STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

AFSCME, LOCAL 71,		
	Complainant,	
vs.		Case LX No. 23049 MP-862 Decision No. 16392-A
CITY OF KENOSHA,		
	Respondent.	

Appearances:
Lawton & Cates, Attorneys at Law, by Mr. Bruce F. Ehlke, for the Complainant.
Lindner, Honzik, Marsack, Hayman & Walsh, S.C., Attorneys at Law, by Mr. Roger E. Walsh, for the Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

AFSCME, Local 71, herein Complainant or Union, having on May 24, 1978, filed a complaint of prohibited practices with the Wisconsin Employment Relations Commission, herein Commission, wherein it alleged the City of Kenosha, herein Respondent or City, has committed prohibited practices in violation of Section 111.70(3)(a), Stats.; and the Commission having appointed Thomas L. Yaeger, a member of its staff, to act as Examiner in the matter; and hearing on said complaint having been held at Kenosha, Wisconsin, on July 11, 1978; and the parties having filed briefs in the matter by September 28, 1978; and the Examiner having considered the evidence and arguments and being fully advised in the premises, makes and issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. That AFSCME, Local 71, is the exclusive bargaining agent for, inter alia employees employed by the City in its Public Works Department Waste Division, and a labor organization within the meaning of 111.70(1)(j), Stats.

2. That the City of Kenosha is a municipal employer within the meaning of Section 111.70(1)(a), Stats., with its principal offices in Kenosha, Wisconsin.

3. That the Union and City were for the period January 1, 1976 through December 31, 1977, parties to a collective bargaining agreement governing wages, hours and conditions of employment of Public Works Department Waste Division employees; that said labor agreement contains a grievance procedure culminating with final and binding arbitration; and that said collective bargaining agreement also contains the following provisions relative to Public Works Department employees:

"ARTICLE XXVI - WORK WEEK

26.01 All employees covered by this Agreement shall have a normal work day of eight (8) hours and work week of forty (40) hours. The normal work week shall consist of five (5) consecutive days, Monday through Friday, except for employees of the Water and Sewage Plants and other employees whose normal schedule shall include Saturday and Sunday work.

26.02 The present work schedules for all departments shall be attached as Appendix "B" hereof.

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APPENDIX 'B'

DEPARTMENTAL WORK SCHEDULES IN EFFECT JANUARY 1, 1976

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2.	Water Construction Waste Division Street Division Park Maintenance	))))	Monday through Friday 7:00 a.m. - 3:30 p.m. One-half hour lunch break

. . .

It is mutually understood that the above schedules are those in effect on January 1, 1976, and that they are subject to change upon proper notification being given by the City.

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ARTICLE II - MANAGEMENT'S RIGHTS

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2.04 The City reserves the right to discipline or discharge for just cause. The City reserves the right to lay off for lack of work or funds, or occurence of conditions beyond the control of the City or where such continuation of work would be wasteful and unproductive. The City shall have the right to determine reasonable schedules of work and to establish methods and processes by which such work is performed.

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ARTICLE XVII - OVERTIME PAY - CALL IN PAY

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17.02 Daily and Saturday Overtime. Employee called upon to perform any service prior to or following his regular eight (8) hour shift, and on Saturdays, shall be compensated for at the rate of one and one-half (1-1/2) times the employee's regular rate of pay.

. . .

ARTICLE XIX - PAID FOR TIME

19.01 All employees covered by this Agreement shall be paid for time spent in the service of the Employer. Time shall be computed from the time that the employee registers in and until he is released from duty and registers out. All time lost due to delays and court appearances as a result of overloads or certificate or other violations involving Federal, State or City regulations which occur through no fault of the driver, shall be paid for.

. . .

ARTICLE XXI - MEAL AND BREAK PERIODS

21.01 Lunch Period. The noon lunch period shall be of thirty (30) minutes duration for hourly paid employees and sixty (60) minutes duration for salaried employees, and shall be taken midway through the regularly scheduled work period. The regular eight (8) hour day will be paid for exclusive of the noon lunch period.

