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WISCONSIN EMPLOYMENT
RELATIONS COMMISSION

STATE OF WISCONSIN : CIRCUIT COURT : MILWAUKEE COUNTY
BRANCH 21

VILLAGE OF FOX POINT,

Petitioner,

-vs-

Case No. 602-413

WISCONSIN EMPLOYMENT
RELATIONS COMMISSION,

Decision No. 20019

Respondent,

and

DISTRICT COUNCIL 48,
AMERICAN FEDERATION OF
STATE, COUNTY & MUNICIPAL
EMPLOYEES, AFL-CIO,

Intervenor.

MEMORANDUM DECISION

This is a proceeding under Sec. 227.16(1)(a) Wis. Stats. to review the certification of representation rendered by the Wisconsin Employment Relations Commission on December 10, 1982.

The petitioner appears by Mr. Thomas E. Hayes, Attorney at Law, and the Wisconsin Employment Commission appears by Mr. Bronson LaFollette, Attorney General, argument by Mr. David C. Rice, Assistant Attorney General. Also appearing, Mr. William Leete, Attorney at Law, and District Counsel 48 American Federation of State, County and Municipal

Employees, AFL-CIO, intervenor, appearing by Podell, Ugent and Cross, S.C. by Ms. Nola J. Hitchcock Cross, Attorney at Law. The petitioner requests the court to review the certification of Milwaukee District Council 48, AFSCME, AFL-CIO, and its affiliated local 2958 as the exclusive collective bargaining representative of the Village of Fox Point Fire Fighters. The Village of Fox Point seeks reversal of the certification of the Wisconsin Employment Relations Commission's decision, certifying Milwaukee District Council 48, AFSCME, AFL-CIO and its affiliated local 2958, as the exclusive bargaining representative of such employees of the Village of Fox Point. The Village has raised four points as reasons for the requests. It alleges:

1. That the WERC decision ignores the clear mandate of Wisconsin Statute Sec. 111.70(4)(d)2a which expressly prohibits the WERC from fragmenting units.

2. That the WERC decision rests on the erroneous conclusion that power of arrest is the only pivotal factor in deciding the appropriateness of a combined fire fighter and patrolman unit.

3. That the WERC decision endorses the unprecedented and unworkable combination of the Glendale and Foxpoint fire fighters in a single unit.

4. That the WERC decision departs from the prior practice of considering a number of factors in determining

an appropriate unit. It is the request of the Village of Fox Point that this court should set aside the finding, conclusion and certification of the Commission.

Wisconsin Employment Relations Commission, respondent, alleges that the certification of the Commission should not be set aside as is being sought by the Village and the ruling should stand and not be disturbed. The WERC raises three issues, to wit: 1. Could the Commission reasonably determine that the fire fighters employed by the Village constitute an appropriate collective unit and that the fire fighters do not have a sufficient community of interest with the police officers to require a single collective bargaining unit? 2. Did the Commission deviate from its past practice of considering a number of factors, and not only the power of arrest, in determining that the fire fighters constitute an appropriate collective bargaining unit separate from the unit of police officers? 3. Did the Commission abuse its discretion by ignoring the statutory requirement that it avoid fragmentation of collective bargaining units whenever possible?

District Council 48 requests that the court affirm the finding of the Commission.

WHAT IS THE DEPARTMENT OF PUBLIC SAFETY UNDER THE AUTHORITY OF THE VILLAGE OF FOX POINT?

In January, 1957, the Village of Fox Point merged its

Fire Department and Police Department into a single Department of Public Safety and "theoretically everybody was supposed to be on the road in squad cars to respond."
(Tp. 40)

It is not a Police Department and it is not a Fire Department, it is a unit composed of police and fire fighters. It is the position of the Village that this unit is cohesive, and that there is greater inter-communication between all members in the police section and fire section. It is the position of the Village that this communication occurs on an hourly and on a daily basis. It is the position of the Village that there is a real unity of interest between the members of the two divisions and that the history of the arrangement and the history of the Department should be recognized.

Union argues that the fire fighters and the policemen's association had a joint bargaining unit over the years and had entered into a contract and was recognized by the Village. It further argues that during the term of the current contract the policemen's association decided to abandon the fire fighters and no longer represent them. The union takes the position that because of this abandonment, the fire fighters now have a right to be represented by a union of their own choosing, and, that the union should have a right to negotiate their own individual contract as a separate bargaining unit.

