

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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

Appearances:

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

Avenue
 Hall,

ORDER AFFIRMING EXAMINER'S FINDINGS OF FACT,
 CONCLUSIONS OF LAW AND ORDER GRANTING MOTION TO DISMISS

Examiner Raleigh Jones having on September 5, 1990 issued Findings of Fact, Conclusions of Law, and Order Granting Motion to Dismiss with accompanying Memorandum in the above matter wherein he determined that the complaint filed by Pat Ferguson and LaCrosse Professional Police Supervisors Association failed to allege facts upon which relief could be granted under Sec. 111.70(3)(a), Stats.; and Complainants having on September 21, 1990 filed a petition with the Wisconsin Employment Relations Commission seeking review of the Examiner's decision pursuant to Secs. 111.07(5) and 111.70(4)(a), Stats.; and the parties thereafter having filed written argument, the last of which was received on November 7, 1990; and the Commission having reviewed the record and being fully advised in the premises, makes and issues the following

ORDER 1/

That the Examiner's Findings of Fact, Conclusions of Law and Order Granting Motion to Dismiss are hereby affirmed.

Given under our hands and seal at the City of
 Madison, Wisconsin this 7th day of January,
 1991.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By A. Henry Hempe /s/
 A. Henry Hempe, Chairman

Herman Torosian /s/
 Herman Torosian, Commissioner

William K. Strycker /s/
 William K. Strycker, Commissioner

(Footnote 1/ appears on the next page.)

1/ Pursuant to Sec. 227.48(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. 227.49 and that a petition for judicial review naming the Commission as Respondent, may be filed by following the procedures set forth in Sec. 227.53, Stats.

227.49 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.

227.53 Parties and proceedings for review. (1) Except as otherwise

specifically provided by law, any person aggrieved by a decision specified in s. 227.52 shall be entitled to judicial review thereof as provided in this chapter.

(a) Proceedings for review shall be instituted by serving a petition therefore 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. 227.49, 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. 227.48. If a rehearing is requested under s. 227.49, 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. 77.59(6)(b), 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.

(b) The petition shall state the nature of the petitioner's interest, the facts showing that petitioner is a person aggrieved by the decision, and the grounds specified in s. 227.57 upon which petitioner contends that the decision should be reversed or modified.

. . .

(c) Copies of the petition shall be served, personally or by certified mail, or, when service is timely admitted in writing, by first class mail, not later than 30 days after the institution of the proceeding, upon all parties who appeared before the agency in the proceeding in which the order sought to be reviewed was made.

Note: For purposes of the above-noted statutory time-limits, the date of Commission service of this decision is the date it is placed in the mail (in this case the date appearing immediately above the signatures); the date of filing of a rehearing petition is the date of actual receipt by the Commission; and the service date of a judicial review petition is the date of actual receipt by the Court and placement in the mail to the Commission.

MEMORANDUM ACCOMPANYING ORDER AFFIRMING EXAMINER'S FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER GRANTING MOTION TO DISMISS

The Complaint:

The instant complaint alleges the following:

FACTS

1. Complainant, Pat Ferguson, is an employee of the Respondent, City of LaCrosse, in the capacity as a Detective Sergeant. He is a member of the Professional Police Supervisors Association and is covered by both the provisions of the Collective Bargaining Agreement between the Professional Police Supervisors Association and the City of LaCrosse.

2. Complainant, Professional Police Supervisors Association, is the duly authorized Collective Bargaining Agent for any and all sworn professional police officers of the City of LaCrosse. The President of the Professional Police Supervisors Association is Jeffrey Osterhout.

3. Respondent, City of LaCrosse, is a municipal employer within the meaning of ss. 111.70, Wis. Stats.

4. Respondent, Chief of Police, Bruce Marco, is the Chief of Police of the City of LaCrosse and was at all times an employer within the meaning of the Act.

5. Respondent, Jerome Rusch, was at all times material herein, the Personnel Director of the City of LaCrosse and an employer within the meaning of the Act.

