STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of CITY OF MILWAUKEE Requesting a Declaratory Ruling Pursuant to Section 111.70(4)(b) Wis. Stats., Involving a Dispute Between Said Petitioner and MILWAUKEE DISTRICT COUNCIL 48, AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO, and its Affiliated Locals 33, 40, 47, 381, 423, 426, 428, 550, 952, 1091, 1238 and 2754	Case CCXIX No. 27720 DR(M)-169 Decision No. 19091

Appearances:

Mr. James B. Brennan, City Attorney, by Mr. Nicholas M. Sigel, Principal Assistant City Attorney, 800 City Hall, 200 East Wells Street, Milwaukee, Wisconsin 53202, for the Petitioner.

Podell, Ugent & Cross, S.C., Attorneys at Law, by Ms. Nola J. Hitchcock Cross, 207 East Michigan Street, Suite 315, Milwaukee, Wisconsin 53202, for the Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECLARATORY RULING

The City of Milwaukee, on March 30, 1981, filed a petition requesting the Wisconsin Employment Relations Commission to issue a declaratory ruling, pursuant to Sec. 111.70(4)(b) of the Municipal Employment Relations Act, (MERA) to determine whether it has the duty to bargain collectively with Milwaukee District Council 48, American Federation of State, County and Municipal Employees, AFL-CIO and its affiliated Locals 33, 40, 47, 381, 423, 426, 428, 550, 952, 1091, 1238 and 2754, with respect to various items included within the amended final offer of Milwaukee District Council 48 and proposed to be submitted to mediation-arbitration and to be included in a new bargaining agreement covering wages, hours and working conditions of those employes of the City in collective bargaining units represented by such organizations. Hearing on said petition was held in Milwaukee, Wisconsin on April 23, 1981 by Stuart S. Mukamal, Examiner, during the course of which the parties were afforded full opportunity to present evidence and argument. The parties thereafter filed briefs, the last of which was received on June 3, 1981. The Commission, having considered the entire record of this matter and being fully advised in the premises makes and issues the following Findings of Fact, Conclusions of Law and Declaratory Ruling.

FINDINGS OF FACT

1. That the City of Milwaukee, hereinafter referred to as the City, is a municipal employer, having its offices at City Hall, 200 East Wells Street, Milwaukee, Wisconsin.

2. That Milwaukee District Council 48, American Federation of State, County and Municipal Employees, AFL-CIO, and its affiliated Locals 33, 40, 47, 381, 423, 428, 550, 52, 1091, 1238, and 2754, hereinafter jointly referred to as AFSCME, are labor organizations and have their offices at 3427 West St. Paul Avenue, Milwaukee, Wisconsin.

3. That at all times material herein AFSCME has been and is, the exclusive collective bargaining representative of certain employes of the City employed in various of its departments, in various appropriate collective bargaining units; and that in said relationship AFSCME and the City have been parties to successive collective bargaining agreements relating to wages, hours and working conditions of the employes in the bargaining units represented by AFSCME, the last of such agreements being in effect for the years 1979 and 1980.

4. That, during the course of bargaining on provisions to be included in a collective bargaining agreement to succeed the 1979-1980 agreement, AFSCME proposed to include therein certain provisions which the City contends relate to non-mandatory subjects of bargaining; that on March 30, 1981 the City filed the petition instituting the instant proceeding, seeking a declaratory ruling with respect thereto; that the proposals remaining in issue at the time of the hearing herein 1/ related to (a) change in health insurance carriers, (b) City Hall area parking, (c) reallocations/reclassifications, and (d) resolution of an impasse on the impact of change in equipment, all as follows:

(a) The insurance proposal: 2/

14. The City may terminate its contract with Blue Cross-Blue Shield and enter into a replacement contract with any other qualified insurer or establish a self-administered plan provided:

(a) That the cost of any replacement program shall be no greater to individual group members than the current plan immediately prior to making any change.

(b) That the coverages and benefits of such replacement program shall be at least identical to the current coverages and benefits of Blue Cross-Blue Shield programs currently in effect for employees and retirees.

(c) Any replacement program shall continue to provide United States Government certified Health Maintenance Organization Plan options or equivalent plan options for employees electing such coverage.

(d) Prior to a substitution of carrier or implementating a self-administered plan, the City agrees to provide the Union with a full 60 days to review any new plan and/or carrier.

(e) Any dispute arising out of the alleged failure of the City to abide by the assurance contained in this section may be submitted to arbitration by the Union. The decision of the Arbitrator shall be limited to a determination of whether or not the substitute plan is in compliance with (a), (b), (c), and (d) above, shall specifically identify the lack of compliance and shall be final and binding in that respect.

