STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

APPLETON PROFESSIONAL POLICEMEN'S ASSOCIATION, Complainant, vs. CITY OF APPLETON, Respondent.	Case CXXXIX No. 27466 MP-1194 Decision No. 18451-B

ORDER AFFIRMING EXAMINER'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Examiner Peter G. Davis having, on September 15, 1981, issued his Findings of Fact, Conclusions of Law and Order in the above entitled proceeding wherein he dismissed the instant complaint; and the Appleton Professional Policemen's Association having, on September 21, 1981, timely filed a petition for Commission review of said decision; and the Complainant having filed a brief in the matter and Respondent choosing to waive review brief, and the Commission having reviewed the record in the matter including the petition for review and the brief filed in support thereto, and being satisfied that the Examiner's decision be affirmed

NOW, THEREFORE, it is

ORDERED 1/

That the Examiner's Findings of Fact, Conclusions of Law and Order in the instant matter be, and the same hereby are, affirmed.

Given under our hands and seal at the City of Madison, Wisconsin this 16th day of June, 1982

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Gary L. Covelli, Chairman

_____
Morris Slavney, Commissioner

_____
Herman Torosian, Commissioner

1/ Pursuant to Sec. 227.11(2), Stats., the Commission hereby notifies the parties that a petition for rehearing may be filed with the Commission by following the procedures set forth in Sec. 227.12(1) and that a petition for judicial review naming the Commission as Respondent, may be filed by following the procedures set forth in Sec. 227.16(1)(a), Stats. (Continued on page 2)

(Continuation of Footnote 1)
227.12 Petitions for rehearing in contested cases. (1) A petition for rehearing shall not be prerequisite for appeal or review. Any person aggrieved by a final order may, within 20 days after service of the order, file a written petition for rehearing which shall specify in detail the grounds for the relief sought and supporting authorities. An agency may order a rehearing on its own motion within 20 days after service of a final order. This subsection does not apply to s. 17.025 (3)(e). No agency is required to conduct more than one rehearing based on a petition for rehearing filed under this subsection in any contested case.

227.16 Parties and proceedings for review. (1) Except as otherwise specifically provided by law, any person aggrieved by a decision specified in s. 227.15 shall be entitled to judicial review thereof as provided in this chapter.

(a) Proceedings for review shall be instituted by serving a petition therefor personally or by certified mail upon the agency or one of its officials, and filing the petition in the office of the clerk of the circuit court for the county where the judicial review proceedings are to be held. Unless a rehearing is requested under s. 227.12, petitions for review under this paragraph shall be served and filed within 30 days after the service of the decision of the agency upon all parties under s. 227.11. If a rehearing is requested under s. 227.12, any party desiring judicial review shall serve and file a petition for review within 30 days after service of the order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. The 30-day period for serving and filing a petition under this paragraph commences on the day after personal service or mailing of the decision by the agency. If the petitioner is a resident, the proceedings shall be held in the circuit court for the county where the petitioner resides, except that if the petitioner is an agency, the proceedings shall be in the circuit court for the county where the respondent resides and except as provided in ss. 182.70(6) and 182.71(5)(g). The proceedings shall be in the circuit court for Dane county if the petitioner is a nonresident. If all parties stipulate and the court to which the parties desire to transfer the proceedings agrees, the proceedings may be held in the county designated by the parties. If 2 or more petitions for review of the same decision are filed in different counties, the circuit judge for the county in which a petition for review of the decision was first filed shall determine the venue for judicial review of the decision, and shall order transfer or consolidation where appropriate.

MEMORANDUM ACCOMPANYING ORDER AFFIRMING EXAMINER'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Background

In its complaint initiating this proceeding the Complainant alleged that the Respondent committed prohibited practices within the meaning of Sections 111.70(3)(a)3 and 4 of the Municipal Employment Relations Act by refusing to bargain over the decision to employ civilian dispatchers as well as over the impact of said decision upon the wages, hours and working conditions of the employes it represents. Complainant further alleged that Respondent's action had the effect of discouraging membership in the bargaining unit by discrimination in regard to hiring, tenure and other conditions of employment. The Respondent denied Complainant's allegations.

The Examiner's Decision

In his decision, the Examiner found the Respondent had been contemplating the use of civilian dispatchers since 1975, when a management consultant's report recommended the position of dispatchers, then filled by police officers, should eventually be filled by civilians. The Examiner concluded that the Complainant had notice that a decision was being made to employ civilian dispatchers who would displace sworn officers performing that function, because Police Chief Gorski discussed the matter with Union President Fuhrman.

