STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the matter of the petition of CITY OF WAUWATOSA requesting a declaratory ruling pursuant to sec. 111.70(4)(b), Stats., involving a dispute between the petitioner and WAUWATOSA FIREMEN'S PROTECTIVE ASSOCIATION LOCAL 1923, IAFF	Case XLIV No. 21590 DR(M)-79 Decision No. 15917

Appearances:

Mr. John K. Brendel, Brendel, Flanagan & Sendik, S.C., for the association.

Mr. Steven B. Rynecki and Mr. Donald J. Cairns, Rynecki and Cairns, Attorneys at Law, for the petitioner.

DECLARATORY RULING

The City of Wauwatosa having filed a petition with the Wisconsin Employment Relations Commission requesting the commission to issue a declaratory ruling pursuant to sec. 111.70(4)(b) of the Municipal Employment Relations Act, herein MERA, to determine whether it has a duty to bargain under sec. 111.70 of MERA regarding various items in dispute between it and Wauwatosa Firemen's Protective Association Local 1923, IAFF; and hearing on said petition having been held on May 16, 1977, before the full commission in Wauwatosa, Wisconsin; and the parties having filed briefs; and the commission having considered the evidence and arguments of counsel, and being fully advised in the premises, makes and files the following

FINDINGS OF FACT

1. The City of Wauwatosa, petitioner herein, is a municipal employer which operates a fire department and has its offices in Wauwatosa, Wisconsin.

2. Wauwatosa Firemen's Protective Association Local 1923, IAFF, the association herein, is a labor organization and is the recognized collective bargaining representative for certain firefighters employed by the petitioner in its fire department.

3. Petitioner and association have been parties to a series of successive collective bargaining agreements. The last one expired at the end of the calendar year 1976. During negotiations for an agreement to succeed the 1976 collective bargaining agreement, a dispute arose between the parties as to whether certain items are mandatory, permissive or prohibited subjects of bargaining.

4. On November 2, 1976, the association petitioned the commission for final and binding arbitration pursuant to sec. 111.77, Stats. A commission investigator solicited final offers from the petitioner and

the association, stating that the submission of such final offers did not prejudice either party in asserting legal arguments in respect to the contents thereof. Petitioner submitted a final offer in response to said solicitation. Its submission contained at least one item which it here contends is a permissive subject of bargaining. Petitioner did not, by such submission, thereby intend its offer to be final for purposes of sec. 111.77, Stats., nor did it thereby intend to relinquish its claim that certain items contained therein were permissive subjects of bargaining. The association's final offer, inter alia, submitted the disputed items which are discussed in paragraphs 5,6,7 & 8 of these findings of fact. Said disputed items were contained in one or more previous collective bargaining agreements between the parties.

5. The association proposed the following disputed items which the commission finds primarily relate to wages, hours or conditions of employment:

a. Duty day. "The duty day shall terminate for the purposes of cleanup, training procedures, and other regular routines on or before 5:00 P.M. The balance of the twenty-four hour period shall be spent in stand-by awaiting and/or serving in matters of emergency and occasional public relations demonstrations as may be reasonably required."

b. Maintenance work after 5:00 P.M. "Maintenance and servicing of equipment, vehicles, and other property after 5:00 P.M. shall be solely limited to items necessary for efficient response to alarms. Apparatus room floors should be made reasonably safe and dry in all areas utilized by men in response to alarms. Normal vehicle and house cleanup will be postponed to the following duty crew."

c. Stay of order. "* * * The filing of any grievance pertaining to non-fire and/or non-emergency functions, shall cause a stay of the ordered activity and possible resulting disciplinary action, pending the ultimate determination of the merits of the grievance providing that the executive board of the Association invokes such stay by including such in the filing of the grievance submitted to the Chief . . ."

d. Contract renewal. "This Agreement shall . . . remain in full force and effect to and including, December 31, 1976 and thereafter shall be considered automatically renewed for successive twelve month periods unless procedures are instituted in accordance with Section 111.77 of the Wisconsin Statutes. * * * In the event the parties do not reach written agreement by the expiration date, the existing Agreement shall be extended until a new agreement is executed."