DEPARTMENT OF PUBLIC SAFETY

Since 1957 the Department of Public Safety has been organized into two separate and distinct sections. The chain of command is from a chief down. From the captain it goes to the police section and from a lieutenant to the fire section. (There is contradictory testimony by the chief in the record in as much as one place he testified that the chain of command is from the chief through the captain). In the police section there are three lieutenants, twelve patrolmen, four dispatchers, one part-time secretary and thirteen auxiliaries.

In the fire section there are two lieutenants, a fireman and twenty-two auxiliaries.

All of the employees of the Department of Public Safety are stationed at the same building. The chief of the Department is a former fire fighter. At the time the Department was integrated into the Department of Public Safety, there as an employee, did both duties, fire oriented duties and police oriented duties. (Tp. 11) He wore a police uniform as his title was that of Safety Officer, but most people called (then) policeman. Upon the sectionalizing of their Department, the Chief, who was not Chief at that time, was transferred to the fire section with the title of fire fighter. He remained a fire fighter for two years and was then transferred to the police section. He went up through

the ranks, first becoming a sergeant, then lieutenant and finally chief.

The population of Fox Point is approximately eight thousand. The Village is about three square miles. It has the title of "a bedroom type community." There are two large shopping centers and one rather small shopping center. There are three apartment complexes. This basically residential community has about five hundred single family homes and no industry per se. There are two taverns and about three restaurants with one town club. There are a number of churches and temples and three schools.

ORGANIZED FOR COLLECTIVE BARGAINING

The Public Safety Department was first organized for the purpose of collective bargaining in 1968 or 1969. The police section was the first to be organized. It was around January of 1979 that the police and fire sections combined for collective bargaining purposes. The first agreement was executed between the Village of Fox Point and the Fox Point Professional Policemen's Association for 1979 and 1981.

COMMON BUILDING

The police section and the fire section are housed in one building. The building housing the Department of Public Safety is used by the fire fighters to store their equipment and the police section to store their equipment. There is a common communication room where all of the files of the Department

are kept. The dispatcher, who serves both the fire section and police section is located in that building. The police section and the fire section are separated by the apparatus room which is used by both the fire section and police section.

DUTIES

The principal duties of the police division is law enforcement. They work three shifts a day. The principal responsibility of the fire section is fire rescue. It operates the ambulance and fire equipment. When an ambulance is called for police personnel meet the fire fighters at the scene of the request. If there is a transport to a hospital one fire fighter rides in the rear as an attendant in the ambulance and a police officer, if he is a certified emergency medical technician, will drive the ambulance. The the second fire fighter that is at the scene returns to the station in a police squad. All the firemen are EMTs. Ten or eleven policemen are EMTs and three remaining policemen are to be trained as EMTs or presently are in the process of being trained. (Tp. 29).

OVERLAPPING DUTIES

To a fire scene the police squad carry with them in the way of fire fighting equipment, boots, raincoats and fire extinguishers. The police officers assist hooking up the engines, pumpers and pull hoses and setting up at the

scene and carry on a number of other police related responsibilities. The fire section personnel sometimes issue bicycle licenses, wash squad cars, help in traffic control at the scene of an accident, assist the police in accident investigation, assist the police in identification of persons that are apprehended and assist the police section in other different functions. They help control prisoners and assist in booking prisoners. Some of the fire fighters have assisted in fingerprinting prisoners. These activities have been engaged in in conjunction with the police working with the firemen and the firemen working with the police in the past. However, there would always be a police officer with the fire section officer in carrying out certain specific police duties and responsibilities. On at least one occasion a fire section officer effectuated an arrest of a law-breaker by the use of a revolver that the fire section person had in his possession pursuant to the execution of his responsibilities as a fire person assisting a police officer.

RECRUITING

The recruiting of Public Safety officers, whether fire fighters or policemen, is a joint advertisement in the local newspaper. The designation states the particular section personnel desired.

EXAMINATION AND TRAINING

The written, physical agility and the oral interviews

are given at the same time. Prior to the last test, the tests were the same. The written test however, has been changed.

Police section personnel receive the "basics in fire fighting evolution." (Tp. 38). They are required for the first year of probation to attend a Saturday firedrill and a Thursday night firedrill. They are trained by the fire section personnel in use of air masks, cardiopulmonary resuscitation, driving the fire apparatus and pumping with the fire apparatus. (Tp. 38).

Fire section personnel do not receive any real formal training in police work other than being exposed to it on the job, and, at different times they are given specialized training as may be required. They are trained by police section personnel with handling of prisoners and lockup and different specialized police functions. At times the fire section personnel will serve as the dispatcher. The dispatcher assumes the responsibility as the jailor. If there is a prisoner in lockup the dispatcher must check that prisoner out every ten minutes for safety purposes. In the past, fire section personnel were assigned to reloading target ammunition that the police section personnel did use for training purposes. Fire section personnel did use the range for target practice also. At one time the fire section member was assigned to train new recruits in the proficiency of firearms.

