STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

LOCAL UNION NO. 487, IAFF, AFL-CIO, LOCAL UNION NO. 29, PROFESSIONAL POLICE ASSOCIATION, POLICE COMMAND GROUP, LOCAL UNION NO. 9, EAU CLAIRE PROFESSIONAL POLICE ASSOCIATION (PATROL GROUP),	:	Case 137 No. 35138 MP-1727 Decision No. 22795-D
Complainants,	:	
vs.	:	
CITY OF EAU CLAIRE,	:	
Respondent.	:	

Appearances:

Lawton & Cates, Atttorneys at Law, by Mr. Richard V. Graylow, 214 West Mifflin Street, Madison, WI 53703-2594, appearing on behalf of Complainants.

Mr. Ted Fischer, City Attorney, City Hall, 203 South Farwell Street, Eau Claire, WI 54701, appearing on behalf of Respondent.

ORDER HOLDING COMMISSION REVIEW IN ABEYANCE PENDING EXHAUSTION OF JUDICIAL APPEAL PROCESS

On May 22, 1986, Examiner Christopher Honeyman issued Revised Findings of Fact, Conclusions of Law and Order with Accompanying Memorandum in the above matter wherein he concluded that Respondent City had not committed any prohibited practices within the meaning of Secs. 111.70(3)(a)1, 2, 3 or 4, Stats., by creating and implementing a system whereby police department employes are cross-trained and perform firefighting duties as Public Safety Officers (PSO's). The complaint was dismissed in its entirety. Thereafter, the Complainants filed a timely petition for review.

On July 8, 1986, in a separate but related action, the Eau Claire County Circuit Court, Judge Thomas Barland presiding, issued a decision that the City lacks home rule authority to undertake a PSO program as envisioned by the City. The City was enjoined from ordering police officers to perform firefighting duties on a regular basis. The City has since appealed Judge Barland's decision to the Court of Appeals, but also requested that briefing on the Petition for Review be completed and a Commission decision issued on all issues in dispute, and opposed the Union's motion to have Judge Barland's decision entered into the record. The Commission granted the Union's Motion to Receive Trial Court Decision and requested the parties to address the impact of that decision in their written argument.

The Commission has reviewed the record in this matter and has considered all the parties' written arguments, and is satisfied that its review of the Examiner's decision in this matter should be held in abeyance pending exhaustion of the judicial appeal process in the related action.

NOW, THEREFORE, it is hereby

ORDERED

That the Commission's review of the Examiner's decision in the above-entitled matter be held in abeyance pending exhaustion of the judicial appeal process of Judge Barland's decision.

Given under our hands and seal at the City of Madison, Wisconsin this 27th day of April, 1987.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Stephen Schoenfeld
Stephen Schoenfeld, Chairman

Herman Torosian, Commissioner

Danae Davis Gordon
Danae Davis Gordon, Commissioner

MEMORANDUM ACCOMPANYING ORDER HOLDING COMMISSION REVIEW IN ABEYANCE PENDING EXHAUSTION OF JUDICIAL APPEAL PROCESS

BACKGROUND AND HISTORY OF PROCEEDINGS

This matter arises from a decision of the City of Eau Claire to implement a Public Safety Officer (PSO) program. In 1985, the City decided to cross-train police department employes to perform firefighting duties and to establish a new classification of employes to perform this function. It refused to negotiate its decision with the unions representing the police and firefighters. In his initial decision Examiner Christopher Honeyman found that the City's decision constituted a permissive subject of bargaining. City of Eau Claire, Decision No. 22795 (1/86), Conclusion of Law 1. In the same decision, the Examiner found that the City had committed a prohibited practice by unilaterally implementing wages and other conditions of employment for the new position, Conclusion of Law 2, supra. Although the City had negotiated wages, hours and conditions of employment with the unions, the Examiner held that it could not thereafter unilaterally implement because there was no necessity to do so, Conclusion of Law 2, supra. The matter was appealed by the unions to the Commission. The Commission, sua sponte, on March 7, 1986, remanded the matter to the Examiner, directing further consideration of the issue of the "impasse-based" defense set forth by the City, and, necessarily, the availability of interest-arbitration in the dispute. The Examiner reconsidered his earlier conclusions and found that the City had negotiated with the patrol union over wages, hours and conditions of employment in good faith to impasse, that the dispute was not subject to interest arbitration, and that the City could proceed to implement its final offer. The complaint was dismissed in its entirety. City of Eau Claire, Decision No. 22795-C (5/86), Revised Conclusion of Law 2. Thereafter, the Complainant unions filed the instant petition for review.