6. The association proposed the following disputed items which the commission finds relate primarily to matters reserved to the management and direction of the petitioner's firefighting mission:

a. Home inspections. "Home inspection duties shall not commence before 10:00 A.M. or continue past 4:00 P.M. and shall exclude such duties on Sundays and/or holidays."

b. Hydrant inspections. "On any day after two inspections have been performed in any fall-winter season, hydrant inspections shall not be ordered when the official wind chill

factor as reported at 8:30 A.M. by the National Weather Service on the day in question is below 0° F. Emergency hydrant inspections may be ordered by the Chief regardless of wind chill factor only when the termperature as measured by the National Weather Service is below -10° F. for seven consecutive days. * * *"

c. Holidays. "On any of the days scheduled as holidays . . . plus Easter Sunday, except for the customary morning cleanup procedures, no service, labor work, or other chores shall be required other than stand-by awaiting and/or serving in matters of emergency call. Civic parade appearances shall be made as required by the department."

d. Assignment of new duties. "No firefighter or other Association member shall be required to perform any duty non fire-related other than those duties heretofore required in 1972. * * *"

7. The association proposed the following disputed item which the commission finds would have as a purpose and effect the perpetuation of strike activity and its direct consequences by municipal employes:

Outside labor disputes. "No member of the Association shall be ordered to man any firehouse of any village, city or town other than the City of Wauwatosa in times of emergency or otherwise if such village, city or town is engaged in a substantial labor negotiation dispute with the authorized bargaining agent of the firefighters for said village, city or town. It shall be the duty of the duly qualified officers of the Association to give the Wauwatosa Fire Chief at least 24 hours written notice that they have been informed by an association that said substantial labor negotiation dispute does in fact exist before a refusal to enter such community boundaries for such purposes shall be proper or excusable on the part of any Association member. Upon directive of the Chief, an Association member shall answer a fire, rescue or other emergency call from said village, city or town with the proviso that said members shall immediately be returned from the said village, city or town boundaries upon the completion of the necessary emergency services required."

8. The association proposed the following disputed item concerning work rules and regulations but the petitioner failed to introduce sufficient evidence regarding the content of said rules and regulations for the commission to find whether they primarily relate to wages, hours or conditions of employment or matters which are reserved to the management and direction of the petitioner's firefighting mission:

Work rules. "Work rules, regulations and conditions of employment as established and enforced in 1972 may be applied without further action. The creation of any new work rule, regulation or condition established after January 1, 1973, or the modification or cancellation of a pre-existing rule, regulation or condition of employment as defined herein shall be subject to negotiation and mutual accord between the Chief and the Association's executive council prior to becoming effective."

On the basis of the above and foregoing findings of fact, the commission makes and files the following

CONCLUSIONS OF LAW

1. The disputed items in paragraph 5 of the findings of fact, since they relate primarily to wages, hours or conditions of employment, are mandatory subjects of bargaining within the meaning of sec. 111.70 (1)(d), MERA.

2. The disputed items in paragraph 6 of the findings of fact, since they relate primarily to matters reserved to the management and direction of the petitioner's firefighting mission, are permissive subjects of bargaining, within the meaning of sec. 111.70(1)(d), MERA.

3. The disputed item in paragraph 7 of the findings of fact is a prohibited subject of bargaining within the meaning of sec. 111.70(1)(d), MERA.

4. There is insufficient evidence of record to establish whether the disputed item in paragraph 8 of the findings of fact is a mandatory subject of bargaining within the meaning of sec. 111.70(1)(d), MERA.

On the basis of the foregoing findings of fact and conclusions of law, the commission makes and files the following

DECLARATORY RULING

1. The petitioner has a duty to bargain about the items in dispute enumerated in paragraph 5 of the findings of fact.

2. The petitioner has no duty to bargain about the items in dispute in paragraph 6 of the findings of fact.

3. The petitioner is prohibited from bargaining about the disputed item in paragraph 7 of the findings of fact.

IT IS FURTHER ORDERED that the portion of the petition asking for a declaratory ruling as to whether the disputed item in paragraph 8 of the findings of fact is a mandatory subject of bargaining within the meaning of sec. 111.70(1)(d), MERA is dismissed.

Given under our hands and seal at the City of Madison, Wisconsin this 9th day of November, 1977.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Morris Slavney, Chairman

_____
Herman Torosian, Commissioner

I concur in part and dissent in part, as set forth in the attached memorandum.

_____
Charles D. Hoornstra, Commissioner

CITY OF WAUWATOSA, XLIV, Decision No. 15917

MEMORANDUM ACCOMPANYING DECLARATORY RULING

The City of Wauwatosa on April 21, 1977, petitioned the commission for a declaratory ruling. During the course of negotiations for a successor agreement to the 1976 calendar year agreement between the city and Wauwatosa Firemen's Protective Association Local 1923, IAFF, the association proposed certain items which the city deemed to be permissive or prohibited subjects of bargaining. The petition asks the commission to make a declaratory ruling as to whether the disputed items are mandatory, permissive or prohibited subjects of bargaining.

