the operation of the Police Department and to the conduct of the police officers employed therein.
 3. The Common Council of the City of Milwaukee as well as the Chief of Police recognizes that those rules and regulations established and enforced by the Chief of Police, which affect the wages, hours, and working conditions of the police officers included in the collective bargaining unit covered by this Agreement are subject to the collective bargaining process pursuant to Section 111.70, Wisconsin Statutes.
 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. Effective from and after January 1, 1977 the Professional Policemen's Protective Association shall be known as the Milwaukee Police Association.

PART V

D. ENTIRE AGREEMENT

The foregoing constitutes an entire Agreement and no verbal statement shall supersede any of its provisions.

SCHEDULE A

HOURS OF WORK

1. The normal hours of work for employees covered by this Agreement shall consist of work shifts of eight (8) consecutive hours which in the aggregate results in an average work week of forty (40) hours.
2. The regularly scheduled 8-hour shift shall be established by the Chief of Police of accordance with the requirements set forth above.
3. Administration and control of the provisions of this paragraph shall be under the control of the Chief of Police and in accordance with Section 2-121 of the Milwaukee Code.

that said labor agreement also contains a grievance procedure culminating with final and binding arbitration.

4. That on or about June 1, 1978, Chief Breier changed the work schedules of certain bargaining unit employees that said changes resulted in a diminution of the number of days of rest in a work week and two work week period received by certain bargaining unit employees; that prior to said change, bargaining unit employees had received 116 days off during a calendar year and that as a result of Chief Breier's action, said employees could receive less than 116 days off during a calendar year; that the aforesaid change of work schedules was effectuated without affording Complainant the opportunity to bargain collectively over same.

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

CONCLUSION OF LAW

1. That there was a labor agreement in full force and effect between Complainant and Respondent during the period of November 1, 1976 and December 31, 1978, which contained under the management rights clause provisions governing the "scheduling of overtime and the trade-offs of work assignments" (Part II C.2) and "work schedules" (Part II C.5), and that said contractual provisions together with the contractual provisions found at Part V, A. 4. and 5., and at Schedule A, "Hours of Work" operated as a waiver, at least for the above mentioned period of time, of Complainant's right to insist upon bargaining over Chief Breier's July 1, 1978 decision which changed the work schedules of certain bargaining unit employees; that Respondent, by unilaterally changing the work schedules of certain bargaining unit employees, has not committed a prohibited practice within the meaning of Sections 111.70 (3)(a)1 and 4 of the Municipal Employment Relations Act.

Upon the basis of the foregoing Findings of Fact and Conclusion of Law the Examiner makes the following

ORDER

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

Dated at Madison, Wisconsin, this 20th day of December, 1979.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Stephen Schoenfeld
Stephen Schoenfeld, Examiner

MEMORANDUM ACCOMPANYING FINDINGS OF FACT,
CONCLUSION OF LAW AND ORDER

JURISDICTION

Complainant charges Respondent with violating Section 111.70(3)(a) 1 and 4 of the Municipal Employment Relations Act (MERA). The gravamen of Complainant's refusal to bargain allegation arises from Chief Breier's alteration of certain bargaining unit employees work schedules which impacted upon the number of days rest accorded said employees and the amount of overtime received by the employees in question. Respondent failed to submit an answer but did file a motion to dismiss on the grounds that Complainant "failed to exercise administrative remedies provided for in the arbitration agreement in the contract." After the Examiner denied said motion, Respondent was given an opportunity to tender an answer and participate in these proceedings, but Respondent's Council refused to do so.

