

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Case CIX  
No. 24046 DR(M)-113  
Decision No. 17025

Mr. Grant F. Langley, Assistant City Attorney, on behalf of the  
Sewerage Commission.  
Podell & Ugent, Attorneys at Law, by Ms. Nola Hitchcock Cross,  
on behalf of Local 366.

The Sewerage Commission of the City of Milwaukee filed a petition with the Wisconsin Employment Relations Commission, herein 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 Local 366, AFSCME, AFL-CIO, District Council 48. Hearing on said petition was held on April 9, 1979 before Hearing Examiner Amedeo Greco at Milwaukee, Wisconsin. After the close of hearing, the parties filed briefs and reply briefs. The Commission, having considered the evidence and arguments of Counsel, and being fully advised in the premises, makes and issues the following

1. The Sewerage Commission of the City of Milwaukee, herein the Sewerage Commission, operates a sewerage facility and is a municipal employer within the meaning of Sec. 111.70, Stats. Its principal office is at 735 North Water Street, Milwaukee, Wisconsin.

2. Local 366, AFSCME, AFL-CIO, District Council 48, herein Local 366, is a labor organization and is the recognized collective bargaining representative for certain employees employed by the Sewerage Commission.

3. The parties are privy to a 1977-1978 collective bargaining agreement which covers operations, maintenance, technical and clerical employees. During the negotiations for an agreement to succeed the 1977-1978 collective bargaining agreement, a dispute arose between the parties as to whether certain items are mandatory or permissive subjects of bargaining.

4. Following an exchange of proposed final offers between the parties during the course of a WERC investigation pursuant to Local 366's December 13, 1978 petition to initiate mediation-arbitration,

the Sewerage Commission submitted timely written objections to certain proposals contained in Local 366's proposed final offer. (Those proposals are specified in Findings 5-7, below). Thereafter, the Sewerage Commission timely filed the instant petition for declaratory ruling.

5. The Sewerage Commission objected to that portion of Local 366's final offer which proposes that position descriptions contained in the parties' 1977-78 agreement be carried forward in the successor agreement on the grounds that said provisions are nonmandatory subjects of bargaining. The positions to which said descriptions relate are as follows: field maintenance equipment man, field maintenance leadman, plant maintenance leadman, plant maintenance equipment man, field and plant maintenance worker, field and plant maintenance laborer, laboratory helper, laboratory technician I, II, and III, chemist I, bacteriologist I, janitor - laboratory, laboratory clerk-typist, acid tar unloader operator I, acid house, sludge conditioning operator, acid house relief operator, survey crew chief, draftsman I and II, trainee crewmen flow gauging, crewman flow gauging, party chief flow gauging, plant office custodian, machine shop custodian, assistant buyer, buyer, accountant, account clerk I, budget technician, general laboratory laborer, clerk steno I, plant control operator, assistant plant control operator, plant control operator-special utility, general laborer, maintenance stores clerk, and custodian. Most, if not all of said descriptions designate for each job title involved, the department in which it is situated, the general and specific duties and responsibilities, and the relationship it has to other positions. Some of the descriptions contain a specification of the position's "hours of work." Some also contain provisions specifying the education, skills, personal characteristics, general experience, Sewerage Commission experience, length of service, and length of service relative to other bidders in the department, necessary to qualify for the job or for advancement to a higher grade within the classification; these matters are variously set forth under such headings as "job requirements," "special requirements," "education," "experience," and "review." The following position descriptions and portions thereof are fairly representative of the content of the others:

Position Title: Clerk-Typist, Laboratory  
Department: Laboratory  
Scope of the Position:

Under the supervision of the Laboratory Supervisor, type correspondence, memorandums, and reports, maintain routine plant records and files and act as laboratory receptionist.

Specific Responsibilities:

1. Type correspondence, letters, memorandums, and reports for the Laboratory Director and Supervisors.
2. Type laboratory analyses and reports.
3. Prepare receiving report of ferric chloride car unloading and calculate daily and monthly ferric chloride usage.
4. Compile information, summarize plant operations and record into the Daily Summary of Plant Operations Report.
5. Maintain plant operation files.
6. Record daily attendance of laboratory personnel.
7. Prepare bi-weekly time cards, record hours worked and sick leave taken and submit to the

- Personnel and Payroll Department after approval by the Laboratory Director.
8. Receive all visitors to the Laboratory and direct to appropriate party.
  9. Make photostatic copies as requested and deliver letters and reports.

Relationship:

Reports to the Laboratory Supervisor.

Education:

High School graduate plus ability to type 50 words per minute.

Experience:

No experience necessary.

Review:

After one year on the job, the employee will be reviewed by management and if qualified will be promoted to Clerk II (hired as Clerk I).

. . .

