STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of DISTRICT COUNCIL 48, LOCAL NO. 594, AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES To Initiate Fact Finding Between Said Petitioner and MILWAUKEE COUNTY	Case XLVI No. 13950 FF-370 Decision No. 9904-B

ORDER DENYING MOTION TO DISMISS AND ORDER APPOINTING FACT FINDER

The Wisconsin Employment Relations Commission having heretofore and on September 11, 1970, issued its Findings of Fact, Conclusions of Law, Certification of Results of Investigation and Order Initiating Fact Finding and Delaying Appointment of Fact Finder, and thereafter, on October 2, 1970, Milwaukee County having filed a petition with the Commission wherein it requested that hearing be reopened in the matter in order to present material evidence which was not available to the parties prior to the issuance of the Commission's decision on September 11, 1970, and wherein the Municipal Employer further requested that the Commission dismiss the petition on the basis that the Municipal Employer is without authority to negotiate the issues upon which the fact finding was sought and ordered; and on October 22, 1970, District Council 48, Local No. 594, American Federation of State, County and Municipal Employees having, in writing, opposed said motion; and after considering the motion to reopen, and pursuant to proper notice, the Commission, by Commissioners Zel S. Rice II and Jos. B. Kerkman, conducted hearing on said motion on November 4, 1970, at Milwaukee, Wisconsin, where the parties were afforded the opportunity to present material evidence and argument with respect to said motion; and the Commission, being fully advised in the premises, makes and issues the following

ORDER

IT IS ORDERED that the motion of Milwaukee County to set aside the Findings of Fact, Conclusions of Law, Certification of Results of Investigation and Order Initiating Fact Finding and Delaying Appointment of Fact Finder, and to dismiss the petition be, and the same hereby is, denied.

IT IS FURTHER ORDERED that Arlen C. Christenson, Madison, Wisconsin, is hereby appointed as the Fact Finder in the matter.

Given under our hands and seal at the City of Madison, Wisconsin, this 2nd day of December, 1970.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Morris Slavney, Chairman

_____
Zel S. Rice, II, Commissioner

_____
Jos. B. Kerkman, Commissioner

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of DISTRICT COUNCIL 48, LOCAL NO. 594, AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES To Initiate Fact Finding Between Said Petitioner and MILWAUKEE COUNTY	Case XLVI No. 13950 FF-370 Decision No. 9904-B

MEMORANDUM ACCOMPANYING ORDER DENYING MOTION TO DISMISS AND ORDER APPOINTING FACT FINDER

On September 11, 1970, the Commission issued an Order initiating fact finding in the instant matter wherein it concluded (1) that the issues as to whether the Department of Public Welfare of the Municipal Employer should be reorganized, as well as the effects of such reorganization upon bargaining unit employes, who are represented by the Union herein, are proper subjects of collective bargaining within the meaning of Section 111.70, Wisconsin Statutes; (2) that the refusal of the Municipal Employer to engage in collective bargaining with the Union with respect to said proposed reorganization and with respect to the effects thereof on salaries and other conditions of employment of the employes involved constituted a failure and refusal to meet and negotiate in good faith; and (3) that the basis for fact finding existed. The Commission ordered that fact finding be initiated "for the purpose of recommending a remedy and/or a solution in the matter", but it delayed the naming of the fact finder in order to permit the Municipal Employer an opportunity to commence bargaining with the Union. On September 18, 1970, the Union directed a letter to the chairman of the Personnel Committee of the Municipal Employer requesting the commencement of negotiations involving the employes in the bargaining unit. Apparently, no negotiations were conducted and on October 2, 1970, the Municipal Employer filed a petition to reopen hearing in the matter wherein it alleged that subsequent to the initial hearing on the fact finding petition (1) the State of Wisconsin, Department of Health and Social Services, Division of Family Services, had assumed jurisdiction over the organizational structure of welfare departments throughout the State pursuant to the state statute; (2) that such State Department was presently engaged in determining the appropriate structuring of the Municipal Employer's Welfare Department, together with the establishment of position classifications and pay ranges and would order such restructuring and ranges to be placed into effect on January 1, 1971; (3) that negotiations between the Union and the Municipal Employer were in progress and looking toward an agreement to become effective on January 1, 1971; and (4) that the intervention of such State Department precluded the Municipal Employer from negotiating with the Union on any subject matter covered by the mandate of the State Department except to the extent that latitude within pay ranges was permitted by said State Department. Further, in its petition the Municipal Employer moved to dismiss the petition for fact

finding on the basis that it was without authority to negotiate the issues upon which fact finding was sought and ordered.