Complainant's charge is based upon Respondent's refusal to bargain and the derivative charge alleges that said conduct also interferes with and restrains the exercise of bargaining unit members' rights guaranteed by Section 111.70(2) of the MERA. The complaint alleges a statutory rather than a contractual violation. Although the Commission will usually require that available contractual remedies be exhausted before asserting its jurisdiction to enforce collective bargaining agreements under Section 111.70(3)(a)5 of the MERA 1/ the instant matter is not one of contract enforcement and therefore the exhaustion of remedies doctrine is inapposite and Respondent's motion was denied. The Commission has jurisdiction to adjudicate the instant complaint which alleges prohibited practice violations other than a breach of contract, although said facts might also support a breach of contract claim which is resolvable only through arbitration. 2/

DEFERRAL

An ancillary issue raised by Respondent's motion is whether the Commission should assert jurisdiction over a dispute which possibly could have been resolved in the grievance-arbitration process or whether the Commission should defer to the arbitral process. The Commission in State of Wisconsin, cited at footnote No. 2, indicated:

Deferral of alleged statutory violations to arbitration is a discretionary act in which the commission abstains from adjudicating the statutory question. The United States Supreme Court has approved deferral on the ground that it harmonizes the objectives of administrative determinations of unfair labor practices with the equally important legislative objective to encourage parties to utilize their mutually agreed upon forum for the resolution of contractual questions. The decision to abstain from discharging the

1/ See Lake Mills Joint School District No. 1 (11529-A, B) 7/73; Oostburg Joint School District No. 1 (11196-A) 11/72; and Mineral Point Unified School District (14970-A, B) 3/78.

2/ See State of Wisconsin, Department of Administration (15261) 1/78.

commission's statutory responsibility to adjudicate complaints in favor of the arbitral process will not be made lightly. The commission will abstain and defer only after it is satisfied that the legislature's goal to encourage the resolution of disputes through the method agreed to by the parties will be realized and that there are no superseding considerations in a particular case. Among the guiding criteria for deferral are these: First, the parties must be willing to arbitrate and renounce technical objections, such as timeliness under the contract and arbitrability, which would prevent a decision on the merits by the arbitrator. Otherwise, the commission would defer only to have the dispute go unresolved. Second, the collective bargaining agreement must clearly address itself to the dispute. The Legislative objective to encourage the resolution of disputes through arbitration would not be realized where the parties have not bargained over the matter in dispute. Third, the dispute must not involve important issues of law. An arbitrator's award is final and ordinarily not subject to judicial review on questions of law. Further, questions of legislative policy and law are neither within the province nor the expertise of arbitrators. On the other hand, the legislature has entrusted to the commission in the first instance the responsibility to resolve questions of law and legislative policy and has made commission decisions subject to further judicial review.

Applying the aforesaid tests to the case at law, the Examiner concludes that deferral of the issues raised in the complaint would be inappropriate. The Examiner arrives at this conclusion because Respondent's Counsel failed to indicate that Respondent was willing to waive any and all defenses relating to the question of arbitrability of the matter involved herein. 3/ Inasmuch as Respondent hasn't indicated it would be willing to allow an arbitrator to render a decision on the merits in this matter and since the Complainant itself did not file a grievance and believes that the change of policy complained of herein doesn't come within the ambit of the grievance definition as set forth in the labor contract, the Commission has no assurance that if this matter were deferred, the statutory violation alleged herein would be resolved. Consequently, the Examiner believes that deferral would not be proper.

POSTPONEMENT

On September 11, 1978, Respondent was served with the Notice of Hearing on complaint. Said Notice indicated that the hearing was scheduled for October 10, 1978, and that Respondent could file its answer by October 2, 1978. Pursuant to a request from Complainant, the hearing was re-scheduled for October 30, 1978, and Respondent, on September 15, 1978, was served with a Notice indicating same. On October 19, 1978, Respondent filed a Motion to Dismiss in the Commission's Milwaukee Office, however, the Examiner did not become aware of or receive same until he arrived at the hearing at which time the undersigned entertained and denied Respondent's motion. The written motion did not contain a request that the hearing be postponed or that the time for filing an answer be extended and, therefore, even if the Examiner had received same prior to arriving at the hearing, the decision to go forward would have not been altered. The position taken

3/ Respondent contended that it was beyond the scope of the Arbitrator under the contract to entertain a dispute involving a change of policy and that Complainant is prohibited by the terms of the contract from challenging the policy implemented by the Chief.