Police personnel must receive a period of training at MATC whereas fire fighters are not required so to do.

PAY SCALES AND BENEFITS

Patrolmen and firemen receive identical salaries. Until January 1, 1981, the fringe benefits, life insurance, hospitalization, surgical care, holiday pay, bereavement leave, military leave, vacations, as well as longevity were the same for fire and police section personnel. Clothing allowance and pension rights do differ.

TEMPORARY ASSIGNMENTS

On long term vacancies in the fire department a police section person may be temporarily assigned to the fire section. (Tp. 95) If there is a short term vacancy in the police department a fire fighter could be assigned to the police section on a temporary basis. The person would not be put on the street alone "because he is not certified as a law enforcement officer. The Department has one year in which to get him certified." (Tp. 96)

ARREST POWER

At the conclusion of the hearing before the Commission it was the opinion of the Union that the case should be decided on the issue of the power of arrest that is afforded to police officers and denied fire fighters. No testimony was taken on the question of the power of arrest. It was raised by way of statement by counsel, Mr. Gregory.

PRIOR REPRESENTATION

Since at least 1969 the Village has recognized the professional policemen's association as the exclusive collective bargaining representative of policemen. (Tp. 20). In 1979 the Village also recognized the association as the exclusive collective bargaining representative of fire fighters in the Village. On January 22, 1981, the association, in a letter over the signature of its president, advised the fire fighters that at a meeting held on July 20, the association determined that it would cease to represent them after August 1, 1981 in any new contractual matters and that they, however, would meet their obligations regarding the execution of their current contract.

On or about December 11, 1981, the fire fighters requested Local 2958 and the Milwaukee District Council Number 48 AFSCME, AFL-CIO to represent them through a petition signed by a large majority of the fire fighters.

December 11, 1981, the Union requested that the Village allow them to represent the fire fighters.

On December 29, 1981, the Village manager responded to the union stating that the Village was not in agreement to have a bargaining unit composed only of fire fighters. The Village said it is our opinion that the appropriate bargaining unit should include all of the employees in the Public Safety Department excepting exempt employees.

PROCEEDINGS FOR CERTIFICATION FOR REPRESENTATION

On January 13, 1982, AFSCME initiated proceedings before the Wisconsin Employment Relations Commission to conduct an election among employees of the Village in a bargaining unit consisting of fire fighters, excluding police officers and Chief.

The Commission concluded that an election by secret ballot should be conducted under the direction of the WERC within forty-five days of October 21, 1982. The Commission found that the personnel are headquartered in a single station, but not sufficient in combination and agreement to warrant the conclusion that separate units of police and fire fighters are inappropriate. That while some conditions of employment relating to both groups are similar, others are different, as are the primary job duties of the police and fire fighters. The fire fighters work twenty-four hour shifts during which they eat and sleep in the Public Safety building. In contrast, the police work eight hour shifts. The fire fighters are required only to receive emergency medical technician training, whereas the police may, but not required to obtain an EMT certification. The Commission continued and remarked, "The critical issue in determining placement in a law enforcement unit is whether the positions in issue have been given authority to make arrests." Here the Commission quoted the City of Greenfield

(7252) 8/65, City of Milwaukee (8605) 7/68; Village of Fox Point (9959-A) 2/71; City of Wauwatosa (12032) 6/73; City of Menomonee Falls (13159-A) 5/75; City of Berlington (13777) 6/75; Waukesha County (14534-A) 11/76. There are other findings by the Commission that are made a part of the original proceeding before this court. The Commission concluded that there is almost no true interchange within the Department of Public Safety between the police and fire fighters.

The Commission found that the Department of Safety has a combination of two relative small sections. That this does not overcome the fact that each section has separate and distinct functions and that the daily activities of the police section are directed by the captain of police and the daily activities of the fire section are directed by the fire lieutenant.

The Commission further concluded that the difference in the training, responsibilities, duties and working conditions of the fire fighters and the police officers in the employ of the Village mandate that the fire fighters constitute a bargaining unit separate and apart from a unit of police officers.

On November 29, 1982, the election was held. The total number eligible to vote was ten. Eight ballots were cast. All eight votes were for the union. There were eight ballots for and none against. The certification of the union

was granted on December 10, making the union the collective bargaining agent for the fire fighters.

