STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

WISCONSIN PROFESSIONAL POLICE ASSOCIATION/LAW ENFORCEMENT EMPLOYEE RELATIONS DIVISION, Complainant,

vs.

CITY OF MADISON, Respondent.

Case 183
No. 52622
MP-3025

Decision No. 28864-B

Appearances:

Mr. Steven J. Urso, WPPA Executive Assistant, 7 North Pinckney Street, Suite 220, Madison, Wisconsin 53703, appearing on behalf of the Wisconsin Professional Police Association/Law Enforcement Employee Relations Division.

Ms. Eunice Gibson, City Attorney, City-County Building, Room 401, 210 Martin Luther King Jr. Boulevard, Madison, Wisconsin 53710, appearing on behalf of the City of Madison.

ORDER AFFIRMING EXAMINER'S FINDINGS OF FACT, MODIFYING EXAMINER'S CONCLUSION OF LAW AND AFFIRMING EXAMINER'S ORDER

On January 8, 1997, Examiner Lionel L. Crowley issued Findings of Fact, Conclusion of Law and Order with Accompanying Memorandum in the above matter wherein he determined that he would not exert the Commission's jurisdiction over the Complainant Wisconsin Professional Police Association/Law Enforcement Employee Relations Division's allegation that the Respondent City of Madison had committed prohibited practices within the meaning of Secs. 111.70(3)(a)5 and 1 of the Municipal Employment Relations Act by violating a bargaining agreement. The Examiner therefore dismissed the complaint.

On January 24, 1997, Complainant timely filed a petition with the Wisconsin Employment Relations Commission seeking review of the Examiner's decision pursuant to Secs. 111.70(4)(a) and 111.07(5), Stats. The parties thereafter filed written arguments in support of and in opposition to the petition, the last of which was received on March 26, 1997.

Having considered the matter and being fully advised in the premises, the Commission makes and issues the following

ORDER

A. The Examiner's Findings of Fact are affirmed.

B. The Examiner's Conclusion of Law is modified to read:

> Inasmuch as the 1994-1995 collective bargaining agreement between the Association and the City provides for final and binding arbitration of disputes over alleged violations of said agreement, the Commission will not assert jurisdiction over the Association's allegation that the City violated the 1994-1995 agreement and thereby committed prohibited practices within the meaning of Secs. 111.70(3)(a)5 or 1, Stats.

C. The Examiner's Order is affirmed.

Given under our hands and seal at the City of Madison, Wisconsin, this 8th day of October, 1997.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Meier /s/
James R. Meier, Chairperson

A. Henry Hempe /s/
A. Henry Hempe, Commissioner

Paul A. Hahn /s/
Paul A. Hahn, Commissioner

**WISCONSIN PROFESSIONAL POLICE ASSOCIATION/
LAW ENFORCEMENT EMPLOYEE RELATIONS DIVISION**

MEMORANDUM ACCOMPANYING ORDER AFFIRMING EXAMINER'S FINDINGS OF FACT, MODIFYING EXAMINER'S CONCLUSION OF LAW AND AFFIRMING EXAMINER'S ORDER

The Pleadings

In the complaint, Complainant asserted that Respondent violated Secs. 111.70(3)(a)5 and 1 of the Municipal Employment Relations Act by failing to comply with the terms of the collective bargaining agreement.

Respondent denied committing prohibited practices and asserted that the Complainant failed to use the applicable grievance arbitration procedure set forth in the parties' collective bargaining agreement.

The Examiner's Decision

The Examiner dismissed the complaint because he concluded that: (1) the grievance arbitration clause in the parties' agreement provided Complainant with a remedy for alleged violations of said agreement; and (2) Complainant had not provided a persuasive reason as to why it was not obligated to use its contractual remedy to seek redress of the Complainant's contractual claim.

In reaching his conclusions, the Examiner recited existing precedent that: (1) a contractual grievance arbitration procedure is presumed to be the exclusive remedy for alleged violations of the contract unless the contract itself expressly states otherwise; and (2) where the contractual grievance arbitration clause is the exclusive remedy for contractual claims, the Commission will not exercise its jurisdiction under Sec. 111.70(3)(a)5, Stats. to determine whether a contract has been violated unless facts exist which warrant creating an exception to the principle of exclusivity.

The Examiner did not find any express contract language which would indicate that the parties intended the grievance arbitration clause to be something other than the exclusive remedy. Nor did he find any facts which warranted creation of an exception to the exclusivity of the contractually provided remedy. Thus, he did not exercise the Commission's jurisdiction under Sec. 111.70(3)(a)5, Stats. and dismissed the complaint.

DISCUSSION

On review, the Complainant asserts the Examiner erred and should be reversed. It contends that the complaint was filed to obtain benefits to which employes are entitled under the contract. It alleges that where the City has itself failed to honor the contract, the City should

not be allowed to turn around and use the same contract as a defense. Where, as here, the City has openly violated the contract, there is no reason to believe use of the grievance procedure will produce voluntary compliance with the contract by the City. Therefore, Complainant argues that use of the grievance procedure would be a futile and useless act which would have delayed employe receipt of their contractual rights. In support of its position, the Complainant cites several grievance arbitration awards in which it was held that failure to comply with portions of a contractual grievance procedure did not preclude the arbitrator from deciding the merits of the grievance.

Respondent urges the Commission to affirm the Examiner in all respects.