Hearing was held before the full commission on May 16, 1977, and the parties thereafter filed supporting briefs. Their respective arguments are discussed as relevant throughout the course of this memorandum.

AUTHORITY OF THE INTEREST ARBITRATOR OVER PERMISSIVE SUBJECTS OF BARGAINING

In addition to asking the commission to rule whether the disputed items are mandatory, permissive or prohibited subjects of bargaining, the petitioner also asks the commission to rule that permissive subjects of bargaining are not within the jurisdiction or authority of an arbitrator appointed pursuant to sec. 111.77, Stats.

Section 111.77, Stats., provides a method of dispute resolution which governs the employer in its relations with those of its employes represented by the association. This method of dispute resolution culminates in final and binding arbitration. However, before the commission can order the parties to proceed to arbitration it must determine "that an impasse has been reached." Section 111.77(3), Stats. If otherwise appropriate, the commission then "shall issue an order requiring arbitration." Id. In determining whether an impasse has been reached, the commission's investigator shall transmit to the commission a report in which he determines the "nature of the impasse." Section 111.77(4)(b), Stats. The investigator's report shall also advise the commission of each "issue which is known to be in dispute." Id.

Accordingly, under the statutory scheme, the items in dispute, concerning which the commission can order the parties to arbitrate, are items about which the parties have come to an impasse in negotiations. It is well established that as part of the duty to bargain the parties may ordinarily, absent contrary agreement, come to impasse only over items which are mandatory subjects of bargaining. 1/ It follows that the interest arbitrator under sec. 111.77, Stats., has authority only over items which are mandatory subjects of bargaining, and, where both parties have agreed, over permissive subjects.

WAIVER BY SUBMISSION

The association argues that the employer has waived its right to contest whether the disputed items are mandatory subjects of bargaining, and, as a result of the waiver, that the petitioner must arbitrate them pursuant to sec. 111.77, Stats., even if the disputed items in fact

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1/ See NLRB v. Borg-Warner, 356 U.S. 342, 42 LRRM 2034 (1958).

are merely permissive subjects of bargaining. The association argues that the petitioner's waiver consists in its submission of the disputed items in its final offer.

We find no waiver by the petitioner. The association, not the petitioner, submitted the disputed items. The association petitioned the commission on November 2, 1976, for final and binding arbitration pursuant to sec. 111.77, Stats. 2/ A member of the commission's staff, after an investigation of the dispute, transmitted the final offers of the parties to each other on January 26, 1977. The commission's file on these matters, of which it takes administrative notice, 3/ shows that the association's final offer addressed itself to three items: wages, health insurance and sick leave. In addition, paragraph 4 of the association's final offer states:

> "4. The union . . . is satisfied with the existing contract language as outlined in the 1976 agreement between the parties. . . and would therefore urge the inclusion of all prior contract language, terms and conditions not otherwise specified herein."

Furthermore, although the petitioner's "final" offer contained at least one item which it now contends is a permissive subject of bargaining, the commission has found that the petitioner did not thereby intend that its offer be final for purposes of sec. 111.77, Stats., and did not intend to relinquish its claim that certain items are not mandatory subjects of bargaining. The investigator called for final offers for purposes of seeking to reduce the items in dispute between the parties. The petitioner expressed reservations about including what it thought were permissive items in its final offer. 4/ On January 14, 1977, in order to induce the parties to submit final offers, the investigator wrote them the following letter:

> "* * * You are again reminded that the final offers submitted may well be the final offers submitted to arbitration. However, my solicitation of the above 'final offers' is not intended to preclude me from refusing to close the investigation and permitting the parties to file possible different final offers. Furthermore once the investigation is closed based on the final offers then on the table either party may challenge the legality of the content of the other side's final offer and the Commission would then, if necessary, schedule a hearing to determine the matter. If either party's final offer is found to be contrary to law the investigation will be reopened and both parties will be afforded an opportunity to amend their final offers."

Under the facts and circumstances, including the investigator's solicitation of final offers without prejudice to the right to amend them on

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2/ The association's petition was docketed in the commission records as City of Wauwatosa (Fire Department), Case XLI, No. 20959, MIA-261.