by Counsel for Respondent, that by virtue of filing said motion the hearing relating to the merits of the complaint should have been automatically postponed and that the time for submitting an answer should have been automatically extended, is unfounded. 4/ Under the circumstances involved herein, where Respondent gave no advance notice of its desire to bifurcate the issues relating to the motion from the issues relating to the complaint itself, it would be an inefficient and costly utilization of the Commission's resources if a hearing were conducted relating to the motion, and then, if the motion is denied, to reconvene on another date and conduct a separate hearing relating to the complaint. If Respondent's Counsel had requested a postponement for a justifiable reason prior to the hearing, the Examiner would have granted same. Because the Examiner made no representation to anyone that the hearing on the complaint would be postponed from the October 30th date or that the time for submitting an answer would be extended after said date, and inasmuch as Respondent did not proffer a good cause explanation for waiting until the day of the hearing to request a postponement and extension of time for filing an answer, and since ERB 10.12 provides in part that "except for good cause shown any motion for re-scheduling must be received at least 2 days before the date set for hearing", the Respondent's request for a postponement was denied.

REFUSAL TO BARGAIN

Section 111.70(1)(d) of the MERA provides, in part, that:

'Collective bargaining means the performance of the mutual obligation of a municipal employer, through its officers and agents and the representatives of its employees, to meet and confer at reasonable time, in good faith, with respect to wages, hours and conditions of employment....'

The above statutory provision imposes an obligation on municipal employers to bargain in good faith with the collective bargaining representative of its employees with respect to mandatory subjects of bargaining. The Commission has held that a municipal employer must bargain over mandatory subjects of bargaining prior to implementing any change on said subjects or be found to have refused to bargain in good faith. 5/ A unilateral change in a mandatory subject of bargaining without first bargaining said change to impasse is a per se refusal to

4/ Respondent argues that the Commission is bound by the Wisconsin Rules of Civil Procedure and that under said rules, the time for filing an answer is extended for ten days after the Commission tenders notice of its decision denying Respondent's motion or refusing to rule thereon. Respondent's reliance on the Wisconsin Rules of Civil Procedure is misplaced. Section 801.01, Stats. governs procedure and practice in the courts of the State. The Commission, as an administrative agency, is not a court of record and isn't bound by said statute. Procedural matters controlling the conduct of hearings before the Commission are governed by the provision of Section 227, Stats. and Commission rules adopted pursuant thereto. Also see State ex rel Thompson V. Nash, 27 Wis. 2d 183, 133 N.W. 2d 769 (1965).

5/ See, Madison Joint School District, (12610) 4/74; City of Oak Creek, (12105 - A, B) 7/74; City of Madison (15095) 12/76.

bargain in good faith. 6/ It has been held by the Commission that the aforesaid statute obligates a municipal employer to bargain during the term of a collective bargaining agreement and precludes the municipal employer from engaging in a unilateral action without bargaining over subjects which were neither discussed or embodied in any of the terms or conditions of the labor contract. 7/ However, the Commission has also found that the right of the employee's collective bargaining representative to bargain over mandatory subjects of bargaining can be waived, but in order to so find, said waiver must be "clear and unmistakable." 8/

The scheduling of work is a mandatory subject of bargaining 9/ and the issue before the Examiner is whether the parties have dealt with said subject clearly enough and in specific detail in their collective bargaining agreement for same to constitute a waiver of Complainant's right to insist upon bargaining during the term of the contract over Respondent's changes of same.

Contrary to the position taken by Complainant, that the contract does not authorize the Chief to make the unilateral change in question and that said contract contains no waiver on the part of the Complainant to bargain over same, it is the Examiner's judgment that the labor agreement in question, in Part II C. 2. and 5., explicitly authorizes the Respondents to schedule overtime work, authorize trade offs of work assignments, determine work schedules and establish the methods and processes by which the work is performed. Furthermore, Schedule A - Hours of work - expressly provides that administration and control of the provisions governing hours of work are under the administration and control of the Chief of Police. 10/ Additionally, the Preamble indicates that the

6/ Fennimore Joint School District (11865-A), 6/74, aff'd Commission (11865-B) 7/74; Winter Joint School District No. 1, (14482-B) 3/77.

