

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

PAT FERGUSON and :
LaCROSSE PROFESSIONAL POLICE :
SUPERVISORS ASSOCIATION, :
: Case 192
Complainants, : No. 43474 MP-2312
: Decision No. 26518-A
vs. :
: CITY OF LaCROSSE, :
CHIEF OF POLICE BRUCE MARCO and :
PERSONNEL DIRECTOR JEROME RUSCH, :
: Respondents. :

Appearances:

Davis, Birnbaum, Joanis, Marcou & Colgan, Attorneys at Law, 2025 South
Mr. Thomas Jones, III, Assistant City Attorney, City of LaCrosse, City

Avenue
Hall,

FINDINGS OF FACT, CONCLUSIONS OF LAW
AND ORDER GRANTING MOTION TO DISMISS

Pat Ferguson and the LaCrosse Professional Police Supervisors Association, hereinafter the Complainants, having on January 12, 1990 filed a complaint of prohibited practices with the Wisconsin Employment Relations Commission wherein it alleged that the City of LaCrosse, et al., hereinafter the Respondents, had committed prohibited practices within the meaning of Sec. 111.7(sic) Stats., by unilaterally modifying a wage, hour or condition of employment between Complainants and Respondents without bargaining and by modifying the vacation formula even though the Complainant is entitled to such formula under the parties' collective bargaining agreement; and thereafter the complaint was held in abeyance pending possible informal resolution which ultimately proved unsuccessful; and Respondents having on June 12, 1990 filed a Motion to Dismiss the complaint on the basis that Complainants are a law enforcement supervisory employe and an association of law enforcement supervisory employes, respectively, and therefore are not entitled to relief under the Municipal Employment Relations Act, hereinafter MERA; and Respondents having, that same day, filed a brief in support of its position; and the Commission, having on June 19, 1990 appointed Raleigh Jones, a member of its staff, to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and Order as provided in Sec. 111.07(5), Stats.; and Complainants having been given until July 13, 1990 to respond to Respondents' Motion but no response having been received by that date; and the Examiner having considered the pleadings and the arguments of the parties, and being satisfied that the Motion to Dismiss should be granted, makes and issues the following Findings of Fact, Conclusions of Law and Order Granting Motion to Dismiss.

FINDINGS OF FACT

1. That on January 12, 1990 the Complainants filed with the Commission a complaint of prohibited practices, attached hereto and containing the parties' 1988-89 collective bargaining agreement, wherein Complainants alleged, in part, that Complainant Pat Ferguson is a Detective Sergeant in the LaCrosse Police Department covered by the parties' labor agreement and that Complainant Association is the duly authorized collective bargaining agent for all supervisory police officers of the City of LaCrosse including Complainant Ferguson.

2. That on June 12, 1990 the Respondents filed a Motion to Dismiss the instant complaint contending that supervisory employes are not entitled to relief under the Municipal Employment Relations Act.

CONCLUSIONS OF LAW

1. That the supervisory law enforcement personnel employed by the Respondent City of LaCrosse are not "municipal employes" within the meaning of Sec. 111.70(1)(i), Stats., and therefore are not granted rights guaranteed to municipal employes under Sec. 111.70(2), Stats., or afforded the protection to exercise such rights pursuant to Sec. 111.70(3)(a), Stats.

2. That as the Complainants Ferguson and LaCrosse Professional Police Supervisors Association filed the instant complaint on behalf of supervisory law enforcement personnel employed by the Respondent City of LaCrosse, alleging violations of Sec. 111.7 (sic) Stats., by Respondents with regard to actions taken as to such supervisory law enforcement personnel, the complaint fails to allege facts upon which relief could be granted under Sec. 111.70(3)(a), Stats.

Upon the basis of the foregoing Findings of Fact and Conclusions of Law, the Examiner makes and issues the following

That the Respondents' Motion to Dismiss is hereby granted and the instant complaint is hereby dismissed in its entirety.

Dated at Madison, Wisconsin this 5th day of September, 1990.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Raleigh Jones, 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.

Section 111.07(5), Stats.