3/ Pursuant to sec. 227.08(2), Stats., the association hereby is given ten days from the date of this decision to make an offer of proof of rebutting or countervailing evidence concerning the contents of its final offer.

4/ Tr. 20.

the basis of legal considerations and the petitioner's prior reluctance to submit a final offer containing what it thought were permissive items, we conclude that the employer did not, by submitting its final offer to the commission investigator, waive its right to contend that some of its contents contained permissive subjects of bargaining.

PERMANENT WAIVER FROM PREVIOUS NEGOTIATED CONTRACTS

The association contends that the petitioner permanently has waived its right to challenge the disputed items as being only permissive subjects of bargaining on the ground that the petitioner agreed to, and did, include them in previously negotiated collective bargaining agreements.

A holding that, by once agreeing to a proposal which is a permissive subject of bargaining the employer forever waives its right to contend that the subject is permissive, would deter collective bargaining settlements. An employer would be reluctant to agree upon a permissive subject under such a rule. It is more consistent with the purposes of MERA to encourage employers to consider agreeing on permissive subjects where doing so would be helpful in settling a labor dispute.

Accordingly, we hold that the petitioner is not barred from arguing that the disputed items are permissive subjects of bargaining even though it previously has incorporated said subjects into collective bargaining agreements. 5/

THE DISPUTED ITEMS

Duty day

The association proposed Article IV, sec. 3, of the expired agreement, which provided:

> "The duty day shall terminate for the purposes of cleanup, training procedures, and other regular routines on or before 5:00 P.M. The balance of the twenty-four hour period shall be spent in stand-by awaiting and/or serving in matters of emergency and occasional public relations demonstrations as may be reasonably required."

Firefighters work a 24-hour tour of duty beginning at 8:00 a.m. Article IV, sec. 3, establishes an eight-hour duty day, from 8:00 a.m. to 5:00 p.m., with a one-hour lunch break. They occasionally work more than eight hours in emergencies and in public relations demonstrations.

The petitioner contends it is unable to discharge all its duties to the public and also to give the firefighters adequate training within the 8:00 a.m. to 5:00 p.m. period. Therefore, it argues, since Article IV, sec. 3, prevents the assignment of routine work

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5/ Accord: Greenfield Education Association (14026-A), 10/76; Allied Chemical & Alkali Workers of America v. Pittsburgh Plate Glass Co., 404 U.S. 157, 187, 92 S.Ct. 383, 30 L.Ed. 2d 341 (1971) ("By once bargaining and agreeing on a permissive subject, the parties, naturally, do not make the subject a mandatory topic of future bargaining.")

after 5:00 p.m., it is not a mandatory subject of bargaining because it unduly impinges upon and substantially interferes with the maintenance of peak firefighting efficiency. The petitioner further asserts that it must be free to schedule assignments within the 24-hour work period, and that the assignment and scheduling of normal duties is only a permissive subject of bargaining.

The number of hours to be worked, like the amount of wages to be paid, undoubtedly impacts on the quantity and quality of services a municipal employer can provide to the community. For example, by requiring the firefighters to engage in active work for twenty-four consecutive hours, the petitioner perhaps could double or triple the fire department's output. By cutting wages in half, and thereby freeing funds to double the work force, the employer similarly could increase the department's output. It could not reasonably be contended that an employer is excused from bargaining about wages because the budget impact thereof prevents it from providing the services it feels the community needs. Similarly, it cannot reasonably be contended that the petitioner is excused from bargaining over the number of hours to be worked because of its impact on the services it can provide.

Consequently, the question whether an item is a mandatory subject of bargaining is not controlled by the fact that such item, if included in a collective bargaining agreement, would have a substantial impact on the employer's ability to provide public services. Accordingly, the supreme court has approved our holding that each proposal is tested by whether it primarily relates to wages, hours or conditions of employment. Beloit Education Assoc. v. WERC, 73 Wis. 2d 43, 54, 242 N.W. 2d 231, 236 (1976).

We conclude that the instant proposal relates primarily to hours since it concerns the number of hours to be worked in a 24-hour tour of duty. Accordingly, the proposal in question is a mandatory subject of bargaining.

