STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MILWAUKEE DISTRICT COUNCIL 48, AFSCME, AFL-CIO and its affiliated LOCALS, Complainants, vs. MILWAUKEE COUNTY and ROBERT J. MIKULA, ALFRED KOPLIN, FRED HAVAS, LEONARD NOWAK, JOHN BROSSMAN, JOHN SAJDAK, JOHN E. VOIGHT, RICHARD SWETALLA, ROBERT G. POLASEK and ANTHONY P. ROMANO, Respondents.	Case XCIII No. 21530 MP-737 Decision No. 15420-A

Appearances:

Podell, Ugent & Cross, Attorneys at Law, Suite 315, 207 East Michigan Street, Milwaukee, Wisconsin 53202, by Ms. Nola J. Hitchcock Cross, appearing on behalf of the Complainant-Union.

Mr. Robert C. Ott, Assistant Corporation Counsel, Milwaukee County, Milwaukee County Courthouse, 901 North 9th Street, Milwaukee, Wisconsin 53233, appearing on behalf of the Respondents.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Milwaukee District Council 48, AFSCME, AFL-CIO and its affiliated Locals, having, on April 1, 1977, filed a complaint with the Wisconsin Employment Relations Commission alleging that Milwaukee County and various of its agents, committed prohibited practices within the meaning of the Municipal Employment Relations Act (MERA); and on April 8, 1977, the Commission having appointed Marshall L. Gratz, at that time a member of its staff, to act as Examiner and make and issue Findings of Fact, Conclusions of Law and Order pursuant to Section 111.07(5), Wis. Stats. as made applicable to municipal employment by Section 111.70(4)(a), MERA; and hearing on said complaint having been held September 1, September 2 and October 12, 1977 at Milwaukee, Wisconsin, and the parties having submitted briefs, and the Commission 1/ having considered the evidence and arguments of counsel, and being fully advised in the premises, makes and files the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. That Milwaukee District Council 48, AFSCME, AFL-CIO and its affiliated Locals, hereinafter referred to jointly as the Union, is a labor organization, and has its principal offices at 3427 West St. Paul Avenue, Milwaukee, Wisconsin 53208.

1/ After hearing this matter, but prior to issuing a Decision, Examiner Gratz left the Wisconsin Employment Relations Commission. On January 4, 1980 both parties to this proceeding executed, and filed with the Commission, a written waiver of compliance with the provisions of Section 227.09(2) and (4) Wis. Stats., enabling the Commission to issue the initial decision in this matter.

2. That Milwaukee County, hereinafter referred to as the County, is a municipal employer and has its principal offices at 901 North 9th Street, Milwaukee, Wisconsin 53233; and that all times material herein Robert J. Mikula, Alfred Koplin, Fred Havas, Leonard Nowak, John Brossman, John Sajdak, John E. Voight, Richard Swetalla, Robert G. Polasek and Anthony P. Romano were agents of the County.

3. That at all times material herein the Union has been the certified exclusive collective bargaining representative of certain employes in the employ of the County; that in said relationship the Union and the County have negotiated and entered into successive collective bargaining agreements covering the wages, hours and conditions of employment of the employes represented by the Union; that in the summer of 1976 the Union and the County commenced negotiations on a collective bargaining agreement to succeed a 1975-1976 collective bargaining agreement, which by its terms would have expired on December 26, 1976; that, however, said agreement, upon the mutual consent of the parties, was continued, on a day to day basis, until June 26, 1977, when the parties concluded their negotiations on the successor agreement; and that the 1975-1976 agreement contained, among its provisions, the following material herein:

PART I

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1.05 MANAGEMENT RIGHTS. The County of Milwaukee retains and reserves the sole right to manage its affairs in accordance with all applicable laws, ordinances, regulations and executive orders. Included in this responsibility, but not limited thereto, is the right to determine the number, structure and location of departments and divisions; the kinds and number of services to be performed; the right to determine the number of positions and the classifications thereof to perform such service; the right to direct the work force; the right to establish qualifications for hire, to test and to hire, promote and retain employes; the right to transfer and assign employes, subject to existing practices and the terms of this Agreement; the right, subject to civil service procedures and the terms of this Agreement related thereto, to suspend, discharge, demote or take other disciplinary action and the right to release employes from duties because of lack of work or lack of funds; the right to maintain efficiency of operations by determining the method, the means and the personnel by which such operations are conducted and to take whatever actions are reasonable and necessary to carry out the duties of the various departments and divisions.