The Examiner found that:

> The record does support a finding that Complainant was aware of the possibility that at some time civilian dispatchers would be employed. Gorski's August 6 memo and subsequent meeting with Furhman, Complainant's President, transformed this general awareness into notice that a decision was being made to employ civilian dispatchers who would displace the sworn officers performing that function. Complainant argues that the Gorski memo and ensuing discussion with Fuhrman merely alerted Complainant to the possibility that divilian dispatchers would be hired. This argument has been rejected for several reasons. Fuhrman admits Gorski told him that once civilian dispatchers were hired, the sworn officers displaced by the civilians would return to patrol duty. Fuhrman also admits that Gorski asked him to contact the Teamsters to discuss union representation of the civilians. Even if the foregoing had constituted the entire conversation, one would be hard pressed to conclude that notice of the decision had not been given. However, Gorski credibly testified that during their conversation Fuhrman stated Respondent should proceed with the hirings and that Complainant couldn't do anything to stop same."

The Examiner then concluded that in mid-August 1980, Complainant was or should have been aware of Respondent's decision. Therefore, it became incumbent upon Complainant to demand bargaining over the decision if it wanted to negotiate the matter. Such a demand was never made by the Complainant.

> "Instead, while Respondent adopted a budget authorizing the hiring of the civilians, mentioned the subject in passing during bargaining and advertised for applicants, Complainant sat silently at the bargaining table, rached a tentative agreement, and ratified same. Assuming arguendo that the decision in question is a mandatory subject of bargaining, Complainant's failure to demand bargaining over the subject during the parties negotiations over a new contract constitutes a clear and unmistakable waiver of any right it had to bargain over the decision."

Having addressed the issue of the decision to employ civilian dispatchers, the Examiner then addressed the impact bargaining question. He found the decision to employ civilian dispatchers impacts on the wages, hours and working conditions of Respondent's employes, and thus Respondent had an obligation to bargain with

Complainant after receiving a timely demand. The Examiner concluded that this duty had been satisfied, since the Respondent had always been willing to and had in fact bargained with Complainant over the impact issue.

Finally, with regard to the allegation that Respondent's action discouraged membership in the bargaining unit by discrimination in regard to hiring, tenure and other conditions of employment, the Examiner summarily concluded that the establishment of wages and working conditions for civilian dispatchers which differ from those of the displaced sworn officers did not violate Section 111.70(3)(a)3 of MERA.

Having found the Complainant had notice of the Respondent's actions and never requested bargaining on same, the Examiner dismissed the complaint.

The Petition to Review

Complainant's petition for review argues that the finding of waiver by the Examiner is clearly erroreous as established by the clear and satisfactory preponderance of the evidence, and it prejudicially affects their rights. Complainant asserts that it did not receive any notice that Respondent was going to hire civilian personnel after it received authorization to hire such personnel, and that, Respondent intended to proceed with the hiring of civilian dispatchers notice or no notice to the Complainant. The Complainant further argues that the waiver found by the Examiner is contrary to applicable law and the principles of bargaining in good faith. Complainant cites several Commission cases that have dealt with waiver by contractual lanaguage, and points out that there is no language in the parties contract specifically waiving their right to bargain about matters not covered by the agreement.

Discussion

Complainant's reliance on Commission cases dealing with waiver by contract is misplaced. The Examiner found waiver by inaction, and not waiver by contract.

The Complainant argued that it never received formal notice of the Respondent's decision to hire civilian dispatchers, so it was never under any obligation to request to bargain the issue. As a result, the Complainant never requested bargaining. The record reveals, however, that the Union had been aware since 1975 that the City was contemplating the hiring of civilian dispatchers. This was common knowledge well in advance of the ultimate decision. In August, 1980 Police Chief Gorski notified Union President Fuhrman by memo of this decision and offered to discuss the issue with the Union representative. Fuhrman then discussed the situation with the Union's Board of Directors. The record supports the Examiner's conclusion that the Union had notice of the City's intent to hire civilian dispatchers.

The record also supports the finding that Complainant never requested to negotiate the decision to employ civilian dispatchers after it became aware of the contemplated action. When the Complainant became aware of the proposed change, Union President Fuhrman expressed grudging acceptance of the decision and told Gorski to proceed with the hiring of the civilians. Therefore, the Complainant waived any right it may have had to bargain the decision.

As to the impact of the decision, the record reveals in late January or early February, the City offerred to bargain with the Association regarding same. However, the record also establishes that the Complainant made no specific proposals in response to said offer. Thus, the Examiner correctly found that the City had not refused to bargain the impact of the decision.

The Examiner did not deem it necessary to determine whether the decision of the Respondent to replace the sworn officers with civilian dispatchers constituted a mandatory or permissive subject of bargaining within the meaning of the provisions of MERA, since, in any event, the Complainant waived its right to bargain the decision. Therefore, we see no persuasive reason, in this proceeding,

to make any determination with respect to the mandatory or permissive nature of such implemented decision.

Dated at Madison, Wisconsin this 16th day of June, 1982.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Gary L. Covelli, Chairman

_____
Morris Slavney, Commissioner

_____
Herman Torosian, Commissioner