STATE OF WISCONSIN

BEFORE: THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of AFSCME, COUNCIL 24, WISCONSIN STATE EMPLOYEES UNION, AFL-CIO Requesting a Declaratory Ruling Regarding the Application of Article IV, Section 26 of the Constitution of the State of Wisconsin, Involving a Dispute Between Said Petitioner and ANTHONY S. EARL, Secretary, DEPARTMENT OF ADMINISTRATION, STATE OF WISCONSIN	Case LVI No. 18825 DR(S)-9 Decision No. 13807-A

DECLARATORY RULING

The Petitioner named above, having on February 10, 1975, filed a petition with the Wisconsin Employment Relations Commission requesting the Commission to issue a Declaratory Ruling, pursuant to Section 227.06, Wisconsin Statutes, with respect to a dispute arising as to the duty of the State of Wisconsin as an employer to bargain with the Petitioner, AFSCME, Council 24, Wisconsin State Employees Union, AFL-CIO, with respect to the effective date of a collective bargaining agreement, including the retroactive application thereof; and prior to hearing thereon, Respondent, Department of Administration, State of Wisconsin, filed a motion with the Commission requesting the Commission to dismiss the petition; and the hearing on said matter having been held at Madison, Wisconsin on October 27, 1975; and the Commission having considered the record and the briefs filed by the parties; and being fully advised in the premises, makes and issues the following Findings of Fact and Declaratory Ruling.

FINDINGS OF FACT

1. That AFSCME, Council 24, Wisconsin State Employees Union, AFL-CIO, hereinafter referred to as the Petitioner, is a labor organization, and has its mailing address at 148 East Johnson Street, Madison, Wisconsin.

2. That the State of Wisconsin is an employer as that term is used under Sections 111.80, et. seq., Wisconsin Statutes; that Anthony S. Earl, Secretary, Department of Administration (DOA), State of Wisconsin, formulated and implemented policies under which the DOA discharged its statutory duties and responsibilities pursuant to Sections 111.80, et. seq., Wisconsin Statutes; that DOA acts for the executive branch with respect to negotiating collective bargaining agreements with certified labor organizations pursuant to Sections 111.80, et. seq., Wisconsin Statutes.

3. That at all times material herein, Petitioner has been and is the exclusive collective bargaining representative for approximately 15,000 State employes; that Petitioner and Respondent have entered into collective bargaining agreements relating to wages, hours and working conditions for the employes represented by the Petitioner; that during bargaining sessions, the Petitioner has requested, but Respondent has refused to bargain with respect to the effective date, including retroactive application thereof of said collective bargaining agreements.

4. That Respondent maintains that Article IV, Section 26, Wisconsin Constitution prohibits the retroactive application of wages and/or other economic subjects; and that Respondent contends that the terms of any collective bargaining agreement cannot be implemented prior to the approval of said agreement by the Joint Committee on Employment Relations.

Upon the basis of the above and foregoing Findings of Fact, the Commission makes and issues the following

DECLARATORY RULING

1. Article IV, Section 26, Wisconsin Constitution does not prohibit retroactive application of negotiated wage rates and/or other subjects of economic import.

2. The effective date of a collective bargaining agreement, including its retroactive applications, is a mandatory subject of collective bargaining over which the Petitioner has the right to bargain, and the State has the duty to bargain within the meaning of Sections 111.81(2), 111.82 and 111.91 of the State Employment Labor Relations Act.

Given under our hands and seal at the City of Madison, Wisconsin this 30th day of April, 1976.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Morris Slavney
Morris Slavney, Chairman

Howard S. Bellman
Howard S. Bellman, Commissioner

Herman Torosian
Herman Torosian, Commissioner

MEMORANDUM ACCOMPANYING DECLARATORY RULING

THE ISSUES

The instant proceeding was initiated as a result of a petition filed by the Union requesting the Commission to issue a declaratory ruling, pursuant to Section 227.06, Wisconsin Statutes, as to (1) whether the effective date of any collective bargaining agreement being negotiated between the Union 1/ and the State Employer, by the Department of Administration, hereinafter referred to as the DOA, and (2) whether the retroactive application of the provisions of such an agreement, including provisions relating to wages and other monetary benefits, are mandatory subjects of bargaining within the meaning of the State Employment Labor Relations Act, hereinafter referred to as SELRA.

