STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

KENOSHA PROFESSIONAL POLICEMEN'S ASSOCIATION, Complainant, vs. CITY OF KENOSHA, Respondent.	Case LXXVIII No. 28667 MP-1257 Decision No. 19110-A

Appearances:

Schroeder, Ventura and Breitenbach, Attorneys at Law, 5500 Eighth Avenue, Kenosha, Wisconsin, 53140, by Mr. Jerold W. Breitenbach, appearing on behalf of the Complainant.

Lindner, Honzik, Marsack, Hayman and Walsh, S.C., Attorneys at Law, 700 North Water Street, Milwaukee, Wisconsin, 53202, by Mr. Roger E. Walsh, appearing on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

Dennis P. McGilligan, Examiner: The Kenosha Professional Policemen's Association, hereinafter referred to as the Association, filed the instant complaint on September 24, 1981, alleging that the City of Kenosha, hereinafter referred to as the City, has committed certain prohibited practices in violation of Section 111.70 of the Wisconsin Statutes, hereinafter referred to as MERA. The Wisconsin Employment Relations Commission, hereinafter referred to as the Commission, issued an Order on November 5, 1981, appointing the undersigned to hold a hearing on the matter, and to make and issue Findings of Fact, Conclusions of Law and Order as provided in Section 111.07(5), Wisconsin Statutes. The City filed an answer on December 8, 1981. A hearing was held on December 22, 1981 at the Municipal Building in Kenosha, Wisconsin, at which time the parties stipulated to certain facts and submitted joint exhibits. The Association thereafter submitted a brief on March 3, 1982. The City's brief was submitted on April 21, 1982.

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

FINDINGS OF FACT

1. THAT the Association is a labor organization which represents a bargaining unit comprised of non-supervisory law enforcement employes of the Kenosha Police Department in the classifications of Detective, Traffic Officer, Police Sergeant, Police Canine Specialist and Police Officer.

2. THAT the City is a municipal employer which operates a police department in the City of Kenosha, Wisconsin.

3. THAT the Association and the City were parties to a collective bargaining agreement for the year 1980, which provided at Article XXV, entitled "DURATION" that:

> Section 1. This Agreement shall be in full force and effect from January 1, 1980, to December 31, 1980, inclusive, and shall continue from year to year thereafter unless written notice of the desire to cancel, amend, or terminate the Agreement is served by mail by either party upon the other at least ninety (90) days prior to the date of expiration.

Written notice of a desire to modify said collective bargaining agreement was given by the Association on June 30, 1980. The 1980 agreement accordingly expired on December 31, 1980.

4. THAT Article XVI of the above collective bargaining agreement, entitled "COST OF LIVING ADJUSTMENT," provided in part as follows:

> A. A cost of living adjustment shall be granted as described below to all full-time employees of the bargaining unit who are employed as of the effective date of each such adjustment.
>
> . . .
>
> C. Effective with the first pay period beginning on or after January 1, 1980, and thereafter during the life of the contract, a cost of living adjustment, if applicable, shall be made quarterly, with the first pay period beginning on or after each April 1, July 1, October 1, and January 1.

The above cited provisions are essentially identical to the provisions contained in the two prior agreements between the parties, each of which had a two year term.

5. THAT the parties met in an attempt to negotiate the terms of a successor collective bargaining agreement, but were unsuccessful. The City thereafter petitioned the Commission for final and binding arbitration between the parties concerning the terms of their successor agreement, pursuant to Section 111.77, Wisconsin Statutes.

6. THAT subsequent to the expiration of the 1980 collective bargaining agreement, the Kenosha City Council, on January 19, 1981 decided not to make any cost of living adjustments (COLA) in 1981 until a labor agreement was reached. This decision was communicated to the Association through a letter dated January 21, 1981 sent by Mr. James J. Warzon, the City's Supervisor of Personnel, to Attorney Jerold W. Breitenbach, counsel for the Association.

7. THAT the City's action in determining not to make COLA payments in 1981 until a successor labor agreement was reached between the parties was neither agreed to nor concurred in by the Association.

8. THAT the rise in the Consumer Price Index following the expiration of the 1980 agreement would have generated COLA payments in 1981 had the 1980 agreement between the parties remained in effect.

9. THAT the 1976-1977 collective bargaining agreement expired on December 31, 1977. Agreement was not reached on a successor agreement until July of 1978. No cost of living adjustments were made by the City during the period from January 1, 1978 to July, 1978.

10. AND THAT the 1978-1979 collective bargaining agreement expired on December 31, 1979. Agreement on a successor agreement was not reached until July 1980. No cost of living adjustments were made by the City during the period from January 1, 1980 to July, 1980.

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

CONCLUSION OF LAW

The City's refusal to make cost of living adjustments in the wages paid to the members of the aforesaid bargaining unit following the expiration of the 1980 collective bargaining agreement providing for such adjustments was not violative of Section 111.70(3)(a)4 of MERA.

