

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MILWAUKEE POLICE ASSOCIATION,

Complainant,

vs.

HAROLD A. BREIER, Chief of Police,
and CITY OF MILWAUKEE,

Respondents.

Case CLXXXI
No. 23597 MP-899
Decision No. 16602-A

Appearances:

Murray & Moake, Attorneys at Law, by Mr. Kenneth J. Murray, Esq.,
appearing on behalf of the Complainant.
Mr. John F. Kitzke, Assistant City Attorney, appearing on behalf
of the Respondents.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Amedeo Greco, Hearing Examiner: Milwaukee Police Association, herein the Association, filed the instant complaint and amended complaint with the Wisconsin Employment Relations Commission, herein Commission, wherein it alleged that Harold Breier and the City of Milwaukee, herein the Municipal Employer, has committed certain prohibited practices. The Commission on October 9, 1978 thereafter appointed the undersigned to make and issue Findings of Fact, Conclusions of Law and Order, as provided for in Section 111.07(5) of the Wisconsin Statutes. Hearing on said matter was held in Milwaukee, Wisconsin on February 15, 1979.

At the conclusion of the hearing, the Examiner established a briefing schedule under which briefs by both parties would be due within three weeks after the parties received copies of the transcript. The parties were subsequently sent copies of the transcript on or about February 15, 1979. On March 2, 1979 the Examiner advised the parties that briefs would be due within three weeks. Mr Murray filed a brief on March 23, 1979. At about the same time, Mr. Kitzke requested, and was granted, a two week extension of time to file a brief. Having not heard anything further, the Examiner, by letter dated April 10, 1979, advised Mr. Kitzke that his brief was late and that he would decide the issues herein without benefit of his brief unless it was received by April 16, 1979. Having heard nothing further, the Examiner by letter dated April 20, 1979 advised Mr. Kitzke that he had not received his brief and that he would decide the case without it. Enclosed in said letter was a copy of Mr. Murray's brief. Thereafter, on April 23, 1979, the Examiner received Mr. Kitzke's brief. Since it was filed late, the Examiner on the same date returned the brief to Mr. Kitzke, unread.

Having considered the arguments and the evidence, the Examiner makes and files the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. The Association is a labor organization which represents certain police personnel, including matrons, employed by the Municipal Employer.

No. 16602-A

2. The Municipal Employer operates a police department in Milwaukee; Wisconsin. Its Chief of Police is Harold A. Breier, who, at all times material herein, has acted on its behalf.

3. The parties are privy to a collective bargaining agreement which ran from November 1, 1976 to December 31, 1978. Said Agreement provides for a grievance-arbitration procedure which culminated in final and binding arbitration.

4. Part II, Section C(3), of said contract provided:

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.

5. One of the positions covered under the collective bargaining agreement is the position of police matron. The June 11, 1975 job description for police matron provided in part:

Matrons escort and guard female prisoners to and from the various bureaus at Police Headquarters for processing as well as escorting and guard prisoners to and from the various courts for prosecution. Matrons are responsible for booking and thoroughly (sic) searching all female prisoners. Dangerous weapons and articles must be taken away; money and other valuable property inventoried and held for safekeeping. They must assist policewomen and members of the Vice Squad in detecting narcotics and cases involving prostitution, fortune-telling and other violations of the law. In many cases of suspected concealment of narcotics and other evidence that may be hidden on the body, matrons are required to search the body crevices of such female prisoner. They are required to obtain urine specimens from female prisoners when such evidence is necessary. They are called on to testify in court regarding evidence obtained by them. The (sic) assist in the conveyance and guarding of female juveniles to and from the Children's Center, as well as returning prisoners from other cities as the occasions arise. Performs such other duties as may be prescribed.

Matrons assist in the preparation of meals and coffee for all prisoners (male and female). They care for all lost children in custody.

Matrons actually perform guard duty while in charge of female prisoners and they are personally responsible for the needs and safe custody of female prisoners. Matrons are frequently required to engage in physically restraining or subduing of unruly female prisoners or those under the influence of drugs and many of these situations are of a rather violent nature.

Matrons have care and custody of all bedding for female prisoners. They are required to keep a written record of their activities.

All in all, the duties of a Police Matron are rather difficult and unpleasant because (sic) most of the time they come in contact with and have custody of the lowest type of human female and they are frequently subjected to vicious verbal ridicule, profanity and are generally abused by such female prisoners.