The petitioner incorrectly relies on Oak Creek-Franklin Joint City School District No. 1 6/ and Wauwatosa Fire Fighters Local 1923, IAFF 7/ as holding that the assignment of normal work duties, as opposed to the assignment of supplemental duties, is a permissive subject of bargaining. These cases are not in point. In Oak Creek the commission held that the number of pupil-teacher contact hours, the number of different class preparations required of a teacher, the decision as to whether teachers must work with certain intern or practice teachers, and the duties to be assigned department and unit chairmen were permissive subjects of bargaining. None of these proposals aimed at the number of hours to be worked, as does the instant proposal. The proposals regarding pupil-teacher contact and the number of different class preparations did not primarily relate to the length of the work day; rather, they implicated questions of educational policy, which are permissive subjects of bargaining. The proposals relating to intern and practice teachers and the duties of department and unit chairmen implicated managerial prerogatives in the assignment of personnel and tasks, and did not primarily relate to wages, hours, or conditions of employment. In Wauwatosa, supra, the commission

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6/ (11827-D) 11/74, aff'd., Dane County Circuit Court (No. 144-473 1975).

7/ (13109-A) 6/75.

held only that the assignment of switchboard duties to firefighters was a mandatory subject of bargaining because those duties merely supplemented and were supportive of their firefighting duties, and the performance of those duties did not relate either to the management or the basic policy direction of the employer. Here, the instant proposal does not concern what duties are to be performed within the proposed eight-hour duty day. Rather, the essence of the instant proposal goes to the number of hours to be spent in active work other than fighting fires.

Implicit in the petitioner's arguments is the contention that since firefighters work 24-hour shifts, the petitioner has no duty to bargain over how the time is to be spent. The unique work shift of a firefighter, however, cannot cloud the fact that the nature of the instant proposal is to determine how much time shall be spent in active work other than fighting fires. Even in the case of an ordinary eight-hour workday, rest periods are mandatory subjects of bargaining. 8/ As the supreme court stated in Joint School District No. 8 v. Wis. E.R. Board, 37 Wis. 2d 483, 491, 155 N.W. 2d 78, 82 (1967):

> "' * * * [T]he particular hours of the day and the particular days of the week during which employees shall be required to work are . . .'"

mandatory subjects of bargaining.

It is appropriate to comment on the nature of the petitioner's argument in order to explicate the nature of the issues. Even though the instant proposal clearly falls within the meaning of hours about which the petitioner is required to bargain, the petitioner defends on the ground that such proposal, if included in the collective bargaining agreement, would place a constraint on the services it can extend to the public. First, however, as noted above, many proposals relating to wages, hours and conditions of employment, about which the petitioner statutorily is required to bargain, would, if included in the agreement, place constraints on its capacity to provide public services. Second, this argument goes to the merits of such constraints, not their bargainability. We here determine bargainability, not the merits, and in doing so we look to the nature of the proposal to ascertain whether it primarily relates to wages, hours and conditions of employment. The question of the merits of a proposal is left to the bargaining process, and, if impasse is reached and compulsory arbitration initiated, the arbitrator determines the merits after weighing the lawful authority of the employer, the interests and welfare of the public, and other statutorily enumerated criteria. See sec. 111.77(6), Stats.

Maintenance work after 5:00 p.m.

The association proposed Article IV, sec. 4, of the previous agreement, which provided:

> "Maintenance and servicing of equipment, vehicles, and other property after 5:00 P.M. shall be solely limited

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8/ See National Grinding Wheel Co., Inc., 75 NLRB No. 112, 21 LRRM 112, 21 LRRM 1095 (1948), and Fleming Mfg. Co., Inc., 119 NLRB No. 55, 41 LRRM 1115 (1957).

to items necessary for efficient response to alarms. Apparatus room floors should be made reasonably safe and dry in all areas utilized by men in response to alarms. Normal vehicle and house cleanup will be postponed to the following duty crew."

The petitioner contends that the first and third sentences in this provision are permissive subjects of bargaining because they limit the assignment of normal work duties within the work day.

These proposals limit the amount of work which can be imposed on employes who already have expended eight hours of active work. They carefully accept maintenance work necessary for safety and fire alarms. The record shows that the performance of routine maintenance on vehicles, equipment and in the stationhouse after 5:00 p.m. is not necessary for providing essential fire protection. 9/

We conclude that these proposals, since they concern the amount of work to be performed after an eight-hour period of active work, primarily relate to hours and conditions of employment and are mandatory subjects of bargaining.

Home inspections

The association proposed Article IV, sec. 5, of the expired agreement, which provided:

"Home inspection duties shall not commence before 10:00 A.M. or continue past 4:00 P.M. and shall exclude such duties on Sundays and/or holidays."