On October 7, 1970, the Union, in writing, indicated that it opposed the petition to reopen and would set forth its reasons therefore in a subsequent letter. On October 20, 1970, the Union set forth in detail the basis for its objection opposing the motion to reopen as follows:

> "First, the authority of the State of Wisconsin, Department of Health and Social Services, Division of Family Services, has had at all times pertinent herein the authority and jurisdiction which the County now asserts it has learned about for the first time. Section 49.52 Stats. upon which this authority exists has been at all times in effect in its present form. Therefore, the County should have made any arguments based on this Section at the time of the original hearing herein rather than waiting until a subsequent date to raise it.
>
> Second, the County continues its process of formulating and implementing its reorganization plan thereby showing it retains sufficient control over the Welfare Department to make both negotiations and fact finding fruitful. Unfortunately, the County still refuses to negotiate on matters that this Commission has held are proper ones for negotiation.
>
> Third, to whatever extent, if any, the County lacks the authority or the ability to carry out a fact finder's recommendation as a result of Section 49.50 (2), Wisconsin Statutes, or other state regulations or federal actions, it may point this out to the Fact Finder. He surely would not recommend that the County do what it may not legally do. If he erroneously did so, the County is not required to follow such a recommendation.
>
> In sum, the County's objection is untimely, unmeritorious, and unnecessary. The County's actions in this and the earlier fact finding case involving Case Aides demonstrate that its reluctance to proceed to fact finding is not based on its fear that the Fact Finder will recommend what is unlawful but that he will recommend what is lawful and the County will hence again be placed in a position of showing its contempt for its obligations to its employees."

After considering the motion to reopen and the statement in opposition, the Commission determined to reopen the hearing and take additional evidence with regard to the motion of the Municipal Employer to dismiss the proceeding. Such hearing was conducted on November 4, 1970, where the parties were permitted the opportunity to adduce evidence and to present arguments with regard to their respective positions. The record discloses that prior to July 31, 1970, the Secretary of the Wisconsin Department of Health and Social Services requested an opinion from the Attorney General on a number of questions concerning the authority of said state department to prescribe statewide compensation standards for county welfare department employes. In response to such a request the Attorney General issued the following opinion:

> "You have requested my opinion on a number of questions concerning the authority of the State Department of Health and Social Services to prescribe statewide compensation standards for county welfare department employes.
>
> Your first question is whether the State Department of Health and Social Services has authority to prescribe statewide compensation

standards for county welfare department employes.

The answer to this question is "yes."

The primary source of your department's power is set forth in sec. 49.50 (2), Stats., which provides:

> "RULES AND REGULATIONS, MERIT SYSTEM. The department shall adopt rules and regulations, not in conflict with law, for the efficient administration of aid to the blind, old-age assistance, aid to families with dependent children and aid to totally and permanently disabled persons, in argeement with the requirement for federal aid, including the establishment and maintenance of personnel standards on a merit basis. The provisions of this section relating to personnel standards on a merit basis supersede any inconsistent provisions of any law relating to county personnel; but this subsection shall not be construed to invalidate the provisions of s. 46.22 (6)."

Insofar as we are concerned herein, there are three main expressions in the statute which indicate that your department, as state supervisor, has authority to prescribe and require compliance with statewide compensation standards for county welfare employes.

First, the rules which you adopt must be in agreement with the requirement for federal aid.

42 U.S.C.A., Public Health and Welfare, S302 (5), provides that the state plan for administration of old-age assistance programs shall include methods relating to the establishment and maintenance of personnel standards on a merit basis and that such plan go to the selection, tenure and compensation of employes.

The same requirement is found in 42 U.S.C.A., Public Health and Welfare, S602 (a), which relates to the state plan for administration of aid and services to needy families with children.

Federal law governing other programs referrred to in sec. 49.50 (2), Stats., have similar requirements.

Federal law requires that compliance with the approved state plan shall be mandatory on all political subdivisions of the state administering federal funds in such cases. 42 U.S.C.A. S602 (1). If a state does not set up and abide by a suitable employe merit system, federal funds may be withheld. 42 U.S.C.A. SS304, 605, 715, 1204, 1384.

In Norton v. Blaylock, D. C. Ark. 1968, 285 F. Supp. 659, it was stated that requirements of federal grants-in-aid programs that states set up and operate under personnel merit systems express a Congressional policy in favor of security of welfare employes who have attained permanent status.