The Arbitrator shall not have the authority to reform the substantive provisions of any replacement program but may order the City to modify it in order to comply with the assurance of this section. Any such challenge shall be brought within the 60 day period of review provided in (d) above.

(b) The City Hall parking proposal:

The City shall provide parking identification tags to employees who are required to use their personal automobiles for the performance of their job duties. Such identification tags, when prominently displayed, will assure free parking on streets in the area of the City Hall while employees are at City Hall for work related purposes.

1/ The City's petition set forth that nine proposals were in issue.

2/ The City challenges the underlined portions of the proposal.

(c) The proposal relating to the submission of unresolved reallocations/ reclassifications to fact finding:

The parties agree that the following unresolved reallocations and reclassifications shall be submitted to a neutral fact finder that is mutually selected by the parties. Such selection shall be made by May 1, 1981 and if the parties are unable to agree on a selection by such date the selection shall be made from a panel of five (5) names provided by the Wisconsin Employment Relations Commission. The fact finder shall commence hearings by no later than September 1, 1981 and shall issue his/her findings of fact no later than May 1, 1982. The decision of the fact finder shall not in any way be binding on the parties. The cost of the fact finding shall be shared equally by the parties, except that each party shall bear the costs of its own witnesses, exhibits, transcripts or proceedings and counsel.

Laborer (Electrical Services)
Parking Meter Repair Worker I
Parking Meter Repair Worker II
Automotive Mechanic
Automotive Mechanic - Heavy
Automotive Electrician
Upholsterer I
Upholsterer II
Property Appraiser III
Public Works Inspector II
Street Construction Technician
Plan Examiner I
Field Service Mechanic
Chief Distribution Repair Worker
Distribution Repair Worker II
Special Design Technician
Building Maintenance Inspector II
Boiler Inspector
Building Construction Inspector
Electrical Inspector
Elevator Inspector
Senior Elevator Inspector
Sprinkler Construction Inspector
Water Department's Production Division
Operating Engineer II
Water Chemist
Water Filtration Operator in Charge
Operating Engineer I
Water Filtration Operator II
Filtration Plant Laborer
Special Equipment Operators
Truck Driver (under 3 1/2 ton)
Truck Driver (over 3 1/2 ton)
Distribution Repair Worker I's
Field Investigator
Meter Reader II, III & IV
Water Distribution Stores Clerk
Meter Repair Workers
Sanitations I's & II's

(d) The proposal relating to change of equipment: 3/

SIDE LOADER TRUCK

If the City rents, leases, or purchases side loader trucks for sanitation pick up, it will meet with the Union for the purpose of negotiating the impact of the new type vehicle on the bargaining unit members. <u>If the parties are unable to reach agreement, the matter shall be submitted to final and binding arbitration.</u>

5. That effective October 3, 1978, the City has maintained a basic health insurance plan provided for in the HOSPITAL SURGICAL-MEDICAL GROUP MASTER CONTRACT FOR THE CITY OF MILWAUKEE; that employes in the active service of the City as well as those employes who had been in active service of the City and who retired on a normal pension (as that term is defined in Chapters 34 and 36 of the City Charter, 1971 compilation and amendments thereto), where those retirees had at least 15 years of active credible service with the City have been covered by said insurance plan; that the 1979-80 collective bargaining agreement between the parties contained provisions relating to "health insurance", which provided health insurance coverage for active as well as retired employes; and that in its last offer submitted to AFSCME prior to the initiation of the instant proceeding, the City included, as part of para. 5 of its health insurance proposal, the following provision subtitled "Retiree Coverage":

3/ The City objects to the underlined portion of the proposal.

The City will pay the cost of premiums for present retiree coverage for general City employes 60-65 years of age, with 15 or more years of service, who retire under the general City employes retirement system with unreduced (normal) retirement service allowance after January 1, 1974, and for former Town of Lake employes 60-65 years of age, with 15 or more years of service, who retire under the Wisconsin retirement fund after January 1, 1975. A surviving spouse of employes retiring with benefits set forth above will have the same benefits, if any, as they would have been eligible for under terms and conditions of the present group health plan for retired employes.

6. That in addition, as para. 6 of its health insurance proposal, the City proposed the following provision:

Right of the City to Select Carrier

It shall be the right of the City to select, and from time to time to change its hospital and medical insurance carrier.

7. That in apparent response to the City's proposal on the right to change insurance carriers, which under the 1979-1980 collective bargaining agreement between the parties was designated as Blue Cross-Blue Shield, AFSCME, in its "9th final offer", received by the City on March 16, 1981, proposed the provision set forth in para. 4(a) of the Findings of Fact, supra.