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

ORDER

It is ordered that the Complaint herein be, and the same hereby is, dismissed in its entirety. 1/

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

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Dennis P. McGilligan
Dennis P. McGilligan, Examiner

1/ Any party may file a petition for review with the Commission by following the procedures set forth in Sec. 111.07(5), Stats.

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(5) The commission may authorize a commissioner or examiner to make findings and orders. Any party in interest who is dissatisfied with the findings or order of a commissioner or examiner may file a written petition with the commission as a body to review the findings or order. If no petition is filed within 20 days from the date that a copy of the findings or order of the commissioner or examiner was mailed to the last known address of the parties in interest, such findings or order shall be considered the findings or order of the commission as a body unless set aside, reversed or modified by such commissioner or examiner within such time. If the findings or order are set aside by the commissioner or examiner the status shall be the same as prior to the findings or order set aside. If the findings or order are reversed or modified by the commissioner or examiner the time for filing petition with the commission shall run from the time that notice of such reversal or modification is mailed to the last known address of the parties in interest. Within 45 days after the filing of such petition with the commission, the commission shall either affirm, reverse, set aside or modify such findings or order, in whole or in part, or direct the taking of additional testimony. Such action shall be based on a review of the evidence submitted. If the commission is satisfied that a party in interest has been prejudiced because of exceptional delay in the receipt of a copy of any findings or order it may extend the time another 20 days for filing a petition with the commission.

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

POSITION OF THE PARTIES

The Association maintains that the City was obligated to continue paying the COLA mandated by the contract even after the December 31st expiration date. The Association basically offers three arguments in support of their position. First, the Association contends that COLA payments are an integral part of the status quo, citing Commission authority and decisions from other jurisdictions. The second and related argument is that a cost of living adjustment during the contract hiatus is required as a matter of "reason" in order to preserve the status quo. Finally, the Association argues that the City evinced an intent to extend the COLA provisions of the contract beyond its expiration, and is thus obligated to do so irrespective of whether said provisions are included in the normal definition of status quo.

The City argues that its obligation during the hiatus period was merely to maintain the status quo that existed at the end of the 1980 agreement (emphasis supplied). The City asserts that the Commission decision cited by the Association actually supports the City's position in this matter. The cases from other jurisdictions relied upon by the Association are not on point and easily distinquishable in the City's view. Even if Commission case law does not clearly resolve the matter in its favor, the City submits that the specific wording of the collective bargaining agreement limits the obligation to make COLA payments to the term of the agreement and thus relieves the City of this obligation once the contract expires.

DISCUSSION

The Menasha Decision

Both parties cite the Commission's decision in Menasha Joint School District (16589-B) 9/81, hereinafter referred to as Menasha, in support of their positions. Their arguments center around differing interpretations of the following language from Menasha:

> . . . The basis for resolving said dispute can be derived from an examination of the underpinning of the status quo doctrine - the concept that the absence of change in wages, hours and working conditions is the best and most neutral atmosphere in which the realities of the collective bargaining process may take their course after a contract has expired.
>
> The maintenance of the status quo during the contract hiatus is not dependent upon the continuation of a contractual obligation in a pre-existing contract, but in the continuation of the wages, hours and conditions of employment which existed at the time when said agreement was in effect. Here, the District, during the contract hiatus, maintained the same salary payments which it has paid to the employes during the term of the agreement, thus maintaining the status quo.
>
> Acceptance of the Complainant's position would constitute a rejection of the doctrine of maintaining the status quo, as it would require change in the form of a salary increase. It is simply this change, not its cost, not the expectations of the employes, not the absence of past practice, not whether the salary schedule is at issue during bargaining, which requires rejection of the position of the Complainants in this proceeding. Therefore we agree with the Examiner's conclusion that the District was not statutorily obligated to grant experience increments to employes in fulfilling its duty to maintain the status quo during the contract hiatus. 2/

2/ Menasha at p.5

The Association asserts that a quarterly cost of living adjustment is a condition of employment and that failure to make such adjustments as they fall due represents a change in the status quo. The City classifies such adjustments as wages and submits that making the adjustment would involve a change in the status quo in the form of a salary increase.

It is clear that cost of living adjustments are more properly termed "wages" than "conditions of employment". They represent a direct payment to the employes of monies generated by increases in the Consumer Price Index. Menasha defines the status quo, when applied to compensation, in terms of the item by item price of the employer's compensation package at the expiration of the contract. So long as there is no change in the form or amount of any item of compensation, the status quo is preserved. A cost of living adjustment paid after the expiration of the contract would increase the price of the wage portion in the compensation package. In refusing to grant such an increase, the City merely sought to maintain the pre-expiration status quo during the contract hiatus. 3/

The "Rule of Reason"

The Association has suggested that cost of living adjustments during the hiatus should be required without regard to whether such payments are a condition of employment under the expired contract. The proposed "rule of reason" submits that an uncompensated increase in the cost of living will result in an actual decrease in the employes's wages. This, in the Association's view, runs counter to the purpose of the status quo doctrine in that the erosion of the employe's purchasing power will create pressures on them to settle quickly, while no such pressure will be brought to bear on the employer.