On July 8, 1986, in a separate but related action, the Eau Claire County Circuit Court, Judge Thomas Barland presiding, issued a decision that the City lacks home rule authority to undertake a PSO program as envisioned by the City. The Judge's primary concern was that, under the City's program as described, PSO officers, as police officers, would at times become subject to the command of fire department employes. The decision states, in part:

> In summary, the creation of a public safety officer program whereby police officers would perform police and fire fighting duties subject to the direction, at different times, of both the police and fire fighting commands is a paramount subject of statewide concern and is not a local affair within the home rule powers of a municipality, because the legislature has so regulated the organization of fire and police departments and the rights of police officers and firefighters that the City's proposal impinges on the pattern of statewide uniformity created by the legislature.
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> For the City to carry out its public safety officer program, enabling legislation is necessary. Until that occurs, the City is enjoined from ordering police officers, as a condition of employment, to perform the duties of a firefighter on a regular basis.

After that decision, the parties temporarily postponed the briefing for the Petition for Review while the City decided whether to appeal Judge Barland's decision. The City has since appealed the decision to the Court of Appeals, requested that briefing on the Petition for Review be completed and a Commission decision issued on all issues in dispute, and opposed the Union's motion to have Judge Barland's decision entered into the record. The Commission granted the Union's Motion to Receive Trial Court Decision and requested the parties to address the impact of that decision in their written argument.

POSITION OF THE PARTIES:

In its brief on review, the Complainants repeat several of the arguments made before the Examiner. In the Complainants view, the Examiner erred in finding that the parties bargained to impasse because he neglected the fact that the City was not at liberty in negotiations to alter the Public Safety Officer (PSO) proposal already adopted by the City Council. Good faith negotiations cannot take place

where a negotiator has no power to bargain over the issues in dispute. In contrast, the Complainants were bargaining in good faith and still amending its proposals when the City unilaterally implemented its proposal.

Secondly, the Complainants contend that even if impasse did exist, the interest arbitration process provided by Sec. 111.77, Stats., is available in this situation because the new PSO employes are being accreted into an existing bargaining unit. In the Complainants' view the instant situation is similar to the situation in Greendale School District, Dec. No. 20184, Torosian dissent (WERC, 12/82). The PSO position is a new position in the City, for which incumbents have just been hired, with duties different from those of any police officer, and it requires unique training. The Complainants contend that the Examiner erred in determining that interest arbitration was not available simply because no prior unorganized group of employes is involved. The crucial factor is that the PSO position is new to the bargaining unit and has not had its terms and conditions of employment previously established by collective bargaining. If these employes are not allowed access to interest arbitration, they might attempt to form a new bargaining unit, leading to undesirable fragmented units. In addition, denying the right to interest arbitration in these situations would encourage employers to bargain in bad faith to impasse and then unilaterally impose their last offers.

Third, the Complainants contend either that the Commission is bound to give full force and effect to the Circuit Court's decision, which found the PSO program to be unlawful, or that the Commission should wait to issue any decision until the underlying legal issues are resolved by the appelate courts. In support of its position, the Union relies on Sec. 808.07(1), Stats., and the doctrines of res judicata and comity. It further contends that the issue of availability of interest arbitration was rendered moot by the Circuit Court's decision. In addition, the Union contends that any contract which included the PSO position, whether negotiated by the parties or resulting from arbitration, would be void as a matter of law because it would be contrary to state statute. WERC v. Teamsters Local No. 563, 75 Wis. 602, 250 N.W. 2d 696 (1976).

The City seeks affirmation of the Examiner's decision in all respects. The City contends that the circumstances establish that the parties had clearly reached an impasse in negotiations according to the criteria set forth in Taft Broadcasting Co. 1/ In response to the Union's contention that the City could not or would not engage in good faith bargaining, the City notes that it justifiably refused to negotiate its management decision to introduce a PSO program, but engaged in eight lengthy bargaining sessions on the impact of the program, and made significant modifications in its position on impact issues. In contrast, the police union insisted throughout negotiations on the complete abolition of the PSO program.

The City further contends that the doctrine of accretion has no application in these circumstances. The City distinquishes the Commission's decision in Greendale because here, as the Examiner correctly concluded, no prior unorganized group of employes is involved. All PSO employes are police officers and all police officers, upon hire, are members of the bargaining unit. The City rejects the Union's suggestion that denying interest arbitration will encourage bad faith bargaining. Prior to implementing a final offer, the employer and the union must reach genuine impasse which is only possible if good faith bargaining has occurred.