8. That, as long as the City proposes to provide health insurance coverage for retirees who were formerly employed by the City in bargaining units represented by AFSCME, the City has waived its right to object to AFSCME's proposal set forth in para. 4(a), supra, as such proposal applies to said retirees in section 14, subsection (b).

9. That AFSCME's proposal with respect to arbitration of disputes arising as a result in the change of insurance carriers, as set forth in para. 4(a), supra, is a procedure to resolve disputes as to whether the City has violated the collective bargaining agreement existing between the parties as a result of change in insurance carriers by the City and therefore primarily relates to wages, hours and working conditions of employes of the City represented by AFSCME.

10. That AFSCME's proposals with respect to City Hall parking, as set forth in para. 4(b), supra, and with respect to the impact of the changeover to side loader trucks, as set forth in para. 4(d), supra, both primarily relate to wages, hours and working conditions of employes of the City represented by AFSCME.

11. That AFSCME's proposal with respect to submitting future unresolved issues relating to reallocations and reclassifications to fact finding, as set forth in para. 4(c), supra, constitutes a "voluntary impasse resolution procedure".

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

CONCLUSIONS OF LAW

1. That former employes of the City, who are considered "retirees" within the meaning of pertinent ordinances of the City, are not municipal employes within the meaning of Sec. 111.70(1)(b) of MERA, and therefore, ordinarily, AFSCME has no enforceable right to bargain collectively, within the meaning of Sec. 111.70(2) of MERA, with respect to any benefits relating to or affecting such retirees.

2. That, however, no provision of MERA prohibits the City from bargaining collectively with AFSCME with respect to any benefits relating to or affecting former employes of the City, who were employed in bargaining units represented by AFSCME, including benefits relating to health insurance coverage, and inasmuch as the City has proposed to include a provision providing health insurance coverage to retirees, in the collective bargaining agreement presently being negotiated between it and AFSCME, and as long as it continues to do so, the City has the duty to bargain collectively with AFSCME on any other matter affecting health insurance benefits relating to such retirees, within the meaning of Sec. 111.70(3)(a)4 of MERA.

3. That the following proposals of AFSCME noted above, involving

a. Arbitration of disputes arising as a result in the change of insurance carriers, as set forth in para. 4(a) of the Findings of Fact;

b. City Hall parking, as set forth in para. 4(b) of the Findings of Fact; and

c. The impact of the changeover to side loader trucks, as set forth in para. 4(d) of the Findings of Fact;

are mandatory subjects of collective bargaining within the meaning of Sec. 111.70(1)(d) and (2) of MERA.

4. That the proposal of AFSCME involving a procedure to assist the parties to resolve a prospective possible impasse relating to reallocations and reclassifications during the term of the next collective bargaining agreement or for future collective bargaining agreements, as set forth in para. 4(c) of the Findings of Fact, is a "voluntary impasse resolution procedure" within the meaning of Sec. 111.70(4)(cm)5 of MERA and therefore is a permissive subject of bargaining.

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 as long as the City continues to propose to provide retirees, who were formerly employed by the City in bargaining units represented by AFSCME, with benefits relating to health insurance coverage, the City has a duty to bargain with AFSCME with respect to health insurance coverage for retirees, and in that regard proposals of AFSCME relating to same, under such circumstances, are properly included in the final offer of AFSCME for the purposes of mediation-arbitration within the meaning of Sec. 111.70(4)(cm) of MERA.

2. That the City has the duty to bargain collectively with AFSCME with respect to the proposals of said Unions relating to

a. Arbitration of disputes arising as a result in the change of insurance carriers;

b. City Hall parking; and

c. The impact of the changeover to side loader trucks;

and that in said regard said proposals of AFSCME are properly included in their final offer for the purposes of mediation-arbitration within the meaning of Sec. 111.70(4)(cm) of MERA.

3. That the City has no duty to bargain collectively with AFSCME with respect to the proposal of AFSCME relating to reallocation and reclassification, and that in said regard, because of the objection of the City, said proposal cannot be included in the final offer of AFSCME for the purposes of mediation-arbitration within the meaning of Sec. 111.70(4)(cm) of MERA.

Given under our hands and seal at the City of Madison, Wisconsin this 28th day of October, 1981.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Morris Slavney, Commissioner

Because I have participated as the mediator-investigator in the mediation-arbitration proceeding between the parties I had intended not to participate in this Declaratory Ruling proceeding. However, since Chairman Covelli and Commissioner Slavney do not agree as to the proposal relating to retirees I find it necessary to participate herein, but only with respect to the issues involving that proposal, and in that regard I concur with Commissioner Slavney.

_____
Herman Torosian, Commissioner

I dissent with respect to Finding of Fact No. 8 as well as Conclusion of Law No. 2 and Declaratory Ruling No. 1 which are based on said Finding of Fact. I concur with the remaining Conclusions of Law and Declaratory Rulings.