Prior to the hearing herein, the DOA filed a motion with the Commission requesting that the petition be dismissed, contending that the Commission lacked jurisdiction to "determine the meaning of any constitutional provision."

THE FACTS

The Findings of Fact succinctly set forth the facts which are material to the issues herein, and we see no need to reiterate same in this Memorandum.

THE PERTINENT CONSTITUTIONAL PROVISION

"ARTICLE IV.

. . .

Extra compensation; salary change. SECTION 26. The legislature shall never grant any extra compensation to any public officer, agent, servant or contractor, after the services shall have been rendered or the contract entered into; nor shall the compensation of any public officer be increased or diminished during his term of office except that when any increase or decrease provided by the legislature in the compensation of the justices of the supreme court, or judges of the circuit court shall become effective as to any such justice or judge, it shall be effective from such date as to each of such justices or judges. This section shall not apply to increased benefits for persons who have been or shall be granted benefits of any kind under a retirement system when such increased benefits are provided by a legislative act passed on a call of yeas and nays by a three-fourths vote of all the members elected to both houses of the legislature, which act shall provide for sufficient state funds to cover the costs of the increased benefits."

1/ The ruling will, of course, also apply to other unions which have been certified to represent State employes in appropriate bargaining units, as well as to the State Employer in bargaining with such unions.

THE PERTINENT STATUTORY PROVISIONS

"16.084 Compensation plan coverage.

. . .

(2) The compensation plan in effect on April 30, 1972, or at the time that a collective bargaining unit is certified, whichever is later, shall constitute the compensation plan for employes in said certified unit until a collective bargaining agreement becomes effective for that unit.

. . .

16.086 Compensation. (1)

. . .

(am) Length of service pay. As a reward for long and faithful service, department heads shall grant length of service pay to eligible employes in the classified service, except employes paid on a prevailing rate and employes on part-time (which is less than half time, on a daily, weekly or monthly basis), short-term, project and student employments. Such length of service pay shall first be paid in December 1969 to employes eligible therefor, as determined by rule, and shall be paid in December of each year on a date determined by the director in addition to other compensation to employes eligible therefor, except that for eligible employes retiring, terminating or dying before the authorized December date for payment, the director may authorize earlier payment dates. Such length of service pay shall be based upon length of continuous state service, as determined retroactively under s. 16.30, as follows: $50 for at least 5 years but less than 10 years of service; $100 for at least 10 but less than 15 years of service; $150 for at least 15 but less than 20 years of service; $200 for at least 20 but less than 25 years of service; and $250 for 25 or more years of service. 2/

. . .

111.91 Subjects of bargaining. (1) Matters subject to collective bargaining to the point of impasse are wage rates, as related to general salary scheduled adjustments consistent with sub. (2), and salary adjustments upon temporary assignment of employes to duties of a higher classification or downward reallocations of an employe's position; fringe benefits; hours and conditions of employment, except as follows:3/

. . .

Section 111.92 Agreements. (1) Tentative agreements reached between the department of administration, acting for the executive branch, and any certified labor organization shall, after official ratification by the union, be submitted to the joint committee on employment relations, which shall hold a public hearing before

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2/ In effect at the time the petition herein was filed, enacted in 1969 [Section 16.05(2)(bf)], and repealed, effective August 1, 1975.

3/ The exceptions are not material to the issues herein.

determining its approval or disapproval. If the committee approves the tentative agreement, it shall introduce in companion bills, to be put on the calendar, that portion of the tentative agreement which requires legislative action for implementation, such as salary and wage adjustments, changes in fringe benefits, and any proposed amendments, deletions or additions to existing law. Such bills shall not be subject to ss. 13.10(1), 13.50(6)(a) and (b) and 16.47(2). The committee may, however, submit suitable portions of the tentative agreement to appropriate legislative committees for advisory recommendations on the proposed terms. The committee shall accompany the introduction of such proposed legislation with a message that informs the legislature of the committee's concurrence with the matters under consideration and which recommends the passage of such legislation without change. If the joint committee on employment relations does not approve the tentative agreement, it shall be returned to the parties for renegotiation. If the legislature does not adopt without change that portion of the tentative agreement introduced by the joint committee on employment relations, the tentative agreement shall be returned to the parties for negotiation.