21.02 A "rest period" or "coffee break" of fifteen (15) minutes duration will be allotted during the morning to each employee and shall be included in the eight (8) hour day for pay purposes. The period of the break shall be from the time when work is stopped until the time when work is resumed. Any abuse of the fifteen (15) minute coffee break privilege will be subject to discipline.

21.03 At the completion of the regular work day, a ten (10) minute wash-up period will be allotted to each employee."

4. That in or about November 1976, the City in its 1977 budget deliberations, determined to change from backyard to curbside waste pickups by Department of Public Works Waste Collectors; that this change was communicated to Willard Rozzoni, then Union President, by letter dated December 8, 1976, from the City Administrator and Finance Committee Chairman; and that said communication, however, did not refer to the City's plan to permit waste collectors to go home early if their new routes were complete prior to the conclusion of their scheduled work shift.

5. That thereafter, on March 2, 1977, a meeting was held between representatives of both the City and the Union to discuss City plans for implementation of its new curbside waste collection program; that during said meeting several aspects of said program such as implementation dates, route selection procedures, and day certain pick-up were discussed, but the matter of Waste Collectors going home early was not discussed at said meeting.

6. That on March 29, 1977, during a bargaining session held pursuant to a contract reopener on noneconomic items, the parties again discussed various aspects of the City's curbside waste collection program; that at said meeting the Union was advised by City representatives that the program would be implemented on May 2, 1977; and that the Union was also told that Waste Collectors that completed their routes prior to the conclusion of their shift would then be allowed to go home; that at said meeting the Union objected to the City plan that Waste Collectors would be allowed to go home at the completion of their routes; and that no agreement was reached at said meeting regarding the City's plan that Waste Collectors be permitted to go home after completing their routes and prior to completing the contractually specified eight (8) hour "normal work day".

7. That on/or about May 9, 1977, the curbside waste collection system was implemented by the City; that during the first few weeks after implementation although Public Works Department supervisors had told most if not all Waste Collectors prior to implementation that they could leave after completing their routes, none left prior to the conclusion of their regular 7:00 a.m. to 3:30 p.m. shift; that employees did not start leaving work upon completion of their routes until in or about early June 1977, but have continued to do so to the present; and that this policy of allowing Waste Collectors to leave work before the end of their scheduled work day had previously occured only in the case of the Friday 2 hour incentive policy where when all routes were complete on Fridays, Waste Collectors were allowed to leave work two hours early.

8. That on April 29, 1977, the Union had requested the City reopen the abovesaid labor agreement in order to negotiate a wage increase

for Waste Department employees because of the change in operation about to be undertaken; that on May 10, 1977, during negotiations pursuant to a noneconomic item reopener, the subject of a wage increase for Waste Collectors was again broached by the Union and the City declined to discuss the subject; that on May 12, 1977, Waste Collectors engaged in a wildcat strike that resulted in a bargaining session the same day between the City and Union to end said strike; that an agreement was reached and ratified by the parties that ended the strike; that said agreement provided for a $.25 per hour increase to Waste Collectors effective May 2, 1977, and that the aforesaid labor agreement be amended as follows:

> "The City and Local 71 mutually agree that curb side pick up is within the job description of waste collectors effective May 2, 1977, and curb side pick up will be performed on a day certain basis and overtime will be worked, if required, to complete the daily work schedule established by the City."

and that the matter of Waste Collectors leaving early was not discussed during the aforesaid negotiations that occurred May 12, 1977.

9. That although the Union occassionally expressed displeasure over the City's policy of allowing Waste Collectors to leave work after completing their routes it was not the subject of any bargaining between the parties, from March 29, 1977, through May 24, 1978, the date the instant complaint was filed with the Commission; and that said policy has never been grieved by the Union, and said failure to grieve has not been excused.