_____
Gary L. Covelli, Chairman

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

In its petition initiating the instant proceeding the City alleged that nine proposals included in the final offer of AFSCME, in a pending mediation-arbitration proceeding, related to non-mandatory subjects of bargaining, and therefore, according to the City, could not be properly included in AFSCME's final offer. In addition the City objected to two of said proposals as being too indefinite and uncertain for consideration by an arbitrator in a mediation-arbitration proceeding. During the course of the hearing conducted by the Examiner on behalf of the Commission, the Examiner made certain rulings on various motions made prior to, and during, the hearing. Since neither party's brief addressed any of the rulings made by the Examiner during the course of the hearing, we conclude that the parties accepted the rulings of the Examiner, and we conclude that they need not be dealt with in this decision.

During, and subsequent to, the hearing herein the City withdrew its objections to five of AFSCME's proposals, including those objected to on the grounds that they were too indefinite and uncertain. The City continues to object to those proposals set forth in para. 4 of the Findings of Fact. We shall, herein, set forth the positions of the parties, as well as the rationale in support of our conclusions, with respect to each of the proposals in issue, as they are set forth in our Findings of Fact.

Health Insurance Coverage For Retirees

The City contends that the proposal to mandate, for retired City employes, continuation of "at least identical" coverage and benefits in the event of a change in health insurance carriers by the City constitutes a prohibited subject of bargaining. The City bases its position upon the fact that AFSCME is the certified bargaining representative of only active City employes, and that retired employes are not included in units represented by AFSCME, and that therefore it cannot bargain for former unit members who are now retired.

AFSCME, while not responding directly to the City's argument, claims that the proposal should be deemed "primarily related to wages, hours and working conditions" under that standard utilized by the Commission in determining whether subjects of bargaining are or are not mandatory. 4/ AFSCME cites the decision of the National Labor Relations Board in Pittsburgh Plate Glass Co., 5/ holding that health insurance benefits applicable to retired employes constitute a mandatory subject of bargaining. AFSCME acknowledges that said NLRB decision was reversed by the United States Supreme Court, 6/ however, it distinguishes the latter decision on the basis that said Court utilized a stricter test for determining bargainability than applied by our own Supreme Court in Racine Unified School District No. 1.

4/ The Commission has followed the standard set forth by the Wisconsin Supreme Court in Racine Unified School District No. 1 v. Wisconsin Employment Relations Commission 81 Wis. 2d. 259 NW2d. 724 (1977) to the effect that the test for determining whether or not a particular bargaining subject is mandatory is whether that subject is "primarily related" to wages, hours and working conditions.

5/ 71 LRRM 1433 (1969).

6/ Chemical Workers v. Pittsburgh Plate Glass Co. 404 U.S. 157, 92 S. Ct. 383, 78 LRRM 2974 (1971).

In Pittsburg Plate Glass, the United States Supreme Court ruled that an employer did not commit an unfair labor practice within the meaning of the National Labor Relations Act by proposing and subsequently modifying health insurance benefits for retired employes during the term of the collective bargaining agreement. The basis for the Court's conclusion was: (1) retired employes are not "employes" within the meaning of Section 2(3) of the National Labor Relations Act; (2) retired employes were not and could not be included in the bargaining unit, in any event, since active and retired employes don't share a community of interest to justify inclusion; and (3) retiree's benefits did not vitally affect the terms and conditions of employment of active employes and that, therefore, proposals relating to retiree benefits were permissive subjects of bargaining.

Although, for existing employes, the Commission has held that the level and scope of health insurance benefits constitute a mandatory subject of bargaining 7/ and that retirement benefits for existing employes are mandatory subjects of bargaining, 8/ the Commission has never held that these same subjects are mandatory when they apply to non-unit members exclusively. In fact, consistent with the Supreme Court's decision in Pittsburgh, the Commission has concluded that proposals that have a primary impact on non-bargaining unit members and only indirect impact on unit members are permissive subjects of bargaining. 9/ Also, consistent with the decision in Pittsburgh, we conclude that an individual who is no longer employed due to retirement and without an expectation of further employment is not an "employee" within the meaning of MERA, nor is that person a member of the bargaining unit.

It is apparent that health insurance coverage for retired City employes is pursuant to a charter ordinance of the City. The City is not prohibited from bargaining insurance benefits for retirees who were previously employed in bargaining units represented by AFSCME. Here the City (as well as AFSCME) has submitted a proposal that the 1981-1982 collective bargaining agreement between the parties contain a provision providing health insurance coverage to retirees. Therefore Commissioners Slavney and Torosian conclude that the City has waived its right to object to the proposal relating to changing insurance carriers on the basis that the proposal also relates to retirees.