6. In January of 1988, Complainant, Professional Police Supervisors Association entered into a Collective Bargaining Agreement with the City of LaCrosse governing the wages, hours and conditions of employment for all supervisory police officers of the City of LaCrosse including Complainant Ferguson. That the parties have had a continuous Collective Bargaining Agreement relationship and contract in place at all times material herein.

7. That said Collective Bargaining Agreement governs the wages, hours and conditions for all supervisory police officers for the City of LaCrosse.

8. That without due notice, the City of LaCrosse through Respondents Marco and Rusch, modified the vacation formula, thereby altering wages and benefits for the Complainants.

9. That at no time prior to the modification of the vacation formula did the City ever negotiate any provisions in its Collective Bargaining Agreement allowing the City to make such modifications to the wages, hours and conditions of employment.

10. That as a result of the illegal action of the City of LaCrosse, the Complainant Ferguson had his vacation pay reduced and has suffered the loss of substantial monies as a result thereof.

11. That Respondents' action in interfering with Complainant Ferguson's employment constitutes unilateral change of condition of employment without negotiating in violation of ss. 111.70 et seq.

WHEREFORE, the Complainant respectfully requests the Commission:

A. To order the Respondent to cease and desist from any and all unfair labor practices,

B. To make Complainant Ferguson whole for any and all losses resulting from the City's modification of the vacation formula;

C. For an order compelling the City to negotiate over any alteration of wages, hours or conditions of employment;

D. For such and further relief as the Commission deems proper.

The Motion to Dismiss:

Respondents filed a Motion to Dismiss alleging that because Complainant Ferguson is a supervisory employe and Complainant LaCrosse Professional Police Supervisory Association represents supervisory employes, Complainants are not persons or entities who are entitled to relief under the Municipal Employment Relations Act.

The Examiner provided Complainants with an opportunity to respond to the Motion. No response from the Complainants was ever received by the Examiner.

The Examiner's Decision:

The Examiner granted Respondent's Motion to Dismiss. In his Memorandum, he noted the following:

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. (Footnote omitted.)

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 in violation of Sec. 111.70(3)(a)4, Stats.

He then proceeded to apply the Commission's holding in City of Milwaukee, Dec. No. 12742-A (WERC, 4/75) 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.

Given the foregoing, the Examiner entered the following Conclusions of Law and dismissed the complaint.

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.

POSITIONS OF THE PARTIES ON REVIEW:

Complainants:

Complainants ask that the Examiner's Order be set aside and that the merits of the complaint be heard.

Complainants assert that they had in fact prepared a response to Respondents' Motion to Dismiss but failed to mail same to the Examiner. Complainants argue that Respondents were not prejudiced by the Complainants' failure to submit a brief to the Examiner and ask that the Motion be considered in light of the response which had been prepared but never mailed.

Complainants agree with the City's view that if Complainant Ferguson is a supervisory employe, he is not entitled to the relief he seeks under the Municipal Employment Relations Act. However, Complainants argue that the determination of whether Ferguson is a supervisor, as alleged by the Respondents, can only be made based on evidence presented at hearing. Complainants contend that because no hearing was held, Respondents failed to meet their burden of proof as to Ferguson's supervisory status. Thus, Complainants allege it was inappropriate for the Examiner to grant the pre-hearing Motion to Dismiss.

Respondents:

Respondents ask that the Commission affirm the Examiner.

Respondents contend that they bear no burden of proof as to Ferguson's status where, as here, the Complainants' allegations assert that Complainant Association has bargained a contract as the representative of supervisory employes and that Complainant Ferguson is a member of Complainant Association and covered by the contract.

Respondents further argue that given Complainants' failure to file a response to the Motion to Dismiss, the Commission can properly refuse to consider the argument contained therein.