In addition to the foregoing, the County reserves the right to make reasonable rules and regulations relating to personnel policy procedures and practices and matters relating to working conditions, giving due regard to the obligations imposed by this Agreement. However, the County reserves total discretion with respect to the function or mission of the various departments and divisions, the budget, organization, or the technology of performing the work. These rights shall not be abridged or modified except as specifically provided for by the terms of this Agreement, nor shall they be exercised for the purpose of frustrating or modifying the terms of this Agreement. But these rights shall not be used for the purpose of discrimination against any employe or for the purpose of discrediting or weakening the Union.

PART 2

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2.04 OVERTIME ASSIGNMENTS

(1) Whenever possible, overtime assignments shall be rotated in accordance with seniority among those employes in the appropriate classification who are able to perform the work.

(2) In those departments where formal policies exist incorporating the principle of rotating overtime assignments, such policies shall not be disturbed.

(3) In those departments where no policy exists, or where existing policies are contrary to the principle of rotations, the head of such department shall meet with the Union for the purpose of formulating a policy which is mutually acceptable. Such discussion shall be carried on and any agreement reached shall be formalized in accordance with the procedures set forth in the Memorandum of Understanding entitled 'Collateral Agreements', dated August 20, 1973.

. . .

PART 3

3.01 DEPARTMENTAL WORK RULES

(1) The Union recognizes the prerogative of the County to operate and manage its affairs in all respects in accordance with its responsibilities, duties and powers, pursuant to the statutes of the State of Wisconsin, the ordinances and resolutions of the County and the rules of the Civil Service Commission. The Union recognizes the exclusive right of the County to establish reasonable work rules. The County shall meet with the Union for the purpose of discussing the contemplated creation or modification of such rules prior to implementation.

(2) Participation in such studies shall be limited to employe representatives from the affiliated Local which represents the employes in the department under consideration.

4. That in January, 1977, and during the negotiations on their 1977-1978 collective bargaining agreement, the Union demanded that the County negotiate on all working conditions then embodied in a document entitled Milwaukee County Park Commission Personnel Directives, which generally covered working conditions of Park Commission employes represented by the Union; that the County refused to negotiate with regard thereto, except that it did negotiate and reach an agreement with the Union on the following provision to be included in their 1977-1978 agreement:

3.16 WORKING CONDITIONS - PARK COMMISSION. The administrative staff of the Milwaukee County Park Commission shall meet with the President and Chief Steward of Local 882, the President of Local 1656, and the appropriate Staff Representatives within 6 months of the execution of this Agreement for the purpose of making a good faith effort to reach an agreement on seniority rights in transfer, work week,

6. That on March 17, 1977, without previously bargaining with the Union thereon, the County unilaterally implemented changes in said Personnel Directives, relating to changes in certain working conditions affecting employes represented by the Union, by eliminating or changing the following rights previously enjoyed by said employes:

a. Choice of a variety of tints in sunglasses furnished by the County.

b. Selection of starting time based on seniority.

c. Choice of transfer to another "unit" or park within a park district.

d. Transfer rights after third month following promotion, but before the sixth month following promotion.

e. Choice of selecting work location within a park district on the basis of seniority.

f. Right to meet with Union representative at employe's work site to discuss grievance.

g. Changing minimum hours for personal leave.

h. Changing right to exercise county-wide seniority for emergency work in various park units.

7. That the Union, during the course of the hearing herein, did not adduce any evidence to support the allegation in its complaint filed herein that the County, by its adoption of the change in the Personnel Directive with respect to overtime work (subparagraph h. above), violated any provision of the extended 1975-1976 collective bargaining agreement between the parties.