Arbitration of Disputes Arising From a Change in Insurance Carriers

The City objects to the proposal of AFSCME as set forth in para. 4(a), specifically, subpara. (e) of the para. identified as "14" in the final offer of AFSCME, claiming that it relates to a permissive subject of bargaining by virtue of Sec. 111.70(4)(cm)5 of MERA. Said provision reads in pertinent part as follows:

> In addition to the other impasse resolution procedures provided in this paragraph, a municipal employer and labor organization may, at any time as a permissible subject of bargaining agree in writing to a dispute settlement procedure, including authorization for a strike by municipal employes or binding interest arbitration, which is acceptable to the parties for resolving an impasse over terms of any collective bargaining agreement under this subchapeter . . . (emphasis added).

The City's argument as applied to this particular proposal is misplaced. Sec. 111.70(4)(cm)5 of MERA clearly is limited in its application to arbitration of "interest" disputes. It provides that the parties to public-sector collective bargaining may, as a permissive subject of bargaining, reach agreement as to an

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7/ See e.g. Walworth County Handicapped Children's Education Board (17433, 11/79; Milwaukee Sewerage Commission (17302) 9/79; City of Jefferson (15482-A) 8/77.

8/ Milwaukee Board of School Directors (17504) 12/79.

9/ See e.g School District of Wisconsin Rapids (17877) 6/80, relating to restrictions on pay of non-contract, substitute or casual employees; City of Madison (16590) 10/78, relating to evaluation of experience and training of non-bargaining unit employes applying for positions within the bargaining unit.

alternative to the statutory mediation-arbitration process set forth by the remainder of Sec. 111.70(4)(cm) of MERA for the resolution of "interest" disputes, i.e. disputes over the terms of collective bargaining agreements. The proposal involved herein, on the other hand, clearly relates to grievance arbtration, since it provides for binding arbitration over disputes relating to compliance with certain terms of a proposed collective bargaining agreement. The fact that the proposal provides for expedited arbitration without the necessity of processing grievances through the lower steps of the contractual grievance procedure does not in any way affect the nature of the proposal as one calling for grievance rather than interest arbitration. Sec. 111.70(4)(cm)5 of MERA does not apply to grievance arbitration. Procedures relating to grievances and grievance arbitration clearly constitute mandatory subjects of bargaining. 10/ Therefore, we hold that AFSCME's proposal concerning expedited binding arbitration of disputes related to compliance with contractual provisions relating to the impact of changes in health insurance carriers constitutes a mandatory subject of bargaining.

City Hall Area Parking

The City has challenged the inclusion of the proposal to require the City to provide identification tags to employes utilizing their personal automobiles on City business, which would permit them to park free of charge in the area of the Milwaukee City Hall without the necessity of complying with parking restrictions in that area. Its challenge is based upon a claim that such a provision constitutes a prohibited subject of bargaining, due to the fact that City Hall parking is regulated both by state statute and by City ordinance. Thus, the City claims that the inclusion of the proposal would require it to commit a violation of law.

Although state statutes do restrict parking in certain specified situations, the State has (excepting those situations specifically provided by statute) expressly delegated to municipalities, including the City herein, the authority to regulate parking and the installation and use of parking meters. Thus, Sec. 349.13(1) and (2), Stats., states, in pertinent part as follows:

> ". . . (T)he local authorities, with respect to highways under their jurisdiction, including state trunk highways or connecting highways within corporate limits, may, within the reasonable exercise of the police power, prohibit, limit the time of or otherwise restrict the stopping, standing or parking of vehicles beyond the prohibitions, limitations, or restrictions imposed by Ch. 346, except that they may not modify the exceptions set forth in s. 346.50 . . .
>
> (2) Except as provided in this subsection, neither the department nor local authorities may extend stopping, standing or parking privileges where stopping, standing or parking is prohibited by ch. 346 . . ."

Sec. 349.14(1), Stats., states as follows:

> (1) "It is the public policy of this state that the use of parking meters by cities, villages, and counties to measure the time for parking vehicles is a local matter to be determined by the local authorities".