This provision originated in response to citizen complaints that inspections were interfering with the routine of home life. 10/ As a consequence of this provision, however, some Wauwatosa citizens have been denied their request for a home inspection after 4:00 p.m. and on Sundays. 11/

The Union's proposal regarding home inspections directly affects the type and level of service to be provided the community of Wauwatosa. The level of service, in this regard, is dependent upon not only how often such services will be performed, if at all, but also on what days of the week and at what times such services will be performed. Paramount in making said decisions is the City's ability to respond and accommodate the wishes of the community in order to perform home inspection at the convenience of the home owners.

We therefore conclude that home inspections as proposed is primarily a managerial decision which properly is within the basic scope of the Petitioner's firefighting mission and as such is a permissive rather than a mandatory subject of bargaining. Any impact of said decision on

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9/ Tr. 79.

10/ Tr. 80 - 81.

11/ Tr. 39.

wages, hours, and conditions of employment, however, is subject to mandatory bargaining.

Hydrant inspections

The association proposed Article IV, sec. 6, of the expired agreement, which provided:

> "On any day after two inspections have been performed in any fall-winter season, hydrant inspections shall not be ordered when the official wind chill factor as reported at 8:30 A.M. by the National Weather Service on the day in question is below 0° F. Emergency hydrant inspections may be ordered by the Chief regardless of wind chill factor only when the temperature as measured by the National Weather Service is below -10° F. for seven consecutive days. * * *"

The petitioner contends that this proposal is only a permissive subject of bargaining because it implicates a management technique, viz., the timing of hydrant checks to insure against freezing.

The instant proposal would control the decision as to the circumstances under which the petitioner could inspect fire hydrants to protect against freezing in cold weather in order to assure the community of adequate fire protection. Such decision essentially involves a managerial decision as to the quality and level of fire protection services to be provided to the community. Such decision, therefore, is a permissive rather than a mandatory subject of bargaining. Unquestionably, however, such decision has an impact on the conditions of employment of firefighters and, as a result, the impact of such decision is a mandatory subject of bargaining. 12/

Holidays

The association proposed Article IV, sec. 7, of the previous agreement, which provided:

> "On any of the days scheduled as holidays . . . plus Easter Sunday, except for the customary morning cleanup procedures, no service, labor work, or other chores shall be required other than stand-by awaiting and/or serving in matters of emergency call. Civic parade appearances shall be made as required by the department."

The employer argues that this proposal is only a permissive subject of bargaining because it limits the scheduling of normal duties during a work day.

This proposal would limit the nature of duties to be performed during the duty day on holidays and Easter Sunday to standby and

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12/ There is a suggestion in the record, Tr. 64, that the purpose of this proposal was to counteract unnecessary assignments in the extreme cold imposed for punitive purposes. Just cause for any disciplinary action, of course, is a distinct issue and, without question, is a mandatory subject of bargaining.

responding to emergency calls. Unlike the association's proposal to limit the number of hours during the day when non-emergency duties are to be performed, this proposal would prohibit the petitioner from assigning any such duties during a firefighter's tour of duty on a holiday. Such a proposal would prevent the petitioner from assigning any of the duties which are a necessary concomitant of the City's basic firefighting mission. We perceive no distinction between tasks required to be performed on regular duty days from those to be performed on holidays, or any other specially designated day, such as Easter Sunday. The public interest requires the same degree of firefighting readiness every day of the year. We conclude that the proposal involved does not relate to a mandatory subject of bargaining, and, therefore, the petitioner is not required to bargain on same. However, the association has the right to bargain over the impact of any duty required to be performed on any holiday, or for that matter, on all days of the year in which they are employed.

Outside labor disputes

The association proposed Article XXII of the previous agreement, which provided:

> "No member of the Association shall be ordered to man any firehouse of any village, city or town other than the City of Wauwatosa in times of emergency or otherwise if such village, city or town is engaged in a substantial labor negotiation dispute with the authorized bargaining agent of the firefighters for said village, city or town. It shall be the duty of the duly qualified officers of the Association to give the Wauwatosa Fire Chief at least 24 hours written notice that they have been informed by an association that said substantial labor negotiation dispute does in fact exist before a refusal to enter such community's boundaries for such purposes shall be proper or excusable on the part of any Association member. Upon directive of the Chief, an Association member shall answer a fire, rescue or other emergency call from said village, city or town with the proviso that said members shall immediately be returned from the said village, city or town boundaries upon the completion of the necessary emergency services required."

