STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of CITY OF BROOKFIELD Requesting a Declaratory Ruling Pursuant to Section 111.70(4)(b), Wis. Stats., Involving a Dispute Between Said Petitioner and LOCAL 20, DISTRICT COUNCIL 40, AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO	Case XXVIII No. 25727 DR(M)-144 Decision No. 17947

Appearances:

Hayes and Hayes; Attorneys at Law; by Mr. Tom E. Hayes; 161 West Wisconsin Avenue; Milwaukee, Wisconsin 53203; for the City of Brookfield.

Lawton & Cates; Attorneys at Law; by Mr. Richard V. Graylow; 110 East Main Street; Madison, Wisconsin 53703; for Local 20, District Council 40, American Federation of State, County and Municipal Employees, AFL-CIO.

FINDINGS OF FACT, CONCLUSION OF LAW AND DECLARATORY RULING

The City of Brookfield filed a petition on February 4, 1980, requesting the Wisconsin Employment Relations Commission to issue a declaratory ruling, pursuant to Section 111.70(4)(b) of the Municipal Employment Relations Act, with respect to whether an action intended to be taken by the City, and raised during the course of negotiations for a collective bargaining agreement commencing January 1, 1980, between the City and Local 20, District Council 40, American Federation of State, County and Municipal Employees, AFL-CIO constituted a mandatory subject of collective bargaining. Hearing was held in the matter on March 14, 1980, in Milwaukee, Wisconsin, before Stuart S. Mukamal, Examiner, during the course of which the parties were given the opportunity to present evidence and arguments. Following said hearing, the City filed a brief in the matter on April 17, 1980, while the Union declined to file a brief. After considering the testimony, exhibits and briefs contained in the record of this matter, the Commission issues the following

FINDINGS OF FACT

1. That the City of Brookfiled, hereinafter referred to as the City, is a municipal corporation and has its offices at 2000 North Calhoun Road, Brookfield, Wisconsin, 53005.

2. That Local 20, District Council 40, AFSCME, AFL-CIO, hereinafter referred to as the Union, is a labor organization, and has its offices at 2216 Allen Lane, Waukesha, Wisconsin, 53186; and that the Union has been, at all times relevant herein, the exclusive collective bargaining representative of a bargaining unit of certain employes employed in the City's Water Utility and in its Department of Parks and Recreation; and that in said relationship the City and the Union were parties to a collective bargaining agreement covering the wages,

hours and working conditions of said employes, effective from January 1, 1978, until December 31, 1979, inclusive, which agreement provided in pertinent part as follows:

ARTICLE VIII

WORK DAY AND WORK WEEK

. . .

8.05 The established hours for the Water Utility shall be from 7:00 A.M. to 3:30 P.M., Monday through Friday.

8.06 The established work schedule for employees in the Park and Recreation Department shall be from 7:00 A.M. to 3:30 P.M., from Monday through Friday.

4. That the parties have been unable to reach an accord in their negotiations for a successor collective bargaining agreement commencing on January 1, 1980; and that on February 13, 1980, the Union filed a petition requesting the Wisconsin Employment Relations Commission to initiate a mediation-arbitration proceeding to resolve their alleged impasse in collective bargaining, which proceeding is still pending.

5. That during the course of negotiations, and prior to the filing of the petition for mediation-arbitration, the City made known to the Union its intention to change the starting time of those employes of its Water Utility and Department of Parks and Recreation from 7:00 a.m. to 8:00 a.m.; 1/ and that the City has not indicated any intention to change the total number of hours worked by the employes affected by said proposal, but its apparent intention is to change the established daily working schedule of said employes to 8:00 a.m. to 4:30 p.m., Monday through Friday.

6. That the City filed the instant petition for declaratory ruling on February 4, 1980, contending that starting times and working hours for those employes of its Water Utility and Department of Parks and Recreation do not constitute mandatory subjects of bargaining, and that the City may therefore implement changes in such starting times and working hours unilaterally and without the necessity of bargaining same with the Union; but that the City agrees that the impact of such changes upon the wages, hours and working conditions of the affected employes would constitute a mandatory subject of bargaining.

7. That the City contends that its intended change in the working hours of the affected employes relates primarily to, and is designed to meet, the needs of the public for the functions performed, and the services offered by, said employes, and that such a change is a permissible exercise of its managerial prerogatives; and that however the Union contends that such a change relates primarily to the hours of said employes, and that the proposed change constitutes a mandatory subject of bargaining.