Federal rules set forth "Standards for a Merit System of Personnel Administration" and are applicable to all personnel, both state and local, unless exempted. 45 CFR 70.6 provides standards for a job classification plan and 45 CFR 70.7 sets forth compensation plan standards as follows:

"A plan of compensation for all classes of positions in the agency will be established and maintained. Such plan will include salary schedules for the various classes in which the salary of a class is adjusted to the responsibility and difficulty of the work. The salary range for each class will consist of minimum, intervening, and maximum rates of pay to provide for salary advancements within the range. In arriving at such salary schedules, consideration will be given to the prevailing rates for comparable positions in other departments of the State and to other relevant factors. The State administrative agencies will adopt plans for salary advancements based upon quality and length of service. Salary laws and rules and regulations uniformly applicable to departments of the State government will be given consideration in the formulation of the compensation plan."

Second, your rules and regulations must provide for the establishment and maintenance of personnel standards on a merit basis."

A merit system is a civil service system. However, it should be noted from a reading of secs. 49.50 (5) and 46.22 (6), Stats., that there must be compliance with the state-prescribed merit system, at least insofar as compensation standards are concerned, even where there is an existing county system of civil service.

A merit system of civil service in Wisconsin includes the idea of a workable compensation plan. See secs. 16.01, 16.105, 16.106, 16.19, 59.07 (20), 59.21 (8), 63.08, 63.11. Also see 15 Am. Jur. 2d, Civil Service, S29, Compensation, 491. Other portions of a system include provisions for job classification, recruitment, examination and testing, certification and appointment, promotion, reclassification, performance evaluation, hearing, suspension and dismissal. The list is not all inclusive. However, a merit system cannot operate effectively unless there is job classification and a reasonable compensation plan which relates thereto.

Third, sec. 49.50 (2) expressly provides that:

"The provisions of this section relating to personnel standards on a merit basis supersede any inconsistent provisions of any law relating to county personnel; * * *."

Your questions are prompted in part by contentions by some county board supervisors that passage of ch. 154, Laws of 1969, removes the Merit Rule as a controlling factor in employe-employer relations in county welfare departments and permits that the county boards of supervisors have a free hand in the fixing of employes' salaries.

Chapter 154, Laws of 1969, amended sec. 46.22 (3), Stats., as follows:

"The county director of public welfare shall serve as the executive and administrative officer of the county department of public welfare. In consultation and agreement with the county board of

public welfare he shall prepare and submit to the county board of supervisors an annual budget of all funds necessary for the county department, and shall prepare annually a full report of the operations and administration of the department. The county board of supervisors shall review and approve, reject or revise by majority vote the annual budget of the county department of public welfare. The county director shall recommend to the county board of public welfare the appointment of employes necessary to administer the functions of the department, subject to sub. (6) and s. 49.50 (2) to (5) and the rules promulgated thereunder. The county director shall make recommendations to the county board of supervisors who shall fix the salary of such employes."

I am of the opinion that ch. 154, Laws of 1965, did not alter the authority of the State Department of Health and Social Services to establish statewide compensation standards for county welfare employes. As far as we are herein concerned, the only change effected by the amendment of sec. 46.22 (3), Stats., was to transfer, from the county board of public welfare to the county board of supervisors, the power to fix the salaries of county welfare department employes within the limits of the compensation standards adopted by the state department.

Your department has prescribed statewide compensation standards for county welfare employes for many years. In interpreting sec. 46.22 (3), as it previously existed, former attorneys general have recognized the power of your department to establish statewide compensation standards under sec. 49.50 (2) to (5), Stats. See 44 OAG 262 (1955), 46 OAG 137 (1957), 52 OAG 117 (1963).

Those opinions concluded that the authority of the county board of public welfare under sec. 46.22 (3) and the county board of supervisors under sec. 59.15 (3) (c) to fix the compensation of employes of the county welfare department was limited by any rules and regulations your department had adopted pursuant to sec. 49.50 (2) to (5), Stats.

In Kenosha County C. D. Local v. Kenosha County (1966), 30 Wis. 2d 278, 140 N. W. 2d 277, the court referred to the limited power of the county board under sec. 59.15 (2) (c), Stats., and at p. 282 stated:

> The aforesaid language supports the respondents' assertion that it was the legislature's intention to place control of the compensation of county welfare workers in the hands of the public welfare department so as to facilitate the maintenance of a statewide program of public welfare, as well as to insure a centralization of administration in order to procure and retain federal financial grants.
>
> We share the following viewpoint expressed by the trial judge:
>
> "When sec. 59.15 and sec. 46.22 are read together it seems evident that the authority and duty to determine wages and functions of employes is vested by the legislature in the County Department of Public Welfare and not in the County Board of Supervisors."