Clearly, the State has intended that local governments be delegated full authority to regulate parking within their respective jurisdictions, if consistent with the State Traffic and Motor Vehicle Code and unless otherwise specifically provided by state statute. An examination of existing state statutes concerning parking for certain specified classes of individuals in certain areas, or in certain emergency and special situations (Secs. 341.14(1), 343.51, 346.50-346.56, Stats.), reveals that none of the provisions contained therein impinges upon, or even indirectly addresses, the right of a municipality to exempt city employes from parking fees imposed in specified geographic areas (assuming that parking regulations and restrictions unrelated to meter and other fees are complied with);

10/ Racine Unified School District (11315-B,D) 4/74.

or from time and meter restrictions existing within those areas. 11/ Thus, the City's contention that the City Hall area parking proposal advanced by AFSCME would require the City to violate State law is unfounded. That proposal only would free City employes using personal automobiles on City business from the necessity to observe time and meter restrictions in the City Hall area that are imposed by City ordinance. The proposal does not purport to free such employes from their obligations to observe State-imposed parking constraints.

The second argument advanced by the City - that the proposal at issue is an illegal subject of bargaining because it would require the City to violate its own parking ordinances relating to the City Hall area - is wholly unconvincing. If such an argument were upheld, a municipal employer would be permitted to declare any bargaining proposal prohibited merely by passing a resolution or ordinance to that effect. Such a result is untenable and inconsistent with applicable precedent. 12/ Thus, the fact that the City has adopted extensive ordinances (including time and meter regulations) regulating parking in the City Hall area does not in any way impinge upon the question of whether a bargaining proposal to exempt certain classes of people from compliance with such ordinances constitutes an illegal subject of bargaining. The City is not prohibited, by law, from amending or repealing its parking ordinance.

In this regard, it should be noted that the City has already created by ordinance, exemptions from time and meter restrictions applicable to City Hall areas and other downtown-area streets for certain classes of persons (e.g., taxpayers wishing to pay property taxes at City Hall, business owners wishing to park in loading zones adjacent to their businesses, and special sticker-exemptions for out-of-twon conventioneers wishing to shop Downtown). Nothing would legally constrain the City from adding to this list City employes utilizing their personal automobiles on City business should the final offer of AFSCME prevail in mediation-arbitration, or be voluntarily agreed to by the City.

11/ The City's contention that Sec. 349.13, Stats., prohibits it from creating exempted classes of persons in addition to those specified by other State Statutes misconstrues that Section. Sec. 349.13, Stats., contains only two provisions restricting local authority over local streets and highways: (1) that the exceptions contained in Sec. 346.50. Stats., may not be modified and (2) that stopping, standing and parking privileges may not be extended by local authorities to areas where such is prohibited by Chapter 346 of the Statutes. Neither of these constraints bears even the slightest relevance to the issue at hand. Sec. 346.50, Stats., addresses such matters as parking of disabled vehicles, parking in order to avoid conflict with other traffic, parking of vehicles owned by public utilities or rural electric co-operatives, and the parking of vehicles registered by disabled war veterans. The remaining sections of Chapter 346 pertaining to parking address area restrictions on parking and the proper methods of parking in specified situations. Chapter 346 does not in any way address the issue of classes of persons whom a municipality may exempt from time and meter restrictions. As noted in subsequent sections of this Memorandum, the City has indeed recognized that it possesses the discretion to exempt, by ordinance, specified classes of persons from such restrictions.

The fact that disabled war veterans and handicapped persons are exempted from certain parking restrictions by state law (see Sec. 341.14(1), 343.51, 346.50, Stats.,) does not indicate in any way that the state thereby intended to preclude local authorities from creating additional classes of persons exempt from locally-imposed time and meter restrictions.

12/ See e.g. Racine County (10917-A) 6/72, aff'd. Racine County Cir. Ct., 7/73 whereby it was held that the adoption of an ordinance (in that case, an ordinance prohibiting the granting of retroactive wage increases) by a municipal employer cannot relieve that employer of the duty to bargain imposed by the Municipal Employment Relations Act.

From the foregoing it is clear that the parking proposal does not constitute a prohibited subject of bargaining. On the contrary, it is obvious that the payment of parking meter or parking lot fees by employes on City business, if paid by such employes, without reimbursement by the City, has a direct and primary effect on the wages and working conditions of such employes, and of course, if so paid by the City such payments have a similar result. Therefore, the proposal involves a mandatory subject of bargaining.

Reallocations and Reclassifications

The parties have apparently been bargaining with respect to the reallocation and reclassification of certain positions included in the various collective bargaining units represented by AFSCME. The proposal of AFSCME with regard thereto, and in issue herein, would require the City to proceed to non-binding fact finding with respect to the positions on which the parties could reach no agreement as to their reallocation and reclassification. The provision does not indicate whether any changes eventually agreed upon with respect thereto were intended to become effective during the course of the 1981-1982 agreement. However, during the course of the hearing the Director of AFSCME's District Council testified that any recommendations with respect to reallocations or reclassifications resulting from the procedure contained in the proposal "would be taken to the bargaining table a year and a half from now". In its brief the City characterizes the purpose of the proposal as being for "usage in negotiations for a successor agreement" to succeed the 1981-1982 agreement.