The petitioner is party to a mutual aid pact with neighboring communities pursuant to which firefighters in one locale assist those in others. The petitioner argues: (1) the proposal is permissive in that it affects the level of services to be provided through the reciprocal feature of the mutual aid pact; and (2) alternatively, the proposal is a prohibited subject of bargaining in that it seeks to make common cause with firefighters who are striking in violation of law.

We agree with the petitioner's second ground and, therefore, need not discuss the first ground. The proposal, as a practical matter, could become operative only in case of a work stoppage or other strike activity in a neighboring signator community. The no-manning provision applies only in case of a "substantial labor negotiation dispute." The substantial dispute causing a manning problem can only be strike activity.

The proposal, therefore, operates only to perpetuate the effect of strike activity and its direct consequences in the neighboring

community. Since strikes by firefighters are prohibited, sec. 111.70 (4)(l), Stats., it would be contrary to the policy of this legislative prohibition to sanction this proposal as potentially a term in a collective bargaining agreement.

Accordingly, we hold that this proposal is a prohibited subject of bargaining.

Assignment of new duties

The association proposed Article XXVI, sec. 1, which provided:

> "No firefighter or other Association member shall be required to perform any duty not fire-related other than those duties heretofore required in 1972. * * *"

The petitioner contends this proposal is a permissive subject of bargaining because it impairs management's right to assign duties necessary to protect health, safety and welfare.

The commission has found this proposal as written to involve a permissive subject of bargaining because its breadth would prevent a city from increasing the level of service to the community by assigning new duties generally recognized as fairly within the training or scope of firefighter work. For example, in a city currently offering no ambulance or paramedic service, this proposal would prevent the city from doing so through its fire department notwithstanding firefighters with increasing frequency have acquired the necessary training to perform, and do perform, such services. We do not believe any legislative purpose would be served by requiring a municipal employer to bargain over such decisions.

On the other hand, employes may reasonably expect to be assigned only those duties which are generally consistent with the overall nature of their work. Peaceful labor relations could be jeopardized if employers could unilaterally require firefighters to perform tasks, normally not performed by them, which ordinarily are performed by employes not trained as firefighters.

Accordingly, in determining whether the assignment of a duty is a mandatory or permissive subject of bargaining, the legislative purpose requires the commission to determine whether said duty ordinarily is regarded as fairly within the scope of responsibilities applicable to the kind of work performed by the employes involved. If a particular duty is fairly within that scope, the employer unilaterally may impose such assignment. If the particular duty is not fairly within that scope, the decision to assign that duty is a mandatory subject of bargaining.

Measured against this test, the instant proposal would prevent the assignment of new duties ordinarily regarded as fairly within the scope of responsibilities applicable to the work of firefighters. Since the consequence would be to impair the city's decision-making power respecting the quality and level of community services without affecting an appreciable employe interest, we hold that this proposal relates to a permissive subject of bargaining.

Work rules

The association proposed Article XXVI, sec. 2, of the previous agreement, which provided:

"Work rules, regulations and conditions of employment as established and enforced in 1972 may be applied without further action. The creation of any new work rule, regulation or condition established after January 1, 1973, or the modification or cancellation of a pre-existing rule, regulation or condition of employment as defined herein shall be subject to negotiation and mutual accord between the Chief and the Association's executive council prior to becoming effective."

The petitioner contends that this proposal is permissive because some of the petitioner's rules and regulations relate to permissive matters.

It is impossible to determine whether the work rules contemplated by this proposal primarily relate to wages, hours and conditions of employment, or whether they also are intended to include so-called work rules which in fact are exclusively managerial prerogatives and, therefore, permissive subjects of bargaining. Further, during the hearing herein petitioner expressly disclaimed any desire to have the commission determine which of the applicable rules are mandatory or permissive subjects of bargaining. Under these circumstances the commission is unable to rule on the merits of the petition in respect to this proposal and, to this extent, has dismissed the petition.

In order to be of assistance to the parties, however, the commission notes its view that any work rule or amendment of a work rule which primarily relates to wages, hours or conditions of employment is a mandatory subject of bargaining, and that any such rule which does not so primarily relate is not a mandatory subject of bargaining. 14/ Accordingly, if the instant proposal contained a statement limiting its application to matters primarily relating to wages, hours and conditions of employment, the commission would find such a proposal to be a mandatory subject of bargaining.

