

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

-----

CUDAHY PROFESSIONAL POLICEMEN'S	:	
(PATROLMEN'S) COLLECTIVE BARGAINING	:	
UNIT,	:	
	:	Case XXIX
Complainant,	:	No. 24850 MP-1002
	:	Decision No. 17139-A
vs.	:	
	:	
CITY OF CUDAHY, WISCONSIN,	:	
	:	
Respondent.	:	
	:	

-----

Appearances:

Mr. John H. Lauerman, Attorney at Law, for the Complainant.  
Mulcahy & Wherry, S.C., Attorneys at Law, by Mr. Mark F. Vetter  
for the Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Complaint of prohibited practices having been filed with the Wisconsin Employment Relations Commission in the above entitled matter; and the Commission having appointed Dennis P. McGilligan, a member of the Commission's 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), Wisconsin Statutes; and hearing having been held at Milwaukee, Wisconsin on September 18, 1979, before the Examiner, and the Examiner having considered the evidence and arguments and being fully advised in the premises makes and files the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. That Cudahy Professional Policemen's (Patrolmen's) Collective Bargaining Unit, hereinafter referred to as the Complainant, is a labor organization having offices at 5050 South Lake Drive, Cudahy, Wisconsin; that Roman Schaefer is an officer of the Complainant and that Jeffrey Lamster is a member of the Complainant.
2. That the City of Cudahy, Wisconsin, hereinafter referred to as the Respondent, is a Municipal Employer having its principal offices at City Hall, 5050 South Lake Drive, Cudahy, Wisconsin; that, among other municipal services, the Respondent maintains and operates a Police Department and that Anthony M. Wise is employed by the Respondent as Chief of Police.
3. That, at all times pertinent hereto, the Respondent has recognized the Complainant as the exclusive collective bargaining representative of all full-time police personnel employed by the Respondent as Patrolmen.
4. That on April 23, 1979, Chief of Police Wise issued a general order prohibiting police officers in the Department from utilizing flashlights with more than two cells in the performance of their duties; that the general order stated as follows:

All officers are ordered to stop the use of the five cell flashlights while on duty. You are ordered to carry no more than a two cell flashlight in the performance of your work. No flashlight is to be used as a baton in the performance of your duty.

Any officer found to be using a baton or flashlight to strike any citizen about the head will be suspended based on the seriousness of the situation.

5. That after the general order was issued, Roman Schaefer, on behalf of the Complainant, contacted both Chief of Police Wise and the Mayor and requested to bargain over the Chief's decision to unilaterally implement the general order; that said representative of the Complainant did not, however, request to bargain with the Mayor or the Chief of Police regarding the impact or the effect that said Order might have had on the working conditions of the aforesaid bargaining unit members; and that at all times material herein, it has been the Complainant's position that it wanted to bargain with respect to the Police Chief's decision.

6. That the Respondent did not discuss with the Complainant at any time or offer to negotiate and did not negotiate on the matter of the aforementioned general order.

7. That during the early part of the month of May, Chief of Police Wise met with the officers in the Department and explained to them the reason for the general order; that subsequent to the issuance of the general order, Chief of Police Wise purchased batons and provided the officers with training in the proper use of the batons as defensive weapons and that the training was conducted by representatives of the Milwaukee County Sheriff's Department.

8. That Chief of Police Wise issued the general order for the following reasons: one; to protect citizens against permanent injury by officers using flashlights as a weapon; two, to protect the City from potential law suits arising from the improper use of flashlights as weapons by officers in the Department and three, to protect the officers in the Department from liability in civil suits alleging that they had improperly used the flashlights as weapons and injured other persons.

9. That the Chief of Police issued the aforementioned general order after he had received complaints regarding the utilization of flashlights by officers in his Department and after several claims and/or suits were filed against the City of Cudahy alleging, in part, that certain officers used their flashlights as weapons to injure the claimants/plaintiffs.

10. That there is no general order, rule or regulation which requires that an officer carry a flashlight as part of his uniform equipment in the City of Cudahy; that, however, officers have purchased and used flashlights in excess of two cells over a period of at least ten years; that adequate protection is provided to an officer who utilizes a two cell flashlight and that it is not necessary to have a higher cell flashlight such as a five cell one in order for an officer to carry out his duties in a safe and efficient manner.

