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-799 Decision No. 17034-D

ORDER REVISING EXAMINER'S FINDINGS OF FACT, REVISING IN PART AND REVERSING IN PART EXAMINER'S CONCLUSIONS OF LAW, AND REVERSING EXAMINER'S ORDER

Examiner Duane M. McCrary having, on January 24, 1980, issued Findings of Fact, Conclusions of Law and Order in the above-entitled matter, wherein the Examiner concluded that the above-named City did not commit a prohibited practice by failing to bargain with the above-named Union with respect to the decision to remove two of the four motorized vehicles previously assigned to the meter attendants; and, further, wherein the Examiner found that the City had committed a prohibited practice within the meaning of Section 111.70(3)(a)4 and 1 of the Municipal Employment Relations Act by refusing to bargain collectively with the Union over the impact of the City's decision to remove two of the four motorized vehicles; and to remedy such violation the Examiner ordered the City to cease and desist from refusing to bargain collectively with the Union thereon and upon request, to bargain with the Union with respect to the impact of the City's decision to remove two motorized vehicles; and the Union and City having timely filed petitions with the Wisconsin Employment Relations Commission, pursuant to Section 111.07(5), Wisconsin Statutes, requesting the Commission to review the Examiner's decision and having agreed to dispense with the filing of additional briefs; and the Commission, having reviewed the entire record, the Examiner's decision, and the petitions for review, makes and issues the following

ORDER

IT IS HEREBY ORDERED:

A. That the Examiner's Findings of Fact are hereby revised to read as follows:

FINDINGS OF FACT

1. That General Drivers and Dairy Employees Union, Local No. 563, hereinafter referred to as the Union, 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 City, 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 the City's agent; that David F. Bill is Director of Personnel for the City 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/

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 City removed two of the vehicles from the meter attendants without notice to the Union. 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 Union 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. That on April 4, 1979 during a grievance meeting regarding the elimination of the two vehicles, the Union proposed to David Bill (Director of Personnel) as a solution to the grievance that all metering remain as is except that meter attendants would walk on College Avenue rather than use a vehicle; that at this meeting Bill indicated he would discuss the proposal with the Chief of Police and then respond to the Union; and that in response to the April 4, 1979 meeting and after a discussion with the Chief of Police, Bill notified the Union in writing on April 18, 1979 that the City would not change its decision in the matter.

5. That at no time did the Union request the City to negotiate the impact of its decision

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1/ Article 21, Section A obligates the City 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.

to eliminate two motorized vehicles on the wages, hours and conditions of employment of the meter attendants.

6. That the City determined to eliminate motorized vehicles from two meter attendant beats in the City's central business district because it desired to reduce the level of meter enforcement in that district and also, because it desired to eliminate traffic problems caused by the blocking of traffic by said vehicles.

B. That the Examiner's Conclusions of Law are hereby revised in part and reversed in part and the following be substituted therefor:

1. That since the City's decision to remove two of the four motorized vehicles assigned to the meter attendants primarily relates to the formulation and implementation of public policy and is therefore a permissive subject of bargaining, the City did not have a duty to bargain said decision and did not, with regard thereto, commit a prohibited practice within the meaning of Section 111.70(3)(a)4 and 1 of the Municipal Employment Relations Act.

2. That, since the Union failed to request that the City negotiate the impact of the decision to remove two of the four motorized vehicles previously assigned to the meter attendants upon the wages, hours and conditions of employment of said meter attendants, in said regard the City did not refuse to bargain in good faith in violation of Section 111.70(3)(a)4 and 1 of the Municipal Employment Relations Act.

