

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

No. 24271 DR(M)-119
Decision No. 16910-A

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4. That included in the City's proposed final offer dated February 8, 1979, was a proposal to "13. Delete Article XXII, Section 11, work option from the agreement"; that thereafter on February 20, 1979, the parties met with the investigator and amended their proposed final offers of February 8, 1979; that the amended offer of the City dated February 20, 1979, included the following addition to its proposal item number 13 of its February 8, 1979, proposed final offer

"Add to item #13: A \$20,000 cash bonus to the Street Department employees on the current seniority list within thirty days of the issuance of an arbitration award. The bonus will be paid to the 37 garbage crew employees on an equal basis or by any reasonable method proposed by the bargaining unit.";

and that the Union's proposed final offer of February 8, 1979 and subsequent final offer as amended on February 20, 1979, by not referring to Article XXII, Section 11, of the precedent collective bargaining agreement, were proposals to continue unchanged said article in the successor agreement.

5. That by letter dated February 23, 1979, the investigator notified the parties in writing that the investigation initiated pursuant to Section 111.70(4)(cm)6 of MERA was being closed effective that date; that on March 2, 1979, the City, by letter, advised the investigator that it objected to the inclusion of a permissive subject of bargaining in the Union's final offer of February 20, 1979; that said objection was the first and only objection filed with the investigator relative to any proposals made by the Union to resolve the parties' contract dispute.

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

CONCLUSIONS OF LAW

1. That the objection dated and filed by the City on March 2, 1979 was untimely under Section ERB 31.11, Wis. Adm. Code.

2. That by not timely objecting to the Union's final offer containing a proposal for the continuation in the successor contract of the alleged permissive subject of bargaining, the City has waived its right to object that said proposal is a permissive subject of bargaining, and said proposal should be treated as a mandatory subject of bargaining as provided in Section 111.70(4)(cm)6.a. of MERA and Section ERB 31.10, Wis. Adm. Code.

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

ORDER

IT IS ORDERED that the Petition for Declaratory Ruling filed herein by the City of Wauwatosa be, and the same hereby is, dismissed.

Given under our hands and seal at the City of Madison, Wisconsin this 7th day of May, 1979.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By *Morris Slavney*
Morris Slavney, Chairman

Herman Torosian
Herman Torosian, Commissioner

Marshall L. Gratz
Marshall L. Gratz, Commissioner

MEMORANDUM ACCOMPANYING FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER DISMISSING PETITION

The City has petitioned us to initiate a declaratory ruling proceeding to determine whether the Union's proposal to continue Article XXII, Section 11, in the successor agreement is a permissive subject of bargaining. Because the City's written objection to said proposal was not filed until after our investigator had closed the investigation initiated pursuant to Section 111.70(4)(cm)6, of MERA, we ordered the City to show cause why its petition for declaratory ruling should not be dismissed.

The City argues that its written objection, filed with the investigator on March 2, 1979, was timely filed. Its Employee Relations Director had allegedly, during the course of the investigation, "expressed - his concern" that the Union's proposal to continue Article XXII, Section 11 unchanged, was a permissive subject of bargaining. Notwithstanding this expression, the City concludes that the investigator prematurely closed the investigation before the City had an opportunity to consult with legal counsel about the "bargainability" of the Union's proposal on Article XXII, Section 11. Further, it contends that irrespective of whether the investigation was prematurely closed, the ten days which elapsed from February 20, 1979, when the parties exchanged amended final offers, until its written objections were filed with the investigator on March 2, 1979, was not an unreasonable amount of time for it to have spent in consulting with its legal counsel and formalizing its objections after exchange of final offers. Thus, it would have the Commission conclude that its objections were timely filed in accordance with Commission rules as outlined in Section ERB 31.11(1)(b), Wis. Adm. Code.

