

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MILWAUKEE POLICE ASSOCIATION,

Complainant,

vs.

HAROLD A. BREIER, CHIEF OF POLICE
and the CITY OF MILWAUKEE,

Respondents.

Case CLXXXVI
No. 23969 MP-925
Decision No. 16769-A

Appearances:

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

Mr. John F. Kitzke, Assistant City Attorney, appearing on
behalf of the Respondents.

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

The above-named Complainant having filed a complaint with the Wisconsin Employment Relations Commission on January 4, 1979 alleging that the above-named Respondents had committed certain prohibited practices within the meaning of Sections 111.70(3)(a)1 and 5 and (3)(c) of the Municipal Employment Relations Act (MERA); and the Commission having appointed Peter G. Davis, a member of the staff, to act as Examiner and to make and issue Findings of Fact, Conclusion of Law and Order as provided in Section 111.07(5) of the Wisconsin Statutes; and hearing on said complaint having been held before the Examiner in Milwaukee, Wisconsin on February 13, 1979; and the parties having chosen not to submit briefs; and the Examiner having considered the evidence and arguments of counsel, makes and files the following Findings of Fact, Conclusion of Law and Order.

FINDINGS OF FACT

1. That the Milwaukee Police Association, herein Complainant, is a labor organization which functions as the exclusive collective bargaining representative of certain non-supervisory law enforcement personnel employed by the City of Milwaukee.

2. That City of Milwaukee, herein Respondent City, is a municipal employer and that Harold A. Breier, herein Respondent Breier, is Chief of Police for Respondent City and at all times material herein functioned as its agent.

3. That on October 16, 1978 Complainant and Respondent City were parties to a collective bargaining agreement which provided for final and binding arbitration of unresolved employee grievances before an impartial arbitrator empowered to take sworn testimony from witnesses who were to testify in a truthful manner; that pursuant to said collective bargaining agreement, Complainant and Respondent City nar-

to the order of a superior officer, he had notified Swanigan of the transfer; that Respondent City elicited said testimony as part of its argument that Swanigan's grievance had not been filed in a timely manner; that during said hearing Deputy Inspector Andrew Busalacchi, a supervisory employe assigned to the Personnel Bureau of the Milwaukee Police Department, gave the following sworn testimony:

DIRECT EXAMINATION

BY MR. KITZKE:

Q State you name and spell you last name for the record.

A Andrew Busalacchi, B-U-S-A-L-A-C-C-H-I.

Q And by whom are you employed and in what capacity?

A City of Milwaukee, Milwaukee Police Department, Deputy Inspector of Police.

Q And what particular area of the Police Department are you assigned?

A Assigned to the Personnel Bureau, Milwaukee Police Department.

Q And do you have under your control, delegated by the Chief, the personnel official records of police officers?

A Yes, I do.

MR. KITZKE: Will you mark this?

THE ARBITRATOR: I'm marking this as Exhibit Seven.

(Whereupon a document was marked for identification as City Exhibit Number Seven.).

BY MR. KITZKE:

Q Now, looking at what is marked Exhibit Seven, can you tell us what that is?

A This is the information record kept of each employee of the Milwaukee Police Department, showing their date of appointment and their assignments.

Q Now, referring to that document, for example on 6-1-70 it says Number Seven District, nights; what does that mean?

A It means that Officer Swanigan was assigned following recruit instruction to the Seventh District nights.

Q And where do you get the information to have that put on the personnel record?

A From the Department orders.

Q All right. Now, looking at April 3, 1977, does that indicate what assignment Officer Swanigan had?

A Yes. On April 3, 1977, he was assigned to the Fourth District nights.

- Q Now, where would you get that information?
- A From Department orders.
- Q And would that Department order be the same day that you put it on the form or could it be delayed or what?

MR. MURRAY: Well, let's go, John. Do I have to get into this leading question bit?

THE ARBITRATOR: I'll allow it. Can you answer that question?

- A It's put on the same day the order comes out; my secretary enters that on the information card.

MR. KITZKE: That is all.

THE ARBITRATOR: Any objection to my receiving this?

MR. MURRAY: Yes. No, I don't object. I would like it admitted.

THE ARBITRATOR: It's received.

(Whereupon City Exhibit Number Seven was received into evidence.)

CROSS EXAMINATION

BY MR. MURRAY:

- Q So in fact your department writes the order for the Chief, does it not?
- A That's correct.
- Q Okay. According to this record, this order was written on April 3, 1977?
- A Right.

MR. MURRAY: That is all.

MR. KITZKE: I have one more question now.

REDIRECT EXAMINATION

MR. MURRAY: Stick to the scope of the cross.