Position Title: Acid House Relief Operator

Department: Laboratory

Scope of the Position:

Under the supervision of the Laboratory Supervisor act as relief operator to assume the duties of Sludge Conditioning Operator during periods of scheduled absence or sickness of the operator; perform laboratory duties as assigned. Assume duties of ferric chloride car unloader as scheduled.

Specific Responsibilities:

1. As Sludge Condition Operator:  
Assume duties of the replaced sludge conditioning operator, acid house.
2. As Car Unloader:  
Assume duties of replaced acid car unloader.
3. Wash dishes, grind soil and perform other non-technical laboratory duties when assigned.

Education:

High school graduate including a chemistry course. Must have mechanical ability.

Experience:

3 years experience in a lower classified position including 1 year as an Operator II Channel.

. . .

Position Title: Survey Crew-Chief

Department: Engineering

Scope of Position:

. . .

Relationship:

1. Reports to the Division Engineer and to Management Engineers who may be assigned to supervise survey work;
2. Is in direct charge of Engineering Aide and other personnel who may be assigned to Survey Crews.

Education:

High school graduate or G.E.D. with at least six (6) semesters of mathematics, including trigonometry and geometry. (All employees must possess the above minimum education requirements).

It is desirable that the employees have successfully completed three (3) semesters of surveying.

Experience:

Six (6) years related experience as an Engineering Aide with the Sewerage Commission, including at least two (2) years on a Field Survey Crew.

6. The Sewerage Commission has also objected to the underlined portions of the following sections of the parties' 1977-78 agreement (which portions Local 366's proposed final offer would have carried forward in the successor agreement), contending that they are nonmandatory subjects of bargaining:

#### SCHEDULE 'A'

. . .

P. Seniority

. . .

5. Promotions. The current promotional systems as modified by the Commission and Union will be continued with the following sections governing the manner in which an employee will be promoted, the union shall be notified of all promotions, and a reasonable effort shall be made to post and fill all jobs as soon as possible.

. . .

b) Promotional system for employees in the Plant Office shall be negotiated and incorporated in this Agreement when prepared and the Union and management will undertake to negotiate all job requirements and descriptions.

. . .

S. Miscellaneous

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5. New Operations, Equipment or Positions. The wage rates for full-time positions on new equipment, operations or jobs, and the manner in which they are assigned by management, shall be negotiated and agreed between the parties, provided said new positions are within the work scope of the bargaining unit.

7. The Sewerage Commission has also objected to certain provisions containing references to "Foreman Warehouse & Maintenance," "Foreman--Plant (Shift)" and "Field or Plant Maintenance Foreman" that are in the parties' 1977-78 agreement and which Local 366 has proposed to carry forward in the successor agreement. However, no further consideration of said objections is necessary herein because the parties agreed during the hearing in the instant declaratory ruling proceeding to let the outcome of a pending unit clarification proceeding determine whether the objected-to language shall be carried forward in the successor agreeeent or deleted therefrom.

8. Of the objected-to portions of Local 366's proposed final offer remaining in dispute herein, as written, the following are primarily related to the formulation or management of public policy:

a. the portions of the position descriptions described in Finding 5, above, governing department, general and specific responsibilities, relationships to other positions, and the job requirements/qualifications provisions except those requiring previous bargaining unit experience or seniority.

b. the underlined portions noted in Finding 6, above.

9. Of the objected-to portions of Local 366's proposed final offer remaining in dispute herein, as written, the following are primarily related to wages, hours or other conditions of employment of Local 366 bargaining unit employees:

a. the portions of the position descriptions noted in Finding 5, above, governing hours of work, eligibility requirements for wage progression (e.g., "review"), and the job requirements consisting of previous bargaining unit experience or seniority.

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 referred to in Finding 8, above, are permissive subjects of bargaining within the meaning of Sec. 111.70 (1)(d), Stats.

2. The disputed items referred to in Finding 9, above, constitute mandatory subjects of bargaining under 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 Sewerage Commission has no duty to bargain with Local 366 or to submit to mediation-arbitration concerning the items in dispute noted in Finding 8, above.


The Sewerage Commission does have a duty to bargain over, and to submit to mediation-arbitration about the disputed items referred to in Finding 9, above.

Given under our hands and seal at the City of Madison, Wisconsin this 18th day of May, 1979.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By

  
Morris Slavney, Chairman

  
Marshall L. Gratz, Commissioner

MEMORANDUM ACCOMPANYING DECLARATORY RULING

The Sewerage Commission primarily contends that all of the disputed items herein constitute permissive subjects of bargaining and that, as a result, they should not be included in any subsequent collective bargaining agreements between the parties.

