STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of	
CITY OF MADISON	Case LVIII No. 22777 DR(M)-85 Decision No. 16590
Requesting a Declaratory Ruling Pursuant to Section 111.70(4)(b), Wis. Stats., Involving a Dispute Between Said Petitioner and	
CITY OF MADISON EMPLOYEES LOCAL 60, AFSCME, AFL-CIO	

Appearances:
Mr. Timothy C. Jeffery, Director of Labor Relations, appearing on behalf of the Petitioner.
Lawton and Cates, Attorneys at Law, by Mr. Bruce Davey, appearing on behalf of the Respondent.

DECLARATORY RULING

The City of Madison having, on March 3, 1978, 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, for the purpose of determining whether certain proposals, submitted by City of Madison Employees, Local 60, AFSCME, AFL-CIO, as the collective bargaining representative of certain employes of the City of Madison, in its final offer in a mediation-arbitration proceeding involving such employes, are mandatory subjects of bargaining; and hearing on such petition having been held at Madison, Wisconsin on April 26, 1978, before Dennis P. McGilligan, a member of the Commission's staff; and thereafter, and by July 10, 1978, the parties having filed briefs in the matter; and the Commission, having considered the evidence and the arguments of the parties, and being fully advised in the premises, makes and issues the following

FINDINGS OF FACT

1. That the City of Madison, hereinafter referred to as the City, is a municipal employer, and has its offices at 210 Monona Avenue, Madison, Wisconsin.

2. That City of Madison Employees Local 60, AFSCME, AFL-CIO, hereinafter referred to as the Union, is a labor organization, and is the collective bargaining representative of certain employes in the employ of the City; and that the 1977 collective bargaining agreement between the Union and the City describes the employes covered by said agreement as follows:

"RECOGNITION AND UNIT OF REPRESENTATION

ARTICLE III

3.01 RECOGNITION:

The City recognizes the Union as the exclusive bargaining agent for all employees occupying the position classifications listed on Appendix A attached hereto, exclusive of managerial, supervisory and confidential employees, for the purpose of engaging in conferences and negotiations with

the City with respect to wages, hours and conditions of employment.

. . .

EMPLOYEES, DEFINED, RIGHTS, PROBATION

ARTICLE VIII

8.01 DEFINITION OF EMPLOYEES:

A. Regular full-time and regular part-time employees are those who are employed in budgeted positions on a probationary or permanent basis or who acquire such status through the application of the provisions of this Agreement.

B. Seasonal/hourly employees are those who are employed and/or reemployed on a temporary basis for seasonal work of a temporary nature or to fill other positions where the permanent employee holding such position is expected to be absent temporarily."

3. That for the past number of years the City and the Union have been parties to collective bargaining agreements covering wages, hours and working conditions of said "general and clerical" employes; that the last of such agreements was for calendar year 1977; that sometime during 1977 the parties engaged in collective bargaining for the purpose of attempting to reach an accord on a successor agreement; that as of January 17, 1978, the parties had failed to reach such an accord; that on that date the Union filed a petition with the Commission, requesting that the Commission initiate a mediation-arbitration proceeding, pursuant to Sec. 111.70(4)(cm)6 of the Municipal Employment Relations Act for the purpose of resolving the alleged impasse existing between the parties in their bargaining with respect to the successor collective bargaining agreement; that during the course of the informal investigation on the mediation-arbitration petition the Commission's Investigator obtained the proposed final offers of the parties; and that prior to the close of the investigation or any other action by the Commission, 1/ the City, on March 10, 1977, filed the instant petition for Declaratory Ruling, wherein it alleged that certain proposals contained in the Union's final offer were non-mandatory subjects of bargaining; and that said certain proposals are herein summarized 2/ as follows:

a. That, in a grievance arbitration proceeding scheduled during normal working hours, grievants, stewards, and other employes who "may be present and testify" do so without loss of their regular pay.

b. That "Temporary and/or Limited Term" employes be defined as those employes "employed on a temporary basis for seasonal work of a temporary nature or to fill a position where the permanent employe is expected to be absent temporarily, and further, that the term of employment of such temporarily and/or limited term employes cannot exceed six 3/ months, unless such an employe becomes a permanent employe.