THE ARBITRATOR: That is all right. Go ahead, put the question.

BY MR. KITZKE:

- Q Is information ever transmitted to officers prior to the formal order as to where they'll be assigned?
- A No.

MR. MURRAY: No further questions.

THE ARBITRATOR: Are you done?

MR. KITZKE: Yes.;

that before the undersigned Examiner, Busalacchi testified that when affirmatively answering Attorney Murray's question "According to the record, the order was written on April 3, 1977" during the October 16, 1978 arbitration hearing, he had misunderstood the question; that the Information Record from Swanigan's personnel file which is referred to in Murray's question contains an Assignment and Transfers section which indicates "4-3-77 No. 4 District, nights"; that the date reflected by said entry is the effective date of the transfer and not the date on which the document ordering the transfer is issued by Respondent Breier; that ORDER NO. 7402, April 1, 1977 issued by Respondent Breier states "Police Officer Verbie E. Swanigan (35966) Vice Squad, is transferred to No. 4 District nights, effective Sunday, April 3, 1977"; that orders such as the foregoing are typically signed by Respondent Breier and distributed to the various Districts on the date shown on the order itself; and that the information contained in such orders is typically transmitted to the affected employee and entered on the employee's Information Record on the same day as the order is issued by Respondent Breier.

4. That Sergeant Buechner did not testify falsely during the October 16, 1978 arbitration hearing regarding the date on which he notified Swanigan of the transfer.

On the basis of the above and foregoing Findings of Fact, the Examiner makes and issues the following

CONCLUSION OF LAW

That Respondents City of Milwaukee and Harold A. Breier, through the October 16, 1978 testimony of Sergeant Buechner, did not commit prohibited practices within the meaning of Section 111.70(3)(a)1 and 5 or (3)(c) of the Municipal Employment Relations Act.

On the basis of the above and foregoing Findings of Fact and Conclusion of Law, the Examiner makes and issues the following

ORDER

That the instant complaint be, and the same hereby is, dismissed.

Dated at Madison, Wisconsin this 29th day of March, 1979.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By


Peter G. Davis, Examiner

MEMORANDUM ACCOMPANYING FINDINGS OF
FACT, CONCLUSION OF LAW AND ORDER

Complainant has alleged that Sergeant William Buechner, while acting as an agent of Respondents City of Milwaukee and Harold A. Breier, gave false testimony during an October 16, 1978 arbitration hearing and that Respondents thereby committed prohibited practices within the meaning of Section 111.70(3)(a)1 and 5 and (3)(c) of MERA. Complainant's legal theory with respect to the alleged violations of 111.70(3)(a)1 and (3)(c) is based primarily upon Layton School of Art and Design (12231-B) 5/75, affirmed Wis. Sup. Ct., 82 Wis. 2d 324, 2/78, wherein the Commission found that an individual, by knowingly making false material statements while under oath during a discharge arbitration hearing, committed perjury within the meaning of Section 946.31, Wisconsin Statutes and thereby committed an unfair labor practice within the meaning of Section 111.06(1)(1) of the Wisconsin Employment Peace Act which prohibits the commission of "any crime or misdemeanor in connection with any controversy as to employment relations."

Complainant has attempted to establish the falsity of Buechner's testimony by pointing to an apparent conflict between his October 16 testimony and that of Busalacchi's. However, the evidence in the instant record is insufficient to support a finding that Buechner gave false testimony regarding Swanigan's transfer. The combination of Busalacchi's credible testimony regarding the standard procedures of the Police Department Personnel Department and the documentary evidence regarding Swanigan's transfer demonstrate that Buechner's October 16 testimony may well have had a basis in fact. Busalacchi's October 16 testimony, in light of his credible explanation thereof during the instant hearing and the evidence just discussed, is clearly insufficient to meet complainant's burden of proof as to the alleged falsity of Buechner's testimony. Complainant's allegations regarding violations of Section 111.70(3)(a)1 and 3(c) must therefore be dismissed. The undersigned expresses no opinion as to whether Section 111.70(3)(a)1 or (3)(c) would have been violated even if Complainant had established that Buechner's testimony was false.

Complainant's allegation that Buechner's false testimony violated the parties' bargaining agreement has also been dismissed. In cases too numerous to cite, the Commission has consistently held that it will not exercise its jurisdiction under Section 111.70(3)(a)5 of MERA to determine the merits of an alleged violation of contract where, as in the instant case, a final and binding arbitration procedure exists to resolve such questions.

Dated at Madison, Wisconsin this 29th day of March, 1979.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By


Peter G. Davis, Examiner