STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

ANTIGO FIREFIGHTERS LOCAL, UNION NO. 1000, IAFF, AFL-CIO, Complainant, vs. CITY OF ANTIGO, Respondent.	Case 62 No. 45403 MP-2459 Decision No. 27108-A

Appearances:
Lawton & Cates, S.C., by Mr. Richard V. Graylow, 214 West Mifflin Street, Madison, Wisconsin 53703-2594, appearing on behalf of the Compla
Ruder, Ware & Michler, S.C., by Mr. Ronald J. Rutlin, and Mr. Jeffrey T. Jones,

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

On March 5, 1991, Antigo Firefighters Local Union No. 1000, IAFF, AFL-CIO, filed a complaint with the Wisconsin Employment Relations Commission, alleging that the City of Antigo was violating Secs. 111.70(3)(a)1, 3 and 4, Wis. Stats., by unilaterally establishing a classification of paid on-call employes outside the bargaining unit represented by Complainant and giving bargaining unit work to that group of employes. The Commission appointed Christopher Honeyman, a member of its staff, to act as Examiner in this matter and to make and issue Findings of Fact, Conclusion of Law, and Order as provided in Sec. 111.07, Wis. Stats. The parties agreed to defer processing of the matter pending receipt of an arbitration award in a related case. Following the issuance of that arbitration award, a hearing was held in Antigo, Wisconsin on January 23, 1992, at which time the parties were given full opportunity to present their evidence and arguments. A transcript was made, both parties filed briefs and reply briefs, and the record was closed on April 7, 1992. The Examiner, having considered the evidence and arguments and being fully advised in the premises, makes and files the following Findings of Fact, Conclusion of Law and Order.

FINDINGS OF FACT

1. Antigo Firefighters Local Union No. 1000, IAFF, AFL-CIO, is a labor organization within the meaning of Sec. 111.70(1)(h), Wis. Stats., and has its principal office at 617 Clermont Street, Antigo, Wisconsin.

2. The City of Antigo is a municipal employer within the meaning of Sec. 111.70(1)(j), Wis. Stats., and has its principal office at 617 Clermont Street, Antigo, Wisconsin.

3. At all times material to this proceeding, Complainant Union has been the exclusive bargaining representative of all full-time firemen and full-time captains and lieutenants employed by Respondent, excluding the Fire Chief, clerical, seasonal, temporary, supervisory, managerial and confidential employes.

4. On November 12, 1986 the City of Antigo Common Council passed a resolution stating that no new hires would be made in the Fire Department, then numbering 15 full-time officers, that the number of full-time Fire Department

staff would be reduced through attrition to 10, and that a volunteer program in which the volunteers would be paid would be initiated. Both prior to the passage of this resolution and subsequently, the Union and City discussed the institution of a "Paid On-Call" program on numerous occasions. The Union, in successive negotiations over a series of collective bargaining agreements, proposed in 1987 for the 1988 contract "to bargain the impact of training paid on-call [POC] personnell (sic) at such time this occurs." In 1989 the Union proposed for the 1990 contract that there be a reopener clause "to receive increases in pay and benefits for the impact of less full-time manpower to do the daily chores of operating the department", as well as a minimum manning clause. These proposals were rejected by management and were dropped by the Union. In 1988, the City forwarded to the Union a draft of a Memorandum of Understanding, stating as follows:

MEMORANDUM OF UNDERSTANDING

WHEREAS, on November 12, 1986, the City of Antigo Common Council passed a Resolution stating that:

(1) Effective immediately no person will be hired in the Fire Department.

(2) The number of full-time Firemen within the Fire Department will be reduced through attrition to ten (10).

(3) A volunteer program will be initiated; and

WHEREAS, the purpose of the above Resolution was to establish a long-term plan designed to create a combined Fire Department comprised of paid-on-call volunteers and full-time employees; and

WHEREAS, the volunteer program was not to be construed or used as a vehicle to lay off any current full-time fireman; and

WHEREAS, implementation of the above plan was consistent with the City of Antigo's management rights as outlined in Article 2 of the Labor Agreement between the City of Antigo and the Antigo Firefighters' Union; and

WHEREAS, the Antigo Firefighters' Union has expressed concerns that Article 2(I) of the Collective Bargaining Agreement between the City of Antigo and the Antigo Firefighters' Union would permit the City to implement a totally volunteer Department by laying off existing full-time employees notwithstanding the stated purpose of the plan as identified above; and

WHEREAS, the City of Antigo seeks assurances from the members of the Antigo Firefighters' Union that they will cooperate in the training of volunteers necessary to assure the success of the plan.

