

In the Matter of the Petition of  
SEWERAGE COMMISSION OF THE CITY OF  
MILWAUKEE

Case CXXXVI  
No. 24845 DR(M)-125  
Decision No. 17302

LOCAL 366, AFSCME, AFL-CIO, DISTRICT  
COUNCIL 48

Mr. Grant F. Langley, Assistant City Attorney, on behalf of the  
Sewerage Commission of the City of Milwaukee.  
Podell, Ugut & Cross, Attorneys at Law, by Ms. Nola J.  
Hitchcock Cross, on behalf of Local 366, AFSCME, AFL-CIO,  
District Council 48.

The Sewerage Commission of the City of Milwaukee having, on July 2, 1979, filed a petition with the Wisconsin Employment Relations Commission, wherein it requested the issuance of a declaratory ruling, pursuant to Section 111.70(4)(b) of the Municipal Employment Relations Act, to determine whether certain proposals, contained in the final offer submitted by Local 366, AFSCME, AFL-CIO, District Council 48, during the course of an investigation conducted by the Wisconsin Employment Relations Commission in a mediation-arbitration proceeding involving said parties, related to permissive or mandatory subjects of collective bargaining. On August 7, 1979, said labor organization filed an affidavit, executed by one of its Staff Representatives, in opposition to the petition. The parties waived hearing in the matter. Counsel for the parties filed briefs, and the Commission, being fully advised in the premises, makes and issues the following

1. That the Sewerage Commission of the City of Milwaukee, hereinafter referred to as the Sewerage Commission, operates a sewerage facility in the Milwaukee, Wisconsin metropolitan area, and it has its offices at Milwaukee, Wisconsin.

2. That Local 366, AFSCME, AFL-CIO, District Council 48, hereinafter referred to as Local 366, is the certified collective bargaining representative of operational, maintenance, technical and clerical employees in the employ of the Sewerage Commission, and that said Local 366 has its offices at Milwaukee, Wisconsin.

3. That the Sewerage Commission and Local 366 have been parties to collective bargaining agreements covering the wages, hours and working conditions for the employes of the Sewerage Commission, who are represented by Local 366, and that, in said regard, the most recent

agreement existing between the parties was, by its terms to expire on December 31, 1978; that on December 13, 1978, after a period of negotiations, Local 366 filed a petition with the Wisconsin Employment Relations Commission, hereinafter referred to as the WERC, requesting that final and binding mediation-arbitration be initiated for the purpose of resolving an impasse existing between the parties in their negotiations pertaining to a collective bargaining agreement to succeed the agreement which was to expire on December 31, 1978; that during the course of the WERC investigation of the mediation-arbitration petition, and following an exchange of proposed final offers between the parties, the Sewerage Commission submitted timely written objections to certain proposals contained in the proposed final offer of Local 366, contending that certain proposals related to non-mandatory subjects of bargaining; and that at the time the Sewerage Commission did not raise any objection to Local 366's proposal relating to long-term disability insurance, which read as follows:

"The Commission agrees to provide long-term disability benefits to all regular full time employees of the Commission, excluding summer and provisional labor, with these major provisions: . . ."

4. That, following a hearing, the WERC on May 18, 1979, issued its declaratory ruling, 1/ wherein it concluded that certain proposals contained in the final offer of Local 366 related to permissive subjects of bargaining, while certain other proposals, also objected to by the Sewerage Commission, related to mandatory subjects of bargaining; that thereafter the parties resumed their negotiations and again failed to reach an accord; that thereupon the WERC investigator again called for final offers for the purpose of the mediation-arbitration proceeding; and that on or about June 19, 1979, Local 366 provided the Sewerage Commission with a copy of its amended proposed final offer, which contained, among its proposals, the following:

"Long Term Disability Insurance. The Commission agrees to provide long-term disability benefits to all regular full-time employees of the Commission, excluding summer and provisional labor, with these major provisions: . . ." (emphasis supplied)

"7. Job Descriptions

a. The Commission agrees to upon request furnish the Union with a written description of the specific enumerated current duties and responsibilities of each bargaining unit position. Further, whenever the Commission is contemplating any change in or addition to said written job descriptions, a written description of such change shall be provided to the Union prior to such contemplated change or addition.