1/ The Investigator has not closed his investigation. Sec. ERB 31.11 (1)(G), Wis. Admin. Code.

2/ The proposals are set forth in full in the Memorandum below.

3/ After the hearing the Union, with the knowledge of the City, modified its proposal from five months to six months. The City's brief was based on the proposal as modified.

c. That seasonal/hourly employes who have worked six months or longer, provided they are qualified, be placed in vacant entry level permanent positions.

d. That job postings must describe "the minimum qualifications necessary for an applicant to reasonably be expected to fill the position upon completion of the probationary or trial period."

e. That the contents of job posting notices remain constant as to duties and minimum qualifications, unless the City has a justifiable reason, submitted to the Union, necessitating a change. 4/

f. That job postings be first posted "Bargaining Unit-Wide, except for certain listed entry level positions", and that no qualified unit employes apply, the City may post "City-Wide or Open and Competitive".

g. That in filling bargaining unit job openings, the City apply to all applicants (i.e., bargaining unit employes and others) specific point standards based on (1) directly related experience in the job series in City service or non-City service and (2) related experience in City service or non-City service.

4. That the Union proposals summarized in Finding 3 parts a, b, c, d and f are matters primarily related to wages, hours and conditions of employment of employes represented by the Union in the instant bargaining unit; but that, the Union proposal summarized in Finding 3 part g, as written, is a matter primarily related to the formulation or management of public policy.

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

CONCLUSIONS OF LAW

1. That the Union proposals summarized in Finding 3, parts a, b, c, d and f, since they relate primarily to wages, hours and conditions of employment, are mandatory subjects of collective bargaining within the meaning of Section 111.70(1)(d), Stats.

2. That the Union proposal summarized in Finding 3, part g, since, as written, it primarily relates to the formulation and management of public policy, is a permissive subject of bargaining within the meaning of Sec. 111.70(1)(d), Stats.

On the basis of the foregoing Findings of Fact and Conclusions of Law, the Commission makes and files the following

DECLARATORY RULING

The City has a duty to bargain collectively with regard to the items in dispute referred to in Finding 3 parts a, b, c, d and f, but not with regard to that in Finding 3 part g, and therefore the Union may properly include the former items but not the latter item in its final

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4/ Following the hearing herein the Union withdrew said proposal.

offer for purposes of mediation-arbitration pursuant to Sec. 111.70(4)(cm), Stats.

Given under our hands and seal at the City of Madison, Wisconsin this 3rd day of October, 1978.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Morris Slavney
Morris Slavney, Chairman

Herman Torosian
Herman Torosian, Commissioner

Marshall L. Gratz
Marshall L. Gratz, Commissioner

MEMORANDUM ACCOMPANYING DECLARATORY RULING

In its petition requesting a declaratory ruling the City contends that various proposals contained in the final offer submitted by the Union in the mediation-arbitration proceeding relate to non-mandatory subjects of bargaining, and therefore, are improperly included in the Union's final offer. The proposals in issue, the positions of the parties with respect thereto, and the Commission's rationale in support of its rulings are set forth below.

No Loss of Pay When Participating in Grievance Arbitration During Normal Working Hours

The Union's proposal in this regard reads as follows:

> "'The fees and expenses for the arbitrator's services shall be borne equally by both parties. The expense of witnesses (if any) other than City employees shall be paid by the party calling such witness(es). The grieving employee(s), Local 60 elected representative (steward) and necessary City employee witnesses may be present and testify without loss of regular pay for time spent in arbitration if the hearing is scheduled during the employee's normal work period. Each party shall be responsible for compensating its own representatives except as set forth herein.'" 5/

The City contends that such proposal establishes a method for the financing of the Union's expenses in grievance arbitration which is not authorized by MERA, and, further that the proposal requires the expenditure of public funds for other than a public purpose, and therefore the proposal relates to a non-mandatory subject of bargaining.