Based upon the foregoing Findings of Fact, the Examiner makes the following

CONCLUSIONS OF LAW

1. That because the change in policy that permitted Waste Collectors to go home early was completed less than one year prior to filing of the instant complaint and has been continued thereafter, Section 111.07(14), Stats., will not time bar the Commission from reviewing said activity to determine if a prohibited practice was committed in violation of Section 111.70(3)(a)4 or 5, Stats.

2. That inasmuch as the parties 1976-77 labor agreement contains a final and binding arbitration provision, which Complainant has not exhausted, the Commission will not assert its jurisdiction to review the alleged breach of said agreement in violation Section 111.70(3)(a)5, Stats.

3. That there was a collective bargaining agreement in effect between the parties for the calendar years 1976, and 1977, which contained a provision governing the "normal work day" and work schedules for City of Kenosha, Department of Public Works, Waste Collectors, and that said contract provision operated as a waiver of Complainant's right to insist upon bargaining the City's decision to permit Waste Collectors to leave work early, at least for the period January 1, 1976, through December 31, 1977

4. That by unilaterally determining to allow Waste Collectors to leave work upon completing their routes, but prior to the end of the scheduled eight (8) hour day, the City of Kenosha has not and is not refusing to bargain in violation of Section 111.70(3)(a)5, Stats.

Upon the basis of the foregoing Findings of Fact, and Conclusions of Law the Examiner makes the following

ORDER

IT IS ORDERED that the complaint in the instant matter be, and the same hereby is, dismissed.

Dated at Madison, Wisconsin this 13th day of December, 1978.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Thomas L. Yaeger, Examiner

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

POSITIONS OF THE PARTIES:

Complainant contends that the City has breached the collective bargaining agreement by allowing City Waste Collectors to leave work after completing their curbside routes, but prior to the completion of their contractual eight hour shift. It insists it never agreed to the City's proposal that would have permitted employees to leave work early and in fact the City agreed with the Union's position that employees should not be allowed to do so. Also, the Union asserts that the City by unilaterally implementing the policy of allowing employees to leave early has refused to bargain. Further, that after the parties had agreed that employees would not be allowed to leave early, the City did not give notice to the Union of its intent to implement a policy to the contrary, and thus the Union was precluded from exercising its legal right to bargain over the change or its impact.

Respondents, however, argue that consideration of the subject complaint by the Commission is barred by the one year statute of limitation for commencing said action. It claims the alleged prohibited practices occurred more than one year prior to filing of the instant complaint with the Commission. Respondent's defense to Complainant's breach of contract allegation is that no agreement was reached precluding the City from permitting Waste Collectors to go home after completing their routes. In Appendix B of the contract and the agreement reached ending the Wildcat strike permit the City to establish and change work schedules. Further, the City argues that the alleged contract violation was resolved by virtue of the Union grieving the early release policy which it later withdrew. Concerning its alleged refusal to bargain the Respondent contends that the parties' labor agreement allowed it to make unilateral changes in method of operation and work schedules without first bargaining with the Union. Additionally, the City argues that it did bargain the impact of its unilateral changes and reached agreement on certain matters, but said agreements did not prohibit early release of employees. Further, the Union's conduct since implementation until filing of the subject complaint supports a finding of a waiver on its demand to bargain over the policy. Consequently, the City had satisfied any duty to bargain it had concerning the Waste Collectors early release policy.

STATUTE OF LIMITATIONS:

The time limit for filing complaints of prohibited practices in violation of the MERA 1/ is one year from the date of the "specific act or unfair labor practice alleged."2/ The City's curbside waste collection program was implemented not later than May 9, 1977. However, while the City claims its policy was to allow employees to leave work upon completing their routes, the evidence establishes that no Waste Collectors did so during the first month after implementation of the new curbside collection program. However, since at least mid-June 1977, Waste Collectors have been leaving work early after completing their routes.

1/ Municipal Employment Relations Act

2/ Section 111.07(14), Stats., "(14) The right of any person to proceed under this section shall not extend beyond one year from the date of the specific act or unfair labor practice alleged."