The Union, on the other hand, disputes the City's claim that its objections were timely filed as provided for in ERB Section 31.11, Wis. Adm. Code. Its analysis of Commission rules respecting the time for filing objections to bargaining proposals made during the Commission's investigation concludes that the Commission lacks discretion to allow the filing of objections after said investigation has been closed. It argues to permit same would cause unnecessary delay. Further, the Union, contends that even if the Commission has the discretion to permit the filing of objections after the investigation has been closed, the facts present herein do not justify a deviation from its rules. It emphasizes the Union's proposal with respect to continuation of Article XXII, Section 11, remained unchanged from the exchange of initial proposals until the present, and, thus, the City had more than ample opportunity to consult with legal counsel concerning the proposal. Furthermore, initial final offers were exchanged on February 8, and not amended until February 20, 1979, allowing almost two weeks for such consultation. Lastly, the Union argues that the facts alleged by the City establish that the City, in fact, never objected to the disputed proposal, but merely expressed its concern about it. Indeed, it claims the City waived any right it had to file an objection by including a proposal on the alleged nonmandatory subject in its own amended final offer.

DISCUSSION:

Section 111.70(4)(cm)6.a. of MERA reads in relevant part as follows:

- a. Upon receipt of a petition to initiate mediation-arbitration, the commission shall make an investigation, with or without a formal hearing, to determine whether mediation-

arbitration should be commenced....Prior to the close of the investigation each party shall submit in writing its single final offer containing its final proposals on all issues in dispute to the commission. Such final offers may include only mandatory subjects of bargaining. Permissive subjects of bargaining may be included by a party if the other party does not object and shall then be treated as a mandatory subject. No later than such time, the parties shall also submit to the commission a stipulation, in writing, with respect to all matters which are agreed upon for inclusion in the new or amended collective bargaining agreement. The commission, after receiving a report from its investigator and determining that mediation-arbitration should be commenced, shall issue an order requiring mediation-arbitration and immediately submit to the parties a list of 5 mediator-arbitrators....(emphasis added)

Pursuant to the mandate of 111.70(4)(cm)8. of MERA that "the Commission shall adopt rules for the conduct of mediation-arbitration proceedings under sub d.6...." the Commission adopted the following rules relevant herein.

ERB 31.09 Informal investigation or formal hearing.

. . .

(2) INFORMAL INVESTIGATION PROCEDURE. The commission or its agent shall set a date, time and place for the conduct of informal investigation and shall notify the parties thereof in writing. The informal investigation may be adjourned or continued as the commission or its agent deems necessary. During said investigation the commission or its agent may meet jointly or separately with the parties for the purposes described in subsection (1) above. Prior to the close of the investigation the investigator shall obtain in writing the final offers of the parties on the issues in dispute, as well as a stipulation in writing on all matters agreed upon to be included in the new or amended collective bargaining agreement. At the same time the parties shall exchange copies of their final offers, and shall retain copies of such stipulation, and if at said time, or during any additional time permitted by the investigator, no objection is raised that either final offer contains a proposal or proposals relating to non mandatory subjects of bargaining, the commission agent shall serve a notice in writing upon the parties indicating the investigation is closed...(emphasis added)

ERB 31.10 Final offers. Final offers shall contain proposals relating only to mandatory subjects of bargaining, except either final offer may contain proposals relating to permissive subjects of bargaining if there is no timely objection by the other party to the inclusion of such proposals in such final offer, and lacking such timely objection, such proposals shall be treated as mandatory subjects of bargaining. (emphasis added)

ERB 31.11 Procedure for raising objection that proposals relate to non-mandatory subjects of bargaining. (1) TIME FOR RAISING OBJECTION. Any objection that a proposal relates to a non-mandatory subject of bargaining may be raised at any time after the commencement of negotiation, but prior to the close of the informal investigation or formal hearing. (emphasis added)

(a) During negotiations, mediation or investigation. Should either party, during negotiations or during commission mediation or investigation raise an objection that a proposal or proposals by the other party relate to a non-mandatory subject of bargaining, either party may commence a declaratory ruling before the commission pursuant to s. 111.70(4)(b), Stats., and chapter ERB 18, Wis. Adm. Code seeking a determination as to whether the proposal or proposals involved relate to a non-mandatory subject or subjects of bargaining.

