STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

THE MADISON PROFESSIONAL POLICE OFFICERS ASSOCIATION, Complainant, vs. CITY OF MADISON, Respondent.	Case LXVI No. 25112 MP-1023 Decision No. 17300-C

Appearances:
Lawton & Cates, Attorneys at Law, by Mr. Richard Graylow, 110 East Main Street, Madison, Wisconsin 53703, on behalf of the Complainant.
Mr. Timothy Jeffery, Director of Labor Relations, City of Madison, City-County Building, 210 Monona Avenue, Madison, Wisconsin 53709, on behalf of the Respondent.

ORDER AFFIRMING EXAMINER'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Examiner Amedeo Greco having, on July 1, 1982, issued his Findings of Fact, Conclusions of Law and Order in the above-entitled proceeding, wherein he concluded that Respondent had not committed prohibited practices within the meaning of Section 111.70(3)(a)1 or 4 of the Municipal Employment Relations Act (MERA) and therefore ordered that the instant complaint be dismissed in its entirety; and Complainant having on July 20, 1982 filed a petition for Commission review of said decision; and the parties having filed briefs in the matter, the last of which was received on September 29, 1982, and the Commission having reviewed the record in the matter including the petition for review and the briefs filed in support of and in opposition thereto and the original briefs before the Examiner, and being satisfied that the Examiner's decision be affirmed:

NOW, THEREFORE, it is

ORDERED 1/

That the Examiner's Findings of Fact, Conclusions of Law and Order in the instant matter be, and the same hereby are, affirmed.

Given under our hands and seal at the City of Madison, Wisconsin this 8th day of July, 1983.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Herman Torosian, Chairman

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Gary L. Covelli, Commissioner

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Marshall L. Gratz, Commissioner

1/ Pursuant to Sec. 227.11(2), Stats., the Commission hereby notifies the parties that a petition for rehearing may be filed with the Commission by following the procedures set forth in Sec. 227.12(1) and that a petition for judicial review naming the Commission as Respondent, may be filed by following the procedures set forth in Sec. 227.16(1)(a), Stats. (Continued on page 2)

1/ (Continued)

227.12 Petitions for rehearing in contested cases. (1) A petition for rehearing shall not be prerequisite for appeal or review. Any person aggrieved by a final order may, within 20 days after service of the order, file a written petition for rehearing which shall specify in detail the grounds for the relief sought and supporting authorities. An agency may order a rehearing on its own motion within 20 days after service of a final order. This subsection does not apply to s. 17.025 (3)(e). No agency is required to conduct more than one rehearing based on a petition for rehearing filed under this subsection in any contested case.

227.16 Parties and proceedings for review. (1) Except as otherwise specifically provided by law, any person aggrieved by a decision specified in s. 227.15 shall be entitled to judicial review thereof as provided in this chapter.

(a) Proceedings for review shall be instituted by serving a petition therefor personally or by certified mail upon the agency or one of its officials, and filing the petition in the office of the clerk of the circuit court for the county where the judicial review proceedings are to be held. Unless a rehearing is requested under s. 227.12, petitions for review under this paragraph shall be served and filed within 30 days after the service of the decision of the agency upon all parties under s. 227.11. If a rehearing is requested under s. 227.12, any party desiring judicial review shall serve and file a petition for review within 30 days after service of the order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. The 30-day period for serving and filing a petition under this paragraph commences on the day after personal service or mailing of the decision by the agency. If the petitioner is a resident, the proceedings shall be held in the circuit court for the county where the petitioner resides, except that if the petitioner is an agency, the proceedings shall be in the circuit court for the county where the respondent resides and except as provided in ss. 182.70(6) and 182.71(5)(g). The proceedings shall be in the circuit court for Dane county if the petitioner is a nonresident. If all parties stipulate and the court to which the parties desire to transfer the proceedings agrees, the proceedings may be held in the county designated by the parties. If 2 or more petitions for review of the same decision are filed in different counties, the circuit judge for the county in which a petition for review of the decision was first filed shall determine the venue for judicial review of the decision, and shall order transfer or consolidation where appropriate.