(5) The commission may authorize a commissioner or examiner to make findings and 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, CONCLUSIONS OF LAW
AND ORDER GRANTING MOTION TO DISMISS

As noted in the prefatory paragraph, the Respondents filed a Motion to Dismiss the instant complaint on the basis that since the bargaining unit Complainant Association represents consists of supervisory employes, Complainants cannot bring a prohibited practice complaint under the Municipal Employment Relations Act (MERA).

POSITIONS OF THE PARTIES

RESPONDENTS

It is the Respondents' position that the instant complaint should be dismissed on the basis that Complainants, as a law enforcement supervisory employe and an association of law enforcement supervisory employes, are not entitled to relief under MERA. It asserts that Complainants are not employes within the meaning of MERA so consequently they are not persons who may be granted relief under MERA. In support thereof it cites the Commission decisions of City of Milwaukee 2/ and City of Green Bay 3/ which it believes are directly on point. In its view, the instant matter is governed by those decisions. The Respondents therefore contend that the complaint should be dismissed.

COMPLAINANTS

Complainants did not file a brief or make any written response to the Motion to Dismiss.

DISCUSSION

The Respondents have moved to dismiss the instant complaint contending, in effect, that even if all the facts alleged in the complaint are assumed to be true, the Complainant Association and the supervisory law enforcement personnel it represents, including Complainant Ferguson, are not entitled to relief under Sec. 111.70(3)(a), Stats.

Commission examiners traditionally apply the following standard in deciding a prehearing motion to dismiss a complaint:

Because of the drastic consequences of denying an evidentiary hearing, on a motion to dismiss the complaint must be liberally construed in favor of the complainant and the motion should be granted only if under no interpretation of the facts alleged would the complainant be entitled to relief. 4/

For purposes of this motion then, it is presumed that: Ferguson is a supervisory police officer, the Association is composed of and represents law enforcement supervisors and the City unilaterally changed a condition of employment (namely the vacation formula) without negotiating same with the Association. Although not so stated in the complaint, such an allegation asserts a refusal to bargain violation of Sec. 111.70(3)(a)4, Stats.

This case does not raise an issue of first impression. To the contrary, the question of whether law enforcement supervisory employes are entitled to

2/ Dec. No. 12742-A (WERC, 4/75).

3/ Dec. No. 25868-A (Shaw, 3/89), aff'd by operation of law, Dec. No. 25868-B (WERC, 3/89).

4/ Unified School District No. 1 of Racine County, Wisconsin, Dec. No. 15915-B (Hoornstra with final authority for WERC, 12/77) at 3.

relief under MERA has been previously addressed and decisively resolved. In City of Milwaukee 5/ the Commission concluded as a matter of law:

That, although Section 111.70(3)(d) of the Municipal Employment Relations Act does not preclude law enforcement supervisors from organizing separate units of supervisors for purposes of negotiating with their municipal employers, no provision in the Municipal Employment Relations Act grants law enforcement supervisory personnel the protected rights of self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection, or the protected right to refrain from any and all such activities.

(At 3)

The Commission's rationale in reaching that conclusion was as follows:

Since Respondent admits that it refused to bargain collectively with Complainant generally within the meaning of Section 111.70(1)(d) of MERA, or specifically with regard to a fair-share agreement within the meaning of Section 111.70(1)(h) of MERA, the narrow issue is whether the Respondent has a duty to bargain collectively with Complainant whom it has recognized as the exclusive representative of certain of its supervisory personnel.

The rights set forth in Section 111.70(2) of MERA, grant:

". . . the right of self-organization, and the right to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection, and such employes shall have the right to refrain from any and all such activities. . . "

are rights which are granted to municipal employes. The term "municipal employe" is defined in Section 111.70(1)(b) as meaning:

". . . any individual employed by a municipal employer other than an independent contractor, supervisor, or confidential, managerial or executive employe."

There is no issue that the personnel employed by the Respondent, which are involved in this proceeding, are law enforcement supervisory personnel. Section 111.70(3)(d) states, in material part, as follows:

"Nothing in this subchapter shall preclude law enforcement or firefighting supervisors from organizing separate units of supervisors for purposes of negotiating with their municipal employers."

