STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MILWAUKEE POLICE SUPERVISORS' ORGANIZATION, Complainant,

vs.

CITY OF MILWAUKEE, CHIEF ARTHUR L. JONES, AND BOARD OF FIRE AND POLICE COMMISSIONERS OF THE CITY OF MILWAUKEE, Respondents.

Case 462
No. 58064
MP-3561

Decision No. 29896-B

Appearances:

Fuchs, Snow, DeStefanis, S.C., by **Attorneys John F. Fuchs** and **Paul H. Beard,** 620 North Mayfair Road, Milwaukee, Wisconsin 53226, appearing on behalf of the Milwaukee Police Supervisors' Organization.

City Attorney Grant Langley, by **Assistant City Attorney Thomas J. Beamish,** 200 East Wells Street, Milwaukee, Wisconsin 53202, appearing on behalf of the City of Milwaukee, Chief Arthur L. Jones, and the Board of Fire and Police Commissioners of the City of Milwaukee.

ORDER AFFIRMING AND MODIFYING EXAMINER'S FINDINGS OF FACT AND CONCLUSIONS OF LAW AND AFFIRMING EXAMINER'S ORDER

On November 20, 2000, Examiner Stuart D. Levitan issued Findings of Fact, Conclusion (sic) of Law and Order with Accompanying Memorandum in the above matter wherein he concluded that Respondents had not committed prohibited practices within the meaning of Secs. 111.70(3)(a)3, 4 or 5, Stats. Therefore, he dismissed the complaint.

Complainant filed a petition with the Wisconsin Employment Relations Commission on November 30, 2000 seeking review of the Examiner's decision pursuant to Secs. 111.07(5) and 111.70(4)(a), Stats. The parties thereafter filed written argument in support of and opposition to the petition, the last of which was received February 26, 2001.

Having reviewed the record and being fully advised in the premises, the Commission makes and issues the following

ORDER

A. Examiner Findings of Fact 1-12 are affirmed.

B. Finding of Fact 13 is made as follows:

> 13. Respondents' conduct was not based in whole or in part on hostility toward protected concerted activity.

C. Examiner Conclusions of Law 1-2 are set aside.

D. Examiner Conclusion of Law 3 is renumbered Conclusion of Law 1 and affirmed.

E. Examiner Conclusion of Law 4 is renumbered Conclusion of Law 2 and is affirmed as modified to read:

> 2. The matters in dispute are addressed by the existing collective bargaining agreement between the City of Milwaukee and the Milwaukee Police Supervisors' Organization. Therefore, the City of Milwaukee did not have a duty to bargain with the Milwaukee Police Supervisors' Organization over said matters. Thus, the Respondents did not commit a prohibited practice within the meaning of Sec. 111.70(3)(a)4, Stats.

F. Examiner Conclusion of Law 5 is renumbered Conclusion of Law 3 and is affirmed as modified to read:

> 3. Respondents did not violate a collective bargaining agreement between the City of Milwaukee and the Milwaukee

Police Supervisors' Organization and thus did not commit prohibited practices within the meaning of Sec. 111.70(3)(a)5, Stats.

G. The Examiner's Order is affirmed.

Given under our hands and seal at the City of Madison, Wisconsin this 28th day of June, 2001.

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

City of Milwaukee

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

The Pleadings

The complaint alleges that by filling a position in the City of Milwaukee Police Department with a civilian instead of a sworn employee represented by the Milwaukee Police Supervisors' Organization (MPSO), Respondents:

(1) failed to bargain collectively with the MPSO in violation of Sec. 111.70(3)(a)4, Stats.; and

(2) discouraged membership in the MPSO in violation of Sec. 111.70(3)(a)3, Stats.; and

(3) breached a collective bargaining agreement in violation of Sec. 111.70(3)(a)5, Stats.

To remedy these violations, Complainant MPSO asks that the position in question be filled by a sworn employee represented by the MPSO.

In their answer, Respondents deny that they committed any of the alleged prohibited practices and affirmatively assert that their actions were within their lawful authority under the City of Milwaukee/MPSO bargaining agreement and state statutes.

The Examiner's Decision

The Examiner concluded that Respondents had not committed any of the alleged prohibited practices.

As to the alleged violation of Sec. 111.70(3)(a)3, Stats., the Examiner held that to sustain this allegation, Complainant MPSO was required to but had not produced evidence that Respondents were hostile toward the MPSO or that Respondents had acted in whole or in part based on such hostility. Thus, he dismissed this complaint allegation.

