

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Respondent.

No. 18410-A

## ARTICLE 25 - DURATION

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### Bargaining Procedures:

Step 1: On or before August 1, 1980, or any subsequent year, the Union shall present its bargaining requests to the City.

Step 2: The City shall present its proposals to the Union on or before August 15 of that year.

Step 3: Negotiations will commence not later than September 1 of that year.

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That the 1978-80 contract also contained the following provision:

## ARTICLE 1 - RECOGNITION

The Employer recognizes the Union as the exclusive collective bargaining representative on all questions of wages, hours, and terms and conditions of employment for all regular full-time employees of the Waupaca City Police Department, exclusive of the Chief of Police, sergeants, clerical and confidential employees.

and, that the 1978-80 contract also provided that grievances involving the interpretation, application or enforcement of the contract, which arise between the City and the employees or the Union, shall be subject to final and binding arbitration.

4. That on May 8, 1980 <sup>1/</sup> the Union and the Law Enforcement Employee Relations Division of the Wisconsin Professional Police Association, herein LEER/WPPA, entered into a retainer agreement, under which LEER/WPPA was hired by the Union to assist it in matters relating to collective bargaining and the processing of grievances, prohibited practices complaints, and, arbitration; that the Union agreed to make monthly payments to LEER/WPPA for such assistance; that the retainer agreement was executed by Patrick J. Coraggio on behalf of LEER/WPPA; that Coraggio was not a member of LEER/WPPA, but rather, he was, and is, employed by LEER/WPPA as its administrator; that all of Coraggio's actions and correspondence, which are material to this proceeding, were pursuant to the retainer agreement; and that there is nothing in the retainer agreement which specifies, or even implies, that LEER/WPPA is replacing the Union as the recognized bargaining representative of the City's police department employees.

5. That by letter dated July 24, Coraggio advised the City that LEER/WPPA had been retained by the Union for the purpose of negotiating a 1981 contract; that enclosed with said letter were written proposals for inclusion in a 1981 contract; that one of said proposals was to revise the Recognition clause in the 1978-80 contract by replacing the word "Union" with the phrase "Law Enforcement Employees Relations Division (LEER) of the Wisconsin Professional Police Association (WPPA)"; that Coraggio had assisted the Union in the drafting of those contract proposals; that in a letter dated August 7, the City informed Coraggio that, since it had previously recognized the Union as the exclusive bargaining representative of its Police Department employees, and, because there was no evidence to show that the Union had ceased to represent a majority

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<sup>1/</sup> Unless otherwise specified, all other dates herein refer to 1980.

of the those employees, the City declined to recognize and bargain with LEER/WPPA until that labor organization had been selected as the exclusive bargaining representative in an appropriate proceeding before the Wisconsin Employment Relations Commission; that by letter dated August 18, Coraggio advised the City that LEER/WPPA had the legal right to represent the members of the Union in collective bargaining, and therefore, it was a prohibited practice for the City to refuse to bargain with a representative of the majority of its employees; that subsequently, the City again refused to recognize and bargain with LEER, until it was certified as the successor bargaining agent by the Commission; that on August 30 Coraggio advised the City he had been retained by the Union to represent it in contract negotiations; that in a letter dated September 9 the City agreed to meet with Coraggio for the purposes of negotiating a successor contract with the Union on the condition that the Union resubmit its proposals for a new contract with all references therein to LEER/WPPA deleted; that by letter dated September 18, Coraggio informed the City that the proposals submitted by the Union on August 1 remained the proposals for bargaining, except for the dropping of the proposal which requested a modification of the Recognition clause; that on October 6, the City reiterated to Coraggio its position that the the Union had to resubmit its proposals after deleting all references to LEER/WPPA, before the City would arrange a bargaining schedule; that Coraggio did resubmit proposals on behalf of the Union on October 31; that said proposals did not contain any references to LEER/WPPA; that the cover letter for those proposals was on LEER/WPPA stationery and was signed by Coraggio as the LEER administrator; that on November 26, the City's labor counsel, Jack Walker, sent Coraggio a letter requesting him to confirm that LEER/WPPA was renouncing any intent of attempting to be recognized as the bargaining representative of the police department employees; that Walker also stated therein that the question of whether the WPPA was a labor organization and could act as a collective bargaining representative for any employees was then pending before the Commission; that Walker said contract negotiations could not begin until said issues were resolved; that in a letter dated December 1 Coraggio stated he had been retained by the Union to represent it in contract negotiations, and in that capacity, he was requesting the City to commence such negotiations; that said letter was the first one, relevant herein, which was not sent on stationery containing the LEER/WPPA logo; that on December 9 Walker sent a letter to Coraggio requesting a response to the matters raised in his letter of November 26; and, that there were no further written communications between the parties prior to January 21, 1981, when the instant complaint was filed.

