STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

GENERAL DRIVERS AND DAIRY EMPLOYEES UNION, LOCAL NO. 563 Complainant vs. CITY OF APPLETON Respondent	Case CXIV No. 24530 MP-977 Decision No. 17034-C

Appearances:
Goldberg, Previant and Uelmen, S.C., Attorneys at Law, by Ms. Marianne Goldstein, appearing on benalf of the Complainant
Mr. David G. Geenen, City Attorney, appearing on behalf of the Respondent

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

The above-named Complainant having filed a complaint with the Wisconsin Employment Relations Commission on May 8, 1979, alleging that the above-named Respondents had committed a prohibited practice within the meaning of Section 111.70 of the Municipal Employment Relations Act (MERA); and the Commission having appointed Duane McCrary, a member of its staff, to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and Order as provided in Section 111.07(5) of the Wisconsin Statutes; and a hearing on said complaint having been held before the Examiner in Appleton,Wisconsin on July 16, 1979; and the parties having filed post hearing briefs by August 28, 1979; and the Examiner having considered the evidence and arguments of counsel; and being fully advised in the premises, makes and files the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. That General Drivers and Dairy Employees Union, Local No. 563, hereinafter referred to as the Complainant, is a labor organization having its offices at 1366 Appleton Road, Menasha, Wisconsin and is the exclusive bargaining representative of Meter attendants employed by the City of Appleton.

2. That the City of Appleton, hereinafter referred to as the Respondent, is a municipal employer having its offices at City Hall, Appleton, Wisconsin; that David L. Gorski is Chief of the City of Appleton Police Department, and functions as Respondent's agent; that David F. Bill is Director of Personnel for the Respondent and functions as its agent.

3. That the parties 1979-1980 collective bargaining agreement provides for final and binding arbitration of unresolved grievances "relative to the interpretation or application of this Agreement" and further provides in Article 24 Seniority that "unless otherwise modified . . . seniority rights shall prevail,"; that there is no provision in the agreement relative to the provision of motorized vehicles to meter attendants. 1/

1/ Article 21, Section A obligates the Respondent to require meter attendants not to use vehicles that are in unsafe operating condition or vehicles that are not equipped with safety appliances. An employe's failure to take out such equipment is not considered a violation of the agreement nor cause for disciplinary action. However, this provision is not material to the issues presented by the instant complaint.

4. That since 1968 all meter attendants have been assigned a vehicle except when a vehicle was being repaired and on one downtown beat every Friday afternoon from 1 to 5 p.m. On March 20, 1979 the Respondent removed two of the vehicles from the meter attendants without notice to the Complainant. The practical effect of this was that meter attendants would cover two beats by vehicle for two weeks and the remaining two beats on foot for the next two weeks; that on March 21, 1979 the Complainant filed a grievance claiming that meter attendants should be assigned to the remaining two vehicles by seniority; that said grievance was processed through the grievance procedure up to but not including arbitration and was denied by the City at each step due to its belief that the assignment of attendants to vehicles or foot patrol was within the scope of its management rights.

5. That the Respondent did not discuss with the Complainant at any time or offer to negotiate the impact of its decision to remove two of the four motorized vehicles from meter attendants on the wages, hours and conditions of employment of said employes.

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

CONCLUSIONS OF LAW

1. That the decision to remove two of the four motorized vehicles from the meter attendants primarily relates to the Respondent's exercise of its municipal powers and responsibilities and thus is a permissive subject of bargaining.

2. That the impact of Respondent's decision to remove two of the four motorized vehicles affects the conditions of employment of the meter attendants represented by the Complainant and is a mandatory subject of bargaining.

3. That Respondent has refused to bargain with Complainant over the impact on conditions of employment of its decision to remove two of the four motorized vehicles from the meter attendants and that therefore Respondent has committed a prohibited practice within the meaning of Sections 111.70(3)(a)4 and 1 of the Municipal Employment Relations Act. 2/

On the basis of the above and foregoing Findings of Fact and Conclusion of Law, the Examiner makes the following

ORDER

IT IS ORDERED that the City of Appleton, its officers and agents, shall immediately:

1. Cease and desist from
   a. Interfering with, restraining or coercing its employes in the exercise of their rights guaranteed by the Municipal Employment Relations Act.

   b. Refusing to bargain collectively with the General Drivers and Dairy Employees Union, Local No. 563 as the exclusive representative of all meter attendants in the employ of said Respondent.