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

CONCLUSIONS OF LAW

1. That those matters contained in the Personnel Directives established by Milwaukee County, as specified in subparagraphs a. through h., noted in Finding of Fact 6, primarily relate to conditions of employment of employes of Milwaukee County, who are represented for the purposes of collective bargaining by Milwaukee District Council 48, AFSCME, AFL-CIO and its affiliated Locals, and therefore said matters relate to mandatory subjects of bargaining within the meaning of Sections 111.70(1)(d), 111.70(2) and 111.70(3)(a)4 of the Municipal Employment Relations Act.

2. That, inasmuch as the 1975-1976 collective bargaining agreement between Milwaukee District Council 48, AFSCME, AFL-CIO and its affiliated Locals and Milwaukee County was continued in full force and effect until at least June 26, 1977, and since said collective bargaining agreement reserved to Milwaukee County the right to make reasonable rules and regulations relating to personnel policy procedures and practices and matters relating to working conditions, Milwaukee District Council 48, AFSCME, AFL-CIO waived its right to collectively bargain any change in reasonable working rules applicable to employes represented by said Union during the extended term of said collective bargaining agreement, and that therefore, in said regard Milwaukee County, its officers and agents, did not violate its duty to bargain in good faith with said Union with respect to such matters implemented prior to June 26, 1977, within the meaning of Section 111.70(3)(a)4 of the Municipal Employment Relations Act.

3. That, however, with respect to the wages, hours and conditions of employment affecting employes of Milwaukee County, who were represented by Milwaukee District Council 48, AFSCME, AFL-CIO and its affiliated Locals, to become effective as a result of the 1977-1978 collective bargaining agreement between said County and said Union, the failure and refusal of Milwaukee County, and its officers and agents, to bargain collectively with said Union on those matters contained in the Personnel Directives established by the County, as specified in subparagraphs a. through h., in Finding of Fact 6, after having been requested to do so by the Union, constituted a refusal to bargain collectively

with the Union, and thereby Milwaukee County committed a prohibited practice within the meaning of Section 111.70(3)(a)4 of the Municipal Employment Relations Act.

4. That, since Milwaukee District Council 48, AFSCME, AFL-CIO and its affiliated Locals did not adduce any evidence to establish that Milwaukee County violated any provision of the extended 1975-1976 collective bargaining agreement between the parties, Milwaukee County did not commit any prohibited practice within the meaning of Section 111.70(3)(a)5 of the Municipal Employment Relations Act by the application of the change in personnel policies affecting working conditions of employes represented by Milwaukee District Council 48 and its affiliated Locals prior to June 26, 1977.

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

ORDER 2/

1. That Milwaukee County, its officers and agents, in order to effectuate the policies of the Municipal Employment Relations Act, shall cease and desist from refusing to bargain collectively with Milwaukee District Council 48, AFSCME,

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2/ Pursuant to Sec. 227.11(2), Stats., the Commission hereby notifies the parties that a petition for rehearing may be filed with the Commission by following the procedures set forth in Sec. 227.12(1) and that a petition for judicial review naming the Commission as Respondent, may be filed by following the procedures set forth in Sec. 227.16(1)(a), Stats.

227.12 Petitions for rehearing in contested cases. (1) A petition for rehearing shall not be prerequisite for appeal or review. Any person aggrieved by a final order may, within 20 days after service of the order, file a written petition for rehearing which shall specify in detail the grounds for the relief sought and supporting authorities. An agency may order a rehearing on its own motion within 20 days after service of a final order. This subsection does not apply to s. 17.025 (3)(e). No agency is required to conduct more than one rehearing based on a petition for rehearing filed under this subsection in any contested case.

227.16 Parties and proceedings for review. (1) Except as otherwise specifically provided by law, any person aggrieved by a decision specified in s. 227.15 shall be entitled to judicial review thereof as provided in this chapter.