RIGHT TO REVIEW

An administrative decision is reviewable as provided in Section 227.15 and 227.16 Wis. Stats. The scope of the court's review of the agency's decision is defined by Section 227.20 Stats. 1977. The review must be confined to the record, Section 227.20(1) and must separately consider questions of law, questions of fact and procedure's Section 227.20(3).

Section 227.20(6) provides that if the agency's action depends on any fact found by the agency in a contested case proceeding, the court shall not substitute its judgment for that of the agency as to the weight of the evidence on any disputed finding of fact....

The review shall be conducted by the court without a jury and shall be confined to the record.... Testimony thereon may be taken in court....

Section 227.20 (2) provides "Unless the court finds a ground for setting aside, modifying, remanding or ordering agency action or ancillary relief under a specified provision of this section, it shall affirm the agency's action.

Section 227.20(6) of the statutes provides.... The court shall, however, set aside agency action or remand the

case to the agency if it finds that the agency's action depends on any finding of fact that is not supported by substantial evidence in the record.

The review of the order of the Commission entails a two-step inquiry. First, it must be determined whether there is substantial evidence in the record as a whole to support the Commission's findings. Then, if the evidence supports the Commission's findings, it must be determined whether the order was within the Commission's broad discretion.

By Municipal Employment Relations Action the Commission is authorized to determine appropriate bargaining units for the purpose of collective bargaining. Section 111.70(4)(d)2a Stats.

In determining bargaining units, the Commission may decide whether, in a particular case, the employees in the same or several departments, divisions, institutions, crafts, professions or other occupational groupings constitute a unit. Arrowhead v. WERC, 109 Wis. 2d 371, 374. The Commission also is required, whenever possible, to avoid fragmentation by maintaining as few units as particular in keeping with the size of the total municipal work force. Section 111.70(4)(d)2a.

In Village of Whitefish Bay v. WERC, 103 Wis. 2d 443, the Village petitioned pursuant to Section 227.15 and 227.16, Stats. for Circuit Court review, contending that the determination that lieutenants were supervisory employees entitled

to be the bargaining agent should be reversed. The Village asserted that because the lieutenants acted as heads of the Department during those shifts when the Chief is off duty they acted as managerial employees. In a memorandum decision, the Circuit Court determined that the WERC had defined the managerial personnel as those who participate in the formation, determination and implementation of management policy or possess effective authority to permit the employees resources. The court said such attributes set them apart from the community of interest shared by other employees. Based upon this definition and the evidence before it, the court affirmed the WERC order and certification.

Here the duties and responsibilities of the fire fighters compared to the police section imbues them with interests significantly at variance with those of the police section. Each job carries a total commitment to a different goal of work. There are times when their work cross lines but it is not united. There are times when one may assist the other, but it is done as a cross-over from one unit to another. There are times when one may contribute to the other but they are not made one unit.

In Arrowhead United Teachers v. WERC, 109 Wis. 2d 371, the court reversed the Commission holding that the Commission abused its discretion under Section 111.70(4)(d)2a Stats. by deviating without explanation from its prior practice

concerning community of interest and unit fragmentation. Such laws involved the teachers and teacher-interns. The analogy of the Arrowhead case is quite different than that of the case before the court. In the matter before the court two separate units are involved. The Village is small, the units are small but yet the units are separate and independent.

The action of the Commission is binding on the court if there is substantial evidence based on the totality of the record to support the Commission's determination. Scharping v. Johnson, 32 Wis. 2d 383. The Commission has found that the historic nature of the functioning of the fire section is different than that of the police section. The principal function of the police section is law enforcement. The principal function of the fire section is fighting fires and ambulance rescue.

The Commission's interpretation of the statute in question may be affirmed if it is reasonable and consistent with the purpose of the statute. Milwaukee v. WERC, 71 Wis. 2d 709(2d) Wis. 2d. The factual finding is conclusive if it is supported by substantial evidence in the record even if more than one inference can reasonably be drawn from the evidence. Chicago M., St. P. and Pac. R.R. v. DILHR, 62 Wis. 2d 392, 396; Vocational Tech & Adult Educ. v. DILHR, 76 Wis. 2d, 230, 240; Village of Whitefish Bay v. WERC, 103 Wis. 2d 443.

It is the opinion of this court that the record in this

case supports by substantial evidence the findings of the Commission and that the order is within the broad discretion of the Commission.

Whereupon the findings of the Commission are affirmed.

Dated at Milwaukee, Wisconsin, this 13th day of September, 1982.

BY THE COURT:



CLARENCE R. PARRISH
Circuit Judge
Branch 21.