(b) At time of call for final offers. Should either party, at such time as the commission or its agent calls for and obtains and exchanges the proposed final offers of the parties, or within a reasonable time thereafter as determined by the commission or its investigator, raise an objection that a proposal or proposals by the other party relate to a non-mandatory subject of bargaining, such offers shall not be deemed to be final offers and the commission or its agent shall not close the investigation or hearing but shall direct the objecting party to reduce the objection to writing, identifying the proposal or proposals claimed to involve a non-mandatory subject of bargaining and the basis for such claim. Such objection shall be signed and dated by a duly authorized representative of the objecting party, and copies thereof shall, on the same date, be served on the other party, as well as the commission or its agent conducting the investigation or hearing, in the manner and within such reasonable time as determined by the commission or its investigator. (emphasis ad

(2) EFFECT OF BARGAINING ON PERMISSIVE SUBJECTS. Bargaining with regard to permissive subjects of bargaining during negotiations and prior to the close of the investigation shall not constitute a waiver of the right to file an objection as set forth in par. (1)(b) above.

ERB 31.12 Petition or stipulation to initiate a declaratory ruling proceeding to determine whether a proposal or proposals relate to mandatory subjects of bargaining. (1) WHO MAY FILE. Either party may file a petition, or both of the parties may file a stipulation, to initiate such a declaratory ruling before the commission.

. . .

(3) WHEN TO FILE. Such a petition or stipulation may be filed with the commission during negotiations, mediation or investigation. If such a petition or stipulation is filed after the investigator calls for final offers, such a petition or stipulation for declaratory ruling must be filed within 10 days following the service on the commission or its investigator of the written objection that a proposal or proposals relate to non-mandatory subjects of bargaining. Failure to file such a petition or stipulation within this time period shall constitute a waiver of the objection and the proposal or proposals involved therein shall be treated

tory subject of bargaining unless consented to in writing by the other party. Should the commission's decision be appealed the parties may agree to the conditional inclusion of such proposals in their final offers.

. . .

The legislative intent expressed in Section 111.70(4)(cm)6.a. is that final offers may contain permissive subjects of bargaining if the other party does not object, in which case the permissive subject(s) shall be treated as mandatory for purposes of a petition for mediation-arbitration. Clearly, by said provision, the legislature intended that the failure of one party to object to the inclusion of a permissive subject of bargaining would result in a waiver of the right to object. It left open the question of when or how such objection should be made.

In implementing said legislative intent, the Commission had several options available to it. First of all, it could have adopted a rule establishing a requirement that any objection to an allegedly permissive proposal must be made when the proposal is first made or shortly thereafter. This would insure that the proponent was aware of the objection and provide the parties with a sufficient amount of time to secure a declaratory ruling under Section 111.70(4)(b) of MERA as contemplated by Section 11.70(4)(cm)6.g. 1/ On the other hand, such an approach would often have held up negotiations pending resolution of the issue even though the Commission's experience has shown that the parties are frequently able to "bargain around" disputes over the bargainability of a particular proposal. For this reason Section ERB 31.11(1)(a) and (2), Wis. Adm. Code provides that either party may raise an objection to a proposal during the negotiation, mediation or investigation stages of the statutory procedure by filing a petition for a declaratory ruling but that it does not waive its right to later object at the time of the call for final offers if it declines to do so and instead attempts to "bargain around" the problem.

Secondly, the Commission could have adopted a rule which allowed a party to object to a proposal sometime after the close of the investigation but before an arbitration award including such an item is issued. This approach would have afforded the parties the maximum amount of time possible to "bargain around" the problem but would have resulted in a situation where one party could cause a delay at a very critical stage of the proceedings, i.e., after an impasse had been reached and perhaps at a time when the parties were considering whether to withdraw their final offers. Furthermore, such a rule would permit one party to wait until the investigation is closed before advising the other party of its objection and thereby eliminate the other party's opportunity to change its final offer by modifying or eliminating the allegedly

1/ Section 111.70(4)(cm)6.g. reads in pertinent part as follows: If a question arises as to whether any proposal made in negotiations by either party is a mandatory, permissive or prohibited subject of bargaining, the commission shall determine the issue pursuant to par. (b), the proceedings under subd. 6.c and d shall be delayed until the commission renders a decision in the matter, but not during any appeal of the commission order. The mediator-arbitrator's award shall be made in accordance with the commission's ruling, subject to automatic amendment by any subsequent court reversal thereof.