(a) Proceedings for review shall be instituted by serving a petition therefor personally or by certified mail upon the agency or one of its officials, and filing the petition in the office of the clerk of the circuit court for the county where the judicial review proceedings are to be held. Unless a rehearing is requested under s. 227.12, petitions for review under this paragraph shall be served and filed within 30 days after the service of the decision of the agency upon all parties under s. 227.11. If a rehearing is requested under s. 227.12, any party desiring judicial review shall serve and file a petition for review within 30 days after service of the order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. The 30-day period for serving and filing a petition under this rehearing. The 30-day period for serving and filing a petition under this paragraph commences on the day after personal service or mailing of the decision by the agency. If the petitioner is a resident, the proceedings shall be held in the circuit court for the county where the petitioner resides, except that if the petitioner is an agency, the proceedings shall be in the circuit court for the county where the respondent resides and except as provided in ss. 182.70(6) and 182.71(5)(g). The proceedings shall be in the circuit court for Dane County if the petitioner is a nonresident. If all parties stipulate and the court to which the parties desire to transfer the proceedings agrees, the proceedings may be held in the county designated by the parties. If 2 or more petitions for review of the same decision are filed in different counties, the circuit judge for the county in which a petition for review of the decision was first filed shall determine the venue for judicial review of the decision, and shall order transfer or consolidation where appropriate.

AFL-CIO and its affiliated Locals with respect to Personnel Directives primarily relating to wages, hours and conditions of employment affecting employes represented by said labor organization, in negotiations between the parties, unless such labor organization has clearly and unequivocally waived such right to so bargain, either by the terms of an existing collective bargaining agreement, or otherwise during the course of said negotiations.

Given under our hands and seal at the City of Madison, Wisconsin this 15th day of June, 1982.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Gary L. Covelli, Chairman

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Morris Slavney, Commissioner

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Herman Torosian, Commissioner

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

This complaint originally came before Examiner Gratz as one of numerous allegations that the County had violated the provisions of MERA. During the course of the hearing on the above-mentioned issues the Union and the County stipulated that the issues herein dealt with and a second allegation be severed from the balance of the complaint, with the balance of the complaint held in abeyance, pending the outcome of certain contractual dispute resolution proceedings concerning them. It should be noted that the individual Respondents set forth in the caption of the proceeding were not identified in the allegations of the complaint.

By letter dated February 21, 1978, Examiner Gratz was informed that the parties had resolved one of the two remaining complaint allegations, thus removing that matter from consideration. What remains for consideration by the Commission follows.

Background and Facts

The Union and the County began negotiations during the summer of 1976 for a successor to their 1975-1976 Memorandum of Agreement (herinafter, Agreement) due to expire December 26, 1976. Negotiations continued until the parties arrived at a contract on or about June 26, 1977. During the hiatus period, December 26, 1976 to June 26, 1977, the parties continued the 1975-1976 Agreement on a day to day basis.

At the outset of negotiations, the County had in effect a series of Personnel Directives regulating certain work activities of the employes represented by and covered by the provisions of its collective bargaining agreement. During the course of negotiations, in January of 1977, the Union demanded to bargain over all of the working conditions covered by the Personnel Directives then in effect. This was the first occasion the Union had attempted to negotiate over the substance of the Personnel Directives.

The County refused to negotiate over the subject matter of the directives, except insofar as there was an agreement reached. The parties' agreement was made in Section 3.16, Working Conditions - Park Commission of the successor collective bargaining agreement, and provides as follows:

> 3.16 WORKING CONDITIONS - PARK COMMISSION The administrative staff of the Milwaukee County Park Commission shall meet with the President and Chief Steward of Local 882, the President of Local 1656, and the appropriate Staff Representative within 6 months of the execution of this Agreement for the purpose of making a good faith effort to reach an agreement on seniority rights in transfer, work week, and choice of off days.

Following the Union's bargaining demand, the County informed the Union that it anticipated implementing changes in the Personnel Directives. On March 15, 1977 representatives of the Union met with a representative of the County Parks Department to discuss the anticipated changes in the work rules. At that meeting, said representative provided the Union representatives with copies of the proposed new directives, which were individually discussed. As the directives were dis-

violated the existing Agreement by refusing to bargain the Personnel Directives before unilaterally implementing them; and (2) the County has a duty to bargain the Personnel Directives during negotiations for the successor Agreement.