6. In addition to the above enumerated duties, the approximately nine Police matrons herein for the last eight years or so have also been

assigned to collate police department times cards at bi-weekly intervals. There are approximately 2,480 time cards which must be collated every two weeks. Each employe of the Milwaukee Police Department has a card. The card has a seven digit number in the corner, which is the employes' pension number. It is the duty of the matrons to put the cards in correct numerical order. In performing said duties, all of the matrons, save one, work together in their spare time in arranging the cards. Thus, although each matron is assigned to collate the cards for a given period, almost all of the matrons in fact help that person sort out the cards. The actual collating takes two or three hours a night for several days, with almost all of the matrons working together. Although it is somewhat difficult to pinpoint the exact number of hours that matrons spend on collating the cards, it appears that each matron spends a maximum of 150 hours per year on said duty. After they are collated, the cards then go to the Administration Bureau.

7. On or about August 31, 1976, the Employer posted a notice which in part provided:

August 31, 1976

In the matter of Sorting of Bi-Weekly Time Cards by Matrons:

To Van E. Vergetis Captain of Police

Sir:

On Tuesday, August 31, 1976 at 10:35 AM Dep. Insp. Police Parnau called and complained that the time cards have not been sorted correctly, in that many mistakes are being found in their not being in strict Payroll Number order.

I advised him that the Matrons would be instructed of the importance of strict Payroll Number order and informed that these cards are the only official Department record of working days, etc, of personnel, much referred to, and that when they are out of order it causes extra work and delays in computing Department business.

. . .

So that responsibility for error in any pay period of 1975 and 1976 can be placed a copy of reports dated Dec 9, 1975 (for the PP in 76) and Jan 24, 1975 (for PP in 75) are attached; copy of all reports sent to Dep Insp Parnau.

The Inspector was advised to return to your office any batch found in error.

Thereafter, a grievance was filed regarding which alleged that police matrons were not required to collate time cards. The matter was brought to final and binding arbitration before Arbitrator James Stern who, on August 4, 1977, found that the Municipal Employer's assignment of said duties was violative of the contract. As a result, the Arbitrator there stated in part:

With due consideration of the testimony, exhibits and arguments of the Employer and the Association the arbitrator hereby finds that the grievance is arbitrable and that the Employer did violate the Agreement.

The arbitrator therefore orders that the Employer either amend the Police Matron job description to include the task of collating time cards or desist from ordering the Police Matrons to perform

this task and further orders that any fixing of responsibility for errors made in 1975 and 1976 as called for by the August 31, 1976, letter of the Employer be revoked.

8. The Municipal Employer thereafter brought an action to vacate said award pursuant to Section 298.10, Wisconsin Statutes. Said matter was heard by Judge Leander J. Foley, Jr., Circuit Court of Milwaukee County. On January 30, 1978 Judge Foley issued a Memorandum Decision wherein he found that: (1) the grievance was arbitrable; (2) the Arbitrator did not exceed his authority when he found that the Municipal Employer had violated the contract; and (3) the arbitrator exceeded his authority in ordering "any fixing of responsibility for errors made in 1975 and 1976 as called for by the August 31, 1976 letter of the Employer be revoked". On April 11, 1978, the Court entered a judgment to that effect.

9. Following issuance of Judge Foley's Order, the Employer relieved the matrons of the collating assignment. Thereafter, the Municipal Employer on or about August 23, 1978 formally altered the police matron's job description to expressly provide for the collating of time cards. As a result, the matrons resumed collating the time cards. The Association by letter dated October 30, 1978 advised James Mortier, the Municipal Employer's Labor Negotiator, that:

We were recently informed by the City Attorney's Office that the job description for Police Matron has been unilaterally revised so as to require that Police Matrons collate the Department's time cards in addition to their other duties.

As this represents a material change in job content and thus, conditions of employment, we hereby demand that the change be bargained with the Milwaukee Police Association pursuant to the provisions of the Agreement between the Association and the City.

We would appreciate your prompt response as the matter is currently before the Wisconsin Employment Relations Commission and the Circuit Court.

If we do not hear from you within 10 days of the date of this letter, we will assume the request to bargain has been rejected.

The Municipal Employer failed to respond to said bargaining demand. At the hearing, the Municipal Employer stipulated that it had refused to bargain with the Association over the modification of the police matron's job description to include the collating of time cards.