As to the alleged violation of Sec. 111.70(3)(a)4, Stats., the Examiner held that if the existing collective bargaining agreement addressed the transfer of work to a civilian employee, then Respondent City had no duty to bargain over the matter. He concluded that the existing contract did address this topic and thus dismissed this complaint allegation.

As to the alleged violations of Sec. 111.70(3)(a)5, Stats., the Examiner reasoned as follows:

> Sec. 11.70(3)(a)5, Stats., (sic) makes it a prohibited practice for the employer to "violate any collective bargaining agreement previously agreed upon by the parties with respect to wages, hours and conditions of employment." The MPSO has invoked the Commission's jurisdiction, and the respondents (sic) have neither objected nor demanded referral to arbitration. The MPSO alleges that the Respondents have committed two violations of this provision -– by assigning lower-ranked personnel rather than filling vacancies with higher-ranked personnel (the "underfilling" claim), and by employing only 23 captains when the city (sic) budget process authorized 24.
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> The MPSO has placed great stock in a prior case in which a different union, the Milwaukee Police Association, successfully challenged the Respondents on a decade-long practice of using lower paid police officers to perform the duties of higher-paid police alarm operators. The court of appeals found this to be a breach of the contract terms setting the applicable pay scale for the performance of the relevant duties. PASKO V. CITY OF MILWAUKEE, 222 WIS. 2D 274 (CT. APP. 1998)
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> As the Respondents note, however, there is a significant difference in the factual basis of the two cases. In PASKO, the collective bargaining agreement specifically identified positions with specific duties and specific pay rates; it was the city's (sic) long-standing practice of assigning lower-paid positions to perform the duties of higher-paid ones that the court held improper. Here, there is no position in the collective bargaining agreement which is identified as having the duties of Chief's Adjunct. Whether or not the City underfilled the position – and Chief Jones' correspondence certainly indicates that's what the City did – such an action in and of itself is not illegal. The MPSO had no legal right to have the duties performed by the Adjunct be assigned to one of its members; therefore it was not illegal for the city (sic) to assign those duties to an employe (sic) paid less than a Captain.
>
> Nor did the MPSO have a contractual right to a certain number of members, or to have the City employ certain number of captains. Indeed, MPSO counsel effectively acknowledged this point on the record at hearing.
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> Accordingly, I have also dismissed the claim of a violation of Sec. 111.70(3)(a)5, Stats.

POSITIONS OF THE PARTIES ON REVIEW

Complainant MPSO

Complainant MPSO asserts that the Examiner erred and asks that he be reversed.

Concerning the alleged violation of Sec. 111.70(3)(a)3, Stats., MPSO argues that the facts of the case are sufficient to establish a violation. MPSO contends that the discrimination against it is established by Respondents' reduction in the number of Captains represented by MPSO and the resultant loss of a promotional opportunity for the employees it represents. These negative impacts constitute circumstantial evidence of hostility and hostility-based motivation that are sufficient to establish a violation of Sec. 111.70(3)(a)3, Stats.

As to the alleged violation of Sec. 111.70(3)(a)4, Stats., MPSO asserts the loss of bargaining unit work is a mandatory subject of bargaining and that the Examiner erred by concluding that the parties' existing contract covered the subject sufficiently to eliminate the duty to bargain over the matter.

Regarding the alleged violations of Sec. 111.70(3)(a)5, Stats., MPSO contends that by permanently underfilling the Chief's Adjutant position and by failing to fill authorized vacancies with employees represented by the MPSO, the City violated the collective bargaining agreement and the Examiner erred by not so finding.

Respondents

Respondents ask that the Examiner be affirmed in all respects.

As to the alleged violation of Sec. 111.70(3)(a)3, Stats., Respondents argue that the MPSO failed to establish that Respondents acted out of hostility toward the MPSO when filling the Adjutant position with a civilian employee. Indeed, the Respondents note that the MPSO stipulated on the record that Respondent Jones had no anti-MPSO animus. Thus, Respondents contend the Examiner correctly concluded that no violation of Sec. 111.70(3)(a)3, Stats., was committed.

Regarding the alleged violation of Sec. 111.70(3)(a)4, Stats., Respondent urges the Commission to affirm the Examiner's determination that there was no duty to bargain because the matter was already covered by the parties' existing contract.