The Union responds to such arguments by contending that Sec. 111.70 (3)(a)2 of MERA makes such payments lawful, and further, in effect, contends that such "expenditures" are for a lawful public purpose to encourage the voluntary settlement of labor disputes through the procedures of collective bargaining.

We agree with the Union in both respects. Sec. 111.70(3)(a)2 expressly and clearly permits the City to reimburse its employes at their prevailing rate for the time spent conferring with the City's officers or agents. We consider the reimbursements referred to in the instant proposal within the intended scope of that express authorization. For, the presentation of the Union's case and testimony on the Union's behalf during a grievance arbitration is an extension of the parties' process of conferring with regard to the dispute which follows upon previous conferences at prior grievance procedure steps. Since MERA expressly authorizes such expenditures, it would be anomalous to interpret the balance of MERA to make bargaining on said subject non-mandatory.

We also reject the City's contention that the reimbursements called for in the proposal would not be for a public purpose. The City argues

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5/ The provision in the 1977 agreement provided as follows:

> "All expenses which may be involved in the arbitration proceeding shall be borne by the parties equally. However, expenses relating to the calling of witnesses or the obtaining of depositions or any other similar expenses associated with such proceeding shall be borne by the party at whose request such witnesses or depositions are required."

in that regard that time spent by employes at arbitration hearings would not be "time spent in the service of the Employer", and that the payment of wages to employes under such circumstances "is not the payment of wages for work or services rendered by the employe". The latter contention is not persuasive since it would make vacation pay and sick leave pay permissive subjects, whereas such are clearly mandatory subjects of bargaining. More importantly, we find that the reimbursement called for in the instant proposal is more than a payment of individuals who help the Union cause difficulties for the City. It is reimbursement of individuals for their efforts to furtherance of the process of peaceful resolution of disputes in a manner promotive of the policies underlying MERA, and set forth in Sec. 111.70(6) and implied in Sec. 111.70(4)(cm), Stats.

Temporary and/or Limited Term Employes

The Union's proposal involving the above noted employes is as follows:

> "Section 8.01-B.
> Temporary and/or Limited Term Employees (LTE's) are those who are employed on a temporary basis for seasonal work of a temporary nature, or to fill other positions where the permanent employee is expected to be absent temporarily. A Temporary or Limited Term Employee's term of employment shall not exceed six (6) months, unless he/she becomes a permanent employee through application for a permanent position from a job posting. An extension of up to one (1) month for the term of a temporary or LTE's employment will be allowed, providing the Union is notified in advance setting forth the reasons for the necessity of an extension.
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> 1. Temporary and/or Limited Term Employees will be paid forty cents (40¢) per hour less than the entry level rates of pay for the position to which they are assigned, except as otherwise provided for in Appendix 'C'."

The City contends that the proposal is a non-mandatory subject of bargaining because: (a) It prevents the City from employing such people for a period of longer than seven months; (b) It prohibits the City from re-employing such individuals in second or subsequent seasons or years once they have completed the seven months maximum term of employment; (c) It would thereby create a class of individuals without a reasonable expectation of continued City employment so as to strip them of representation rights under MERA; (d) It would require greatly increased turnover among such individuals which would result in reduced efficiency and higher training costs; and (e) It would require the City to reduce its training program for CETA employes since the normal length of CETA on-the-job training is 12 months. By (d) and (e), the City contends, the proposal in question relates primarily to basic public policy decisions concerning the level of services and the extent to which the City will comply with optimal CETA guidelines.

The Union contends that the provision is not intended to cause turnover, but rather is intended to provide individuals performing unit work 6/ the same benefits received by the other employes in the bargaining unit.

6/ It should be noted that the proposal would apply to only employes "who are employed on a temporary basis for seasonal work of a temporary nature, or to fill other positions where the permanent employee is expected to be absent temporarily."