1/ The City included this proposed change of starting time in the mediation-arbitration investigation on April 17, 1980. The Union's tentative final offer, dated April 22, 1980, makes no reference to starting time, however it does not propose to change sections 8.05 or 8.06 of the expired agreement.

8. That the hours during which the City desires to serve the public through its Water Utility and its Department of Parks and Recreation primarily relate to the formulation, implementation and management of public policy, and that, however, the hours which employes of the City are regularly expected to work primarily relate to 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, since the hours during which the City of Brookfield desires to serve the public through its Water Utility and its Department of Parks and Recreation primarily relate to the formulation, implementation and management of public policy, therefore, any proposal relating to said matter constitutes a non-mandatory subject of bargaining within the meaning of Section 111.70(1)(d) of the Municipal Employment Relations Act.

2. That, since the hours which employes are regularly expected to work primarily relate to hours and working conditions, a proposal relating to regularly scheduled hours of work constitutes a mandatory subject of bargaining within the meaning of Section 111.70(1)(d) of the Municipal Employment Relations Act.

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 City of Brookfield has no duty to bargain with Local 20, District Council 40, American Federation of State, County and Municipal Employees, AFL-CIO, with respect to any proposal relating to the hours during which the City of Brookfield desires to serve the public through its Water Utility and its Department of Parks and Recreation.

2. That the City of Brookfield has a duty to bargain with Local 20, District Council 40, American Federation of State, County and Municipal Employees, AFL-CIO, with respect to the hours which employes are regularly scheduled to work.

Given under our hands and seal at the City of Madison, Wisconsin this 17th day of July, 1980.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Morris Slavney, Chairman

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Herman Torosian, Commissioner

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Gary L. Covelli, Commissioner

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

Background

During the course of negotiations for a new collective bargaining agreement effective as of January 1, 1980, and prior to the filing by the Union of a petition for mediation-arbitration, the City initiated the instant proceeding, requesting the Commission to issue a Declaratory Ruling as to whether two proposals of the City related to a mandatory subject of bargaining. The City's first proposal was to change the regular operating hours of its Water Utility and of its Department of Parks and Recreation from 7:00 a.m.-3:30 p.m. to 8:00 a.m.-4:30 p.m. The City's second proposal was designed to effectuate the implementation of its first proposal and it was to change the regular starting times of operations and maintenance employes within its Water Utility and Department of Parks and Recreation from 7:00 a.m. to 8:00 a.m. 2/ Such a change would have the effect of changing the regular ending times of such employes from 3:30 p.m. to 4:30 p.m., given that the City has not proposed to change the number of hours contained within these employes' regular work week.

Throughout the course of negotiations, the City has contended that it possesses the authority to effectuate such a change unilaterally, without the necessity of bargaining same with the Union. During the course of the mediation-arbitration investigation involving the bargaining unit, which includes the affected employes, the City submitted a final offer, which included as one of its proposals the proposed change of regular starting times for these employes. Such does not constitute a waiver of the City's view that it need not bargain with the Union over said subject. The Union's tentative final offer, dated April 22, 1980, makes no specific reference to the subject involved herein, but proposes that the applicable language of the predecessor collective bargaining agreement be continued.

The City's Position

The City claims that its first proposal, regarding operating hours of its Water Utility and of its Department of Parks and Recreation, is related to the perceived needs and desires of the public and to the need for the efficient operation of said Departments. It presented evidence as to why later regular operating hours would be more in conformance with the wishes and living habits of the public and with the activities of the Departments. It drew particular attention to park maintenance, park activities and customer-related services performed by employes of the Water Utility.

The City contends that its second proposal was motivated by the desire to achieve better coordination of the working hours of certain of its personnel with what it perceives to be the needs and preferences of the public for the provision of those services offered by such personnel at certain hours of the day. It claims that an 8:00 a.m.-4:30 p.m. regular working day for the affected employees is better suited to the public's needs for efficient delivery of such services than the present 7:00 a.m.-3:30 p.m. regular working day, which, it claims, is "out of step" with the public needs and desires.