1. As to substantially new, changed, additional or increased duties which are fairly within the scope, or not fairly within the scope, of the responsibilities applicable to the kind of work performed by the employees involved, the Commission shall commence negotiations to the impact of such duties on wages, hours and working conditions. Negotiations will commence before management imposes any such duty and any agreement or decision rendered by an arbitrator

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1/ Decision No. 17025.

shall be retroactive to the date the new, changed, additional or increased duties were performed by the relevant employees. If the parties are unable to reach agreement on the adjustments in wages, hours and working conditions necessary as a result of the impact of any substantially new, changed, additional or increased duties, management may implement and either party may submit such dispute to final and binding interest arbitration by selecting an arbitrator as set forth in this Agreement in the section relating to new operations, equipment and positions.

- b. The Union and management will negotiate the selection criteria for all bargaining unit positions, where the selection is from a group which includes at least one present bargaining unit applicant.
- c. The Commission agrees to furnish the Union with status quo departmental structures and relationships and to furnish the Union with any proposals for modification. The Union and management shall negotiate the impact on wages, hours, and conditions of employment on any change in the Commission's organizational structure.
- d. The Union and management shall negotiate all eligibility requirements for wage progression (e.g., 'review') for bargaining unit jobs." (emphasis supplied)

5. That on July 2, 1979, the Sewerage Commission filed a petition initiating the instant proceeding, wherein it contended that the underlined portions of the final offer of Local 366, as indicated in paragraph 4, supra, relate to:

"non-mandatory subjects of bargaining and/or those proposals involve subjects reserved to management and direction of the petitioner (Sewerage Commission) and are not matters primarily related to wages, hours and conditions of employment."

6. That the parties have agreed to include in their new collective bargaining agreement certain provisions which were included in their 1977-1978 agreement; and that among said provisions to be included in the new agreement are the following relating to various types of insurance:

"F. Insurance

1. Health Insurance. All regular full-time employees, excluding summer and provisional labor, of the Sewerage Commission are to be covered by the Associated Hospital Service, Inc., through the Wisconsin Blue Cross & Blue Shield Plan under Group No. 954 or Compcare Plan 954.2. Group No. 954 provides as follows:

. . .

2. Dental. The Commission agrees to a voluntary checkoff dental plan:

Available at no cost to Employer (Commission); available only if available to all Commission personnel, including management; available only if minimum proportion of eligibles check off for the program as established by the insurer.

. . .

3. Life Insurance

A. All regular full-time employees of the Commission after six (6) consecutive months of service may be enrolled in a Group Life Insurance Plan providing coverage in an amount based on the individual's last year's salary which, if not in even thousands, is increased to the next higher thousand.

. . .

4. Eye Care. All regular full-time employees of the Commission, excluding summer and provisional labor, shall be covered under the Wisconsin Vision Service program. The Commission shall pay the full premium and also any increases which occur during the term of this contract.

. . ."

7. That various labor organizations other than Local 366 are the certified or properly recognized collective bargaining representatives of Sewerage Commission employees other than those employees who are represented by Local 366; that, however, inasmuch as the proposal of Local 366 relating to long-term disability insurance coverage, described as being applicable to "all regular full-time employees of the Commission" is worded, with respect to employee applicability, in accordance with past practice, and, further, is consistent with other insurance coverage provisions which the parties have agreed will be incorporated in their new collective bargaining agreement, the specific proposal involved does not extend the proposal to cover Sewerage Commission employees not represented by Local 366; and that, therefore, said proposal relates to conditions of employment covering employees represented by Local 366.

8. That the proposal of Local 366 relating to "contemplated" changes or additions to written job descriptions, as reflected in paragraph 7 a. of its proposed final offer, relates to possible changes or additions to job descriptions, rather than to actual decisions to change or add to job descriptions; and that, therefore, such proposal relates to a state of mind, rather than actual changes or additions to job descriptions and the implementation thereof, which might affect the working conditions of employees represented by Local 366.

9. That the proposal of Local 366, set forth in paragraph 7 a. 1. of its proposed final offer, which would require the Sewerage Commission not to implement any "substantially new, changed, additional or increased duties, which are fairly within the scope of the responsibilities applicable to the kind of work performed by the employees involved" without first commencing negotiations on the impact of such new, changed, additional or increased duties, primarily relates to the formulation of management policy.