In the City's view, the Circuit Court decision should have no effect on these proceedings because the court ruling involved a separate and independent non-labor law issue. The judiciary and this administrative agency are two separate and independent entities, each having its own jurisdictional boundaries. The Circuit Court decision deals exclusively with the matter of municipal legal power and authority. According to the City, it is no more appropriate for the Commission to apply that decision here then it would be for the Circuit Court to review the Examiner's decision independently of the Commission. Moreover, the decision is on appeal and it may be reversed. Thus, any reliance on it at this time is premature. Furthermore, according to the City, "if the Commission were to follow the decision at this time, prior to final disposition on appeal, it would then in

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1/ 163 NLRB 475, 64 LRRM 1386 (1967)

effect be rendering its own judgment on the merits of the decision." This, the City submits, would be in excess of the Commission's jurisdiction, as enunciated in City of Brookfield. 2/

The City also contests the Union's arguments concerning res judicata, comity, mootness, and voidness of contract. With regard to res judicata, the City contends that an identity of issues does not exist since the issue before the Commission involves municipal labor law while the issue before the Court involved only the legality of the PSO proposal in relation to non-labor statutes. The City also argues that the doctrine of res judicata applies solely to courts and not to administrative agencies.

In rejecting the application of the principle of comity, the City contends that in this instance the Commission and courts do not have concurrent juridiction over any issue, but rather each have exclusive jurisdiction over different issues. The ultimate determination of the Commission will not permit or require the City to violate the Circuit Court decision or any other judicial determination on review.

The City does not view the issues as moot since 1) the Circuit Court decision is on appeal; 2) the Circuit Court decision appears to permit a PSO operation if changes were made in the method of command; and 3) the PSO program could be legitimized by the passage of enabling legislation. Furthermore, the instant appeal presents the Commission with an opportunity to provide future guidance to municipal employers and unions on a significant issue of importance concerning interest-arbitration, i.e. access to interest arbitration in mid-term of a contract. The Commission can explain and clarify the impact, if any, of its change of position on Greendale School District on the interest-arbitration process.

The City argues that the Union's arguments concerning voidness of contract simply reiterate its arguments based on res judicata and mootness.

Finally, the City contends that should the Commission decide it is bound by the decision of the Circuit Court, the remedy should be to affirm the Examiner's decision and dismiss the Union's appeal. If the Union believes that the Circuit Court decision bars any further WERC proceeding, it should simply have withdrawn its appeal.

DISCUSSION

The initial question before the Commission concerns the effect of the Eau Claire County Circuit Court's decision which found the proposed PSO program to be illegal and therefore enjoined the City's attempts to implement it. There has been no challenge made to the Circuit Court's assertion of jurisdiction. We note that Sec. 111.07(1), Stats., provides that while any controversy concerning unfair labor practices may be submitted to the Commission, nothing within that subchapter shall prevent the pursuit of legal or equitable relief in courts of competent jurisdiction. There can be no doubt that the Circuit Court had jurisdiction to decide the limited issue before it since it concerned a question of law requiring an interpretation of the Wisconsin Constitution and Wisconsin statutes.

It is also clear that, on review of the Examiner's decision, the Commission would also have jurisdiction to determine whether the proposed PSO program was illegal and, if not, whether the decision to establish a PSO program was a mandatory or permissive subject of bargaining. Such a determination would have been necessary in order to reach ultimate conclusions on whether the City had violated Sec. 111.70, Stats., in its bargaining and implementation of the PSO program. Prior to our determination, Judge Barland issued his decision.

We are not persuaded by the City's argument that the Circuit Court decision should have no effect on these proceedings. The City exaggerates the extent to which the decisions of an administrative agency and the courts are totally independent of each other. The decision in City of Brookfield v. WERC did not hold that the WERC can never interpret statutes other than labor related statutes

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2/ City of Brookfield v. WERC, 87 Wis. 2d 804, 275 NW 2d 723 (1979).

in seeking to enforce the legislative enactment of Chapter 111. Rather, that decision held that upon judicial review, the WERC's interpretation of statutes other than Chapter 111 is not entitled to persuasive or substantial weight. As to the effect of a Circuit Court's decision, the Commission cannot simply ignore a Circuit Court's decision on the matter of a municipality's legal power and authority when the question of the municipality's legal authority is a relevant threshold matter related to the labor law issues before the Commission.