Turning to the alleged violations of Sec. 111.70(3)(a)5, Stats., Respondents assert the Examiner correctly concluded that the parties' contract does not prohibit filling the Adjutant position with a civilian and does not obligate Respondents to employ a specific number of Captains.

DISCUSSION

Looking first at the alleged violation of Sec. 111.70(3)(a)3, Stats., this statutory provision makes it a prohibited practice for a municipal employer:

> 3. To encourage or discourage a membership in any labor organization by discrimination in regard to hiring, tenure, or other terms or conditions of employment; . . .

MPSO asserts that the Respondents' actions violated Sec. 111.70(3)(a)3, Stats., because the negative impact of the loss of a promotional opportunity and of the reduction in the number of employees represented by MPSO inevitably discouraged employee membership in the MPSO and can only be viewed as discriminatory. We disagree.

Section 111.70(3)(a)3, Stats., does not prohibit employer conduct merely because it may discourage membership in a labor organization. By the terms of the statute itself, only where the employer conduct constitutes "discrimination" does "discouraging" conduct violate Sec. 111.70(3)(a)3, Stats.

The Wisconsin Supreme Court has held that to establish the requisite "discrimination," a complainant must show that:

> 1. The complainant was engaged in protected concerted activity; and
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> 2. The employer was aware of that activity and hostile thereto; and
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> 3. The employer's conduct toward the complainant was motivated in whole or in part by that hostility.

SEE EMPLOYMENT RELATIONS DEPT. V. WERC, 122 WIS.2D 132 (1985); MUSKEGO-NORWAY C.S.J.S.D. NO. 9 V. W.E.R.B., 35 WIS.2D 540 (1967).

The MPSO correctly argues that hostility and motivation can be established by inference. The MPSO asserts that given the negative impact of the Respondents' action upon the employees MPSO represents, the only possible inference is that Respondents were hostile and motivated by that hostility. We disagree.

We believe an assessment of the reason the employer asserts it took the disputed action plays an important role when a decisionmaker determines what inferences to draw from the evidence. EMPLOYMENT RELATIONS DEPT., SUPRA:

> As the key element of proof involves the motivation of [the employer] and as, absent an admission, motive cannot be definitively demonstrated given the impossibility of placing oneself inside the mind of the decisionmaker, [the employee] must of necessity rely in part upon the inferences which can reasonably be drawn from facts or testimony. On the other hand, it is worth noting that [the employer] need not demonstrate 'just cause' for its action. However, to the extent that [the employer] can establish reasons for its action which do not relate to hostility toward an employe's protected concerted activity, it weakens the strength of the inferences which [the employee] asks the [WERC] to draw." EMPLOYMENT RELATIONS DEPT. AT 143.

In the instant matter, there is no direct evidence of hostility. The record establishes that Respondent Jones decided to have a civilian employee perform the Chief's Adjutant functions because he wanted to retain the services of the incumbent civilian who was capably performing those functions. The legitimacy of Jones' motivation overwhelms any inference of hostility and motivation that could be drawn based on the negative impact the Respondents' action had on the total number of employees represented by MPSO and the loss of a desirable promotional opportunity for unit members. Given the absence of illicit hostility or motivation, the fact that the Respondents took action that might discourage membership in the MPSO does not violate Sec. 111.70(3)(a)3, Stats.

Turning to the alleged violation of Sec. 111.70(3)(a)4, Stats., the MPSO asserts the City violated its duty to bargain during the term of an existing contract because it unilaterally took action as to mandatory subjects of bargaining (i.e. filling the Chief's Adjutant position with a civilian instead of a sworn employee and reducing the number of employees represented by the MSPO). The MPSO asserts that the parties have not already bargained over these matters because said topics are not addressed in the existing contract. 1/ The Examiner disagreed.

1/ We note that there is a certain inconsistency between the MPSO contention that the existing contract does not address these matters and the MPSO argument that the City violated provisions of the existing contract by its actions.

During the term of a contract, there is no duty to bargain over matters already addressed by that contract. CADOTT EDUCATION ASS'N V. WERC, 197 WIS.2D 46 (CTAPP 1995). The parties have already struck a bargain on such matters and are entitled to rely on that bargain for the term of the contract.