NOW, THEREFORE, the City of Antigo and the Antigo Firefighters' Union agree as follows:

1. The City of Antigo agrees that it will not lay off any existing full-time firefighter for the purpose of replacing them with a paid-on-call volunteer.

2. The Antigo Firefighters' Union and its members agree to cooperate with and assist the City in training paid-on-call volunteers who are recruited by the City to replace full-time firefighters as they retire or quit.

In reply, Bob Donohue, as President on the Union's behalf, wrote as follows:

> The recent discussion on the Paid on Call/Volunteer Firefighters program prompts this letter. In the last few months Local 1000 was given a "Memorandum of Understanding" for the membership to sign. After much discussion, we the members of Local 1000 believe we cannot sign this for the following reasons.
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> 1. The members of Local 1000 feel that the reduction to ten full-time firefighters is detrimental to the overall population of the city of Antigo. We are concerned first with the safety of the citizens we protect and also for our own safety as well. No one in the department is worried about losing their job as the City Council already passed the resolution to go to ten men through attrition. Our union would support the paid-on-call program if it is used to supplement the present force of fifteen men.
> 2. In recent months a lot of articles have appeared in the paper showing how the City of Antigo is growing through new business (K-Mart complex, Motel 8, Red Owl, Tradewells), and annexations (Cutlass Royale, Sheldons, Draegers, Reifs). Several new and different businesses have entered our fire protection area.
>
> The members of Local 1000 feel that the city should maintain the "status quo" in this department by maintaining a force of fifteen full time firefighters at all times. Not long ago the fire department employed seventeen firefighters. We have been reduced by two men and the city has saved a substantial amount of money by not replacing them.
>
> The members of Local 1000 feel that by reducing the fire department to ten men is a step in the wrong direction. We urge you to take this problem back to the full City Council to see if the original resolution can be rescinded. In our professional opinion, to rescind the resolution would be in the best interest of every citizen in the city of Antigo.

5. The record shows that by 1990, the City's concern with the costs of maintaining 15 full-time firefighters had abated in view of business expansion in the area. On March 6, 1990 the City drafted a set of terms and conditions of paid-on-call employment, and formerly initiated a program of hiring paid-on-

call employes at the rate of three new employes per year. The March 6, 1990 draft was formerly adopted by the City Council on March 14, 1990. The record shows that then-Union President Michael Bartz was aware of the adoption of these terms and received a copy shortly thereafter. The Union's proposals in bargaining for 1991, however, did not challenge the adoption of the POC program. On October 1, 1990, instead, the Union filed a grievance alleging that existing contractual provisions were violated when a POC was placed on duty replacing a full-time firefighter who was ill, thus depriving another full-time firefighter of an overtime opportunity. The parties processed the grievance to arbitration, and in his July 1, 1991 arbitration award, Arbitrator Stuart Levitan found that the Union had allowed the City to abrogate any past practice that might have existed as to full-time firefighters' overtime entitlement, because the Union was on notice as to the POC program and did not challenge its establishment at the time.

6. The record demonstrates that the City negotiated with the Union as to each of the proposals the Union made concerning the paid-on-call program in the several years leading up to the adoption of that program. The record further shows that when the program was finally adopted in March, 1990, it was with the proviso that 15 full-time firefighters be maintained, which was a position the Union had previously taken. The record additionally shows that the Union made no proposal concerning the POC program in its 1990 proposals, and had dropped the proposals made in prior years. The record accordingly demonstrates that the Union waived bargaining for the 1991 contract period concerning the establishment of the POC program.

7. The record is devoid of any evidence that the City discriminated against any firefighter based on Union or concerted protected activity, or interfered with the firefighters' exercise of their rights of organization.

Upon the basis of the foregoing Findings of Fact, the Examiner makes and files the following

CONCLUSION OF LAW

The City of Antigo did not violate Sec. 111.70(3)(a)1, 3 or 4, Wis. Stats. when it established the paid-on-call program in March, 1990, because the Union had had full opportunity to negotiate concerning the establishment of that program, had engaged in such negotiations, and had dropped its proposals.

Upon the basis of the foregoing Findings of Fact, Conclusion of Law, the Examiner makes and renders the following

ORDER 1/

IT IS ORDERED that the complaint filed in this matter be, and hereby is, dismissed in its entirety.