10. The collation of time cards by the police matrons does not fairly fall into the usual scope of their duties.

Upon the basis of the above Findings of Fact, the Examiner makes the following

CONCLUSIONS OF LAW

1. The Employer has not violated Section 111.70(3)(a)5 of the Municipal Employment Relations Act, herein MERA, by failing to adhere to the terms of the Stern Arbitration Award.

2. The Employer has violated Section 111.70(3)(a)4 of MERA by refusing to bargain with the Association over its assignment to the matrons that they collate time cards.

Based upon the above and foregoing Findings of Fact and Conclusions of Law, the Examiner makes and issues the following

ORDER

IT IS ORDERED that that part of the complaint which alleges that the Employer has refused to honor the terms of a valid arbitration award is hereby dismissed.

IT IS FURTHER ORDERED that the Employer, its officers and agents shall immediately

1. Cease and desist from:
 - a. Refusing to bargain with the Association over its assignments to the police matrons that they collate time cards.
2. Take the following affirmative action which the Examiner finds will effectuate the policies of MERA:
 - a. Immediately cease and desist from assigning police matrons to collate time cards until such time as the Employer first bargains with the Association over said assignments.
 - b. Notify all employees by posting in conspicuous places in its offices where employees are employed copies of the notice attached hereto and marked "Appendix A". That notice shall be signed by the Employer and shall be posted immediately upon receipt of a copy of this Order and shall remain posted for thirty (30) days thereafter. Reasonable steps shall be taken by the Employer to insure that said notices are not altered, defaced or covered by other material.
 - c. 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.

Dated at Madison, Wisconsin this 4th day of May, 1979.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By 
Amedeo Greco, Examiner

Appendix A

NOTICE TO ALL EMPLOYEES

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 our employees that:

1. We will discontinue our policy of requiring police matrons to collate time cards and we will not reintroduce said policy until we first bargain over said matter with the Association.
2. We will not require police matrons to collate time cards until such time that we first bargain over said assignment with the Association.

City of Milwaukee
(Police Department)

By _____

MEMORANDUM ACCOMPANYING FINDINGS OF
FACT, CONCLUSIONS OF LAW AND ORDER

Complainant primarily alleges that the Employer unlawfully refused to (1) follow the terms of the Stern Arbitration Award; and (2) refused to bargain with the Association over its assignment to the police matrons that they collate time cards.

As noted above, the Employer did not file a timely brief in this matter. Nonetheless, the Employer did file a motion to dismiss which it fully argued at the hearing. Thus, the Employer alleged that: (1) the Complainant failed to state a cause of action; (2) the Employer has complied with the terms of the arbitration award; and (3) Chapter 586 of the Laws of 1911, now incorporated as Section 62.50 of the Wisconsin Statutes, enables the Chief of Police to make the assignments herein.

As to the Employer's first contention, the record shows that the Association's complaint and amended complaint alleged violations of Section 111.70(3)(a)1, 2, 4 and 5 of MERA. Since the gravamen of the complaint alleges a refusal to follow an arbitration award and a refusal to bargain, and inasmuch as the complaint refers to those statutory provisions, it must be concluded that the complaint does allege a cause of action. 1/

Turning to the Employer's alleged refusal to follow the terms of the Stern Arbitration award, that award in part provided that:

The Arbitrator therefore orders that the Employer either amend the Police Matron job description to include the task of collating time cards or desist from ordering the Police Matrons to perform this task and further orders that any fixing of responsibility for errors made in 1975 and 1976 as called for by the August 31, 1976, letter of the Employer be revoked.

Commenting on said award, Mr. Murray, on behalf of the Association, asserted at the hearing that the award was "vague".

The Examiner disagrees. The Award itself clearly specifies that the Employer shall either amend the job description or desist from ordering matrons to collate time cards. Here, the Employer has amended the job description, thereby bringing itself in compliance with the Arbitrator's award. As a result, this complaint allegation is dismissed.

As to the duties themselves, the Commission in City of Wauwatosa 2/ has held:

Accordingly, in determining whether the assignment of a duty is a mandatory or permissive subject of bargaining, the legislative purpose requires the commission to determine whether said duty ordinarily is regarded as fairly within the scope of responsibilities applicable to the kind of work performed by the employees involved. If a particular duty is fairly within that scope, the employer unilaterally may impose such assignment. If the particular duty is not fairly within that scope,

1/ Since Section 111.70(3)(a)2 of MERA is not involved in the present proceeding, that part of the complaint is dismissed.