10. That part of the proposal of Local 366, set forth in paragraph 7 a. 1. of its proposed final offer, which would require the Sewerage Commission not to implement any "substantially new, changed, additional or increased duties, which are not fairly within the scope of the responsibilities applicable to the kind of work performed by the employees involved" without first commencing negotiations on the impact of such new, changed, additional or increased duties, primarily relates to wages, hours and working conditions.

11. That the proposal of Local 366, set forth in paragraph 7 b. of its proposed final offer, when interpreted in the light of the Declaratory Ruling previously issued, pertains to selection criteria to be considered for promotional and lateral transfer opportunities for unit employees, and that, therefore, such proposal relates primarily to wages, hours and working conditions.

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

#### CONCLUSIONS OF LAW

1. That the objections filed by the Sewerage Commission with respect to the various proposals contained in the proposed final offer of Local 366 are sufficient in form and substance so as to comply with rule ERB 31.11 of the Wisconsin Administrative Code and with Section 111.70(4)(c)6.a. of the Municipal Employment Relations Act.

2. That the Sewerage Commission, by failing to object in the initial declaratory ruling involving the parties, to the proposal of Local 366 relating to long-term disability insurance, did not waive its right to subsequently object to such proposal, in light of the fact that on its face such proposal may reasonably be interpreted so as to involve an illegal subject of bargaining within the meaning of Section 111.70(1)(a) of the Municipal Employment Relations Act.

3. That the following proposals of Local 366 relate to mandatory subjects of bargaining within the meaning of Section 111.70(1)(d) of the Municipal Employment Relations Act:

- a. The intent of the proposal relating to long-term disability insurance;
- b. The proposal relating to any "substantially new, changed, additional or increased duties, which are not fairly within the scope of the responsibilities applicable to the kind of work performed by the employees involved," which would require the Sewerage Commission to commence negotiations on the impact of such duties on wages, hours and working conditions before management imposes any such duties; and
- c. The proposal relating to selection criteria to be considered for promotional and lateral transfer opportunities for unit employees.

4. That the following proposal of Local 366 relating to matters with respect to which the Sewerage Commission has no mandatory duty to bargain as contemplated by Section 111.70(1)(d) of the Municipal Employment Relations Act:

- a. The proposal relating to "contemplated" changes in written job descriptions; and
- b. The proposal relating to "substantially new, changed, additional or increased duties, which are fairly within the scope of the responsibilities applicable to the kind of work performed by the employees involved," which would require the Sewerage Commission to commence negotiations on the impact of such duties on wages, hours and working conditions before management imposes any such duties.

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

DECLARATORY RULING

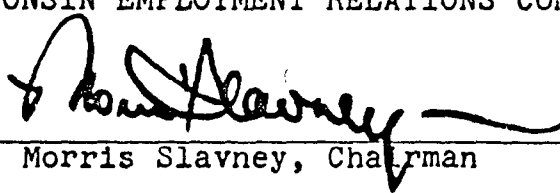
1. That the Sewerage Commission has the duty to bargain with Local 366, and the duty to submit to mediation-arbitration if no agreement is reached thereon, with respect to the proposals of Local 366 found herein to involve mandatory subjects of bargaining.

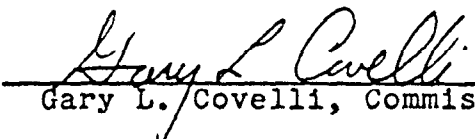
2. That the Sewerage Commission has no duty to bargain with Local 366 with respect to the proposals of Local 366 found herein to involve non-mandatory subjects of bargaining; and that, therefore, such proposals cannot be submitted to mediation-arbitration.

Given under our hands and seal at the  
City of Madison, Wisconsin, this 28<sup>th</sup>  
day of September, 1979.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By

  
Morris Slavney, Chairman

  
Gary L. Covelli, Commissioner

SEWERAGE COMMISSION OF THE CITY OF MILWAUKEE, CXXXVI, Decision No. 17302

MEMORANDUM ACCOMPANYING  
FINDINGS OF FACT, CONCLUSIONS OF  
LAW AND DECLARATORY RULING

The Sewerage Commission asserts that all four of the disputed proposals relate to permissive subjects of bargaining and that, therefore, they cannot be properly included in Local 366's amended final offer.

