STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of CITY OF GLENDALE Requesting a Declaratory Ruling Pursuant to Section 111.70(40(b), Wis. Stats., Involving a Dispute Between Said Petitioner and DISTRICT COUNCIL 48, AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO and its affiliated LOCAL 2958	Case XXXI No. 28485 DR(M)-196 Decision No. 19719

Briefs Filed By:

Mulcahy and Wherry, S.C., Attorneys at Law, by Mr. Robert Mulcahy, 815 East Mason Street, Milwaukee, Wisconsin 53202, for the Municipal Employer.

Podell, Ugent and Cross, S.C., Attorneys at Law, by Ms. Nola Hitchcock Cross, 207 East Michigan Street, Milwaukee, Wisconsin 53202, for the Union.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECLARATORY RULING

The City of Glendale having filed a petition, and an amended petition, requesting the Wisconsin Employment Relations Commission to issue a Declaratory Ruling as to whether it had the duty to bargain collectively within the meaning of the Municipal Employment Relations Act with respect to a provision in an existing collective bargaining agreement between it and District Council 48, AFSCME, AFL-CIO and its affiliated Local 2958 in negotiations on a successor to said existing agreement; and said Union having filed a motion to dismiss said petitions, contending that they were prematurely filed, and further having filed a statement in opposition to said petitions; and the parties having waived hearing in the matter and having stipulated to the facts pertinent to the issues involved, and having filed briefs by February 8, 1982; and the Commission being fully advised in the premises, makes and issues the following

FINDINGS OF FACT

1. That the City of Glendale, hereinafter referred to as the City, is a municipal employer, having its principal offices at 5909 North Milwaukee River Parkway, Glendale, Wisconsin 53209; and that among its municipal functions the City maintains and operates a Fire Department.

2. That District Council 48, American Federation of State, County and Municipal Employees, AFL-CIO and its affiliated Local 2958, hereinafter referred to as the Union, is a labor organization and has its offices at 3427 West St. Paul Avenue, Milwaukee, Wisconsin 53208.

3. That at all times material herein the Union has been, and is, the certified exclusive collective bargaining representative of non-supervisory firefighter personnel employed by the City in its Fire Department; that in said relationship the Union and the City were parties to a collective bargaining agreement covering the wages, hours and conditions of employment of said non-supervisory firefighter personnel, which agreement, by its terms, was effective for the year 1981, and that said agreement contained among its provisions the following material herein.

ARTICLE I

RECOGNITION

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SECTION 1.05 - Management Rights

Except as limited herein, the City reserves all right to manage its own affairs. Such rights include but are not limited to:

(1) Determining the services and level of services to be offered by the Fire Department.

(2) Establishing, continuing, abolishing or altering policies, practices and procedures for the operation of the Fire Department.

(3) Determining the number, type and rank of firefighters required, and to increase or decrease the number of firefighters according to the rules, decision and findings of the W.E.R.C. and the courts of the State of Wisconsin.

(4) Assigning work, determining if overtime work is to be required, the amount of it and the firefighters who are to perform it, and the right to contract with others to provide services.

ARTICLE II

AGREEMENT

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SECTION 2.03 - Duration

The terms of this agreement shall become effective on the first day of January, 1981 and any actions taken by the City subsequent to January 1, 1981, in order to perform the provisions thereof on its part to be performed shall be made retroactive to January 1, 1981 and this agreement shall terminate at the close of business through the 31st day of December, 1981. In the event agreement is not reached for renewal of the contract by that date, the existing terms and conditions shall continue to apply until settlement is reached in negotiations. Conferences and negotiations shall be carried on between the City and the Union during the last year of the contract as follows:

Step 1: The Union and the City shall exchange proposals in writing by August 1.

Step 2: Both parties shall thereafter meet to review the proposals at an open meeting on or before August 31, 1981.

The foregoing timetable is subject to change by mutual agreement of the parties.

. . .

SECTION 17.10 - Existing Practices

The parties agree that all wages, hours and conditions of employment in effect as of the date of this Agreement and not herein changed shall remain in effect unless changed by mutual agreement in writing.

4. That on July 27, 1981 and prior to the commencement of negotiations between the parties on the terms and provisions to be included in their 1982 collective bargaining agreement relating to the non-supervisory firefighter personnel, the City filed the petition initiating the instant proceeding and therein requested that the Wisconsin Employment Relations Commission issue a declaratory ruling to determine in effect whether the provision identified as being set forth in Section 17.10 of the 1981 collective bargaining agreement related to a mandatory subject of collective bargaining within the meaning of the Municipal Employment Relations Act; that on the following day the Commission directed a letter to the City indicating that its petition was not in conformity with the Wisconsin Administrative Code, in that it "fails to include the specific language of the current contract" objected to, as well as "a clear and concise statement of the facts relied upon" in support of the City's position; and that on August 19, 1981 the City filed an amended petition remedying the defects in its original petition.