(2) No portion of any tentative agreement shall become effective separately.

(3) Agreements shall coincide with the fiscal year or biennium.

(4) It is the declared intention under this subchapter that the negotiation of collective bargaining agreements and their approval by the parties should coincide with the overall fiscal planning and processes of the state.

. . .

111.96 Effective date: transitional provisions.

. . .

(3) State Employes. Notwithstanding any other provision of the statutes, all compensation adjustments for state employes shall be effective on the beginning date of the pay period nearest the statutory or administrative date."

THE CONSTITUTIONAL ISSUE

Positions of the Parties:

In its motion filed prior to the hearing herein, the DOA requested the Commission to dismiss the petition, contending, in material part, that the Commission lacks jurisdiction to interpret the meaning of any constitutional provision and to make a determination on the constitutionality of SELRA. However, in its post-hearing brief, the DOA acknowledged that the matter of retroactive pay can be made the subject of a declaratory ruling issued by the Commission, in determining whether such matter is a mandatory subject of bargaining under SELRA.

With respect to the constitutionality issue, the Union responds that it is not requesting the Commission to rule on any constitutional issue.

Discussion:

There has been no request to make any pronouncement concerning the constitutionality of any statutory provision. However, in order to determine the issue raised herein, it is imperative to ascertain the applicability of Article IV, Section 26 of the Wisconsin Constitution. There is a fundamental difference between the constitutional application of legislation to a given set of facts and the constitutionality of the legislation. As stated in Davis, Administrative Law, Section 20.04:

> "We commit to administrative agencies the power to determine constitutional applicability, but we do not commit to administrative agencies the power to determine the constitutionality of legislation."

THE SUBSTANTIVE ISSUES

Positions of the Parties:

The Petitioner contends that the effective date of a collective bargaining agreement covering employes of the State is a mandatory subject of bargaining, and further that there is no legal impediment precluding a union, which represents state employes, and the DOA from agreeing to retroactively apply the terms of a successor collective bargaining agreement. The Petitioner argues that Article IV, Section 26 of the State Constitution does not prohibit such type of agreements for the reason that said provision does not "recognize modern-day collective bargaining", and that assuming, arguendo, that said constitutional provision does apply to collective bargaining agreements, it does not prohibit the implementation of the retroactive application of provisions relating to economic matters "once the parties have tentatively agreed" thereto.

In support of such position, the Petitioner cites decisions of the National Labor Relations Board and the courts, 4/ to the effect that the duration of a collective bargaining agreement is a mandatory subject of bargaining, as is "contract retroactivity". Further, the Petitioner cites a decision of the Commission, rendered under the Municipal Employment Relations Act, to the effect that the retroactive applications of matters relating to wages, hours and conditions of employment are mandatory subjects of bargaining. 5/ In addition, the Union also cites an arbitration award interpreting SELRA and the pertinent constitutional provision, wherein the arbitrator concluded that there was no constitutional barrier with respect to the retroactive implementation of certain merit increases. 6/ Further, the Petitioner argues that the State Supreme Court, 7/ as well as the Dane County Circuit Court, 8/ have recognized the non-applicability of the constitutional provision to the area of collective bargaining. Finally, the Union contends that there is no provision in SELRA prohibiting the retroactive application of the effective date of a collective bargaining agreement.

4/ NLRB v. Yutana Barge Lines (52 LRRM 2752); Bergen Point Iron Works (22 LRRM 1476).

5/ Racine County (10917-B) 7/72.

6/ Stumreiter & WSAA v. State of Wisconsin 3/75 (Arb. John P. Morris).

7/ State ex rel. Singer v. Boos (44 Wis. 2d 374).

8/ State ex rel. Thomson v. Giessel (262 Wis. 51).