The rule proposed by the Association has no support in any previous Commission decision. To suggest that wages must be maintained relative to the cost of living as an element of the status quo is to invite "fine tuning" of virtually every aspect of the relationship during the hiatus. Every such adjustment would be open to dispute as to motive, necessity and degree. The destructive effect of this on the "neutral atmosphere" sought by the status quo doctrine is fairly obvious. Furthermore, there could be no principled distinction drawn in applying this proposed rule between units already receiving COLA and those which do not enjoy that benefit. In periods of high inflation such as those experienced in recent years, this could lead to the absurd result of employes winning a moderate increase in wages and suffering an actual cut in pay at the end of the hiatus. The effect of any employer efforts to recover the resulting overpayments would be predictably injurious to its relationship with its employes. For these reasons, the undersigned rejects the Association's proposed "rule of reason."

3/ The Association cites four cases from other jurisdictions for the proposition that the status quo includes COLA. The decisions of the Allegheny County Court of Common Pleas in Pennsylvania, the Circuit Court of Cook County, Illinois, and the Eastern District of Virginia address the COLA issue in conclusory terms, being primarily concerned with the enforcement of prior orders of the involved courts, which had required continuance of terms and conditions specified in expired collective bargaining agreements. The decision of the tripartite arbitration panel cited by the Association is solely concerned with the specific language of a collective bargaining agreement providing that, pending the outcome of interest arbitration, "all conditions of this contract shall remain undisturbed."

The common thread of all these cases was the existence of either an order or a contractual provision requiring continuance of COLA payments. The tribunal in each case was concerned with the enforcement of the order or provision, rather than the basic question of whether such an obligation existed. This, together with the lack of pertinent analysis in the body of the decisions, and the fact that each was decided prior to the Commission's decision in Menasha, renders these cases inapposite and unpersuasive.

Intent to Extend the COLA Beyond the Expiration of the Collective Bargaining Agreement

The final argument of the Association is that the City's contractual obligation to make COLA payments did not expire when the collective bargaining agreement itself expired. The Association bases this argument on a letter sent by James J. Warzon, Supervisor of Personnel, to the Association's counsel. 4/ In the body of this letter, Mr. Warzon notifies the Association that:

> "The Common council, in executive session, has expressed itself as not being in favor of making any COLA adjustments for 1981 until a labor agreement is reached."

The Association reads the conditional nature of the notice as establishing a future intent by the employer to make payments of the COLA mandated by the 1980 agreement. This intent to comply with the expired contract signifies, in the Association's view, an agreement to extend the COLA provision through the hiatus. This is a strained interpretation of a letter the plain meaning of which is that the City had no intention of agreeing to such an extension. While the City need not have sent such a notice, the mere fact of its being sent is not sufficient to infer an intent to treat the COLA differently from the other portions of the expired agreement. A contrary finding would mean that any communication regarding the expired provisions of the agreement might bind the parties to an unintended extension of those provisions. 5/

The Limitation Contained Within the Expired Agreement

The City's brief urges the Examiner to find that the language contained within the COLA provision of the expired contract, limiting the provision's effect to "the life of the contract" operates to waive any claim to COLA payments after expiration, even if the payments would ordinarily be required as a part of the status quo. In holding that Menasha allows the City to discontinue these payments during the contract hiatus, the Examiner would stress that the outcome of this case in no way constitutes acceptance of the City's contractual argument. The fact that there is language limiting a provision to the term of agreement does not determine the question of whether it must be continued during the hiatus under the status quo doctrine. All provisions in a collective bargaining agreement are limited to "the life of the contract," and such general language cannot serve to modify the obligation to maintain wages, hours and working conditions as they existed upon expiration of the agreement. As the Commission noted in Menasha:

> The maintenance of the status quo during the contract hiatus is not dependent upon the continuation of a contractual obligation in a pre-existing contract, but in the continuation of the wages, hours and conditions of employment as they existed at the time when said agreement was in effect. 6/ (emphasis supplied)

As the obligation to maintain the status quo is not generated by the agreement, it follows that it may not be avoided through general contractual limitations and/or disclaimers contained therein.

4/ Joint Exhibit 2.

5/ The facts which the Association alleges constitute an extension of the contract in this case are clearly distinquishable from those which formed the basis of Commissioner Torosian's dissent in Menasha. In Menasha, the School District had actually granted step increases to new hires, while denying them to unit members during the contract hiatus. The implementation of the expired salary schedule with respect to some employes provided the evidence of intent to extend the contract in Menasha. The evidence offered in this case to establish intent to extend the COLA is of a far less substantial and persuasive nature.

6/ Menasah, supra. at page 5.

CONCLUSION

The obligation to maintain the status quo during the contract hiatus is satisfied by the absence of change in wages, hours and working conditions. The payment of COLA by the City would constitute change in the form of a salary increase and disrupt the status quo. By refusing to make such payments, the City has maintained the status quo and met its duty to bargain. In view of all the foregoing, the Examiner dismisses the complaint alleging that the City violated Sec. 111.70(3)(a)4 of MERA.

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

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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