C. That the Examiner's Order is hereby reversed, and that the following be substituted therefor:

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

Given under our hands and seal at the City of Madison, Wisconsin this 2nd day of May, 1980.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Morris Slavney, Chairman

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Herman Torosian, Commissioner

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Gary L. Covelli, Commissioner

CITY OF APPLETON, Case CXIV, No. 17034-D

MEMORANDUM ACCOMPANYING ORDER REVISING EXAMINER'S FINDINGS OF FACT, REVISING IN PART AND REVERSING IN PART EXAMINER'S CONCLUSIONS OF LAW, AND REVERSING EXAMINER'S ORDER

In its complaint initiating the instant proceeding the Union alleged that the City violated the Municipal Employment Relations Act (MERA) by unilaterally changing the working conditions of the meter attendants by eliminating two of the four vehicles assigned to the meter attendants and thereby requiring that two meter attendants perform their entire patrol by walking rather than driving. The City responded that the decision to eliminate the two vehicles is not a mandatory subject of bargaining and that in any event, the Union never requested bargaining on either said decision or on the impact thereof. The City further argued that the complaint should be dismissed for failing to set forth the specific section of MERA alleged to have been violated as required by Wisconsin Administrative Code, ERB 12.02(2), and also because the Commission lacks subject matter jurisdiction since the Union invoked the contractual grievance procedure which provides final and binding arbitration to resolve this matter.

The Examiner's Decision:

The Examiner in denying the City's motion to dismiss the complaint for a lack of specificity conformed the pleadings to the proof on the basis that he found that the complaint alleged a refusal to bargain collectively in violation of Chapter 111 and that the City fully litigated the refusal to bargain issue. The Examiner asserted Commission jurisdiction over the instant complaint because it involved an alleged statutory violation separate and apart from the collective bargaining agreement existing between the parties. The Examiner concluded that the decision to remove two of the four vehicles constituted a permissive subject of bargaining, but that the impact of said decision, which affected the conditions of employment of the meter attendants, is a mandatory subject of bargaining. Further, the Examiner found that the Union was presented with a fait accompli, since it had no opportunity to bargain the impact until after the vehicles had been removed, and therefore the Union did not waive, by inaction, its right to bargain over the impact of said decision. He found that the City failed to engage in collective bargaining with respect to the impact of its decision and ordered the City, upon request of the Union, to bargain collectively with respect to the impact of its decision to remove the vehicles.

The Petitions For Review:

Both the City and the Union timely filed petitions for review and both agreed to dispense with the filing of briefs. The Union in addition, filed a statement in opposition to the City's petition for review.

In its petition for review the City excepted to the Examiner's Finding of Fact No. 5, in which the Examiner found that the City did not discuss with the Union, or offer to negotiate, the impact of the decision to remove the two vehicles. The City alleges that the Union made a proposal regarding the removal of the vehicles, which the City considered and rejected. The City further claims that it made a counter-proposal dealing with the impact of the decision, which the Union rejected, and that other than the one proposal which was considered and rejected, the Union has not made any other proposals or further requests to negotiate the impact of the decision. The City takes exception to the Examiner's reasoning that the Union was confronted with a fait accompli with respect to negotiating the impact

of the decision to remove the vehicles. The City argues that the fait accompli was the decision to remove the vehicles and that once the decision was made, the duty to bargain the impact then became a continuing duty. The City contends the record establishes that either the Union bargained over the impact, or waived the right to bargain over the impact, by its own inaction. Therefore the City requests that the Commission set aside Finding of Fact No. 5 and dismiss the complaint.

In response to the City's petition for review, the Union argues that when the Union sought to negotiate the removal of the vehicles, the City's position was that the matter was entirely within the discretion of management and that the unilaterial removal of vehicles without notice presented the Union with a fait accompli, making the subsequent request to bargain futile.

The Union in its petition for review argues that the decision - to remove two vehicles, resulting in the meter attendants walking rather than driving jeeps - primarily relates to the employes' working conditions and must be considered a mandatory subject of bargaining. Even assuming that only the impact of the decision is a mandatory subject of bargaining, the Union contends that the Examiner's remedy is inadequate and requests that the Commission order that the collective bargaining agreement be reopened to negotiate a new wage rate for walking meter attendants retroactive to March 20, 1979 and further, if impasse is reached, that the statutory provisions of mediation-arbitration would apply.