2. Further, the Respondent shall take the following affirmative action which the Examiner finds will effectuate the policies of the Municipal Employment Relations Act.

   a. Upon request, bargain collectively with Complainant with

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2/ City of Madison (15095) 12/76

respect to the impact on conditions of employment of the meter attendants of its decision to remove two of the four motorized vehicles from the meter attendants represented by the Complainant.

b. Notify all meter attendants, by posting in conspicuous places on its premises where meter attendants are employed copies of the notice attached hereto and marked as "Appendix A." That notice shall be signed by Respondent and shall be posted immediately upon receipt of a copy of this order and shall remain posted for thirty (30) days thereafter. Reasonable steps shall be taken by the Respondent to ensure that said notices are not altered, defaced or covered by other material.

c. Notify the Wisconsin Employment Relations Commission in writing, within twenty (20) days following the date of this Order as to what steps have been taken to comply herewith.

Dated at Madison, Wisconsin this 24th day of January, 1980.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Duane McCrary, Examiner

APPENDIX "A"

NOTICE TO ALL EMPLOYES

Pursuant to an Order of the Wisconsin Employment Relations Commission, and in order to effectuate the policies of the Municipal Employment Relations Act, we hereby notify our employes that:

1. WE WILL IN THE FUTURE BARGAIN COLLECTIVELY regarding the impact of any policy decision affecting the wages, hours, and conditions of employment of meter attendants represented by General Drivers and Dairy Employees Union, Local No. 563.

2. WE WILL NOT in any other or related matter interfere with the rights of our employes, pursuant to the provisions of the Municipal Employment Relations Act.

By_____
David F. Bill, Director of Personnel
City of Appleton

Dated at Appleton, Wisconsin this ____day of ___ _____ _____,1980.

THIS NOTICE MUST REMAIN POSTED FOR THIRTY (30) DAYS FROM THE DATE HEREOF AND MUST NOT BE ALTERED, DEFACED OR COVERED BY ANY OTHER MATERIAL.

MEMORANDUM ACCOMPANYING FINDINGS OF FACT CONCLUSIONS OF LAW AND ORDER

The instant complaint alleges that Respondent, by unilaterally removing two of the four vehicles assigned to the meter attendants without negotiation with the Complainant, has refused to bargain collectively in violation of the Municipal Employment Relations Act. Respondent denied that it refused to bargain the change and moved to dismiss the complaint because the Complainant has failed to specify the section of the Municipal Employment Relations Act which the Respondent has allegedly violated by the acts stated in the complaint as is required by the Wisconsin Administrative Code, Section 12.02(2). Moreover, Respondent argues that the Commission lacks subject matter jurisdiction over the instant complaint in that the Complainant has invoked the contractual grievance procedure which provides for final and binding arbitration to resolve the dispute.

Although the Commission may dismiss any complaint which fails to state with specificity the section or sections of MERA allegedly violated, the Examiner declines to do so in that Respondent was not prejudiced by Complainant's lack of precision. Numbered paragraph 6 of the complaint alleges that Respondent has "refused to bargain collectively in violation of Chapter 111, Wisconsin Statutes." As Respondent fully litigated the refusal to bargain issue, the reasonable inference that may be drawn is that it knew exactly what it had to defend against. Consequently, the Examiner will conform the pleadings to the proof and will deny Respondent's motion to dismiss.

Respondent incorrectly cites Lake Mills Jt. School District (11529A,B) 8/73 for the proposition that the Commission lacks subject matter jurisdiction over the instant complaint. Lake Mills, supra, stands for the proposition that the Commission will not assert its jurisdiction to determine whether a violation of the contract occured where the parties collective bargaining agreement provides that such questions are to be submitted to final and binding arbitration. The instant complaint alleges a statutory violation which is independent of the parties' collective bargaining agreement and in such a circumstance the Commission will exercise its exclusive jurisdiction to determine whether Respondent's activity constitutes a prohibited practice pursuant to Section 111.70(4) Wisconsin Statutes.