It is clear that the curbside waste collection program, of which leaving early was a part, was implemented by at least May 19, 1977, and thus occured more than one year prior to filing of the instant complaint on May 24, 1978. However, Waste Collectors only started leaving work early in June, after filing of the subject complaint and have continuously to the present been permitted to do so. Thus, the conduct complained of falls within the one year statutory period. Furthermore, even though the events that led up to the change in policy are just as clearly outside the one year period, they have been relied upon only to illucidate the events occuring within the prescribed period.

REFUSAL TO BARGAIN:

The refusal to bargain allegations arise from the City's decision to permit Waste Collectors to leave work at the completion of their routes notwithstanding that they have not completed their eight hour shift. This change was brought on with the City's modification of waste collection operations to curbside pickups. The City's defense to Complainant's charges are that the labor agreement permitted it to act unilaterally, and further, that it did bargain with the Union regarding the impact of its decision to release the employees after they had completed their routes.

It is clear that a municipal employer has a duty to bargain to impasse during the term of an existing labor agreement regarding any mandatory subject of bargaining not dealt with in the contract or where the Union has not waived its right to insist upon said bargaining. 3/ If, on the other hand, the employer desires to make a change in a matter which is dealt with in the collective bargaining agreement during its term, it cannot do so without first obtaining the Union's assent. 4/

No dispute is presented herein concerning whether the early release of employees is a mandatory subject of bargaining. It deals with employee hours and clearly is a subject about which bargaining is mandatory. Furthermore, it is the change to curbside pickup that is the change in operation which triggered the early release policy. It is necessary therefore to determine whether the City's unilateral action respecting the early release breached its duty to bargain.

It is clear from an examination of the parties' contract that the general subject of hours has been dealt with therein. Article XXVI describes both the "normal work day", and "normal work week" and Appendix B which is incorporated into Article XXVI by reference also outlines the daily work schedules by division and/or classification. Appendix B also reserves to the City the right to alter said daily work schedules "upon proper notification being given". In addition, the labor agreement contains a management's rights clause that reserves unto the City the right to establish reasonable work schedules and other clauses that deal with break periods, overtime hours, etc.

The most significant of these contract clauses, in terms of the instant dispute, are Article II - Management's Rights and Article XXVI - Work Week. The change instituted by the City is to allow Waste Collectors to leave work upon completion of their curbside routes notwithstanding that they have worked less than the 8 hour "normal work day". However, even-though they worked less than 8 hours they continued to be paid for an eight hour day. 5/ Consequently, the only effect of the change was to allow employees to go home early if they finished early, otherwise they would continue to work the normal 8 hour day.

3/ Lorentzan Tile Company, (9630) 5/70.

4/ Potlatch Forests, Inc., 87 NLRB 1193, 25 LRRM 1192.

5/ This is to be inferred from the absence of any evidence that said employees were paid less than 8 hours or that they incurred any economic loss as a consequence of the change.

The question, therefore, is whether the parties have dealt with the subject of hours clearly enough and in sufficient detail in their contract for same to be deemed a contractual waiver of the Union's right to insist upon bargaining during the term of the contract on employer changes in employee hours. It goes without saying, however, that if the contract language prohibits the contemplated change then, as noted earlier herein, prior assent to the change is required.

The subject labor agreement, both in Articles II and XXVI, explicitly acknowledges the City's right to institute changes in the hours of employees. Article II specifically provides that the "City shall have the right to determine reasonable schedules of work". Furthermore, in Appendix B, which is incorporated into Article XXVI, the Union agreed that with notice to the Union the City could change the work schedules published therein. However, even more significant than any of the contractual language that without doubt constitutes a waiver by the Union to bargain over the City's decision to allow Waste Collectors to leave work early, is the fact that the work schedule for Waste Collectors has not been changed. Rather, the City is not insisting upon adherence to said work schedule once the work to be completed during said period has been accomplished.

Also, while the parties did bargain certain aspects of the change in operation no agreements were reached during these negotiations that prohibited the City from releasing Waste Collectors early upon completing their routes. The only agreement to amend that parties' labor contract was reached on May 12, 1977, was ratified by both sides, but was silent on the subject of early release. It rather only dealt with day certain pick up, overtime and wages.