In its post-hearing brief, the DOA sets forth various arguments in support of its position that neither the effective date of a collective bargaining agreement, nor the retroactive application of its "economic" provisions are permissible under the State Constitution, or the provisions of SELRA. The DOA contends that a conclusion that retroactive pay is not a mandatory subject of bargaining is consistent with the constitutional provision involved herein. It also argues that the Legislature in enacting SELRA intended to prohibit any agreements providing for retroactive pay and sets forth Section 16.084(2) as support for this contention.

DOA points out that the Legislature obligated municipal employers to bargain about "wages"; 9/ however, in the state sector, the law requires the employer to negotiate with respect to "wage rates". 10/ Respondent urges the Commission to conclude that the difference in terms precludes from the scope of mandatory bargaining the question of retroactive application of wage rates.

DOA further contends that Sections 111.92(1), (2), (3) and (4), SELRA, provide that labor contracts must be negotiated and approved by the Legislature to coincide with the biennium; that no agreements can be effective before legislative approval; and that no portion of any tentative agreement can become effective separately. Respondent concludes that retroactive pay would encourage deviation from the above-mentioned legislative edict, and therefore, the Legislature could not have intended to make retroactive pay a mandatory subject of bargaining.

Finally, DOA argues that, notwithstanding the provision of any other statutory subsection, under Section 111.96(3) SELRA, adjustments cannot be effective until the beginning date of the pay period nearest the statutory or administrative date and that this precludes the parties from bargaining with respect to retroactivity of wage rates.

Discussion:

The Applicability of Article IV, Section 26 of the State Constitution:

The Honorable Norris Maloney, Circuit Judge, Dane County has ruled in State of Wisconsin ex rel University of Wisconsin System et. al. v. Joe E. Nusbaum (7/72), Cir. Ct. Case No. 136-235 that the aforesaid constitutional provision did not prohibit retroactive payment of salaries of University of Wisconsin faculty members. In his memorandum opinion he recited the apposite Wisconsin cases that bear directly upon the definition of what constitutes extra compensation.

> "'Extra compensation' proscribed by the Constitution means compensation outside of and in addition to that compensation previously agreed upon. State ex rel. Thomson v. Giessel (1952) 262 Wis. 51, 55, 63-64, 53 NW 2d 726. It was held in this case that increased retirement benefits for teachers who had already retired was unconstitutional.
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> After the first Thomson v. Giessel case, supra, the Legislature approved the same benefits to the retired teachers upon the condition that they make themselves available for re-employment. The Wisconsin Supreme Court held in the second Thomson v. Giessel case,

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9/ Section 111.70(1)(d), MERA.

10/ Section 111.91(1), SELRA.

(1953) 265 Wis 558, 61 NW 2d 903, that this act did not violate Article IV, Section 26 of the Wisconsin Constitution because the State was receiving a future benefit by assuring itself of a supply of experienced substitute teachers.

It was held as early as 1923 in State ex rel. Dudgeon v. Levitan 181 Wis. 326, 193 NW 499, that there was no violation of the Constitution when the additional compensation (calculated upon basis of past service) related only to present employees who would be employed in the future and the dominant purpose of the additional compensation was not to grant compensation for prior service but to induce experienced teachers to remain in the profession."

The Dudgeon case involved a state statute, Section 45.21, Statutes, 1921, wherein increased pensions for teachers, who had been in service more than 25 years before the enactment of said provision, were based on a computation of what they would have received if said provision had been in force during their period of service.

Judge Maloney's decision, and the cases cited for authority, are significant. Bargaining about the retroactive application of wages and other economic items may enhance the prospects of inducing experienced state employes in bargaining units to remain in their respective jobs and may assure the State of a supply of experienced employes. This is a bona fide benefit to the State, and is certainly consistent with the policy set forth in SELRA where the Legislature has indicated that "orderly and constructive employment relations for State employes and the efficient administration of State government" are interests to be preserved. Section 111.80(2), SELRA. Furthermore, the terms and conditions of any collective bargaining agreement apply to those employes in bargaining units who were employes prior to the agreement and continue to hold themselves available for employment after the execution of the agreement. Consequently, the potential retroactive application of a collective bargaining agreement executed under SELRA is no more in a proscribed class of extra compensation than the benefits in Thomson, Dudgeon or Nusbaum.