Both parties correctly set forth the test for whether a topic is a mandatory subject of bargaining quoted in the City of Brookfield v WERC 87 Wis 2d 819 (1978) which is whether the topic is primarily or fundamentally related to wages, hours and conditions of employment. However the Wisconsin Supreme Court also stated in Brookfield, supra, that matters primarily related to the exercise of municipal powers and responsibilities and the integrity of the political processes of municipal government are not mandatory subjects of bargaining.

The Complainant asserts that the withdrawal of the two vehicles constitutes a change in working conditions which is mandatorily bargainable or in the alternative, that if the Examiner finds that the Respondent's decision that certain parking patrol work is to be done on foot is not itself mandatorily bargainable, then the impact of the decision on wages, hours and conditions of employment is. The Respondent argues that its decision to remove two of the vehicles primarily related to the exercise of municipal powers and responsibilities and the integrity of its political processes and therefore the decision is not a mandatory subject of bargaining. Moreover, it contends that a Municipal Employer has the right to determine the manner in which the desired work will be performed. Lastly, the Respondent asserts that although it may be required to bargain the impact of the decision to remove two of the vehicles, there was no demand by the Union either to bargain the decision or its impact on the wages, hours and conditions of employment of the bargaining unit employes. Hence, even if the Examiner does find that the Respondent had a duty to bargain the decision or its impact, the Union has waived its right to bargain by failing to make a specific demand.

The Wisconsin Supreme Court in Brookfield, supra, affirmed the judgement of the Circuit Court which, inter alia, ruled that the City of Brookfield may, in its sole capacity determine the level of service it will provide, even though that determination would affect the wages, hours and working conditions of its employes. However, the Circuit Court went on to rule that the City must bargain over the effect of its decision. Here, the Respondent decided to reduce the level of parking meter enforcement in the downtown area by removing two vehicles from beats three and four (the downtown beats). The record indicates that there was much public concern about the level of parking enforcement in the downtown area. This concern expressed by Civic groups and the City Council essentially was that the vehicles used by the attendants were blocking the flow of downtown traffic and that the then existing level of parking meter enforcement served to keep the citizenry away from downtown Appleton. The Examiner concludes that the Respondent's decision to remove two vehicles from beats three and four thus reducing the level of parking meter enforcement in the downtown area was a managerial decision primarily related to the exercise of municipal powers and responsibilities. Such decision, therefore, is a permissive rather than a mandatory subject of bargaining.

However, the Examiner believes that Respondents decision has an impact on the working conditions of the bargaining unit employes because they now walk beats three and four instead of covering them by motorized vehicle and thus, the impact of this decision is a mandatory subject of bargaining. 3/

The remaining question is whether the Complainant waived the right to bargain. The Commission has consistantly held that a waiver of the right to bargain on mandatory subjects of bargaining must be clear and unmistakable, and that a finding of such waiver must be based on specific language in the agreement, or by conduct. 4/

However, waiver by inaction has been recognized as a valid defense to alleged refusals to bargain, including alleged unilateral changes in a mandatory subject, except where the unilateral change amounts to a fait accompli or the circumstances otherwise indicate that the request to bargain would have been a futile gesture. 5/ Here on March 20, 1979 the Complainant was presented with a fait accompli. The Respondent without notification to the Complainant removed two of the vehicles. Complainant had no opportunity to bargain the impact until after the matter had been decided and put into effect. The Examiner concludes that the Complainant was presented with a fait accompli by the Respondent which indicated that it was in no position to bargain the matter. Consequently, the Complainant did not waive its right to bargain over the impact of Respondent's decision to remove two of the four vehicles assigned to meter attendants. Here, Respondent's unilateral action had an impact on the meter attendants' conditions of employment. It failed to engage in collective bargaining concerning the impact of its decision, thereby violating its duty to bargain in good faith as provided for in Sections 111.70(3)(a) and 4 of the Municipal Employment Relations Act.

Dated at Madison, Wisconsin this 24th day of January, 1980.

By Duane McCrary, Examiner

3/ City of Wauwatosa (15917) 11/77; City of Brookfield (11489-B), 11500(B) 3/76

4/ Turtlelake School District (16030,B,C,D) 3/79; City of Madison (15095) 12/76; Middleton Joint School District No. 3 (14680A,B) 6/76.

5/ Walworth County (15429-A,B) (15430-A,B) 12/78