MEMORANDUM ACCOMPANYING
ORDER AFFIRMING EXAMINER'S FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

BACKGROUND:

In its complaint initiating this proceeding the Association alleged that the City committed prohibited practices within the meaning of Sections 111.70(3)(a)1 and 4 of the Municipal Employment Relations Act by unilaterally deciding to require certification in Cardiopulmonary Resuscitation (CPR) as a minimum standard for all officers without bargaining that decision with the Association, and by implementing the CPR Program without bargaining over the impact of that decision 2/. The City admitted that it had, through its Chief of Police, decided that CPR certification is required of all officers but alleged that it has no statutory obligation to bargain over that decision; the City further admitted that its Chief of Police had implemented the CPR Program but denied that it had committed a refusal to bargain about the impact of the decision on wages, hours and conditions of employment and alleged that such negotiations over impact had taken place and were continuing at the time of the hearing.

THE EXAMINER'S DECISION:

In determining that the City's decision to require CPR training and certification was not a mandatory subject of bargaining, the Examiner placed primary reliance on a principle established by prior Commission decisions 3/ that management has the right to unilaterally assign duties which fall fairly within the scope of an employe's regular job duties. Having found that the Police Department had had some form of in-service training in cardiac or pulmonary resuscitation for at least 17 years, and having determined, based on testimony, that a primary goal of the Police Department is public safety and the protection of life, the Examiner concluded that "the City's decision to refine those rescue tasks by adopting a CPR program involves nothing more than an extension of the rescue duties which police officers traditionally have performed as part of their regular job duties." The Examiner expressly found that the implementation of a CPR program was primarily related to the formulation and management of public policy. As a result, the Examiner concluded that the City's decision to effect changes in its CPR program did not constitute a mandatory subject of bargaining.

In distinguishing three earlier cases cited by the Association 4/ for the proposition that employers cannot assign a disputed duty without first bargaining with the Union involved, the Examiner stated:

> All three of these cases, then, are clearly distinguishable from the instant case as they involved duties which: 1) could logically be performed by others; and 2) more importantly, fell outside the scope of duties which the affected employes regularly performed. Here, on the other hand, there are no other City employes assigned to patrol the streets who are likely to be the first to arrive to the scene of an accident or emergency. As a result, if police officers were not

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2/ The complaint also alleged that the City refused to abide by the terms of an earlier negotiated settlement of this matter, but in its brief the Association stated that that portion of the complaint should be dismissed and the Examiner did so.

3/ City of Wauwatosa, 15917 (11/77); Milwaukee Sewerage Commission, 17025 (5/79).

4/ City of Milwaukee, 16602-B (1/80), affirmed Milwaukee County Circuit Court, (1/81); Oak Creek-Franklin Joint City School District No. 1, 11827-D (11/74); City of Wauwatosa, 13109-A (6/75), affirmed Milwaukee County Circuit Court, Case No. 433-051 (3/76).

required to give CPR assistance - which must be performed immediately if it is to be effective - the City thereby would be prevented from fulfilling its public safety mission.

In response to the allegation that the City had refused to bargain over the impact of the decision, the Examiner found that the City was willing to bargain and did, in fact, bargain over the impact at all material times. The Examiner did not determine what issues were, in fact, properly categorized as impact items. In response to the Association's contention that the City could not implement the program while it was still actively negotiating matters relating to impact, the Examiner made the following statement:

> Furthermore, since the program herein involved a matter of life and death, and because it is a refinement of the pre-existing rescue program, and since the Association has failed to show how it was in any way prejudiced during its negotiations with the City, it was unnecessary for the City to hold up implementation of the CPR program pending resolution of its negotiations with the Association. Accordingly, there is no basis for finding that the City refused to bargain over the impact of the CPR program.