The Union further alleges that the implementation of the new Personnel Directives violated the tentative agreement which eventually became Section 3.16 "Working Conditions - Park Commission" of the 1977-1978 Agreement. Finally, the Union asserts that the County violated Section 2.04(3) "Overtime Assignments" of the 1975-1976 Agreement by its new Personnel Directives governing overtime assignments.

The County, in denying the allegations of the Union, argues that the Personnel Directives of the County have never been treated as negotiable by the parties. As to the Union allegation that the unilateral changes violated the tentatively agreed upon contract language, the County alleges that the language was only tentative, and at any rate, that no final agreement was in existence at the time which could be violated.

In responding to the Union breach of the 1975-1976 Agreement allegation, the County asserts that Section 3.01 of the collective bargaining agreement confers upon the County exclusive rights to promulgate and/or modify reasonable work rules, subject only to an obligation to meet and confer with the Union beforehand, which obligation was satisfied. Finally, the County contends that work rule changes were insignificant.

Discussion

The County defends its admitted refusal to bargain the new Directives during contract negotiations by asserting that since the Personnel Directives had never been bargained in the past, it was not obliged to bargain them during successor negotiations. This argument misconstrues the duty to bargain. The Union has not forever waived its right to bargain by failing to exercise this right in prior negotiations. The duty to bargain exists inchoate, and the County's obligation arose when the Union made its demand. 3/

Once the demand for bargaining has been made, it is the County's obligation to bargain over mandatory subjects of bargaining. Bargaining history does not determine whether a proposal is a mandatory or permissive subject. The test is whether the proposal is primarily related to wages, hours and conditions of employment. 4/ Work rules, whose bargainability lie at the core of this dispute, can be either mandatory or non-mandatory subjects of bargaining. 5/ A work rule which primarily relates to wages, hours or conditions of employment is a mandatory subject of bargaining. 6/ The County does not contend that the work rules at issue are non-mandatory in nature and a review of the impact of the rule changes reveals their mandatory nature. The tints to be made available on sunglasses affects working conditions and as such is a mandatory subject of bargaining. 7/ Similarly, employes have a right to bargain over shift assignments and times. 8/ Transfers within the bargaining unit have long been held to be mandatory subjects of bargaining. 9/

3/ See City of Merrill (15431) 4/77, in which the Commission concluded that the City had a duty to bargain work schedules despite the Association's earlier failure to exercise that right.

4/ City of Beloit, 73 Wis 2d 43, 242 NW 2d 231 (1976); Unified School District No.1, Racine County, 81 Wis 2d 89, 1977.

5/ City of Wauwatosa (15917) 11/77.

6/ City of Milwaukee (9419) 1/70.

7/ Jefferson County (15482-A) 8/77.

8/ City of Green Bay (12402-B) 1/75; City of Brookfield (17947) 7/80.

9/ Oconto County (12970) 3/75.

Proposals relative to provisions designed to secure contracted-for benefits are mandatory subjects of bargaining. 10/ These benefits include grievance procedures and even procedures preliminary to grievance filing and procedures that might obviate the employe's need to file a grievance, such as here, a conference between an employe and a steward. The earning and use of personal days relates primarily to hours since it concerns the number of hours to be worked, and as such is a mandatory subject of bargaining. 11/ Finally, the assignment of overtime is simply a mechanism to determine the number of hours any particular employe shall work, and bargainable.

The parties did bargain over some of the work rules, and incorporated the fruits of their bargaining into Section 3.16 of the 1977-1978 Agreement. While 3.16 may reasonably be read to satisfy the County's bargaining obligation in the areas of transfer, work week, and choice of off days it cannot reasonably be read to satisfy that obligation relative to sunglasses, selection of starting times, union steward representation, and use of personal days.

It is the County's duty to bargain over these matters. The merits of the proposals advanced and the significance of the issues in dispute is left to the bargaining process and is not a relevant concern in this proceeding.

The Union also contends that by unilaterally altering certain terms and conditions of employment after having refused to bargain over these matters, the County has committed a second, independent refusal to bargain.