Dated at Madison, Wisconsin this 21st day of May, 1992.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Christopher Honeyman, Examiner

(See Footnote 1/ on Page 6)

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 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

BACKGROUND:

The complaint alleges that the City violated Sec. 111.70(3)(a)1, 3 and 4, Wis. Stats. by unilaterally introducing a classification of paid-on-call employes outside the bargaining unit, setting terms and conditions of employment for said employes unilaterally, and giving those employes work which was previously done by employes in the bargaining unit represented by Complainant. Complainant requests a cease-and-desist order. The essential facts are outlined in the Findings and need not be repeated here.

DISCUSSION:

The facts of this matter are essentially undisputed, and it is clear from the record that the Union was on notice at all times of the City's current intent, even though that intention varied from year to year according to the circumstances. Indeed, the Union made, though it subsequently dropped, proposals relating to the POC officers' work on several occasions. It should also be noted that nothing in this decision should be read as commenting on the most recent such proposals by the Union, made in 1991 for the 1992 collective bargaining agreement. The parties were engaged in negotiations over that agreement at the time of the hearing, and the Union's proposal to allow full-time firefighters first choice at overtime work was at issue in the bargaining for the subsequent contract.

The arguments made by the parties essentially address four issues: whether or not the City had any duty to bargain concerning the establishment of the POC program, and three different types of waiver argument. The complaint's allegations of interference and discrimination appear only in the form of the statutory numbers cited; there is no evidence in the record or substantive argument to support the citation of those sections of the statute; and those allegations are therefore clearly meritless.

Establishment of the POC Program

The City initially argues that it has no duty to bargain concerning the establishment of this program, because the function of this program was to improve services, and therefore it was "primarily related" 2/ to management and direction of the governmental unit rather than to wages, hours and conditions of employment. The Union, in opposition, cites Brown County v. WERC 3/ for the proposition that where a youth home was subcontracted out to a private contractor, there were governmental policy issues involved, but the employer had a choice of employing its own personnel or other personnel to fulfill the policy issues. The Union argues that this indicates that the City's choice to use paid-on-call volunteers to perform firefighting services rather than bargaining unit employes was primarily related to wages, hours and conditions of employment.

2/ Unified School District No. 1 of Racine County vs. WERC, 81 Wis.2d, 89, 102, 259 N.W.2d 724, 731 (1977).

3/ 138 Wis.2d 254 (1987).

I agree with the Union. It is clear from all of the testimony that the City's primary motivation in establishing the paid-on-call group of employes was that paid-on-call employes, as part-time employes working relatively small numbers of hours, could be paid at lower rates than the full-time firefighters in the bargaining unit, and that there would be a considerable savings in fringe benefits. Virtually nothing in the record substantiates the City's claim that quality of service or quantity of service were the underlying considerations. Therefore, I find that when the Racine test is applied, the decision to establish the paid-on-call program primarily relates to wages, hours and conditions of employment.

Waiver By Inaction

The City concedes that waiver must be established clearly and unmistakably, but alleges that such waiver may be found based on the bargaining history of the parties, citing City of Appleton 4/ and other cases to that effect. The City contends that in numerous cases, the waiver principle has been applied where a union was aware of the employer's plans, but did nothing. Here, the City argues, the City was quite clear as to its intent, but in 1990 when the plan was adopted, the union made no proposals that would impact on it, choosing instead to file a grievance under existing contract language. The City notes further that the Union's previous proposals in prior rounds of collective bargaining related to the POC issue were dropped.

The Union replies that most of the cases cited by the City deal with situations in which the unions involved never made any proposal or took any action. The Union contends that here, by contrast, it made proposals related to the POC issue, which it dropped only after the City argued in the negotiations involved that the POC issue was not ready to be negotiated yet because there was no impact. The Union notes that it did not file the previous POC proposals for the 1990 contract year "because the grievance had already been filed".