THE PETITION FOR REVIEW:

In its petition for review, the Association generally asserts that the Examiner erred "as a matter of fact and as a matter of law," and appeals from the Examiner's Conclusion and Order. It does not specify what Findings of Fact were in error. In support of its petition for review, the Association relies upon both its original briefs before the Examiner and additional briefs which include one additional case citation. 5/ The Association asserts that the Examiner gave inadequate consideration to both the private and public sector cases cited.

The Association's arguments, before the Examiner and on review, remain essentially the same and include the following. Pointing to city ordinances, job descriptions and the oath of office of police officers, the Association asserts that the primary duty of police officers is law enforcement. Life support services, such as those involved in a CPR program, fall outside the scope of responsibilities applicable to the officers' primary duties. Therefore, the assignment of such duties and the requirement of CPR training are mandatory subjects of bargaining over which the City has refused to bargain. In addition to the several previous decisions by the Commission which held that employers could not assign certain disputed duties before exhausting their bargaining obligation, the Association cites several private and public sector cases for the proposition that an ever expanding number of subjects have been determined to be mandatorily bargainable.

The Association also contends that a number of issues relating to the impact of the City's decision to require CPR certification are mandatory subjects of bargaining, including effective date of implementation, "grand-fathering" arrangements, increase in wages, evaluation procedures, discipline for failure to become certified, health and safety considerations, program expansion, and mandatory participation. The Association contends that the City may not implement the CPR program until it has met its bargaining obligation with regard to each of these factors. It argues that the bargaining obligation requires that the parties reach agreement or impasse before the City implements any aspect of its CPR program.

In response to the City's arguments, the Association denies ever having waived its right to bargain on this issue and contends that both the WERC and the NLRB narrowly construe any such waivers. Based on statutory analysis, it denies that the Chief of Police has reserved power to make unilateral decisions in this regard.

The City requests that the Examiner's decision be affirmed in its entirety, and relies on both its original brief before the Examiner and briefs submitted in response to the Association's petition for review.

5/ City of Westland and Local 1279, IAFF-Westland Fire Fighters, Michigan Employment Relations Commission, Case No. C78 E-98 (March 8, 1979).

The City argues that the decision to require CPR certification is a permissive subject of bargaining for two reasons. First, it is primarily related to the formulation or management of public policy in that it is a direct exercise of the City's power and responsibility to act for the health, safety and welfare of the public. Secondly, the City contends that the administering of emergency first aid, including CPR, is clearly within the scope of a police officer's responsibilities. Finally, the City argues that even if the decision was determined to be a mandatory subject of bargaining, the City has already secured through negotiations the right to establish standards for CPR training.

With regard to the impact of its decision, the City alleges that it has engaged in good faith negotiations concerning impact. However, it maintains that the nature and content of the CPR training program and any requirements for re-qualification are part of its right to establish the nature and level of services offered to the public; therefore it has no statutory obligation to bargain over these matters. The City further argues that it had a duty to bargain only those impact items actually raised by the Association in negotiations and not those matters raised and identified for the first time in these proceedings.

Finally, the City argues that the statutory duty to bargain impact should not serve as a bar to its right to implement the CPR program. The City argues the harmful practical effect of such a bar and relies on a prior declaratory ruling by the Commission which held that a proposal requiring an employer in all circumstances to bargain and reach agreement over impact prior to implementation of changes in job duties was not a mandatory subject of bargaining. 6/

DISCUSSION:

The Commission finds no reason to modify/reverse the Examiner's Findings of Fact, Conclusions of Law and Order. While the Examiner's discussion may have been somewhat abbreviated, he correctly applied the law as to each issue in dispute.

The Decision to Require CPR Training & Certification

In deciding whether the decision to require CPR training and certification was a mandatory subject of bargaining, the Examiner primarily relied on the principle that management has the right to unilaterally assign duties which fall fairly within the scope of an employe's regular job duties. There was ample testimony by Captain Hischke and Inspector Thomas that the delivery of first aid in emergency situations, including various methods of CPR, was a long-standing part of job training and job duties for all police officers.