In support of this position, the Union cites the City of Green Bay, 12352-B, C (1975), wherein the City refused to bargain over the standards, qualifications, and procedures for promotions within the collective bargaining unit following a Union demand to bargain said items. Following its refusal to bargain in the promotion area the City unilaterally scheduled and conducted promotional exams. This action was held to have violated Section 111.70(3)(a)(1), MERA, in that it interferred with, restrained, and coerced municipal employes in the exercise of their collective bargaining rights.

The difference between this case and the facts underlying the Green Bay matter center on the operative collective bargaining agreement language.

The parties to this proceeding have stipulated that the 1975-1976 collective bargaining agreement was extended and was effective at the time of the County's unilateral changes. One of the provisions of that agreement was Section 3.01 Departmental Work Rules, which provides:

> PART 3
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> 3.01 DEPARTMENTAL WORK RULES
>
> (1) The Union recognizes the prerogative of the County to operate and manage its affairs in all respects in accordance with its responsibilities, duties and powers, pursuant to the statutes of the State of Wisconsin, the ordinances and resolutions of the County and the rules of the Civil Service Commission. The Union recognizes the exclusive right of the County to establish reasonable work rules. The County shall meet with the Union for the purpose of discussing the contemplated creation or modification of such rules prior to implementation.
>
> (2) Participation in such studies shall be limited to employe represenatives from the affiliated Local which represents the employes in the department under consideration.

The above provision clearly and unambiguously recognizes the right of the County to establish reasonable work rules. That right is to either create or modify rules, and requires only that the County meet and discuss the rules prior to

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10/ City of Wauwatosa (15917) 11/77.

11/ City of Wauwatosa, Ibid.

implementation. There is no contention that the rules established are unreasonable. The County met with the Union and discussed the rules on March 15, two days prior to their implementation.

The Union's reliance on Green Bay is somewhat misplaced since there is no reference to any similar contractual provision in the Green Bay case. The contractual language in this proceeding is sufficiently clear and explicit to operate as a waiver 12/ of the Union's right to bargain over reasonable work rules during the term of the contract.

At least in the pleading stage the Union alleged that the County, by its unilateral actions in the area of work rules, had violated the provisions of a tentative agreement previously arrived at (Section 3.16 covering seniority rights in transfer, work week, and choice of days off) for the successor collective bargaining agreement. As its name suggests, a tentative agreement is typically viewed as just that, tentative. Its future inclusion in a collective bargaining agreement is conditioned upon other issues being resolved. Unless otherwise agreed, it is commonly understood to take effect simultaneously with the effectuation of the rest of the newly negotiated contract. There is no evidence to suggest that the parties intended anything else here.

The Union contends that the implementataion of the new Emergency Work Assignment altered the past practice of rotating overtime work following seniority in a park district-wide basis to a new practice of limiting eligibility to a unit-wide pool of employes. This change is alleged to violate Section 2.04 of the continued contract, which provides:

> 2.04 OVERTIME ASSIGNMENTS
>
> (1) Whenever possible, overtime assignments shall be in accordance with seniority among those employes in the appropriate classification who are able to perform the work.
>
> (2) In those departments where formal policies exist incorporating the principle of rotating overtime assignments, such policies shall not be disturbed.
>
> (3) In those departments where no policy exists, or where existing policies are contrary to the principle of rotations, the head of such department shall meet with the Union for the purpose of formulating a policy which is mutually acceptable. Such discussion shall be carried on and any agreement reached shall be formalized in accordance with the procedures set forth in Memorandum of Understanding entitled 'Collateral Agreements', dated August 20, 1973.

A review of the old overtime Directive and the new Directive does not, on its face, reveal the alleged limitation of eligibility for overtime. There is no record testimony to support such a finding nor is there any evidence relating in any way to implementation of an overtime plan which is non-rotational, and therefore there is no evidence to establish any violation of the collective bargaining agreement.

Dated at Madison, Wisconsin this 15th day of June, 1982.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Gary L. Covelli, Chairman

_____
Morris Slavney, Commissioner

_____
Herman Torosian, Commissioner

12/ Milwaukee County (12739-A,B) 2/75.