I find, contrary to the Union, that waiver by inaction did occur in the 1990 contract year. It is true that the Union had previously advanced bargaining proposals related to the establishment of the POC program, and the Union presents an understandable case as to its reasons for dropping the proposals in the prior years. But the grievance did not supplant a demand to bargain as to the POC issue in 1990, for several reasons. First, the POC program was formally adopted in March, 1990, but the Union did not file the grievance until October, after the program had been initiated, officers trained, and actually substituted for at least one full-time firefighter on at least one occasion. Thus, the Union cannot reasonably claim that the grievance "had already been filed". Also, the grievance was an attempt to secure rights under the existing contract language. The arbitrator in that case subsequently determined that the right to overtime was unprotected under the existing collective bargaining agreement, but whether or not the Union believed that the existing collective bargaining agreement would adequately defend its interests, it was entitled to and had the opportunity to present proposals for the 1991 respective round of negotiations, and did not do so. In view of the fact that by 1990 the Union had been aware literally for years that the POC issue was forthcoming, I find that this constitutes the clear and unmistakable evidence of waiver required under Wisconsin law. 5/

4/ Decision No. 14615-C (1/78).

5/ See Kenosha County, Dec. No. 14937, 14943 (WERC, 1/78); City of Stevens Point, Dec. No. 21646-B (WERC, 11/85); also City of Eau Claire, Dec. No. 22795-B (WERC, 3/86), and cases cited therein.

Waiver By Contract

Both the 1990 and 1991 collective bargaining agreements contained the following clause:

> ARTICLE 24 - ENTIRE MEMORANDUM OF AGREEMENT
>
> A. Amendments: This Agreement constitutes the entire Agreement between the parties. Any amendment or agreement supplemental hereto shall not be binding upon either party unless executed in writing by the parties hereto.
>
> B. Waiver: The parties further acknowledge that, during the negotiations which resulted in this Agreement, each had the unlimited right and opportunity to make demands and proposals with respect to any subject or matter not removed by law from the areas of collective bargaining and that he understanding and agreements arrived at by the parties after the exercise of that right and the opportunities as set forth in this Agreement, each voluntarily and unqualifiedly waives the right and each agrees that the other shall not be obligated to bargain collectively with respect to any subject or matter not specifically referred to in this Agreement, even though such subject may not have been within the knowledge and contemplation of either or both the parties at the time that they negotiated or signed this Agreement. Waiver of any breach of this Agreement by either party shall not constitute a waiver of any future breach of this Agreement.
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> . . .

The City contends that this constitutes a waiver clause which conclusively disposes of any argument by the Union that it had a right to negotiate during the term of the collective bargaining agreement. The Union contends that this was a mere "zipper" clause, also arguing that such a clause constitutes a "blanket waiver" under numerous WERC decisions which have held that blanket waivers will not be honored, absent evidence that the parties knew or should have known of the impending actions which were argued to be waived.

The primary difficulty with the Union's argument here is that the Union did in fact know of the likelihood that a POC program would be introduced. I conclude from the clear evidence that the Union was well aware in advance of the 1990 contract year that the POC program could be adopted at any time; that by agreeing to the continuation of the language of Article 24 in 1990 and 1991, the Union did in fact agree to a contractual waiver of items not included in the collective bargaining agreement; and that this included the establishment of the POC program.

Waiver By Reliance

The City's third (less stressed) argument amounts to a claim of estoppel, to the effect that the City had in fact met the Union's primary objection to the POC program before it adopted it. Union President Bob Donohue's letter in opposition to the program in 1989, and the testimony of the subsequent union

president Michael Bartz, clearly demonstrate that the Union's immediate and primary concern in opposing the POC program up to 1990 was the potential of the loss of jobs, together with safety concerns arising from fewer full-time firefighters being available even in the event of attrition. Indeed, Donohue's letter explicitly states that the Union "would support" the POC program "if it is used to supplement the present force of fifteen men."

By the time the POC program was adopted, however, the City had agreed to maintain 15 full-time firefighters, and neither layoffs or attrition were a part of the establishment of the POC program. The City had two motivations for doing this: it wished to secure the assistance of the Union members in training the POC firefighters, and business conditions in the City of Antigo had changed such that a larger group of firefighters than 10 appeared justified to the City on its own merits. Clearly, the second reason does not constitute reliance on the Union's actions. However, there is an element of reliance involved here in the fact that the Union strenuously objected to attrition, as well as layoffs, to cut the full-time firefighter complement to 10 members, and there is nothing in the record to indicate that the Union had augmented this position by the time the City enacted the 1990 POC program. Thus, there is some merit in the City's contention that the City had met the Union's essential demand from prior to 1990 in the structure which it then adopted.

Dated at Madison, Wisconsin this 21st day of May, 1992.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Christopher Honeyman, Examiner