The City primarily objects to the proposal on the basis that it contravenes Sec. 63.23, Stats., with respect to the authority of the City's City Service Commission to classify positions occupied by employes of the City. As a further challenge to the proposal the City argues that the procedural aspects of the proposal relates to a "voluntary impasse resolution procedure" as set forth in Sec. 111.70(4)(cm)5 of MERA, and, therefore, the proposal constitutes a permissive subject of bargaining. AFSCME, on the other hand, contends that MERA favors procedures established for the resolution of labor disputes, and the proposal should be held to be a mandatory subject of bargaining.

AFSCME's argument provides, little, if any, rationale in the attempt to persuade the Commission that the provision involved relates to a mandatory subject of bargaining. On the other hand, the City is no more convincing in support of its argument that the proposal would interfere with the claimed statutory right of its City Service Commission, for the simple reason that the procedure contained in the proposal relates to recommendations, rather than having a binding effect on any reclassifications involved. 13/ We view the proposal as creating a type of "study committee" to make recommendations to the parties and to the City Service Commission with regard to the subject matter involved in preparation for negotiations, and the results thereof, relating to the future 1983-1984 collective bargaining agreement between AFSCME and the City.

With respect to the City's second argument to the effect that the proposal relates to a permissive subject of bargaining as set forth in Sec. 111.70(4)(cm)5 of MERA, it should be noted that the parties are not presently at impasse with respect to what pay ranges the classifications involved should be assigned, and/or as to what the new classification should be. Rather, they cannot agree as to a procedure to assist them in reaching an accord or impasse with regard to same in negotiations leading to an agreement for 1983-1984.

13/ Since only recommendations are involved we see no reason to determine whether the proposal relates to a non-mandatory subject of bargaining on the contention that only the City Service Commission can classify positions.

The placement of positions in various pay ranges, as we view the term "reallocation", primarily relates to wages and working conditions. With respect to "reclassifications" we conclude that neither the record testimony nor the exhibits introduced during the course of the hearing are sufficient to enable the Commission to herein determine whether the factors concerning such reclassifications do or do not relate to mandatory subjects of bargaining. We have stated that if a particular duty is fairly within the scope of responsibilities applicable to the kind of work performed by the employes involved, a municipal employer may unilaterally impose such assignment and it constitutes a non-mandatory subject of bargaining. However, if the particular duty is not fairly within that scope, the decision to assign that duty is a mandatory subject of bargaining. 14/

Even assuming that "reclassifications and reallocations" relate to a mandatory subject of bargaining, we conclude that since the proposal would require the City to proceed to "fact finding" to assist the parties in their negotiations with respect to such reclassifications and/or reallocations, the proposal provides for a voluntary impasse resolution procedure within the meaning of Sec. 111.70 (4)(cm)5 of MERA and thus is a permissive rather than a mandatory subject of bargaining.

Further, and still assuming that the reclassifications and/or reallocations involved relate to mandatory subjects of bargaining, if the parties are presently at impasse thereon, the parties would be able in the instant mediation-arbitration proceeding to proceed to final and binding arbitration thereon. However, the proposal implies that the parties are not presently at impasse on said matters, and the procedure proposed contemplates a prospective impasse with regard to a future contract other than the next collective bargaining agreement between the parties. We do not interpret MERA as requiring either a union or an employer to mandatorily bargain with respect to a procedure to assist them in resolving such a prospective impasse.

Side Loader Trucks

AFSCME's proposal with respect to "side loader trucks" utilized in sanitation pick up relates to the impact on the working conditions of employes working with said equipment, where the change of such equipment occurs during the term of the 1981-1982 agreement. The City challenges the proposal as relating to a permissive subject of bargaining, pursuant to Sec. 111.70(4)(cm)5 of MERA. There is no doubt that had the City already made such equipment change, the impact of such change on wages and working conditions would be a mandatory subject of bargaining.

Since final and binding arbitration of interest disputes outside the context of statutory mediation-arbitration procedure constitutes a permissive subject of bargaining, 15/ the threshold question is whether the proposal herein comes within the ambit of statutory mediation-arbitration pursuant to our decision in Dane County (17400) 11/79. In Dane County we held that the mediation-arbitration procedures are only applicable to deadlocks which occur in (1) reopened negotiations under a binding collective bargaining agreement to amend or modify a specific portion of an existing collective bargaining agreement subject to a

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

15/ Sec. 111.70(4)(cm)5, Stats.

specific reopener provision; (2) negotiations for a successor agreement; and (3) negotiations for an initial agreement. We believe that AFSCME's proposal to reopen negotiations when the City purchases or rents side loader trucks for sanitation pick up in order to negotiate the impact of said changes is a specific re-opener within the intent of Dane County. Thus, an impasse with regard to the impact of the City's action in utilizing side loader trucks would be subject to binding interest arbitration, pursuant to Sec. 111.70(4)(cm) of MERA, and not to the contractual grievance arbitration procedure and therefore the proposal is a mandatory subject of bargaining.