6. That the City reasonably interpreted Coraggio's initial letter of July 24 to be a request for voluntary recognition of LEER/WPPA as the exclusive collective bargaining representative of the police department employees, by virtue of the accompanying proposed revision of the contractual recognition clause.

7. That the City's subsequent refusals to meet and negotiate with Coraggio were premised both on a good faith belief that the Union continued to represent a majority of the police department employees, and, on the uncertainty as to whether Coraggio was representing LEER/WPPA or the Union.

8. That, although Coraggio finally did advise the City on September 18 that the proposal to modify the recognition clause had been dropped, he never made a clear and specific statement to the City that LEER/WPPA had renounced the objective of replacing the Union as the voluntarily recognized bargaining representative of the police department employees, and therefore, that henceforth he was acting only in the capacity of a negotiator hired by the Union, rather than on behalf of LEER/WPPA.

9. That neither the Union, nor any bargaining unit employee, filed, or attempted to file, a grievance under the contractual grievance procedure over the City's failure to comply with the contractual procedure for negotiations of a successor contract.

10. That there has been no petition filed with the Commission requesting an election to determine whether a majority of the police department employees desire representation by LEER/WPPA for collective bargaining purposes.

11. That Coraggio testified at the hearing on the instant complaint without being subpoenaed by either party to this proceeding; that the Union's attorney allowed Coraggio to so testify after stating her request for the exclusion of such testimony from the record; and, that Coraggio was not compelled to testify at the hearing in this proceeding, but rather, he testified on a voluntary basis.

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

#### CONCLUSIONS OF LAW

1. That the Union did not exhaust, nor attempt to exhaust, the grievance and binding arbitration procedure established by the collective bargaining agreement between the Union and the City with respect to its claim of a breach of contract, resulting from the City's failure to comply with the contractual negotiations procedure, and therefore, the Examiner will not assert the jurisdiction of the Commission to determine whether the City thereby breached the 1978-80 contract.

2. That the City, by refusing to commence negotiations for a 1981 contract with the Union until Coraggio specifically renounced any intent to seek to have LEER/WPPA recognized as the exclusive bargaining representative of the police department employees during such negotiations, did not engage in a prohibited practice within the meaning of Section 111.70(3)(a) 4 of the Municipal Employment Relations Act.

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


#### ORDER

IT IS ORDERED that the complaint filed in the instant matter against the City of Waupaca be, and the same hereby is, dismissed.

Dated at Madison, Wisconsin this 12th day of June, 1981.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By

  
Douglas V. Knudson, Examiner

MEMORANDUM ACCOMPANYING FINDINGS OF FACT  
CONCLUSIONS OF LAW AND ORDER

Position of the Union:

The Union contends that, as the certified bargaining representative for the police department employees, it had the legal right to retain LEER/WPPA for assistance and advice. Although such functions were provided by Coraggio, the Union, rather than Coraggio, made the final decision on all collective bargaining matters. The mere fact that the Union sought voluntary recognition of LEER/WPPA as the collective bargaining representative of the police department employees did not make the request a reality. The only reason for withdrawing the voluntary recognition proposal was to facilitate the commencement of bargaining, rather than because of any legal infirmity. Both the Union and LEER/WPPA specifically assert that LEER/WPPA is not the bargaining representative of the police department employees.

There is no legal support for the City's contention that one labor organization is prohibited from serving as an agent for another labor organization.

If the City had reasonable cause to believe that a question of representation existed, then its proper recourse was to file an election petition, rather than refusing to bargain.

Position of the City:

Since the Union had been recognized as the exclusive bargaining representative, the City had no duty to bargain with LEER/WPPA. In a case directly on point, the NLRB ruled that an employer had no duty to bargain with a union retained as the bargaining agent by the exclusive representative of that employer's unit employees. <sup>2/</sup> Allowing one union to retain a second union would circumvent the basic policy underlying the Commission's election procedures, since there would be no guarantee that the retained union represented a majority of the unit employees. Further, such a retention would nullify the Commission's successorship doctrine, since LEER/WPPA was not chosen by a procedure which safeguarded the free choice of the affected employees. Additionally, there was little, if any, continuity between LEER/WPPA and the Union.

Because LEER/WPPA admits managerial employees into its membership, it can't act as an exclusive representative or a bargaining agent. The retainer agreement is a subterfuge to avoid such a legal problem, and therefore, should not be condoned.

Discussion:

The Union requested the exclusion of Coraggio's testimony from the record for the reasons that he had not been subpoenaed by either party to this proceeding, and, that he had left the hearing prior to being called to testify by the City. Although Coraggio did not testify, he had been present at the hearing during the presentation of the Union's case. Following a recess, which was requested by the Union's attorney, Coraggio did not return to the hearing room when the hearing resumed. At that point, the Union's attorney rested her case. The City's attorney then called Coraggio as a wit-

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<sup>2/</sup> Sherwood Ford, Inc., 188 NLRB 131 (1971).

ness, whereupon the Union's attorney stated that Coraggio was "gone". The City's attorney moved for an adjournment of the hearing until he could subpoena Coraggio. The Examiner stated he would grant such a request. The Union's attorney then made Coraggio available for testimony, but requested that his testimony be excluded from the record.