Discussion:

In affirming the Examiner's conclusion that the decision by the City to remove two vehicles from the meter attendant performing duties in the central business district is a permissive subject of bargaining, we believe that the Examiner's rational has adequately dealt with the Union's contentions herein.

Turning to the issue of whether the City refused to bargain regarding the impact of its decision to remove the two vehicles, we disagree with the Examiner's conclusion. Contrary to the inference that can be drawn from the Examiner's Finding of Fact No. 5, it is not the City's obligation to initiate bargaining regarding the impact of the City's decision when the Union has knowledge of the change. It is incumbent upon the Union to demand that the City bargain the impact. 2/

The Union claims that following the withdrawal of the vehicles the Union attempted to negotiate with the City concerning the impact of the City's decision on the meter attendants' working conditions, but the City refused. Contrary to this contention, the record establishes that the Union never requested bargaining on the impact of said decision. The Union bases its contention on a discussion which took place at a grievance meeting on April 4, 1979, regarding the decision to eliminate the vehicles. 3/ During this meeting, as a solution to the grievance, the Union proposed to Bill (Personnel Director), as an alternative to removing the two vehicles, that a walking beat be established along College Avenue in the central business

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2/ Drummond Integrated School District (15909-A, B) 3/78; New Richmond Joint School District (15172-A, B) 5/78; City of Jefferson (15482-A) 5/77; Middleton Joint School District (14680-A) 6/76.

3/ The Union had filed a grievance claiming that the assigning of the remaining vehicles should be on the basis of seniority rather than alternating beats.

district. Bill indicated he would respond to the suggestion after conferring with the Chief of Police. After consulting with the Chief, Bill notified the Union by letter on April 18, 1979 that the City had not changed its position. Other than the Union's one proposal made on April 4, 1979, as a solution to the grievance, which was considered and rejected by the City, the Union never requested bargaining on the impact of the decision to remove the two vehicles. The mere objection by the Union of a unilateral change as evidenced by the filing of the grievance, and the proposed solution to the grievance without requesting bargaining on the impact of said decision does not result in a refusal to bargain. 4/

We also disagree with the Examiner's reasoning that the City violated its duty to bargain because the Union had no opportunity to bargain the impact until after the decision to remove the two vehicles had been decided and put into effect. He concluded that the Union was presented with a fait accompli. The problem with this reasoning is that: (1) assuming arguendo that there was a fait accompli, it dealt with the decision to remove the two vehicles and not the impact of the decision on the wages, hours and conditions of employment of the meter attendants; and (2) we have previously held that a municipal employer has a right to implement a decision which primarily relates to the formulation and implementation of public policy (and thus is a non-mandatory subject of bargaining) without first bargaining the impact of the decision. 5/

Furthermore, the City's actions did not indicate that a request for bargaining on the impact would have been futile. To the contrary, the record establishes that the City considered a Union proposal made during the grievance meeting that went to the actual decision rather than the impact, and also, in response to a comment by a grievant about the difficulty of changing from walking to riding on a weekly basis, Bill offered to consider having meter attendants remain on one type of beat (walking or driving) for an extended period, but the Union rejected this.

Based on all of the above, we have dismissed the complaint in its entirety.

Dated at Madison, Wisconsin this 2nd day of May, 1980.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Morris Slavney, Chairman

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Herman Torosian, Commissioner

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Gary L. Covelli, Commissioner

4/ Walworth County (15430-A, B) 12/78; See also, Clarkwood Corp., 97 LRRM 1034 (1977); Medicenter, 90 LRRM 1576 (1975); Triplex Oil Refining, 78 LRRM 1711 (1971).

5/ See Sewerage Commission of the City of Milwaukee (17302) 9/79, in which we stated that an opposite conclusion, would result in imposing an unwarranted restriction upon an employer's right to unilaterally implement a change where such change does not require a duty to bargain.