We reject all of the City's contentions. The instant proposal does not, per se, prevent the City from establishing the level of services that it will provide in its jurisdiction or from training CETA-funded personnel for a period of 12 months. Rather, it appears likely to make it more expensive to do so by generating turnover or by causing the City to create more permanent entry level vacancies than it otherwise would have created. That consideration goes only to the merits of the proposal, however, and does not make it a non-mandatory subject of bargaining. For the same reason, the fact that increased turnover, higher training costs and other potential inefficiencies arise because of its implementation is not a basis for concluding the proposal is non-mandatory.

Finally, while the proposal would substantially reduce the likelihood of continued employment of such individuals after seven months with the City, such reduction would not effect an exclusion of such individuals from the bargaining unit or from the MERA definition of a "Municipal Employe". While the lack of a reasonable expectation of continued employment has often been a basis for finding an employe ineligible to vote in a representation election in a unit including regular employes performing the same job functions, it does not constitute the basis for excluding such temporary employes' positions from such bargaining unit.

Proposal Relating to "Seasonal/Hourly" Employes

The Union proposed the following provision relating to seasonal/hourly employes, who are included in the bargaining unit:

> "2. Employees who currently are classified as 'seasonal/hourly' and who have worked six (6) months or longer (continuously) shall be placed in entry level permanent positions as they become vacant and provided they are qualified as provided for in 9.04-A-1."

The City argues that the proposal is a permissive subject of bargaining for the following reasons: (a) As written, it would require the City to fill a vacant entry level position with seasonal/hourly employes who have worked six months or longer, regardless of whether the City desires to fill the vacancy in question, thereby invading the City's managerial prerogative to leave a position vacant or to abolish it altogether; (b) It would decrease the level of service to be provided by the City; and, (c) It is in conflict with the City's civil service appointment procedures and its ability to meet affirmative action goals which are primarily related to matters of public policy.

The Union asserts the same arguments as it advanced in support of its proposal pertaining to temporary/limited term employes. In addition, the Union contends that the instant proposal is aimed at providing preference to seasonal/hourly employes for vacant entry level permanent positions, and that such a preference system is a mandatory subject of bargaining. Lastly, the Union asserts that the City has an obligation to bargain over the proposal even though ordinances which may conflict with the Union's proposal already exist.

The City has incorrectly characterized the instant proposal as requiring it to fill a position immediately upon its vacancy. It would be unreasonable to so interpret the Union's proposal, since Section 9.04-A-1 of the existing agreement, (and apparently to be included in the new agreement) specifically recognized the City's authority to decline to fill a vacancy. That Section states, in pertinent part:

> "However, the employer may decide not to fill a vacancy or pending vacancy. . . ."

Thus, the effect of the proposal is to provide seasonal/hourly employes with the opportunity to fill permanent vacant positions should

the City determine to fill such positions when they become vacant; it does not require the City to fill such vacancies. 7/

Further, the proposal does not remove the City's right to determine the level of services. Various items in the parties' collective agreement such as posting requirements and promotion procedures, like the instant proposal, may act to constrain the efficiency of the City in providing services. However, they do not go directly to the level of service itself, as the City retains the authority to make that determination.

The Commission also rejects the City's third argument. While a demand requiring violation of an expressed command of law would be necessarily outside the scope of the duty to bargain, 8/ the City has not demonstrated that the instant proposal would require such a violation. Nor has the City demonstrated that the instant proposal is primarily related to its function of determining public policy rather than to the employes' wages, hours and conditions of employment. 9/ Regarding the City's reference to its Civil Service Ordinances, the parties have already entered into a stipulation of agreed-upon matters by which Sec. 1.04 provides that ordinance provisions inconsistent with provisions of the agreement are superceded by the agreement. Moreover, the City has not shown that the instant proposal would require it to violate an expressed command of the Civil Service Statutes pursuant to which it enacted the ordinances in question initially.