In concluding that the contract already addressed the matters in dispute, the Examiner relied on Article 5 of the contract that provides in pertinent part:

ARTICLE 5

MANAGEMENT RIGHTS

1. Except as specifically provided otherwise by this Agreement, any and all rights concerning the management and direction of the Police Department and the Police force shall be exclusively the right of the City and the Chief of Police.

2. Specifically, and without limitation by enumeration, the City shall have the following unrestricted rights:

   a. The MPSO recognizes the right of the City, the Board of Fire and Police Commissioners and the Chief of Police to operate and manage their affairs in all respects. The MPSO recognizes the exclusive right of the Board of Fire and Police Commissioners and/or the Chief of Police to establish and maintain departmental rules and procedures for the administration of the Police Department during the term of this Agreement, provided that such rules and procedures do not violate any of the specific provisions of this Agreement.

   b. The City has the exclusive right and authority to schedule and/or assign overtime work. The City shall have the sole right to authorize trade-offs of work assignments.

   c. It is understood by the parties that every duty connected with operations enumerated in job descriptions is not always specifically described; nevertheless, it is intended that all such duties shall be performed by the employee.

   d. The City reserves the right to discipline or discharge for cause. The City reserves the right to lay off employees.

   e. The City shall determine work schedules and establish methods and processes by which such work is performed.

   f. The City shall have the right to assign and/or transfer employees within the Police Department.

g. Except as otherwise specifically provided in this Agreement, the City, the Fire and Police Commission and the Chief of Police shall retain all rights and authority to which by laws they are entitled.

h. The City shall have exclusive authority to transfer any or all of the operations of the Milwaukee Police Department to another unit of government and such transfer shall not require any prior negotiations or the consent of the MPSO.

i. The City shall have the authority, without prior negotiations, to consolidate operations of two or more departments.

j. The City shall have the authority, without prior negotiations, to consolidate operations within the Department or to reorganize within the Department.

k. The right of contracting or subcontracting is vested in the City.

We affirm the Examiner's determination that Article 5 of the existing contract addresses the matters at issue between the parties and thus we also affirm his conclusion that there was no duty to bargain over these matters during the term of that contract.

The MPSO equates the City's decision to "civilianize" the Chief's Adjutant position with a decision to subcontract. Obviously, Article 5, Section 2. k. of the contract references "subcontracting" and thus we conclude this portion of the MPSO concern is addressed by the existing contract. 2/

2/ This explicit reference to subcontracting clearly distinguishes this case from the MPSO cited decision in BROWN COUNTY V. WERC, 138 WIS. 2D 254 (CTAPP 1987) where the Court held that management rights clause language giving the employer the right to lay off employees for "legitimate reason" did not allow a municipal employer to avoid bargaining over the decision to subcontract unit work.

The other component of the MPSO's concern over the City's conduct is the reduction in the number of employees represented by the MPSO and/or the number of promotional opportunities available to MPSO represented employees. At a minimum, Article 5 (preamble) and Article 5, Sections 2. a. d. e. f. g. and i. all address this MPSO concern and thus we again conclude this matter is addressed by the existing contract.

Because we are satisfied that the matters in dispute are addressed by the contract, it follows under CADOTT that the City had no obligation to bargain over these matters during the term of the contract. Thus, we affirm the Examiner's dismissal of this portion of the complaint.

As the Court noted in CADOTT, a determination that a matter is addressed by an existing contract only resolves the duty to bargain issue and does not resolve the question of whether the contract was or was not violated. As the Court further noted, the issue of a contract violation is typically left for resolution by the parties' grievance arbitration procedure. However, where, as here, there is no assertion that a contractual grievance arbitration provision was an available and exclusive mechanism for resolution of the violation of contract issue, it is appropriate for us to exercise our violation of contract jurisdiction under Sec. 111.70(3)(a) 5, Stats.

When arguing that the Respondents' actions violated the terms of the collective bargaining agreement, the MPSO relies heavily on the holdings in PASKO V. CITY OF MILWAUKEE, 222 WIS.2D 274 (CTAPP 1998) -- herein PASKO I -- and PASKO V. CITY OF MILWAUKEE, 241 WIS.2D 226 (CTAPP 2000) -- herein PASKO II.