The purpose of a subpoena is to require the attendance of a witness at a hearing. Coraggio was in attendance when the hearing commenced. Coraggio was not compelled to testify. If he and the Union's attorney had chosen to do so, Coraggio could have refused to testify until he had received a subpoena. Rather, Coraggio chose to testify at the hearing without so waiting for the receipt of a subpoena. Such was a voluntary action by Coraggio. Accordingly, there is no legitimate basis for the exclusion of Coraggio's testimony from the record, and, the Union's request for such exclusion has been denied. Further, the City is not required to pay witness fees to Coraggio.

The complaint alleges a violation of Section 111.70(3)(a) 5 of MERA. However, the Chairman of the Union's Negotiating Committee testified that neither the Union, nor any bargaining unit employee, ever attempted to file a grievance over the City's failure to comply with the contractual negotiations procedures. The 1978-80 contract did contain a grievance procedure which culminated in final and binding arbitration to resolve disputes arising under the contract. Since the Union did not attempt to exhaust the grievance procedure, the Examiner will not assert the jurisdiction of the Commission to determine whether the City's failure to comply with the contractual negotiations procedure breached the contract in violation of Section 111.70(3)(a)5 of MERA.

The City had voluntarily recognized and bargained with the Union as the exclusive collective bargaining representative of its police department employees. In response to a proposal that such recognition be abandoned and replaced with recognition of LEER/WPPA as the bargaining representative, the City refused to bargain with LEER/ WPPA until it was selected as the representative of the police department employees through an election conducted by the Commission.

In subsequent letters, even though Coraggio ultimately dropped the proposal to revise the recognition clause, he never did clearly state to the City that LEER/WPPA was also renouncing the goal of being voluntarily recognized as the bargaining representative of the police employees, during the negotiations, and further, that he was acting solely in the capacity of a hired negotiator for the Union. Coraggio's reluctance to disclaim a continued objective of having the City recognize LEER/WPPA as the exclusive bargaining representative is puzzling since at the hearing in this matter he testified that "a retainer agreement is used when the local association wants assistance in collective bargaining as opposed to us 3/being certified as the sole and exclusive collective bargaining agent". 4/ That statement, in addition to the retainer agreement itself, make it evident that as of the hearing herein the Union was not abandoning its status as the recognized collective bargaining representative of the City's police department employees, but rather, was merely employing a representative of LEER/WPPA, i.e., Coraggio, to assist in its contract negotiations. However, such information was not available to the City prior to the hearing in this matter.

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3/ The word "us" as used here by Coraggio clearly was meant to identify LEER/WPPA.

4/ Tr. at 21.


In reviewing a decision of the National Labor Relations Board, the Supreme Court of the United States concluded that the recognition clause does not come within the definition of mandatory bargaining. 5/ Said decision has direct application to the instant case, wherein Coraggio, prior to the hearing, never clearly expressed to the City that he had abandoned the goal of obtaining voluntary recognition of LEER/WPPA, so that it would replace the Union in the contractual recognition clause. Faced with the City's continued refusal to meet for contract negotiations, Coraggio ultimately did withdraw the proposal to modify the recognition clause. However, he continued to communicate with the City on LEER/WPPA stationery and to sign such communications over the title of LEER administrator. Such actions created sufficient confusion with respect to his status so as to justify the City's continued refusal to commence negotiations until Coraggio specifically clarified his status. Faced with such a refusal, Coraggio's failure to specifically inform the City that he was renouncing any intention to seek voluntary recognition of LEER/WPPA resulted in a deadlock over a non-mandatory subject of bargaining, which prevented the commencement of negotiations. The Commission has determined that a party may not maintain a proposal over a non-mandatory subject of bargaining to the point of causing a deadlock in negotiations. 6/ Therefore, it was Coraggio's, rather than the City's, responsibility to remove the proposal creating the deadlock. Since Coraggio failed to take such action prior to the hearing herein, the City did not violate Sec. 111.70(3)(a)4 of MERA by refusing to commence negotiations over a successor contract.

Inasmuch as the complaint is being dismissed for the foregoing reasons, it is not necessary to determine whether LEER/WPPA properly constitutes a labor organization within the meaning of Section 111.70(1)(j) of MERA.

Dated at Madison, Wisconsin this 12th day of June, 1981.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By

  
Douglas V. Knudson, Examiner

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5/ NLRB v. Wooster Division of Borg Warner Corp. 356 US 342, 43 LRRM 2034 (1958).

6/ City of Lake Geneva, (12184-B & 12208-B) 5/74.