Local 366 contends (1) that the Sewerage Commission's objections are improper since the Sewerage Commission failed to state the basis of its objections when it filed the instant petition for declaratory ruling; (2) that the Sewerage Commission did not object to the proposal of Local 366 relating to long-term disability insurance when the Commission was considering the first declaratory ruling proceeding and that as a result the Sewerage Commission is now estopped from objecting to said proposal; and (3) that in any event, all of the disputed proposals relate to mandatory subjects of bargaining.

The Alleged Failure to State the Basis of Objections

The Sewerage Commission, in its objections, specifically contended that it "submits the following objections to the proposals of Local 366, Affiliated with District Council 48, AFSCME, AFL-CIO, which are objected to because they involve subjects reserved to the management and direction of the governmental unit and are not matters primarily related to wages, hours and conditions of employment." Thus, it is quite apparent that the Sewerage Commission did state the basis for its objections.

The objections need not set forth argument or rationale in support of the objections. Argument with respect to the issues can be included in briefs filed with the Commission, as was the case here.

Failure to Initially Object to the Proposal Relating to Long-Term Disability Insurance

While it is true that the Sewerage Commission did not object to the long-term disability insurance proposal in the initial declaratory ruling proceeding, we deem that the Sewerage Commission did not waive its right to object to the proposal at a subsequent date inasmuch as the proposal, standing alone, would appear to cover employees not in the bargaining unit represented by Local 366, and such proposal might possibly be susceptible to an interpretation that it covered employees in units represented by other labor organizations. If, in fact, such an interpretation was possible, the provision would be illegal, since it would interfere with the rights of other labor organizations in fulfilling their representative responsibilities. Although, pursuant to our ruling in Madison Metropolitan School District, <sup>2/</sup> a party is normally estopped from raising an issue which it could have raised in its original petition for declaratory ruling, that principle does not apply to a proposal relating to an illegal or prohibited subject of bargaining.

The Long-Term Disability Insurance Proposal

The Sewerage Commission objects to the proposal on the basis that it would appear to apply to all regular full-time employees of the

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<sup>2/</sup> Decision No. 16598-A, 1/79.

Sewerage Commission. In other words, to employees other than those represented by Local 366. However, it should be noted that the phrase "all regular full-time employees of the Commission . . ." is consistent with insurance provisions existing in the present agreement, and which will continue in the new agreement. When interpreted in light of the other insurance provisions, and the representations of the Local 366 at the hearing and in its brief, we find that the intent of the proposal is not to extend such additional insurance coverage to employees not covered in the collective bargaining unit. Therefore, since insurance is a matter which falls within wages and conditions of employment, the proposal relates to a mandatory subject of bargaining, and is properly included in the final offer for mediation-arbitration.

#### Change Job Descriptions

In our initial declaratory ruling we determined that the Sewerage Commission had "the duty to furnish to Local 366, upon request, the duties and responsibilities of each bargaining unit position in order to facilitate bargaining wages, hours and conditions of employment for each . . ." However, since the issue involved herein was not then presented, we did not pass upon the additional question of whether said information had to be provided to Local 366 prior to, or subsequent to, the Sewerage Commission's determination to alter its job descriptions. The proposal, as written, relates to intended changes or additions to job descriptions, rather than to actual decisions to change or add to job descriptions. Therefore, the provision, as literally interpreted, applies to a state of mind rather than to an actual decision. If the provision related to an actual decision to change or add to a job description, the issue would then arise as to whether the Sewerage Commission was obligated to provide Local 366 with a written description of such changes or additions prior to the implementation thereof. While the parties did not in their arguments directly deal with respect to the latter issue, we deem it advisable to state our conclusion with regard thereto so as to avoid another declaratory ruling proceeding.

We conclude, where a change or addition to a job description is intended to establish duties which are not fairly within the scope of the job involved, Local 366 may demand that the Sewerage Commission provide it with copies of a written description of such changes or additions prior to the implementation of such changes or additions. On the other hand, where the changes or additions create duties which are fairly within the scope of the job, then Local 366 may not demand that the Sewerage Commission supply it with copies of written descriptions of such changes or additions prior to the implementation of the changes or additions involved. Local 366 has the right to obtain copies of such changed job descriptions at the time they are prepared, either before or after the implementation of such changes, in order to bargain on the impact thereof.