But in PASKO I and II, the Court did not interpret the collective bargaining agreement before us in this proceeding. Further, as the Respondents note on review, the bargaining agreement between the City and the Milwaukee Police Association (MPA) interpreted by the Court in PASKO I and II is not even part of the record in this case. Thus, while the MPSO is free to use PASKO I and II as part of its argument as to how the City/MPSO contract before us should be interpreted, PASKO I and II clearly are not and cannot be dispositive.

From our reading of the PASKO decisions, it is clear that there are fundamental distinctions between the facts and contract language found by the Court in PASKO I and II and the evidence before us.

In PASKO I, the Court found that the City had a permanent practice of using lower paid officers represented by the MPA to perform the duties of higher paid officers also represented by the MPA and never promoting anyone to fill the higher paid position. The failure to promote anyone and the failure to pay officers at a contractually identified rate that corresponded to the contractually identified position/duties formed the basis for the conclusion that the contract was violated and that the lower paid officers where entitled to back pay. Here, unlike PASKO I, there is no contractually identified Chief's Adjutant position or Chief's Adjutant pay rate. Here, unlike PASKO I, the position was filled on a permanent basis.

In PASKO II (which was decided by the Court of Appeals after the Examiner issued his decision in this case), the Court concluded that the City/MPA contract and Sec. 62.50(9), Stats., obligated the City to promote qualified employees represented by the MPA rather than continuing to "underfill" the position in question. A reading of PASKO II makes clear that the

existence of a contractually identified position was critical to the Court's analysis. Again we note that the City/MPSO contract before us does not identify the Chief's Adjuntant as a specific position covered by the contract.

To the extent the MPSO relies on Sec. 62.50(9), Stats., we begin by noting that unlike the Court in the PASKO II writ of mandamus proceeding, we do not have jurisdiction to interpret this statute except to the extent it is incorporated into the City/MPSO contract. MPSO asserts that the statute is so incorporated by Article 4 but we find this argument less than persuasive. Article 4 of the contract states that the contract is subordinate to Sec. 62.50, Stats., but does not state that the statute is incorporated into the contract. We would further note that on its face, Sec. 62.50, Stats., references the promotion of "officers or persons" and thus would not seem to specify that only an "officer" represented by the MPSO (as opposed to a civilian employee not so represented) can be "promoted" to perform the duties of the Chief's Adjutant.

Given all of the foregoing, we do not find that the PASKO decisions provide a persuasive basis for concluding that the Respondents' actions violated the City/MPSO contract.

At hearing, the MPSO conceded that the Respondents were not contractually prohibited from using a civilian employee to fill the Chief's Adjutant position and that the City/MPSO contract does not require that there be a specific number of Captains. Ultimately then, the MPSO violation of contract argument reflects the view that the City can choose to have a civilian perform the Chief's Adjutant duties so long as the number of MPSO represented employees is not reduced. SEE transcript page 21. MPSO grounds this contractual argument on assertions that: (1) Article 4 of the City/MPSO contract incorporates City ordinances; (2) the 1999 City Budget Ordinance authorizes 300 MPSO represented positions; and therefore (3) the contract requires that the City employ 300 MPSO represented employees.

We do not find this contractual argument persuasive for several reasons. Article 4 states:

> ARTICLE 4
>
> SUBORDINATE TO LEGISLATIVE AUTHORITY
>
> 1. In the event that the provisions of this Agreement or its application conflicts with the legislative authority delegated to the City Common Council, the Chief of Police and Fire and Police Commission (which authority being set forth more fully by: The Milwaukee City Charter:
>
> the statutory duties, responsibilities and obligations of the Chief of Police and the Fire and Police Commission as they are provided for in

> Section 62.50 of the Wisconsin Statutes; The Municipal Budget Law, which is set forth in Chapter 65 of the Wisconsin Statutes; or other applicable laws or statutes); then this Agreement shall be subordinate to such authority.

From our reading of Article 4, it is less than clear to us that any City budget ordinance is incorporated into the contract. Second, we do not have a City budget ordinance in our record and the MPSO's request in its January 17, 2001 brief that we take notice of the existence of a 1999 Budget ordinance is untimely. Third, there is no contract language that states that the City must maintain the budgeted number of positions/employees for the duration of the contract. Fourth, any argument that such a provision should be inferred is at odds with the Article 5, Section 2. c. right of the City to lay off employees. Thus, we conclude Respondents did not violate the City/MPSO contract.

In summary, we have affirmed the Examiner's dismissal of the complaint.

Dated at Madison, Wisconsin this 28th day of June, 2001.

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

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