Section 16.084(2) throws no light on the issues involved herein. It merely provides that a compensation plan shall remain in effect for employes in certified units "until a collective bargaining agreement becomes effective for that unit." The provision was designed to effectuate the transition between unilaterally established compensation plans and wage rates agreed upon by the parties in collective bargaining.

It should be further noted that since December 1969, and continuing through July 31, 1975, the Legislature provided retroactive compensation to State employes, based on length of past service, in various sums for five, ten, 15, 20 and 25 years of service. 11/ Such payments, in effect, constituted retroactive pay for services rendered in the past. It is to be noted that neither party called the Commission's attention to Section 16.086(1)(am). It is apparent that the Legislature, in enacting and implementing such legislation, did not deem the benefits derived therefrom to be violative of Article IV, Section 26 of the Constitution.

Therefore, on March 3, 1976, in a letter to counsel for the parties, the Commission directed attention to said statutory provision and therein permitted counsel to file supplemental briefs with respect to the

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11/ Section 16.086(1)(am), Statutes, 1973, supra.

applicability of said provision to the issue involved herein. Both counsel filed statements in response thereto.

The Union argues that said section "calls for additional compensation to be paid after the original employment services have been rendered. It is an extra, added incentive for continuing employment", and that therefore such provision indicated support of its position.

The DOA contends that the section does not provide pay for pay services or "extra compensation within the meaning of the material constitutional provision, but that payments made under Section 16.086(1)(am) is a "future benefit for long and faithful service".

While Section 16.086(1)(am) has been repealed, the collective bargaining agreements presently existing between the Petitioner and the State contains provisions for length of service payments, pursuant to the formula set forth in said statutory provision. Furthermore, said agreements provide that employes who retire, die or terminate their employment shall receive their length of service payments on a date earlier than the dates set forth in said agreement for the payment of same, specfically October, 1975; June 30, 1976 and June 30, 1977.

Retroactive pay of increases negotiated can be deemed, as compensation for continuing services by the employes who receive same, and as inducement to remain in the service of the State.

The Commission is not persuaded by DOA's argument that the distinction between the terms "wages" in MERA and "wage rates" in SELRA provides any basis upon which to differentiate their retroactive application.

The pertinent provisions of SELRA do not contain language which prohibits the retroactive application of the terms of a negotiated agreement, including those relating to wage rates and other economic benefits. Section 111.92(3) provides that agreements "shall coincide with the fiscal year or biennium". Thus said section does not specifically prohibit an agreement on retroactivity to coincide with the fiscal year or the biennium. The DOA, apparently as a result of the Circuit Court decision (Nusbaum), argues that the date on which the Joint Committee on Employment Relations approves the tentative agreement, provided no further negotiations occur in accordance with Section 111.92(1), constitutes the date on which the entire 12/ collective bargaining agreement can become effective. Such a date is certainly not the statutory date, since after such approval, there must be legislative action thereon, as well as approval by the Governor, in the form of a signed bill. Further the tentative agreement, subject to the approval of said Joint Committee, could contain a provision for retroactive application.

Based on the foregoing discussion, it is our considered opinion that neither the State Constitution, nor any provision in the Wisconsin Statutes, prohibits the retroactive implementation of wage rates or other economic benefits, agreed upon in collective bargaining, approved by the Joint Committee on Employment Relations, and ultimately reduced to bill form, adopted by the Legislature, and signed by the Governor, or the retroactive application of other provisions agreed upon, not

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12/ Since Section 111.92(2) provides that the portion of the agreement cannot become effective separately.

requiring final action by the Joint Committee on Employment Relations, the Legislature, or the Governor, to at least the commencement of the biennium or fiscal year. 13/

Dated at Madison, Wisconsin this 30th day of April, 1976.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Morris Slavney, Chairman

_____
Howard S. Bellman, Commissioner

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Herman Torosian, Commissioner

13/ Our ruling herein is not intended to imply that the State must agree to any retroactivity.