The court held that the county board of public welfare had limited power with respect to fixing wages of county welfare workers, but that such power was subject to the statewide plan. At p. 283 the court stated:

> " * * * The state is obliged to meet certain standards in regard to federally supported welfare programs. While such programs are administered on a county basis, they are subject to a statewide plan of which federal approval is required."

In amending sec. 46.22 (3), the legislature transferred any county fixing-of-salaries power from the county board of public welfare to the county board of supervisors. The power transferred in the last sentence is not made expressly subject to the provisions of sec. 49.50 (2) to (5). There was no reason to limit the power in this section. Section 59.15 (2) (c) expressly limits the power of the county board as follows:

> "(c) The board may provide, fix or change the salary or compensation of any such office, board, commission, committee, position, employe or deputies to elective officers without regard to the tenure of the incumbent (except as provided in par. (d)) and also establish the number of employes in any department or office including deputies to elective officers, and may establish regulations of employment for any person paid from the county treasury, but no action of the board shall be contrary to or in derogation of the rules and regulations of the department of health and social services pursuant to s. 49.50 (2) to (5) relating to employes administering old-age assistance aid to dependent children, aid to the blind and aid to totally and permanently disabled persons or ss. 63.01 to 63.17." (Emphasis supplied.)

The legislature was aware of the limitation in sec. 59.15 (2) (c), as it expressly amended the same by ch. 366, s. 117 (2) (b), Laws of 1969.

Failure of the legislature to delete the precedence language of the last sentence of sec. 49.50 (2), Stats., is additional grounds for concluding that the legislature did not intend to give the county board of supervisors a free hand in fixing the salaries of county welfare department personnel.

Your second question is whether such standards must include reasonable options available to the various counties.

The answer to this question is in the affirmative.

Your present county merit system compensation standards contain the following rules which are in part at least the basis of county option.

Rule PW-PA 10.25 (4) provides:

> "(4) At least the minimum for the class shall be paid, but no county shall be precluded from paying in excess of the maximum provided in the salary schedule although no reimbursement shall be made on any amount of salary in excess of the maximum provided in the schedule."

Rule PW-PA 10.26 provides in part:

"(1) The County Board of Supervisors under Sec. 46.22 (3), Wis. Stats. shall establish a minimum for each class of position at any step within the range. Example: An agency may select Step (4) as the minimum for the Social Work Supervisor II-County classification, Step (3) as the minimum for the Social Worker V-County classification, and at the same time select Step (5) as the minimum for the Typist I-County classification. Agencies are encouraged to select a minimum for each class of position which will enable them to successfully recruit for staff vacancies. In counties with court attached staff, the juvenile court judge shall establish a minimum for each class of position attached to the court."

Former sec. 46.22 (3) contemplated that the county board of public welfare have some degree of latitude in fixing salaries, and present sec. 46.22 (3), as amended by ch. 154, Laws of 1969, and sec. 59.15 (2) (c) contemplate that the county board of supervisors exercise some power in that regard. Statewide standards without any options would leave the county board of supervisors powerless in the area, with the possible exception of granting, increasing or reducing merit increases recommended by the county director. Your present standards include a number of options, including those noted above, which would give meaning to the power granted county boards of supervisors in secs. 46.22 (3) and 59.15 (2) (c), and which are conducive to making the compensation standards workable in the several counties of the state which may vary in population, economic resources, employment needs or other material characteristics.

Your third question is whether the county board of supervisors, acting under sec. 46.22 (3) as amended by ch. 154, Laws of 1969, must conform to the state standards, choosing options which are available, in order to gain reimbursement from state and federal funds.

I am of the opinion that there must be compliance with the state standards in order to gain reimbursement and that a county cannot ignore the Merit Rule even where the county does not claim reimbursement. The federal laws and regulations cited above provide that reimbursement may be withheld for noncompliance.

Your fourth question is whether sec. 111.70 Stats., has any applicability to county welfare employes as it pertains to salary or finge benefits. This statute deals with the right of municipal employes to organize and join labor unions and to bargain in municipal employment.

This question was answered in the affirmative in 52 OAG 117, 120, 121. The reasoning and conclusion reached in that opinion are applicable here.

Your Rule PW-PA 10.28 (7) provides:

"(7) When the County Board provides for across-the-board increases for all county employees, employees of the agency may be granted increases

in accordance with this provision within the established range of their classifications and at intervals of less than one calendar year."