7/ City of Brookfield, 11406-A, aff'd Commission, aff'd Waukesha County Circuit Court (6/74).

8/ City of Brookfield, supra, City of Green Bay, (12411-A, B) 4/76; Milwaukee County, (12739-A, B) 2/75.

9/ City of Merrill, (15431) 4/77.

10/ Said provision also provides that the administration and control of the hours of work shall be in accordance with Section 2 - 121 of the Milwaukee code. The Examiner has taken administrative notice of Section 2 - 121, Milwaukee code and said section provides in material part as follows:

2 - 121. Duties of Chief of Police

". . . Effective October 5, 1973, he shall assign to each policeman in the service of said city work shifts of eight (8) consecutive hours which in the aggregate result in an average work week of forty (40) hours. Effective January 1, 1974, he shall assign every police officer twelve (12) work days off per annum in lieu of holidays.

Such work days off in lieu of holidays shall be included in computing the aforesaid average work week of 40 hours.

The scheduling of work shift assignments and work days off in lieu of holidays shall be controlled by the Chief of Police."

It is the Examiner's judgment that there is nothing in Section 2 - 121 which obviates the finding that Complainant, under the terms of the contract, waived its right to bargain over the scheduling of work. Although Complainant relies on the Chief's alteration of his prior interpretation and implementation of Section 2-121 as the basis of its prohibited practice complaint, the Complainant's reliance on same is misplaced. By entering into the collective bargaining agreement in question, Complainant specifically gave the Chief the right to establish and re-establish work schedules and thereby waived, for the duration of the contract in question, its right to bargain over same.

agreement is the result of the unlimited right and opportunity afforded each party to make any and all demands and proposals with respect to the subjects of hours of work and conditions of employment and Part V - D. provides that the labor contract constitutes the entire agreement between the parties and no verbal statement shall supersede any of its provisions. Finally, Part V - A. 4. provides, in part, that Complainant had an opportunity to raise all matters in connection with the negotiations resulting in the contract and is precluded from initiating any further negotiations for the term of said contract concerning matters under the control of the Chief of Police, and under Part V - A. 5., Complainant only has a right to negotiate with the Chief of Police concerning the establishment of new rules or regulations or changes in existing rules or regulations provided such new rules or regulations or changes in existing rules or regulations do not fall within the Chief's unfettered management functions. Inasmuch as the Chief has the express right to (1) determine work schedules, (2) to establish methods and processes by which such work is performed, (3) to schedule overtime and (4) to authorize trade-offs of work assignments, (Complainant's Counsel, in his brief, recognizes their authority), it is the undersigned's judgment that the contractual language constitutes a clear and unmistakable waiver on the part of Complainant to bargain over the unilateral change of employee's work schedules. Consequently, Respondent's conduct in this regard doesn't constitute a prohibited practice within the meaning of the MERA. 11/

Based on the aforesaid, the Examiner has dismissed the complaint.

Dated at Madison, Wisconsin this 20th day of December, 1979.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Stephen Schoenfeld
Stephen Schoenfeld, Examiner

11/ Since Complainant's charge is based upon a statutory rather than a contractual violation, the Examiner's interpretation of the labor agreement is limited to a determination concerning whether Complainant waived its statutory right to bargain. If Complainant believes that Chief Breier's conduct violated a provision(s) of the collective bargaining agreement, it could have filed a grievance over same. The Examiner wants to make it clear that he has made no findings concerning any potential contractual violation which may have arisen by virtue of the Chief's actions. Furthermore, since the Examiner has found that Complainant's waived its right to bargain over the Chief's decision to re-schedule work, the Examiner need not address Respondent's contention that Section 62.50 Stats. controls this matter.