While the Union claims the City verbally agreed at the March 29, 1977 meeting that Waste Collectors would not be permitted to leave work early, said alleged parole agreement cannot be relied upon to vary or contradict the written labor agreement. 6/ Herein, the contract clearly does not prohibit early release of Waste Collectors. Thus, any oral expression by the City that employees would not be released early amounts to nothing more than an expression of present intent, but clearly does not constitute an amendment to the written contract. Hence, even if the City verbally said it would not release employees early, that does not alter its contractual right to do so. Rather, only a mutual agreement to amend the labor agreement as was reached on May 12, 1977, would have the effect being urged by the Union.

While the Examiner is mindful of the Union's fears as to what this policy may portend for the future in terms of employee production, that has no bearing upon whether what has been done is legally permissible, and those fears cannot be allayed in this forum.

Inasmuch as the undersigned has determined that there is a contractual waiver it is unnecessary to determine whether there has been a waiver by conduct respecting the Union's right to insist upon bargaining the early release policy respecting Waste Collectors. Nonetheless, bargaining did take place on May 12, 1977, respecting the impact of the change in operation. That bargaining was prompted by the Waste Collectors' wildcat strike on said date, and did result in an agreement between the parties on various items related to the change in operation. However, the Union, for whatever reason, did not raise the issue of early release during these discussions, although at the time the policy had been communicated to them. Since those discussions, aside from expressing its displeasure with the policy, it has not to date requested to bargain about it or its impact.

6/ Nutrena Mills Inc. v. Earle, 111 N.W. 2d 491, 14 Wis. 2d 462 (1961), Hampton Plains Realty Co. v. Cohen, 252 N.W. 572, 214 Wis. 128 (1934), Oconto Chamber of Commerce v. Grandall, 185 N.W. 544, 175 Wis. 447,(1921)

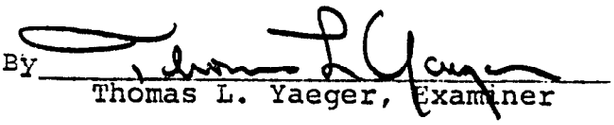
Consequently, there is no basis for concluding that the City's implementation of a policy of allowing Waste Collectors to leave work early after completing their routes constituted a refusal to bargain in violation Section 111.70(3)(a)4, Stats.

BREACH OF CONTRACT:

The cases are legion wherein the Commission has refused to assert its jurisdiction to review alleged breach of contract prohibited practices where the labor agreement claimed to have been violated provides for final and binding arbitration. Exhaustion of the available contractual remedies is thus a prerequisite to suit for breach of contract unless,it has been excused, e.g. exhaustion was precluded by the Union's breach of its duty of fair representation, or where exhaustion would be patently futile.

Herein, the only evidence of any attempt by the Union to resort to the contractual grievance machinery to challenge the City's actions as being violative of the labor agreement, is a grievance that was filed by a Street Department employee on January 18, 1978, that was subsequently withdrawn. However, that grievance inter alia was a challenge to the alleged discriminatory application of the going home early policy in that it allegedly did not apply to employees of the Street Department who were temporarily assigned to waste collection crews, and was not a challenge to implementation of the policy itself as being violative of the collective bargaining agreement. Thus, other than said grievance, the Union never resorted to the grievance procedure to resolve its claim of breach of contract. Further, there is no record evidence to excuse this failure to exhaust its contractual remedy. Consequently, the Commission, consistent with its well enunciated policy will not assert its jurisdiction herein to review the Union's claim of breach of contract. 7/

Dated at Madison, Wisconsin this 13th day of December, 1978.

By 
Thomas L. Yaeger, Examiner

7/ While we won't review the merits of the breach of contract claim, it was nonetheless necessary to previously interpret portions of said agreement in order to determine if a refusal to bargain prohibited practice had been committed. The difference being, however, that said construction was necessary to resolution of an alledged prohibited practice and not a determination of whether there has been a substantive breach of contract.