2/ The City's proposal affects the five full-time year-round employes of its Department of Parks and Recreation, but does not affect a number of seasonal workers hired by the Department solely for the warmer months. The proposal also affects all five employes of the Water Utility within the classifications of Specialist, Operator and Operator-Laborer. The City's Water Utility serves approximately 2,750 households or approximately 30 percent of the City's population.

Specifically, with regard to the Department of Parks and Recreation, the City contends that a later start of the working day is more "in step" with patterns of public use of the Department's facilities and services which, it claims, tend to be heaviest during the late afternoon and early evening hours, especially during the warmer months. Operations most efficiently performed during that time of the day include baseball and softball diamond maintenance, and care and maintenance of ice skating rinks and swimming pools. In addition, the City argues that mowing of grass, a major warm-weather function, is best accomplished after 10:00 a.m. The City contends that well over one-third of the time of the Utility's employes is spent performing tasks which involve direct customer contact and entry into customers' residences or onto customers' properties. These include installation, replacement, reading and repairs of meters and water registers, response to customer complaints and flushing of water mains to eliminate rust in the system. It states that work of this nature cannot be efficiently performed until 8:00 or 8:30 a.m. because the earlier scheduling of such activities would interfere with the customers' morning family routine (including getting ready for school or work), and with morning traffic. It cited two particular examples: that the flushing of water mains early in the morning would result in rusty tap water, and that it would cause street flooding during the morning rush hour, when children are often waiting for school buses.

In support of its position, the City refers to the Commission's decision in City of Wauwatosa 3/ and particularly to that section of the decision dealing with home and hydrant inspections, and to Milwaukee Board of School Directors 4/ particularly to those sections dealing with parent conferences, special help for students or faculty and departmental meetings after 4:00 p.m.

The Union's Position

The Union contends that the City's proposals in effect pertain primarily to the regular working hours of the affected employes and that the starting times and the regularly scheduled working day of the affected employes primarily relate to "hours" and therefore constitute a mandatory subject of bargaining. It argues that while the issues raised by the City might well relate to the desirability of offering certain services at certain times, or the efficiency with which those services are rendered, such arguments are not properly argued and determined within the confines of a declaratory ruling proceeding. It further argues that the impact of the proposed change of hours upon the City's budgetary situation, or upon the efficiency of the operations of the affected departments, or the desire to better coordinate delivery of services with perceived public demand, are irrelevant to the issue of bargainability. It finally argues that bargaining with respect to the schedule of regular hours does not affect the underlying ability of the City to deliver the services performed by the affected employes at any time of day or the prerogative of the City to continue or discontinue particular services as it sees fit.

Discussion

The instant proceeding involves the issue as to whether the City has the duty to bargain with the Union concerning the subjects set forth by the City's petition -- i.e., the regular daily operating hours of the

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3/ Dec. No. 15917, 11/77.

4/ Dec. No. 17504, 17508, 12/79.

two affected City Departments and the regular starting times and hours of the affected employes. The applicable standard to be applied herein by the Commission is whether the City's proposals are primarily related to the wages, hours and conditions of employment of the affected employes, or whether the proposals are primarily related to the formulation or management of public policy. 5/ The desirability, per se, of the City's proposals in terms of relative costs and benefits is not determinative as to the issue on whether the proposals relate to matters which are mandatorily bargainable.

There is no question that the City retains the right to operate its Water Utility and its Department of Parks and Recreation at hours consistent with public needs and desires. In its capacity as representative of the public within its jurisdiction, the City may thus determine what services are to be offered and the timing and method of delivery of such services. Therefore, the City's first proposal, concerning the operating hours of these two Departments, relates primarily to the formulation, implementation and management of public policy and as such it does not constitute a mandatory subject of bargaining. 6/

There is equally no question that the City's proposals by their very nature have an impact upon "hours" -- the regular hours worked by the employes affected by the proposals. There is equally no question that the City's second proposal concerning the regular working hours of employes of its Water Utility and Department of Parks and Recreation carries a possible budgetary impact and that it affects its decision making as to delivery of certain services. We conclude that the proposal's effect in this regard is less direct than its effect upon the hours and working conditions of the affected employes.