It is useful to set forth certain relevant statutory and policy considerations before looking at the specific dispute before us. A labor organization enjoying exclusive representative status has standing as a "party in interest" under Sec. 111.07(2)(a), Stats., to file a complaint with the Commission under Sec. 111.70(3)(a)5 of the Municipal Employment Relations Act (or Sec. 111.06(1)(f) of the Wisconsin Employment Peace Act) alleging that an employer has violated the parties' collective bargaining agreement. GENERAL DRIVERS & HELPERS UNION LOCAL 662 V. WERB, 21 Wis.2d 242, 251 (1963); MELROSE-MINDORO JOINT SCHOOL DISTRICT NO. 2, Dec. No. 11627 (WERC, 2/73). However, where the labor organization has bargained an agreement with the employer which contains a procedure for final impartial resolution of disputes over contractual compliance, the Commission generally will not assert its statutory complaint jurisdiction over breach of contract claims 1/ because of the presumed exclusivity of the contractual procedure and a desire to honor the parties' agreement. MAHNKE V. WERC, 66 Wis.2d 524, 529-30 (1974); UNITED STATES MOTOR CORP., Dec. No. 2067-A (WERB, 5/49); HARNISHFEGER CORP., Dec. No. 3899-B (WERB, 5/55); MELROSE-MINDORO, supra; CITY OF MENASHA, Dec. No. 13283-A (WERC, 2/77). Where the labor organization has bargained an agreement with the employer which does not contain a procedure for final impartial resolution of disputes over contractual compliance but does contain a procedure through which the parties can bilaterally attempt to resolve such disputes, the Commission will assert its breach of contract jurisdiction**,** AMERICAN MOTORS CORP. V. WERB, 32 Wis.2d 237, 249 (1966). WEYAUWGEGA JOINT SCHOOL DISTRICT NO. 2**,** Dec. No. 14373-B (6/77), aff'd, Dec. No. 14373-C (WERC, 7/78), but only if the contractual procedure has been exhausted**.** LAKE MILLS JOINT SCHOOL DISTRICT NO. 1, Dec. No. 11529-A (7/73), aff'd, Dec. No. 11529-B (WERC, 8/73); WEYAUWEGA, supra. By requiring exhaustion as a condition precedent to the assertion of jurisdiction, the Commission respects the parties' agreement and enhances the prospects that such disputes will be resolved through the statutorily preferred means of bilateral collective bargaining without need for third party intervention. See, Secs. 111.70(1)(a) and 111.70(6), Stats. Thus, where there is a failure to exhaust a non-binding procedure, a complaint alleging breach of contract will be dismissed. LAKE MILLS, supra.

The policy bases for the exhaustion requirement noted above are applicable whenever the parties' contractual procedure is potentially available for resolution of the specific type of

dispute. Thus, even where the labor organization has bargained a non-binding procedure as to which it has no access absent a willing employe grievant, the Commission will not assert jurisdiction over the labor organization's breach of contract complaint even though the affected individual employe has not utilized the contractual procedure. JOINT SCHOOL DISTRICT NO. 3, PLUM CITY et al., Dec. No. 15626-A (4/78), aff'd, Dec. No. 15626-B (WERC, 5/79). Where the contractual procedure is unavailable, 2/ to either the labor organization or the employe as to a specific type of dispute, the Commission is an available forum for resolution of breach of contract claims absent a clear and unmistakable waiver of that statutory right. CITY OF WAUWATOSA, Dec. Nos. 19310-19312-A (WERC, 11/82), modified, Dec. Nos. 19310-19312-C (WERC, 4/84).

We affirm the Examiner's dismissal of the complaint. Complainant may well be correct that Respondent would not have conceded any violation of the contract if the Complainant had used the contractual grievance procedure to pursue its claim. But what Complainant neglects to mention is that if the City had not conceded violating the contract, Complainant then had access to a final and binding arbitration proceeding in which it could seek to persuade a neutral decision-maker that the contract had been violated and, if successful, could obtain appropriate relief. The parties' grievance arbitration procedure does not end with the City's denial of any violation. It ends with final and binding arbitration. As correctly found by the Examiner, the parties' contract reflects an agreement that an arbitrator will decide the merits of claims which are not resolved by the parties through the grievance procedure. If the Commission were to exercise its jurisdiction over the merits of the contract claim, we would be inappropriately undermining the agreement of the parties to have an arbitrator decide such issues and would be acting in a manner contrary to the presumed exclusivity of the contractual procedure.

The arbitration cases cited by Complainant are situations in which a party to a contract successfully sought to use the contractual grievance arbitration procedure to obtain a ruling on the merits of the grievance despite procedural objections by the other party. Here, the Complainant did not seek to use the grievance arbitration process it had bargained with the City as the exclusive remedy for contract claims. If it had followed that process, there is no reason to believe it would not have received a ruling on the merits of its claim against the Respondent City.

Given all of the foregoing, we affirm the Examiner's dismissal of the complaint. We have modified his Conclusion of Law only to remove any inference that if the Complainant had

"exhausted" the contractual process and been unsuccessful, Complainant could then have used the Commission's complaint jurisdiction to obtain another "bite of the apple".

Dated at Madison, Wisconsin this 8th day of October, 1997.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Meier /s/
James R. Meier, Chairperson

A. Henry Hempe /s/
A. Henry Hempe, Commissioner

Paul A. Hahn /s/
Paul A. Hahn, Commissioner

ENDNOTES

1/ Exceptions to this policy include instances where (1) the employe alleges denial of fair representation [WONDER REST CORP., 275 Wis. 273, (1957)]; (2) the parties have waived the arbitration provision, [ALLIS CHALMERS MFG. CO., Dec. No. 8227 (WERB, 10/67)] and (3) a party ignores and rejects the arbitration provisions in the contract, [MEWS READY MIX CORP., 29 Wis.2d 44 (1965).]

2/ Where the procedure has been accessible, but for some failure to meet a contractual prerequisite such as a time limit for grievance filing, the Commission, due to the exhaustion requirement previously discussed, would not assert its jurisdiction. In such instances, the procedure would be deemed "available" for the purposes of our analysis herein.

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