Local 366 disagrees. It argues that the items herein have been included in past contracts between the parties and that, therefore, said agreement represents "the parties' mutual understanding of what constitutes the scope of the job." Local 366 also contends that the disputed items primarily relate to wages, hours and working conditions and that, as such, they constitute mandatory subjects of bargaining.

The first of the Union's arguments above is clearly inconsistent with our established precedents on the point. The fact that a disputed item has been contained in prior agreements does not foreclose a party from questioning whether it is a mandatory subject in connection with the bargaining of subsequent contracts and interest arbitration proceedings that may arise out of such bargaining. 1/

The established test for distinguishing mandatory from permissive subjects of bargaining was articulated by the Wisconsin Supreme Court as a determination of whether the management decision involved primarily relates to the formulation or management of public policy or, instead, primarily relates to the wages, hours and conditions of employment of the employees in the bargaining unit in question. 2/ The results of our application of that test to the disputed proposals herein follows.

I. Specifications of Duties in Position Descriptions

We have previously held that if a particular duty is fairly within the scope of responsibilities applicable to the kind of work performed by the employees involved, the decision to assign such work to such employees is a permissive subject of bargaining. 3/ Only when the duties involved are not fairly within that scope does the matter of whether the employees may be assigned such work become a mandatory subject of bargaining. 4/ Since there is no contention or showing herein that any of the duties contained in the contractual descriptions are not fairly within the scope of responsibilities applicable to the kind of work performed by each of the employee groups involved, the general and specific duties and responsibilities portions of each of the position descriptions in question herein has been found to be a permissive subject of bargaining.

While the above ruling will afford the Sewerage Commission the opportunity to unilaterally prevent inclusion of the aforesaid speci-

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- 1/ E.g., City of Wauwatosa (15917) 11/77, on appeal on other grounds in Milwaukee County Circuit Court.
- 2/ Racine Schools v. WERC, 81 Wis. 2d 89 (1977).
- 3/ City of Wauwatosa, above, Note 1; see also, Oak Creek Schools (11827-D, E) 9/74, affirmed Dane Co. Cir. Ct., 11/75 (assignment of clerical duties to teachers held to be a mandatory subject).
- 4/ See cases cited in Note 3, above.

fications of responsibilities in the successor agreement, it does not relieve the Sewerage Commission from other related aspects of the duty to bargain collectively, to wit: the duty to furnish to Local 366, upon request, the duties and responsibilities of each bargaining unit position in order to facilitate bargaining the wages, hours and conditions of employment for each; the duty to bargain collectively with Local 366 before unilaterally imposing any new duty that is not fairly within the scope of the responsibilities applicable to the kind of work performed by the employees involved; and the duty to bargain collectively with respect to the impact of any substantial change in the duties of a bargaining unit position. 5/

## II. Specification of Necessary Qualifications in Position Descriptions

We have previously held that the criteria for a municipal employer's initial hiring decisions are permissive subjects of bargaining where the selection is exclusively from among non-members of the bargaining unit. 6/ However, where the selection is from a group which includes one or more bargaining unit applicants, the selection criteria affect the opportunities of unit employees for promotion or lateral transfer such that they become mandatory subjects of bargaining. 7/

Here, the criteria set forth in the agreement have not been expressly limited to situations in which at least one bargaining unit member is an applicant. Therefore, we have concluded that most of the specifications of qualifications set forth in the position descriptions, as written, are permissive subjects of bargaining. The exceptions are those qualifications that could only be had by present or former bargaining unit members, i.e., prior experience in bargaining unit positions or seniority in the bargaining unit.

## III. Specification of Hours of Work in Position Descriptions

In general, the hours of work of bargaining unit employees is a mandatory subject of bargaining. While a proposed limitation on the hours of work of Sewerage Commission employees (such as proposing banker's hours for all employees, thereby threatening to prevent the municipal employer from operating around the clock) could be fashioned that is primarily related to the formulation or management of public policy, the Sewerage Commission has not shown that any of those contained in the instant job descriptions is of that sort. Hence, the "hours of work" specifications in the position descriptions at issue have been held herein to be mandatory subjects of bargaining.

## IV. Specification in Position Descriptions of Department and Relationships to Other Positions

We are satisfied that the shape of its organizational structure so directly influences the ability of a municipal employer to operate so as to carry out its governmental mission that decisions regarding that structure primarily relate to the formulation and

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5/ On the last point, see City of Sheboygan (11877-A, B) 8/76.

6/ City of Madison (16590) 10/78.