The testimony of the City's witnesses establishes that much of the work time of the affected employes is devoted to duties that can be performed equally well under the 7:00 a.m. to 3:30 p.m. schedule as under the City's proposed 8:00 a.m. to 4:30 p.m. schedule. These duties include the 63 percent of the time spent by Water Utility employes on non-customer related duties, such as operation and maintenance of pumping stations, reservoirs, mains, meters and hydrants, the time spent by employes of the Department of Parks and Recreation on maintenance of vehicles and equipment and general park maintenance unrelated to specific public activities, and virtually the entire range of duties of those employes during the winter months. Thus, the City's proposal would affect, at best, the performance of only a fraction of the duties of the affected employes. In addition, the 7:00 a.m. to 3:30 p.m. working day does not prevent the employes from performing even those duties that the City cites as most prominent in formulating the motivation for the proposed change, such as grass cutting and baseball diamond maintenance (in the case of the Department of Parks and Recreation), and customer-related duties such as meter reading and installation of water main flushing (in the case of the Water Utility). At most, the proposed change of working hours, if implemented, would make delivery of those

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5/ Unified School Dist. of Racine County v. WERC, 81 Wis. 2d 89, 259 NW 2d 724 (1977), Beloit Education Assn. v. WERC, 73 Wis. 2d 43, 242 NW 2d 231 (1976).

6/ See e.g. Kenosha County (14937-B, 14943-B) 2/77 in which the decision of the employer to establish an additional workshift was held to be a non-mandatory subject of bargaining. City of Wauwatosa (Fire Dept.) (15917) 11/77, particularly that portion of the decision relating to assignment of duties on holidays. Oak Creek Education Association (11827-D, E) 11/75, particularly that portion of the decision relating to teacher-pupil contact hours.

services more efficient and responsive to patterns of public use. In addition, the City retains the discretion under the present, or indeed any schedule of regular hours, to require the affected employes to work any hours it deems necessary subject to payment of overtime and compliance with other bargaining agreement obligations. 7/

The fact that the City's proposal affects its budget or the means by which it delivers services to the public is not determinative with respect to the question of bargainability. In City of Wauwatosa, 8/ we stated as follows:

> . . . Even though the instant proposal clearly falls within the meaning of hours about which the petitioner is required to bargain, the petitioner defends on the ground that such proposal, if included in the collective bargaining agreement, would place a constraint on the services it can extend to the public. First, however, as noted above, many proposals relating to wages, hours and conditions of employment, about which the petitioner statutorily is required to bargain, would, if included in the agreement, place constraints on its capacity to provide public services. Second, this argument goes to the merits of such constraints, not their bargainability. We here determine bargainability, not the merits, and in doing so we look to the nature of the proposal to ascertain whether it primarily relates to wages, hours and conditions of employment. The question of the merits of a proposal is left to the bargaining process. . . .

Certainly the above analysis applies equally to a proposal over the scheduling of hours worked as to one over the number of hours worked. Both directly relate to "hours" as contemplated by Section 111.70(1)(d), MERA.

The City's reliance upon certain portions of the City of Wauwatosa and Milwaukee Board of School Directors decisions, as noted above, is misplaced. The proposals involved in those decisions (concerning home and hydrant inspections in the former instance, and parent conferences, special help for students or faculty and departmental meetings in the latter instances were worded so as to prevent the employer in those instances from requiring its employes to perform certain vital services at any but specified hours. The absolute prohibition on providing those services outside of the specified hours was the factor leading to the conclusion that those proposals were primarily related to managerial decision making. No such situation is present herein. Nothing adduced in the record prevents the City from requiring its employes in either or both of the departments to perform their duties at any time of the day whatsoever. The proposal involved herein only affects their regularly scheduled working hours and perhaps the City's liability for overtime or premium pay. Thus, while the City's second proposal has at best an indirect impact on its managerial prerogatives, it has a very direct impact on the hours which the employes are regularly scheduled to work.

On the basis of the foregoing, we conclude that the second proposal of the City is primarily related to the "hours and working conditions" of its employes and therefore said proposal relates to a mandatory

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7/ Milwaukee Teachers' Education Association (17504 - 17508) 12/79.

8/ Dec. No. 15917 (11/77).

subject of bargaining.

The Union's Motion for attorneys' fees, costs and disbursements is denied. The position of the City cannot be considered to be frivolous, since substantial issues of law arose in the matter.

Dated at Madison, Wisconsin this 17th day of July, 1980.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Morris Slavney, Chairman

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Herman Torosian, Commissioner

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Gary L. Covelli, Commissioner