#### New, Changed, Additional or Increased Duties

Local 366 has proposed that the Sewerage Commission "commence" negotiations on wages, hours and working conditions whenever the Sewerage Commission creates substantially new, changed, additional or increased duties which are either fairly within the scope, or not fairly within the scope, of the responsibilities performed by the employees. Said proposal does not require that the parties reach impasse before the Sewerage Commission can implement said changes. Instead, it provides that if the parties are unable to reach agreement on the adjustments, management is then free to implement its proposal, and that either party can petition for final and binding interest arbitration.

In our previous declaratory ruling involving the instant parties we stated:



"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. 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."

It is quite clear from the above language in our initial declaratory ruling that we indicated that duties which are fairly within the scope of the responsibilities applicable to the kind of work performed relate to permissive subjects of bargaining. It is only those new, changed, additional or increased duties which are fairly not within the scope of the responsibilities applicable to the work performed which are subject to bargaining. Therefore, it follows that Local 366 may not insist that negotiations commence before the Sewerage Commission implements any substantially new, changed, additional or increased duties which are fairly within the scope of the responsibilities applicable to the kind of work performed by the employees involved. For an opposite conclusion would result in imposing an unwarranted restriction upon an employer's right to unilaterally implement a change in a job description where such change does not require a duty to bargain.

However, since the Sewerage Commission has the duty to bargain on such new, changed, additional or increased duties where such duties are not fairly within the scope of the job, it follows that Local 366 may demand that the Sewerage Commission commence negotiations on the impact of said new, changed, additional or increased duties prior to implementing same.

#### Selection Criteria

In our initial declaratory ruling between the parties, we stated:

"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. 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." (Footnote citations omitted)

At the same time, we also held that a union could bargain over those selection criteria that could only be had by unit members, such as prior experience in bargaining unit positions or unit seniority.

After the initial declaratory ruling Local 366 amended its final offer to provide that the parties would negotiate the selection criteria for unit positions where the selection is from a group which includes at least one present bargaining unit applicant.

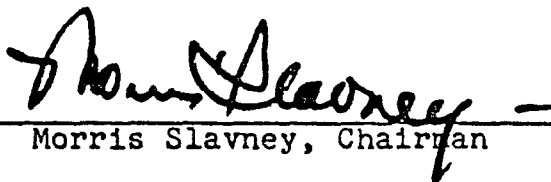
The Sewerage Commission objects to said proposal on the ground that it is required to bargain only over those "qualifications" pertaining to prior experience in bargaining unit positions and unit seniority. The establishment of other qualifications, claims the Sewerage Commission, is "strictly a management function," thereby relieving it of any duty to bargain with Local 366 over said other qualifications.

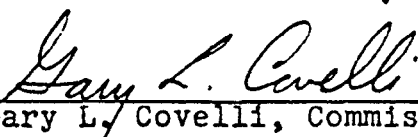
In resolving this issue, the Commission finds merit to the Sewerage Commission's position that the establishment of job qualifications affecting unit members may relate to the formulation or management of public policy. The reason for this is that the selection of employees may affect the services offered by the municipal employer.

However, the problem with the Sewerage Commission's argument lies in its failure to distinguish between "selection criteria" to be applied in choosing between qualified candidates, such as prior experience in bargaining unit positions and unit seniority, and the right to determine the qualifications necessary for a job. We have previously held in the City of Madison 3/ case that the former, insofar as they would apply to job opportunities for which one or more unit members may apply, are mandatory subjects of bargaining. Because Local 366's proposal uses the expression "selection criteria," as that expression was used in our prior decision herein, the Commission concludes that on balance Local 366's demand to bargain concerning the selection criteria for job positions affects promotion or transfer opportunities for unit employees and, therefore, is primarily related to the wages, hours and conditions of employment of the employees in the unit. 4/ As a result, it constitutes a mandatory subject of bargaining.

Dated at Madison, Wisconsin, this 28<sup>th</sup> day of September, 1979.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By   
Morris Slavney, Chairman

  
Gary L. Covelli, Commissioner

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3/ Decision No. 16590, 10/78.

4/ We wish to make it clear that if the Sewerage Commission establishes a new position and Local 366 attempts to utilize this proposal for the purpose of negotiating concerning matters that deal with qualifications rather than selection criteria, the Sewerage Commission could question the bargainability of such a proposal at that time.