Regarding the City's reference to the impact of the instant proposal on affirmative action, we note that the proposal subjects the placement rights of seasonal/hourly employes to the condition that the employe be "qualified as provided for in 9.04-A-1" of the Union's proposed final offer, which proposal reads in relevant part as follows:

A. In 9.04-A-1 add a sub-section to read as follows:

"Job postings shall describe the minimum qualifications necessary for an applicant to reasonably be expected to fill the position upon completion of the probationary or trial period. Job postings shall conform to affirmative action and federal regulations of non-discrimination. . . ." (Emphasis supplied).

Since the above-quoted provision conditions selection of a bidder upon the consistency of such selection with the requirements of affirmative action, it cannot be said that the Union's proposal (that seasonal/hourly employes receive whatever preference is possible consistent with that requirement) would in any way interfere with achievement of the City's affirmative action obligations under law. 10/ While the instant proposal does relate to some extent to the City's policy-making with

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7/ Oak Creek-Franklin School Dist. No. 1 (11827-D) 11/74 (Aff. Dane Co. Cir. Ct. (1975).

8/ City of Glendale v. Glendale Professional Policemen's Association, 83 Wis. 2d 90, 1102 (1978).

9/ Unified School District of Racine County, 81 Wis. 2d 89, 102 (1977).

10/ Since we have based our conclusion that the instant proposal is a mandatory subject upon the fact that it has been proposed in tendem with its proposal in Sec. 9.04-A-1, our conclusion in that regard may not remain the same if the underlined portion of the Union's proposal is hereinafter deleted from the Union's proposal during post declaratory ruling investigation proceedings.

regard to the degree to which it shall pursue affirmative action objectives beyond those required by law, the proposal is also directly related to the wages and conditions of employment of seasonal/hourly employes in the bargaining unit. On balance, we find the proposal primarily related to such wages and conditions of employment of such employes, and therefore, a mandatory subject.

Job Postings

The Union proposed the following item to be included in the parties' successor agreement:

"Job postings shall be first posted Bargaining Unit-Wide, except for entry level positions.

1. Entry level positions are:

   a. Clerk
   b. Clerk-Typist
   c. Data Entry Operator
   d. Data Terminal Operator
   e. Laborer
   f. Public Works Maintenance Worker I
   g. Custodial Worker II

2. If no qualified applicants apply Bargaining Unit-Wide, the Employer has the option of posting City-Wide or Open and Competitive."

Under the 1977 agreement, the City is free to recruit employes for any bargaining unit position through open and competitive (open to City employes and others), City-wide, or bargaining unit-wide procedures, at the City's choice. The City contends that the instant proposal, by limiting the recruitment pool for initial consideration to bargaining unit personnel (except for entry level vacancies) would hamper the City in implementing its public policy regarding affirmative action. The Union, on the other hand, asserts that the proposal seeks to establish a promotion system which rewards prior City service and that it is, therefore, a mandatory subject.

During the declaratory ruling hearing herein, the Union presented a document (exhibit 12), executed by an Equal Opportunities Commission hearing examiner, wherein said examiner stated that "charges of discrimination involving hiring practices" were being resolved by "agreement between the Equal Opportunities Commission, the City-s [sic] Labor Relations Negotiator, and AFSCME Local 60"; and that said agreement was to the effect that the City's negotiator would introduce, inter alia, the above provision as a part of its proposals for modifications of the 1977 agreement, and that "[b]oth parties are in agreement as to these proposals and shall incorporate them into their respective bargaining positions." Our examiner received the document over the City's objection to its hearsay nature. Our examiner noted that either party could present clarifying evidence if it chose to do so, but the City did not choose to do so. We therefore conclude that the letter reflects what was, in fact, an agreement between the parties and the EOC, by which a resolution of outstanding charges was effected. That agreement negates any contention that the above proposal would require the City to violate the expressed command of the equal employment opportunity laws. 11/

As was the case with the seasonal/hourly proposal, above, the instant proposal does relate to some extent to the City's public policy-

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11/ See note 8 above, and accompanying text.

making with regard to the degree to which it shall pursue affirmative action objectives beyond those required by law. However, as with the seasonal/hourly proposal, we find the instant proposal is directly related to the wages and conditions of employment of bargaining unit employes, and, on balance, primarily related thereto. Hence, we conclude that it is a mandatory subject of bargaining.