Lastly, Respondents assert that if the Commission were to accept Complainants' assumption that certain members of Complainant Association are not supervisors, some employes would be able to pursue relief before the Commission under the Municipal Employment Relations Act while other employes, covered by the same contract, would not. Respondents argue that such a result is absurd and should be avoided.

DISCUSSION:

We affirm the Examiner.

The complaint alleges that Complainant Association and Respondent City are party to a contract which governs the wages, hours and conditions of employment of "all supervisory police officers of the City of LaCrosse including Complainant Ferguson." Thus, Ferguson's status as a supervisor and the Association's status as the representative of supervisors is clearly pleaded. Respondent's Motion to Dismiss was based upon this most reasonable interpretation of the complaint. Had the Examiner received Complainants' response to the Motion, he would have known that Complainants were now asserting that Complainant Ferguson was not a supervisor and that a hearing was needed to determine Ferguson's status. However, because Complainants never mailed their response to the Examiner, he obviously had no basis for concluding that there was any uncertainty as to the content of the complaint before him. He thus appropriately proceeded to rule on the Motion and correctly dismissed the complaint based upon our holding in City of Milwaukee, supra.

Complainants now ask that we review the Examiner's Order based upon a theory never raised before the Examiner. In effect, Complainants wish to amend the complaint to plead that Ferguson is not a supervisory employe but instead is a municipal employe. Both Section 111.07(2)(a), Stats, 2/ which is made applicable to the instant complaint by Sec. 111.70(4)(a), Stats., and ERB 12.02(5) 3/ make clear that amendments to complaints are untimely if made after issuance of the Examiner's final order. Thus, we decline to consider Complainants' "amended" complaint as the amendment was made in an untimely manner.

Lastly, we would note that even if we were to consider Complainants' amendment and even if it were established that Ferguson is not a supervisory employe, dismissal of the complaint would nonetheless have been appropriate. As noted by the Examiner and still not disputed by the Complainants, the complaint is most reasonably interpreted as alleging a refusal to bargain in violation of Sec. 111.70(3)(a)4, Stats. Even as a municipal employe, Ferguson would not have standing to raise a refusal to bargain allegation inasmuch as municipal employer's duty to bargain runs not to individual municipal employes but only to the bargaining representative of municipal employes. 4/ Further, a determination that Ferguson was a municipal employe would not affect Complainant Association's status in this matter as the representative of supervisory employes. As we noted in City of Milwaukee, supra, a municipal employer has no duty to bargain with the representative of supervisory employes. 5/

Given the foregoing, we have affirmed the Examiner.

Dated at Madison, Wisconsin this 7th day of January, 1991.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

2/ Section 111.07(2)(a), Stats. provides, in pertinent part:

"...any such complaint may be amended in the discretion of the Commission at any time prior to the issuance of a final order based thereon..."

3/ ERB 12.02(5) provides:

(5) AMENDMENT. (a) **Who may amend.** Any complainant may amend the complaint upon motion, prior to the hearing by the commission; during the hearing by the commission if it is conducting the hearing, or by the commission member or examiner authorized by the board to conduct the hearing; and at any time prior to the issuance of an order based thereon by the commission, or commission member or examiner authorized to issue and make findings and orders.

4/ Section 111.70(2), Stats. provides municipal employes with the right "...to bargain collectively through representatives of their own choosing..." Section 111.70(3)(a)4, Stats. provides that it is a prohibited practice for a municipal employer "To refuse to bargain collectively with a representative of a majority of its employes..."

We would also note that if Ferguson were a municipal employe, it would be the bargaining representative of the non-supervisory employes, not Complainant Association, who would have standing to raise the refusal to bargain issue.

5/ Subsequent amendment of Sec. 111.70(8), Stats. has provided City of Milwaukee police supervisors with all rights of municipal employes. See City of Milwaukee, Dec. No. 19190 (WERC, 12/81).

By A. Henry Hempe /s/
A. Henry Hempe, Chairman

Herman Torosian /s/
Herman Torosian, Commissioner

William K. Strycker /s/
William K. Strycker, Commissioner