2/ Decision No. 15917 (11/77).

the decision to assign that duty is a mandatory subject of bargaining.

Applying that test here, it is therefore necessary to determine whether the collating of time cards falls "fairly within the scope of responsibilities applicable" to the other duties performed by the matrons herein.

On this point, the record shows, as reflected in the matron's job description of June 11, 1975, that the primary function of the matrons is to guard and help process female prisoners. In performing said primary duty, there is no evidence that the matrons must spend a substantial portion of their time in performing clerical related duties. Thus, Arbitrator Stern noted in his decision that:

The task of collating time cards is not related to the other duties of the Police Matron. The other duties described in Rule 26 [the matron's job description] relate to the procedures to be followed in dealing with female prisoners. Collating time cards of the more than 2000 members of the Milwaukee Police Department is not even obliquely related to the charging and guarding of female prisoners.

The Examiner agrees that the collating of time cards does not fairly fall "within the scope of responsibilities applicable to" the work performed by the matrons. For, in this connection, the record shows that whereas the matrons primarily guard and help process prisoners, the collating of time cards is purely a clerical function which is not related to said duty. Moreover, since each matron apparently spends approximately 150 hours collating the cards, it cannot be said that such duty is insubstantial. Accordingly, applying the Commission's test in Wauwatosa, supra, it must be concluded that the assignment herein is a mandatory subject of bargaining. Here, the Employer has admittedly refused to bargain over said assignment.

As a result, it is therefore necessary to determine whether the Chief of Police was relieved of his bargaining obligation by virtue of the powers invested in him under Section 62.50, Stats.

With respect to that issue, it is now well recognized that, if at all possible, the provisions of MERA are to be read in harmony with applicable police and fire department statutes. Thus, for example, the Wisconsin Supreme Court has recently held that a contractual seniority provision was not in derogation of a police chief's statutory powers to run the police department. 3/

In the present situation, Section 62.50(23), Stats., provides that "The Chief of each department shall have the power to regulate his or her respective department and shall prescribe rules for the government of its members". The fact that the Chief of Police has such power, however, does not mean that the Chief has unfettered discretion in labor matters. Thus, for example, the parties herein have entered into a comprehensive collective bargaining agreement, one which limits the Chief's powers in certain areas.

As to the dispute herein, it is clear that even under the Commission's holding in Wauwatosa, supra, the Chief need not bargain over job

3/ Glendale Professional Policemen's Association v. Glendale, 83 Wis 2d 90 (1977).

duties if said duties fairly fall within the scope of an employee's duties. Thus, the Chief is totally free to assign such duties without consulting the Association. As a result, the Chief of Police can unilaterally act in assigning those duties which are fairly within the scope of an employee's regular duties.

It is only in the instances when a duty does not fairly fall within the scope of an employee's regular duties that the Chief must bargain said duty with the Association. In fact, this point was noted by Judge Foley when he considered Arbitrator Stern's award. For, Judge Foley there noted:

The changing or assigning of duties within the broad accepted parameters of the job description is then a protected responsibility of the Chief. When the assignment goes beyond those parameters, the employee's protected right under the contract comes into play (an absurd example discussed during oral argument, assigning a patrolman the added duties of making coffee for the office staff).

Going on, Judge Foley added that "The added duty of collating cards is not basic" to the Chief's powers as to warrant vacating Arbitrator Stern's Award.

Accordingly, based upon the Supreme Court's decision in Glendale, supra, along with Judge Foley's earlier decision in the arbitration case, it must be concluded that, pursuant to Wauwatosa, supra, the Employer's refusal to bargain over the time card assignment was violative of Section 111.70(3)(a) and 4 of MERA. 4/

To rectify said violation, the Employer has been ordered to cease such assignment until such time that it first bargains in good faith with the Association. In that way, the status quo ante can be fully restored. 5/

Dated at Madison, Wisconsin this 4th day of May, 1979.

By Amedeo Greco
Amedeo Greco, Examiner

4/ See also Oak Creek-Franklin Jt. City School District No. 1, Decision No. 11827-D, affirmed Circuit Court Dane County (11/75), wherein the Commission held that the performance of clerical duties by teachers constituted a mandatory subject of bargaining.

5/ See, for example, Unified School District No. 1 of Racine County v. WERC, 81 Wis. 2d 89 (1977).