Dated at Madison, Wisconsin this 28th day of October, 1981.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Morris Slavney, Commissioner

I have only participated with respect to the proposal relating to retirees.

_____
Herman Torosian, Commissioner

OPINION OF CHAIRMAN COVELLI CONCURRING IN PART AND DISSENTING IN PART

I agree with Commissioner Slavney regarding the Findings of Fact, Conclusions of Law and Declaratory Ruling and the accompanying rationale in support thereof, with respect to all proposals at issue except for the proposal concerning health insurance for retirees. With respect to that proposal, I disagree with the conclusion of my colleagues that the City, by including in its final offer, a proposal to continue providing health insurance coverage for retired employes in one provision, has waived its right to object to the portion of AFSCME's proposal involving the inclusion of retirees within the ambit of a provision that provides for the maintenance of at least identical coverage and benefits if the City changes health insurance carriers. The City has objected to AFSCME's proposal claiming that it is a prohibited subject of bargaining.

I would first note that AFSCME never argued waiver with respect to this proposal (retirees) even though AFSCME did argue waiver concerning two of the original nine objections made by the City in their Motion to Dismiss. 16/ At the hearing in response to the claim of waiver, the City argued that the objected-to proposals are prohibited subjects of bargaining, and therefore, the right to object cannot be waived citing Milwaukee Sewerage Commission (17302) 9/79. 17/

I agree with my colleagues that as indicated in paragraphs 5, 6 and 7 of the Findings of Fact, it would appear that the City has already agreed to health insurance coverage for retirees. The key difference between myself and my colleagues is the inference to be drawn from what appears to be the City's inconsistent approach to health insurance coverage for retirees - on the one hand the City has agreed to health insurance for retirees, but on the other hand objects to the inclusion of retirees in a provision that relates to the change of carriers and the maintenance of coverage and benefits identical to those now in existence. Despite the City's apparent inconsistency, I believe the City is saying that it is willing to include retirees in the health insurance coverage, but if and when, it decides to change insurance carriers, it reserves the right to object to retirees being included in said plan at that time. I view this objection as one that goes to the length of time that the City is willing to agree to or incorporate a non-mandatory subject of bargaining in a contract. This is very similar to incorporating a permissive subject of bargaining for a specific contract period 18/ or bargaining on a permissive subject prior to the close of

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16/ AFSCME claimed that the City had waived its right to object to the two proposals because the City had included identical proposals in the City's own final offer. Subsequent to the hearing, the City withdrew its objections to five of AFSCME's proposals, including the ones that AFSCME argued waiver.

17/ In Milwaukee Sewerage Commission, the Commission held that a party by failing to object in an initial declaratory ruling involving the same parties and negotiations, 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 a prohibited subject of bargaining.

18/ See, e.g., Greenfield Education Association (14026-B) 11/77; City of Wauwatosa (15917) 11/77; wherein the Commission held that a petitioner has not waived its right to challenge a proposal as being a permissive subject of bargaining even though it has previously incorporated said subject into a collective bargaining agreement. See also Pittsburgh, supra, note 6, p. 187. ("By once bargaining and agreeing on a permissive subject, the parties, naturally, do not make the subject mandatory topic of future bargaining.")

investigation, 19/ neither of which makes a permissive subject of bargaining mandatory.

For the above stated reasons and because the City's objection was timely made, I would conclude that the objected to proposal regarding health insurance for retirees is a permissive subject of bargaining and therefore, such proposal cannot be submitted to mediation-arbitration. I would not require the City to withdraw its proposal regarding health insurance for retirees in order for the proposal herein to be found permissive, as it appears my colleagues would have the City do.

Dated at Madison, Wisconsin this 28th day of October, 1981.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Gary L. Covelli
Gary L. Covelli, Chairman

19/ Wis. Adm. Code, ERB 31.11. In particular the following subsections:

"(1) TIME FOR RAISING OBJECTION. Any objection that a proposal relates to a non-mandatory subject of bargaining may be raised at any time after the commencement of negotiations, but prior to the close of the informal investigation or formal hearing.

. . .

(2) EFFECT OF BARGAINING ON PERMISSIVE SUBJECTS. Bargaining with regard to permissive subjects of bargaining during negotiations and prior to the close of the investigation shall not constitute a waiver of the right to file an objection as set forth in par. (1)(b). above."