Stay provision

The association proposed Article XXVII, sec. 2, of the previous agreement, which in part provided:

"* * * The filing of any grievance pertaining to non-fire and/or non-emergency functions, shall cause a stay of the ordered activity and possible resulting disciplinary action, pending the ultimate determination of the merits of the grievance providing that the executive board of the Association invokes such stay by including such in the filing of the grievance submitted to the Chief. . . ."

The petitioner contends this proposal is permissive because it empowers the association to stay implementation of management decisions which are permissive subjects of bargaining.

14/ See Southern Transport, Inc., 145 NLRB No. 69, 55 LRRM 1023 (1963), enforced 343 F.2d 558, 58 LRRM 2822 (8th Cir. 1965); See Murphy Diesel Co. v. NLRB, 454 F.2d 303, 78 LRRM 2992 (7th Cir. 1971); NFL Players Asso. v. NLRB, 503 F.2d 12, 87 LRRM 2118 (8th Cir. 1974).

While the language "ordered activity" is sufficiently broad as to bring permissive items within its sweep, whether or not they are included in a labor agreement, the word "grievance" effectively limits this sweep to permissive items which the employer voluntarily has reduced to a term of the collective bargaining agreement, since a "grievance" involves only an allegation that the agreement has been violated. 15/ Even though permissive subjects of bargaining do not fall within the jurisdiction of the interest arbitrator under sec. 111.77, Stats., a proposal, such as the instant one, designed to secure contracted for benefits, whether permissive or mandatory, is a mandatory subject of bargaining and would fall within such an interest arbitrator's jurisdiction. The reason is that once an employer agrees to terms, even if they are permissive, the labor organization may bargain for methods to secure compliance with those terms. To hold otherwise would convert a grievance-arbitration procedure, a mandatory subject of bargaining which is designed to secure compliance with all terms, into a permissive subject of bargaining simply because it would cover breaches of contract as to items which were permissive subjects of bargaining.

Since the essence of this proposal is to secure contracted for benefits, it primarily relates to wages, hours and conditions of employment and is a mandatory subject of bargaining.

Contract renewal

The association proposed Article XXXVI of the previous agreement, which provided:

> "This Agreement shall . . . remain in full force and effect to and including, December 31, 1976 and thereafter shall be considered automatically renewed for successive twelve month periods unless procedures are instituted in accordance with Section 111.77 of the Wisconsin Statutes. * * * In the event the parties do not reach written agreement by the expiration date, the existing Agreement shall be extended until a new agreement is executed."

The petitioner contends that this proposal is permissive because it compels permissive subjects in an expired agreement to be continued even into the arbitration process such that permissive subjects could be submitted to an arbitrator over objections from the other party.

We do not so read this proposal. This proposal merely continues the effective date of the agreement until a new agreement is reached.

15/ The grievance procedure in part provides at Article XXVII:

> "Section 1. The Association and the City recognize that grievances involving interpretation, application or enforcement of the terms of this Agreement and the application of work rules, regulations and conditions of employment should be settled promptly and in a just manner.
>
> "Section 2. Any grievance by an Association member relative to the above must be submitted to the Chief within five (5) days of an alleged contract violation . . ."

It says nothing about the scope of the submission to the arbitrator. It does not constitute a permanent waiver precluding the employer from arguing, as it does here (without a claimed violation by the association), that certain items are permissive and beyond the arbitrator's powers.

Essentially this proposal seeks to preserve contractual benefits and duties until a new agreement is reached. Accordingly, it primarily relates to wages, hours and conditions of employment and is a mandatory subject of bargaining.

Dated at Madison, Wisconsin this 9th day of November, 1977.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Morris Slavney, Chairman

_____
Herman Torosian, Commissioner

OPINION OF COMMISSIONER HOORNSTRA CONCURRING IN PART AND DISSENTING IN PART

I concur with the commission's decision in all respects except as to the holiday proposal.

My colleagues view the holiday proposal as an association effort not to perform regular duties within an ordinary work period. In my view, holidays are not ordinary work periods, and the proposal merely seeks holiday benefits. Surely, if the association had sought increased compensation because of having to work on holidays, we would agree the proposal is a mandatory subject of bargaining, and I see no reason to treat differently the instant proposal, which is to work less on holidays as a result of having to be on hand to meet emergencies. It is not unreasonable to interpret as a condition of employment a proposal to allow for greater relaxation time on Christmas Day and other such events, except for emergencies, where the proposal would not jeopardize the employer's ability to fight fires.

By _____
Charles D. Hoornstra, Commissioner