offending proposal, since final offers may not be changed after the close of the investigation without the consent of the other party. 2/ For this reason the Commission adopted a rule which permits either party to withhold the filing of an objection to a proposal alleged to be a permissive subject of bargaining until after the call for final offers but before the investigation is closed. If need be, the investigator has the power under ERB 31.09(2) and ERB 31.11(1)(b), Wis. Adm. Code, to hold the investigation open to allow a party a reasonable amount of time to file such an objection which must be reduced to writing and served on the other party. Once an objection is filed ERB 31.12(3), Wis. Adm. Code, gives the objecting party ten days in which to file a petition or stipulation for a declaratory ruling.

Here there is no claim that the petitioner lodged an objection either orally or in writing at the time the parties exchanged modified proposed final offers on February 20, 1979. Furthermore, no written objection was transmitted to the investigator until a week after he had closed the investigation on February 23, 1979.

The only claim made by the City in this regard is that sometime during the two meetings with the investigator, which took place on February 8 and February 20, 1979, David P. Moore, the City's Director of Employee Relations, expressed concern to the investigator that by proposing to continue the language contained in Article XXII, Section 11 of the prior collective bargaining agreement, the Union was proposing language which was a non-mandatory subject of bargaining. 3/ We treat this claim as factual for purposes of ruling on the issue raised herein.

However, said assumed fact does not excuse the City's failure to comply with the rule in question. As noted in the Union's arguments, its proposal to continue Article XXII, Section 11 remained unchanged from the outset of the negotiations. The City had more than ample opportunity to consult with legal counsel concerning its alleged concern. Furthermore, that concern was never put in the form of an objection, written or oral. Finally, the City included a counter-proposal to said proposal in its final offer.

Because we find that the City has failed to comply with the rules regarding the filing of objections and that it should not be excused for its failure to so comply, it is unnecessary to deal with the Union's argument that the Commission lacks discretion to allow

2/ See Section 111.70(4)(cm)6.d. of MERA and Section ERB 31.16(5), Wis. Adm. Code.

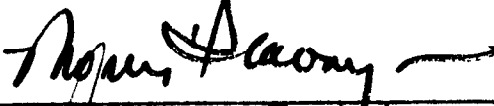
3/ The Petitioner's attorney filed an affidavit along with his brief in opposition to the entry of an order dismissing the petition, wherein he alleges that Moore consulted with him on March 1, 1979 and again on March 2, 1979 concerning the alleged non-mandatory nature of the proposal and that during these conversations and in subsequent conversations Moore alleged that he had expressed such concern and that Yaeger had acknowledged in a telephone conversation that Moore probably had done so.

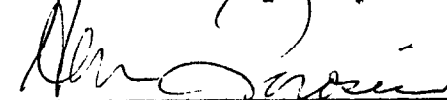
the filing of objections after the investigation has been closed. 4/ For the above and foregoing reasons, we have concluded that by not timely objecting to the inclusion of the alleged permissive proposal, the City has waived its right to so object and said proposal should be treated as a mandatory subject of bargaining for purposes of mediation-arbitration under Section 111.70(4)(cm)6.a. of MERA and Section 31.10, Wis. Adm. Code. Since the City is precluded from objecting to the proposal at this time, there is currently no "dispute" within the meaning of Section 111.70(4)(b) of MERA and we have consequently dismissed the petition. Such dismissal does not preclude the City from filing another petition in the future if it raises a timely objection to the continued inclusion of Article XXII, Section 11 in future agreements.

Dated at Madison, Wisconsin this 7th day of May, 1979.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By


Morris Slavney, Chairman


Herman Torosian, Commissioner


Marshall L. Gratz, Commissioner

4/ See ERB 10.01, Wis. Adm. Code. It should also be noted that the Commission has, under appropriate circumstances, directed the reopening of a closed investigation. See School District of New Lisbon (16578) 10/4/78.