7/ Id.



management of public policy rather than to the wages, hours and conditions of employment of affected employees. Hence, we have concluded that both the department in which a position is to organizationally reside and the positions to which it is subordinate and superior are permissive subjects of bargaining. Nevertheless, Local 366 is entitled to know the status quo departmental structure and relationships in order to permit it to fashion proposals on such matters as departmental seniority groups and the identity of recipients of bargaining unit employees' grievances at various levels of the contractual grievance procedure. Moreover, the impact of any change in the employer's organizational structure on such wages, hours or conditions of employment would be a mandatory subject of bargaining. 8/

#### V. Eligibility Requirements for Wage Progression

Because the conditions upon which an employee will advance to a higher wage rate primarily relates to wages, the portion(s) of the instant position descriptions specifying such conditions, e.g., under "review," have been held herein to be mandatory subjects of bargaining.

#### VI. Proposed Contractual Obligation to Negotiate Job Requirements and Descriptions

Since Local 366's proposal to retain the underlined portion of Appendix A(P)(5)(b) [in Finding 6] does not limit its application to requiring such negotiations with respect to criteria for selection where at least one applicant is a bargaining unit member, it would, as written, also govern selections involving no bargaining unit personnel. Hence, for the reasons noted under II, above, we have concluded that said portion of said proposal, as written, is a permissive subject of bargaining as it relates to job requirements.

Similarly, since said proposal does not limit its application to requiring such negotiations with respect to job descriptions to bargaining about duties that do not fairly come within the scope of duties applicable to the kind of work performed by the employees involved, it has also been held to be a permissive subject, as written, as it relates to job descriptions, for the reasons noted under I., above.

#### VII. Proposed Limitations on Municipal Employer's Right to Assign Work

Left, then, is Local 366's proposal that Schedule A(5) (5) of the 1977-1978 contract be included in the successor contract. It states:

New Operations, Equipment or Positions. The wage rates for full-time positions on new equipment, operation, or jobs, and the manner in which they are assigned by management shall be negotiated and agreed between the parties, provided said new positions are within the work scope of the bargaining unit.

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8/ To the extent that the Commission's decision in Milwaukee County (9904) 9/70 is inconsistent with the holdings above, that pre-WERA case must be deemed to have been superceded by subsequent refinements in the statutory and case-law definitions of the scope of mandatory bargaining. See, Sec. 111.70(1)(d), Stats., containing a reference to "subjects reserved to management and direction of the governmental unit" and the Racine Schools test (above, Note 2).

It is the underlined phrases which are in dispute herein, with the Sewerage Commission claiming, and Local 366 denying, that they constitute permissive subjects of bargaining.

Commenting on the first underlined phrase, Local 366's brief claims that:

The disputed language merely requires management to negotiate with the employees' representatives as to the make-up of the crew which will perform the new operation; or as to which employees by seniority, rotation, classification, etc. will run the new equipment; or as to which employees shall be assigned (transferred or promoted) to the new positions.

From those comments, it is clear that (besides the "and agreed" limitation discussed below) Local 366 interprets its proposal above as requiring the Sewerage Commission to negotiate with it during the term of the successor agreement as to ". . . the manner in which [new equipment, operations or jobs within the bargaining unit] are assigned by management." If that proposed reservation of the right to negotiate had been expressly limited to matters primarily related to wages, hours and conditions of employment of bargaining unit members, it would have been held to be a mandatory subject of bargaining. As written, however, the proposal also reserves the right to negotiate certain nonmandatory subjects such as whether the operation of a new piece of equipment will be assigned to an existing position where operation of the new equipment is fairly within the scope of responsibilities applicable to the kind of work performed by the employees involved. Therefore, because it is an inextricable mixture of permissive and mandatory elements, the underlined portion of the proposal above, as written, has been held herein to be permissive. 9/

The underlined phrase "and agreed," would apparently prohibit the Sewerage Commission from introducing "new operations, equipment or positions" until such time as the parties bargain and agree over the impact of such changes. The phrase thereby would prevent the Sewerage Commission from effectuating such changes not only for the length of the negotiations period (entailed by the portion of the provision not objected-to herein) but also until such time as the Union gives its consent by reaching agreement on impact. We hold that a proposal to the latter effect is a permissive subject of bargaining because it might well prevent the municipal employer from taking actions that are essential to its fulfillment of its basic governmental mission. Notwithstanding that holding, however, the Union may propose the mandatory subject of a final and binding third-party resolution mechanism (such as contract grievance arbitration) for disputes arising during the term of the agreement as to the impact of such a nonconsensual management action.

In light of the above, while the Commission finds the phrase "as agreed" constitutes a permissive subject of bargaining, Local 366 is nonetheless entitled to propose to modify said provision to provide that certain unresolved disputes arising under this language

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9/ City of Wauwatosa, above, Note 1.

be submitted to third-party resolution such as the contractually agreed to arbitration procedure.

Dated at Madison, Wisconsin this 18th day of May, 1979.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Morris Slavney  
Morris Slavney, Chairman

Marshall L. Gratz  
Marshall L. Gratz, Commissioner