The City has made several specific arguments against application of the doctrine of res judicata. 3/ It contends that the doctrine of res judicata is not applicable because there is not an identity of issues between the two actions. It is true that there are additional issues before the WERC concerning impasse and the availability of interest arbitration. However, the issue of whether the City had legal authority to proceed is present in both cases and the Circuit Court's decision is controlling on that issue.

The City's sweeping argument that the doctrine of res judicata is inapplicable to the proceedings of an administrative agency is also unpersuasive. The cases the City relies upon are inapposite. Those cases, along with more recent Wisconsin court cases, 4/ deal with situations where a challenge is made to an administrative agency's right to reconsider its own decisions, or to a Court's right to review the decision of an administrative agency. None of the cases cited by the City stand for the proposition that an administrative agency can ignore the decision of a Circuit Court where that decision is within the Court's jurisdiction and involves interpretation of statutes outside an agency's special expertise.

The City's argument against the doctrine of comity is also not persuasive. As already discussed above, it is our conclusion that the Circuit Court and the WERC had concurrent jurisdiction over the narrow issue of whether the PSO program was illegal. The Circuit Court found that program to be illegal prior to the Commission's review of the Examiner's decision. It is appropriate for us to defer to that Court's decision, especially since the Court's determination of the program's illegality was based on an analysis of statutes about which the Commission has limited expertise. 5/ We find nothing in the statutory provisions which we are empowered to enforce which is in direct conflict with the Circuit Court decision so we defer to its judgment in this case.

The claim of mootness is relevant primarily to the issue of the availability of interest arbitration in the instant circumstances. If in fact the PSO program cannot legally be established, then the City could not legally bargain to impasse on the decision of the impact of the PSO program on wages, hours and conditions of employment and the availability of arbitration would not be an issue. If the Circuit Court's decision is upheld on appeal, then this issue remains moot. If the Circuit Court is reversed at the end of the appeal process, the Commission can

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3/ Res judicata, which literally translated means "a thing decided," is the doctrine by which a judgment on the merits in a prior suit bars a second suit involving the same parties or their privies based on the same cause of action. In order for the first action to bar the current action, there must be an identity of parties and an identity of claims in the two cases. See Heinz Plastic Mold Co. v. Continental Tool Corp., 114 Wis.2d 54, 337 NW 2d 189 (Ct.App.1983); Barbian v. Lindner Bros. Trucking Co., Inc., 106 Wis.2d 291, 316 NW 2d 371 (1982).

4/ See, e.g., Village of Prentice v. Transportation Commission of Wis., 123 Wis. 2d 113 (Ct App., 1985); Board of Regents of U.W. System v. Wis. Personnel Commission, 103 Wis. 2d 545 (Ct App. 1981); City of Fond du Lac v. Dept. of Natural Resources, 45 Wis. 2d 620 (1970).

5/ After considering the broad home-rule powers found in the Wisconsin Constitution (Article XI, Section 3), the statutory grant of power to the cities (Section 62.11(5)), and the exceptions to these grants of power, the Circuit Court concluded that the City's proposed PSO program would conflict with the legislative organization of police and fire protection found primarily in Section 62.13, Stats., and, by implication, in a number of other statutory provisions. The Court did not consider Section 111.70, Stats.

then review the Examiner's decision regarding the City's duty to bargain, the existence of impasse, and the availability of interest arbitration. Given the uncertain result of the appeal process, and the unusual fact situation in this case, we do not believe it is appropriate to resolve an issue which is at least at this point moot.

Thus, we have concluded that our review in this matter should be held in abeyance pending exhaustion of the judicial appeal process regarding the legality of the PSO program. This does not involve any immediate delay for the City since the City is currently enjoined from implementing its PSO program anyway. If it is ultimately determined that the PSO program is illegal, then the Commission would be bound by that decision which would have an obvious impact on the remaining issues on review. If the PSO program is ultimately found to be lawful and the injunction is vacated, then the Commission can review all the issues decided by the Examiner. Again, even if this occurs, the City would not necessarily be delayed because, having prevailed before the Examiner, it could choose to implement its PSO program if it is willing to assume that risk pending review of the Unions claims by the Commission.

Dated at Madison, Wisconsin this 27th day of April, 1987.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Stephen Schoenfeld
Stephen Schoenfeld, Chairman

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