While the Examiner did not discuss the City's argument that its decision was clearly an exercise of its right to determine public policy and the level of services and was therefore a permissive subject of bargaining according to the standards developed in several key decisions by the Supreme Court 7/, a consideration of these cases firmly buttresses the City's position that this was not a mandatory subject of bargaining.

The Association asserts that the delivery of life support services such as CPR is outside the scope of an officer's primary mission, which is law enforcement, as indicated by the oath of office taken by all personnel and by the current job position descriptions. However, the Examiner correctly concluded that in spite of how the primary function of the Police Department is defined, the testimony of Inspector Thomas and Captain Hischke clearly establishes that the rendering of first aid in accident situations is another long-established function of police personnel. Hence, each of the prior Commission decisions finding that a duty assignment was a mandatory subject of bargaining is factually distinguishable because here the duties and training in question do fall fairly within the scope of a police officer's regular job duties.

6/ Milwaukee Sewerage Commission, 17025 (5/79).

7/ Unified School District No. 1 of Racine County v. WERC, 81 Wis 2d 89 (1977); City of Brookfield v. WERC, 87 Wis. 2d 819 (1978).

While the Association cites a number of cases in support of the general proposition that courts and agencies in other states have defined an ever-expanding number of subjects as mandatory subjects of bargaining, we do not find in any of those cases a persuasive rationale for reversing the Examiner's outcome herein. Rather, we find that the outcome reached by the Examiner appropriately represents the outcome of an application of the Racine Schools test because the public policy dimensions of the instant requirement that police personnel be trained to provide CPR in emergencies predominate over the wage, hours and condition of employment aspects of the decision.

Impact

The parties do not dispute that there exists an obligation to bargain with regard to the impact of the decision to require expanded CPR training and certification. As the Examiner found, it is clear that the City had negotiated and, at least up to the time of hearing, continued to be willing to negotiate impact issues. At the hearing both the Association's President and one of the City's chief negotiators testified that the parties had met at least twice to discuss impact and had exchanged proposals, after which both parties stated in writing that impasse had not been reached regarding the CPR matter and that each party remained open to further negotiations.

There are, however, disputes over which matters are properly designated impact issues and over the City's right to implement its decision prior to reaching agreement or impasse on these issues.

As discussed above, the Association contends in its briefs that a large number of unresolved matters are impact issues and mandatorily subject to bargaining. The City makes two arguments in response. First, it contends that the quality and content of the CPR in-service training program, the effective date of implementation, the standards for certification, and any requirement for periodic requalification are each so essentially linked to the right to establish the nature and level of services offered to the public that it has no statutory obligation to bargain any of these issues. Secondly, the City argues that any obligation it may have to bargain impact is limited to those issues which the Association identified and raised in prior negotiations, i.e. notice to the Association, wages, criteria for exempting employes, and discipline for failure to attain certification.

The Commission finds the City's second argument persuasive and dispositive and therefore finds it unnecessary to determine herein which of the exact items in dispute are impact items subject to mandatory bargaining. Once the City notified the Association of its intent to continue and expand its CPR program, the extent of the City's obligation to bargain impact was dependent on the extent of the Association's request in that regard. The Association made proposals on certain items and the bargaining about those subjects has begun. A review of the proposals and correspondence which constitute Exhibits 22 through 26 shows that the Association's specific proposals address the issues of notice, wages, exemptions and discipline. Since the City has engaged in good faith bargaining with respect to those proposals, the Association's claim that there has been an unlawful refusal to bargain in this case is without merit.

The foregoing resolution makes unnecessary an analysis of the mandatory or permissive nature of additional subjects as to which the record reveals no request for bargaining had been advanced prior to the filing of the instant complaint.