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

#### CONCLUSIONS OF LAW

1. That the City of Cudahy, Wisconsin is a Municipal Employer within the meaning of Section 111.70(1)(a) of the Municipal Employment Relations Act; and at all times material herein, Anthony M. Wise, Chief of Police, was an agent of said Municipal Employer, acting within the scope of his authority.

2. That at all times material herein, Cudahy Professional Policemen's (Patrolmen's) Collective Bargaining Unit, has been, and is the exclusive bargaining representative of a unit of all police personnel employed by the City of Cudahy consisting of all full-time patrolmen for the purposes of collective bargaining within the meaning of Section 111.70(1)(d) and 111.70(4)(d)1 of the Municipal Employment Relations Act.

3. That since the request of Complainant to bargain concerning the Chief's decision to prohibit police officers from using more than a two cell flashlight in the performance of their duties is not a matter which directly and intimately affects the working conditions of the aforementioned police personnel, the City of Cudahy has no duty to bargain the matter of

said decision with Cudahy Professional Policemen's (Patrolmen's) Collective Bargaining Unit, and therefore, in said regard, the City of Cudahy did not commit any prohibited practice within the meaning of Section 111.70(3)(a)1 and 4 of the Municipal Employment Relations Act.

Upon the basis of the above and foregoing Findings of Fact and Conclusions of Law, the Examiner makes the following

ORDER

That the complaint in the above-entitled matter be, and the same hereby is, dismissed.

Dated at Madison, Wisconsin this 29<sup>th</sup> day of January, 1980.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Dennis P. McGiligan  
Dennis P. McGiligan, Examiner

MEMORANDUM ACCOMPANYING  
FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The instant complaint was filed on July 3, 1979 and amended at the hearing without objection by the Respondent. Hearing was held on September 18, 1979 and the transcript thereof issued on September 27, 1979. Complainant filed a brief with the Examiner on October 16, 1979, Respondent filed its brief with the Examiner on October 23, 1979. Complainant filed a reply brief on November 19, 1979 while Respondent filed its reply brief on November 8, 1979.

The Complainant basically maintains that the City of Cudahy unilaterally changed a condition of employment when, on April 23, 1979, Anthony M. Wise, Chief of Police, issued a general order requiring members of Complainant bargaining unit to cease the use and carrying of flashlights containing more than two cells. The Complainant adds that the unilateral promulgation of same without engaging in collective bargaining over said decision constitutes a violation by Respondent, City of Cudahy, of Sections 111.70(3)(a)1 and 4 of the Wisconsin Statutes.

The Respondent, on the other hand, initially argues that a determination of the alleged violation of Section 111.70(3)(a)4 of the Wisconsin Statutes should properly be deferred to the arbitration procedure in the collective bargaining agreement. With respect to the merits of the complaint the Respondent contends that its decision to prohibit the members of the Police Department from using more than two cell flashlights deals with a subject reserved to the management and direction of the City upon which Respondent has no duty to bargain. Finally, the Respondent argues that the provisions in the collective bargaining agreement granted the City the unilateral right to implement the general order without entering into negotiations with the Complainant.

A municipal employer has a duty to bargain in good faith with respect to "wages, hours and conditions of employment." <sup>1/</sup>The Examiner finds that the Police Chief's decision to limit the size of flashlights carried by officers while on duty does not involve a "condition of employment" as alleged by the Complainant. The Examiner concludes, therefore, that the Respondent does not have a duty to bargain over the matter of said decision.

The duty of a municipal employer to bargain with municipal employees is not absolute. It is specifically limited by the following pertinent provisions in Section 111.70(1)(d) of the Wisconsin Statutes:

"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 with the intention of reaching an agreement, or to resolve questions arising under such an agreement. The duty to bargain, however, does not compel either party to agree to a proposal or require the making of a concession. Collective bargaining includes the reduction of any agreement reached to a written and signed document. The employer shall not be required to bargain on subjects reserved to management and direction of the governmental unit except insofar as the manner of exercise of such functions affects the wages, hours and conditions of employment of the employees. In creating this subchapter the legislature recognizes that the public employer

-----  
<sup>1/</sup> See Sections 111.70(1)(d) and (3)(a)5 of the Municipal Employment Relations Act.

must exercise its powers and responsibilities to act for the government and good order of the municipality, its commercial benefit and the health, safety and welfare of the public to assure orderly operations and functions within its jurisdiction, subject to those rights secured to public employes by the constitutions of this state and of the United States and by this subchapter. (Emphasis added)

In the instant case, the Respondent contends that the decision to issue the general order dealing with the type of flashlights to be used by the officers in the Department deals with a subject which is both;

1. Reserved to the management and direction of the government unit and
2. Related to the safety and welfare of the public.