This section of MERA permits municipal employers, if they so desire, to negotiate with organizations representing supervisory law enforcement or firefighting personnel. There is no provision in MERA which requires that a municipal employer do so. Nor is there any provision in MERA which grants supervisory personnel the same rights afforded to "municipal employes" in the Act. Further, the prohibited practices set forth in MERA only apply to activities involving municipal employers and employes or their organizations, or to any person acting on behalf of in the interest of municipal employes or municipal employers, and not to law enforcement or fire fighter supervisory personnel or their organizations.

Since the Municipal Employer has no statutory duty to bargain collectively with the supervisory organization herein, its failure to enter into a fair-share agreement or to honor the dues check-off authorizations

5/ Supra, note 2.

cannot be deemed to be prohibited practices.

(At 5)

Although this decision dealt only with a municipal employer's duty to bargain with the representative of supervisory law enforcement personnel under MERA, the Commission's rationale in concluding that no such duty existed is equally applicable to any of the rights guaranteed under Sec. 111.70(2), Stats.

The wording of the definitions of "municipal employe" and "supervisor" contained in MERA is the same today as it was at the time of the Commission's decision in City of Milwaukee. The same is true as to Sec. 111.70(2), Stats., "Rights of Municipal Employes", and Secs. 111.70(3)(a)1, 3, 4 and 5, Stats., dealing with prohibited practices by a municipal employer.

The only pertinent change in MERA subsequent to the decision in City of Milwaukee has been in that provision which allows law enforcement and fire fighting supervisors to organize for the purpose of negotiating with their employers. In 1975 that provision was Sec. 111.70(3)(d), Stats., which read as follows:

(d) Nothing in this subchapter shall preclude law enforcement or fire-fighting supervisors from organizing separate units of supervisors for purposes of negotiating with their municipal employers. The commission shall by rule establish procedures for certification of such units of supervisors and the levels of supervisors to be included. The commission may require that the representative in a supervisory unit shall be an organization that is a separate local entity from the representative of the employes but such requirement shall not prevent affiliation by a supervisory representative with the same parent state or national organization as the employe representative.

That provision was renumbered to Sec. 111.70(8), Stats., in 1977 and amended to provide:

(8) SUPERVISORY UNITS. This subchapter does not preclude law enforcement or fire fighting supervisors from organizing in separate units of supervisors for purposes of negotiating with their municipal employers. The commission shall by rule establish procedures for certification of such units of supervisors and the levels of supervisors to be included in the units. The commission may require that the representative in a supervisory unit shall be an organization that is a separate local entity from the representative of the nonsupervisory municipal employes, but such requirement does not prevent affiliation by a supervisory representative with the same parent state or national organization as the nonsupervisory municipal employe representative. In cities of the 1st class, this section applies to law enforcement supervisors. For such purposes, the term "municipal employe" includes law enforcement supervisors in cities of the 1st class.

(Emphasis added)

The only material change in this provision has been the addition of the emphasized language noted above which apparently was made in response to the Commission's decision in City of Milwaukee. The effect of this statutory change was addressed in City of Green Bay 6/ where the complainant, like the complainant in this case, was an association representing supervisory personnel of the police department. Therein it was held that:

While the addition of that wording, especially the last sentence, might arguably form the basis for a finding that law enforcement supervisors "in cities of the 1st class" are given the same rights and protections that "municipal employes" have under Secs. 111.70(2) and (3) of MERA, there is no allegation, and can be no allegation, that the law enforcement supervisors represented by Complainant in this case are employed by a city of the "1st class". Therefore, whatever the effect of the additional language, it does not apply to the supervisory law enforcement personnel on whose behalf the instant complaint was filed.

(At 8)

Inasmuch as the City of LaCrosse, like the City of Green Bay, is not a city of

6/ Supra, note 3.

the "1st class", it follows that the Commission's conclusion in its decision in City of Milwaukee remains applicable as to the complaint of prohibited practices filed by the Complainants in this case.

On the basis of the foregoing, the Examiner is satisfied that the instant complaint does not allege facts under which the Complainants, and/or the law enforcement supervisors it represents, would be entitled to relief under MERA. Accordingly, the Respondents' Motion to Dismiss has been granted.

Dated at Madison, Wisconsin this 5th day of September, 1990.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Raleigh Jones, Examiner