Implementation

A final issue raised by the Association on review is whether the City can implement any portion of its CPR program without having reached either agreement or impasse with the Association in impact bargaining. Relying on a previous declaratory ruling 8/, the Examiner concluded in his discussion that because the program involved a matter of life and death and was a refinement of the pre-

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8/ Milwaukee Sewerage Commission, 17025 (5/79).

existing rescue program, and because the Association failed to show it was prejudiced during its negotiations, it was unnecessary for the City to delay implementation pending resolution of its negotiations. The Commission agrees with the Examiner's Conclusion in that regard.

The record establishes that the parties had met at least twice during July and August of 1979 to negotiate the impact of the CPR program, and had exchanged proposals. The City did not refuse to negotiate any of the impact items raised by the Association. The record clearly established that, at the time of the hearing, the parties were not yet at impasse over the disputed issues, and were engaging in good faith bargaining.

In our view, an employer's fulfillment of its bargaining obligation with regard to the impact of a permissive subject decision is not a condition precedent to implementation of that permissive subject decision. 9/ In some cases, however, the parties' rights and obligations to bargain impact matters "at reasonable times" may "require that bargaining over impact commence prior to implementation. 10/ Such questions are subject to a case by case analysis as to whether the employer's totality of conduct is consistent with the statutory requirement of good faith. 11/

The cases relied upon by the Association in this matter are not dispositive. In NLRB v. Katz, 369 U.S. 736, 50 LRRM 2177 (1962), the Court found that the employer had violated its statutory obligation to bargain where it unilaterally implemented changes which were mandatory subjects of bargaining and still under negotiation. Here, the City implemented a permissive subject of bargaining. Thus, the Commission's policy of allowing implementation of a decision which is a permissive subject of bargaining prior to resolving all impact issues is not in conflict with NLRB v. Katz; indeed the Commission has affirmed the general rule established by NLRB v. Katz. 12/

The Association has also brought to our attention a 1979 decision by the Michigan Employment Relations Commission. 13/ In response to a new state statute requiring that all operating ambulances have at least one licensed emergency medical technician (EMT) present in the ambulance, a city fire department decided that all 60 of its fire fighters had to receive training and become licensed, with the penalty of discharge for those failing to do so. While finding that the basic decision to require EMT licensure was in no way negotiable, the Michigan Commission held that questions of implementation and impact of a training program which encompasses such basic changes in the terms and conditions of employment are mandatory subjects of bargaining.

The Michigan Commission's general approach is similar to ours, and that decision is not in conflict with our decision here because of several factual distinctions. In ordering the City to bargain over impact before making any changes in conditions of employment, the Michigan Commission was apparently confronted with an employer who refused to bargain impact, even where "the training was intended to change the very nature of the job which fire fighters do and its successful completion may have been made a condition of continued employment for all fire fighters." In contrast, in the present case, the Examiner properly found that the CPR program did not present a change in the very nature

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9/ Milwaukee Sewerage Commission, 17302 (9/79).

10/ Milwaukee Schools, 20093-A (2/83) at 37-40.

11/ See, e.g., City of Green Bay, 18731-B (6/83).

12/ See, e.g. City of Greenfield, School District No. 6, 14026-B (11/77); Winter Joint School District No. 1, 14482-B, C (3/77).

13/ See footnote 4 for citation.

of the police officer's job, and that employes who did not meet the standards had only been ordered to participate in additional training. The record further establishes that, although there may have once been some discussion of discipline (see transcript 32-34, 80-89) for refusal to participate in the program, no employe has been disciplined or threatened with discipline for unsatisfactory performance in the training program and the City has at all times bargained with the Association about impact and has been willing to make various accommodations for employes with medical problems. Therefore, we find no basis in the instant situation to warrant the conclusion that the City has committed a refusal to bargain either in a per se or totality of conduct analytical framework. 14/

Dated at Madison, Wisconsin this 8th day of July, 1983.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Herman Torosian, Chairman

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Gary L. Covelli, Commissioner

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Marshall L. Gratz, Commissioner