Evaluation of Experience and Training

Sec. 9.04 of the 1977 collective bargaining agreement contains a provision relating to bargaining unit "Job Position[s] and Filling". Set forth therein are candidate evaluation standards, which include reference to "Evaluation of experience and training", detailed in Appendix E of the agreement. The initial paragraph of said appendix reads as follows in the 1977 agreement:

> "For all examinations, an Evaluation of Experience form as herein described will be completed on each City and non-City employee who has been admitted for an examination. The Form will be completed by a representative in the City Personnel Office. The evaluation form shall be scored and the point total added to the other point totals obtained in the examination as described in Article IX-3 of the contract."

Said 1977 appendix also contains the following provision with respect to "how the experience is to be credited":

"LEVELS DEFINED:

A. Directly related experience in the job series in City service.
B. Directly related experience in the job series in non-City service.
C. Related experience in City service to the job applied for.
D. Related experience in non-City service to the job applied for.

LEVEL OF EXPERIENCE	EXPERIENCE IN PRECEDING 12 MOS.	1 YR AGO	2 YRS AGO	3 YRS AGO	4 YRS AGO	TOTAL MAXIMUM
Level A	9	8	6	6	6	35
Level B	8	7	5	5	5	30
Level C	7	6	4	4	4	25
Level D	6	5	3	3	3	20"

The Union's proposed final offer contains a proposal which would amend Appendix E to reflect the following changes in the "points" assigned to the various Levels of Experience as follows:

"A. Directly related experience in the job series in City service.
B. Directly related experience in the job series in non-City service.
C. Related experience in City service to the job applied for.
D. Related experience in non-City service to the job applied for.

LEVEL OF EXPERIENCE	EXPERIENCE PREC. 12 MOS.	1 YR. AGO	2 YRS. AGO	3 YRS. AGO	4 YRS. AGO	5 YRS. AGO
Level A	10	9	8	7	6	5
Level B	8	7	6	5	4	3
Level C	8	7	6	5	4	3
Level D	6	5	4	3	3	2

LEVEL OF EXPERIENCE	6 YRS. AGO	7 YRS. AGO
Level A	5	50
Level B	2	35
Level C	2	35
Level D	2	25"

The City contends that the proposal involves a non-mandatory subject of bargaining since it relates to non-unit employes who apply for positions in the bargaining unit. In support of such position the City would change the first paragraph of Appendix E to read as follows:

> "For all examinations, an Evaluation of Experience form as herein described will be completed on each represented employee who has been admitted for an examination. The form will be completed by a representative in the City Personnel Office. The evaluation form shall be scored and the point totals added to the other point totals obtained in the examination as described in Article IX-3 of the contract." (Emphasis supplied).

In its amended offer the City also proposed different point values to the various levels.

The City contends that the Union's proposal involves a non-mandatory subject of bargaining for the reason that the Union has no authority to bargain over non-unit employes who apply for vacant positions in the unit. The Union, on the other hand, argues that its proposal affects the promotion rights of employes in the bargaining unit, a condition of employment, and therefore, a mandatory subject of bargaining. We would agree with the Union if its proposal were worded so as to be applicable only when unit employes apply for promotion or lateral transfer vacancies. However, as its proposal reads it would also apply when no unit employe seeks a promotion or lateral transfer. To the latter extent, the Union's proposal would govern selections as between non-unit applicants even when no unit employe-applicant is involved. In such cases it would, if at all, only obliquely relate to employes' wages, hours and conditions of employment and would more directly relate to the City's policy-making functions. Therefore, as written, the proposal is a non-mandatory subject of bargaining.

Dated at Madison, Wisconsin this 3rd day of October, 1978.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Morris Slavney
Morris Slavney, Chairman

Herman Torosian
Herman Torosian, Commissioner

Marshall L. Gratz
Marshall L. Gratz, Commissioner