In order to maintain a proper relationship between the salaries of employes of various departments, welfare department employes have a legitimate interest in being represented in conferences and negotiations at the county level which deal with salaries and fringe benefits.

Your fifth question is whether your department can delegate the development of compensation standards to counties having a civil service system.

The answer to this question is "no."

The state can request the assistance, recommendations and cooperation of the county civil service agency in establishing the statewide standards. The County agency should be aware of special needs within the county. However, sec. 49.50 (5) is specific as to the functions which may be delegated and formulation of the compensation standards to be applicable to county welfare department employes is not included. That statute provides:

"(5) COUNTY PERSONNEL SYSTEMS. In counties having a civil service system, the department may delegate to the civil service agency in such county responsibility for determining qualifications of applicants by merit examination, provided the standards of qualifications and examinations have been approved by the department and the department of administration. The personnel in such counties shall be exempt from such reexamination provided such personnel has qualified for present positions by examinations conducted pursuant to standards acceptable to the department."

The compensation plan which your department is authorized to promulgate is one which establishes statewide standards and a county does not have statutory authority to determine such standards. Section 66.30 (2), Stats., only empowers the named governmental units to "contract jointly * * * for any joint project, wherever each portion of the project is within the scope of the authority" of the contracting units. 48 OAG 231."

The Municipal Employer contends that, in light of the authority of the State Department of Health and Social Services, fact finding herein would be hopelessly inappropriate since the areas which would permit negotiation were extremely limited and that, where there might be an area of flexibility for local determination, such area would be subject to further regulations by said State department, and, further, that there remains virtually no flexibility relating to wages, hours and conditions of employment for the employes involved.

The Union contends that with respect to the employes involved it has bargained in the past with the Municipal Employer within the framework of the statutory merit system, and that collective bargaining has been useful despite the existence and imposition of such a merit system imposed by state statute, and, further, that such bargaining has been conducted during periods where a good number of both state and federal regulations relating to bargainable matters have been in effect. The Union concedes that any negotiation between it and the Municipal Employer, as well as any collective bargaining agreement entered into by them following such

negotiations, are both subject to the paramount authority of the state and federal government and have been so in the past. With respect to salaries the Union argues that there are options available to the parties within the guidelines which may be established by the State Department of Health and Social Services or otherwise regulated by state or federal laws. The Union further contends that, rather than showing a lack of need for fact finding, the decision of the state in becoming more actively involved indicates the need for prompt negotiations between the parties, and that the Municipal Employer has continued to refuse to negotiate "its own implementing of its own changes that it has unilaterally decreed and imposed upon its employes, and is continuing to unilaterally decree and impose upon its employes".

We are not convinced that the evidence adduced during the course of the re-opened hearing, namely, the authority of the State Department of Health and Social Services to promulgate rules and standards affecting the employes involved herein, warrants a determination by the Commission to set aside its fact finding order and to dismiss the fact finding petition. If we were to accept the Municipal Employer's argument as a basis for dismissing the petition, the Municipal Employer could unilaterally establish salaries and working conditions for its welfare department employes and thus eliminate one of the statutory grounds for fact finding. As stated in the Attorney General's opinion, Section 111.70 of the Wisconsin Statutes, applies to county welfare employes as it pertains to salaries and finge benefits. 1/ Such matters could possibly be affected by the reorganization of the welfare department.

While the reorganization is subject to limitations set forth in pertinent federal and state statutes, as well as the regulations promulgated by the Wisconsin Department of Health and Social Services within its lawful authority, the salaries and working conditions of the employes in the bargaining unit represented by the Union may be affected by such reorganization, and therefore the reorganization and the effects thereof are subject to Sec. 111.70, Wisconsin Statutes, and therefore are considered by the Commission as being proper subjects for conferences and negotiations within the meaning of the fact finding provisions of said statute. We are therefore denying the motion of the Municipal Employer and, since the Municipal Employer has continued in its refusal to meet and engage in meaningful bargaining with the Union with respect to the matter, we have today designated the fact finder, and he is authorized to proceed forthwith in the matter.

Dated at Madison, Wisconsin, this 2nd day of December, 1970.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Morris Slavney, Chairman

_____
Zel S. Rice, II, Commissioner

_____
Jos. B. Kerkman, Commissioner

1/ While we agree with the opinion of the Attorney General with respect to his remarks concerning the effect of Sec. 111.70, we wish to make it clear that the Commission has jurisdiction to determine the applicability of said statutory provision and the effect thereof upon issues arising in collective bargaining between municipal employers and the representatives of their employes. The Commission is not bound by opinions or rulings of the Attorney General in such matters.