The Examiner agrees.

The applicable standard for determining whether a particular decision is a mandatory subject of collective bargaining or a matter reserved to determination by the governmental unit is the "primary relationship" standard. This standard was established by the courts in the case of Beloit Education Association v. WERC, 73 Wis. 2d 43 (1976) which affirmed the Commission decision City of Beloit (Schools), (11831-C), 9/74. More recently the test was restated in the case of Unified School District No. 1 of Racine County v. WERC, 81 Wis. 2d 89 (1977) at page 102 as follows:

The question is whether a particular decision is primarily related to the wages, hours and conditions of employment of the employees, or whether it is primarily related to the formulation or management of public policy. Where the governmental or policy dimensions of a decision predominate the matter is properly reserved to a decision by the representative of the people.

This test can only be applied on a case-by-case basis, and is not susceptible to broad and sweeping rules that are to apply across the board to all situations. 2/

Applying the above test to the facts in the present dispute the Examiner finds that the public policy implications of the City's decision predominate. The Police Chief testified that he issued the general order because he wanted to: (1) protect citizens against serious injury by officers using flashlights as weapons; (2) protect the City against potential law suits and (3) protect officers in the Department from liability in civil suits. Absent persuasive evidence to the contrary the Examiner concludes that these were legitimate law enforcement and fiscal concerns of the Police Chief and that he acted to provide for the "good order of the municipality" and the "safety and welfare of the public to insure orderly operations and functions within its jurisdiction. 3/ Indeed, the

-----  
2/ ID. See also Madison Metropolitan School District, (16598) 10/78.

3/ See Section 111.70(1)(d), Wis. Stats. noted above

Police Chief acted only after receiving citizen complaints regarding use of the flashlight as a weapon and after several claims and/or suits were filed against the City.

The Complainant attempted to show that the Police Chief's unilateral decision affected their working conditions because they could not perform their duties in as safe a fashion with a two cell flashlight as they could with a five cell flashlight. However, the record does not support a finding regarding same. 4/ In the first place there is no requirement that an officer carry a flashlight as part of his uniform equipment in the City of Cudahy, and not all officers do. 5/ Secondly, the Complainant offered testimony regarding only a relatively few number of instances where police functions allegedly could not be performed as adequately with a two cell flashlight as they could with a five cell flashlight. In response to each of the Complainant's examples, the Respondent offered credible evidence to the contrary. In addition, the Police Chief testified for the Respondent, unrefuted by the Complainant, that in his 43 years as a member of the Police Department, he was not aware of any instance where a member of the Department was injured or his safety was at stake because he was utilizing a two cell flashlight. Finally, although some officers apparently would utilize the flashlight as a weapon to protect themselves against disruptive citizens as a last resort, the Police Chief provided officers training with a police baton in what is called the Lam method of self-defense. (Emphasis added) Presumably, more training in said method would be provided by the City if needed and/or requested.

At most the record indicates that the Police Chief's decision had only a deminimus effect upon the employes' working conditions. Where an action by a Municipal Employer does not directly and intimately affect the working conditions of the employes involved it is not subject to a duty to bargain over same. 6/

Based on all of the above, the Examiner finds that the decision by the Police Chief to regulate the size of flashlights utilized by officers while on duty is not a matter on which the Respondent has a duty to bargain, and therefore, it has not committed a prohibited practice for its unilateral action and failure to bargain collectively regarding same.

The Respondent raises two other issues regarding the instant dispute. However, since the Examiner has found that the Respondent does not have a duty to bargain in the instant case said issues are moot.

In view of all of the foregoing, the Examiner dismisses the prohibited practice complaint alleging that the Respondent, City of Cudahy, violated the provisions in Sections 111.70(3)a)1 and 4 of the Municipal Employment Relations Act.

Dated at Madison, Wisconsin, this 29th day of January, 1980.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Dennis P. McGilligan  
Dennis P. McGilligan, Examiner

- 
- 4/ The Commission has found that a Municipal Employer does not have a duty to bargain a change in the manning of a fire department absent evidence that safety of firefighters was involved. City of Brookfield (11489-B) 4/75.
- 5/ Night officers normally carry flashlights of more than two cells although the exact number of cells varies with the individual officer.
- 6/ City of Brookfield, supra.