5. That the Union, on September 4, 1981, after it received a copy of the amended petition, filed a motion urging the Commission to dismiss the instant proceeding on the contention that it was prematurely filed, in that at the time there existed no "dispute" between the parties, which, pursuant to Section 111.70(4)(b) of MERA and ERB Chapter 18, Wisconsin Administrative Code, is a condition precedent to the processing of a petition for declaratory ruling to determine whether either party has the duty to bargain on any subject; that prior to any Commission action on said motion, the Union, on September 8, 1981, filed a statement in opposition to the amended petition filed by the City, wherein the Union asserted that the contractual provision involved related to a mandatory subject of bargaining, inasmuch as it related to wages, hours and conditions of employment, and that, therefore, the City had the duty to bargain on said provision; that hearing in the matter was scheduled for November 10, 1981, but that said hearing was cancelled and the parties stipulated to the material facts and submitted briefs in support of their respective positions.

6. That the City filed its petition and amended petition for the purpose of determining whether it has a mandatory duty to collectively bargain with the Union over the language contained in Section 17.10 in the 1981 agreement during negotiations for a 1982 agreement between the parties.

7. That Section 17.10, as written and contained in the 1981 collective bargaining agreement existing between the City and the Union, may cover hours and conditions of employment not set forth in the collective bargaining agreement, which primarily relate to the formulation and management of public policy applicable to the residents of the City, rather than primarily relating to hours and conditions of employment.

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

CONCLUSIONS OF LAW

1. That as, in initiating the instant declaratory ruling proceeding, the City of Glendale filed its perfected amended petition on September 8, 1981, a date following the date set forth in the collective bargaining agreement, existing between the City of Glendale and District Council 48, AFSCME, AFL-CIO and its affiliated Local 2958, for the exchange of written proposals with respect to negotiations on a successor collective bargaining agreement, such amended petition is deemed to have been timely filed within the meaning of Section 111.70(4)(b) of the Municipal Employment Relations Act, as well as within the meaning of ERB 18.02(3)(d), Wisconsin Administrative Code.

2. That, inasmuch as the language contained in Section 17.10 of the 1981 collective bargaining agreement in existence between the City of Glendale and District Council 48, AFSCME, AFL-CIO and its affiliated Local 2958, relating to wages, hours and conditions of employment of non-supervisory firefighter personnel in the employ of the City of Glendale, can be interpreted as applying to hours and conditions of employment not set forth in the collective bargaining agreement which primarily relate to the formulation and management of public policy, rather than primarily relating to hours and conditions of employment of said non-supervisory firefighter personnel, said provision, as presently worded, in part, related to a non-mandatory subject of bargaining within the meaning of Sections 111.70(1)(d), 111.70(2), and 111.70(3)(a)4 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/

1. That the City of Glendale has no duty to collectively bargain with District Council 48, AFSCME, AFL-CIO and its affiliated Local 2958 with respect to Section 17.10, as set forth in the 1981 collective bargaining agreement, in negotiations on a successor agreement between the parties.

Given under our hands and seal at the City of Madison, Wisconsin this 30th day of June, 1982.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Gary L. Covelli, Chairman

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Morris Slavney, Commissioner

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Herman Torosian, Commissioner

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

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

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

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

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

Prior to the commencement of negotiations between the City and the Union on the provisions to be incorporated in their 1982 collective bargaining agreement, the City filed a petition, and a perfected amended petition, requesting the Commission to issue a declaratory ruling as to whether the City had the mandatory duty to collectively bargain with the Union with respect to the City's desire to eliminate an "Existing Practices" provision from the 1982 agreement, which provision had been included in their 1981 agreement. The Union would have the Commission dismiss the proceeding on the claim that there existed no "dispute" between the parties with respect to the matter, since negotiations had not yet commenced on the 1982 agreement, and that, in any event, the provision in issue relates to a mandatory subject of bargaining. The parties waived the conduct of a hearing in the matter, and in lieu thereof filed a stipulation of the material facts, as well as briefs in support of their respective positions.

Positions of the Parties

The City contends that the provision in issue is so sweeping and broad that it may, and indeed has, prevented it from exercising its management prerogatives granted under Chapter 62, Wis. Stats. It notes that should it decide to lay off employes represented by the Union, or reduce the hours of dispatchers, under said provision, it is obligated to bargain such decisions. Absent such provision, and pursuant to the decision issued by the Supreme Court in City of Brookfield v. WERC, 2/ the City would have no enforceable duty to bargain its decision to lay off employes. The City directs the Commission's attention to Unified School District No. 1 of Racine County v. WERC, 3/ wherein the Supreme Court stated as follows:

> The question is whether a particular decision is primarily related to the wages, hours and conditions of employment of the employes, or whether it is primarily related to the formulation or management of public policy. Where the governmental or policy dimensions of a decision predominate, the matter is properly reserved to decision by the representatives of the people.

The City cites the Commission's decision issued in Rusk County 4/ in support of its argument wherein the Commission concluded that a portion of a "Maintenance of Standards" provision related to non-mandatory subjects of bargaining.

In response to the Union's claim that its petition herein was prematurely filed, the City asserts that negotiations had commenced, and that in any event the "evaporation" of the provision in issue was intended to occur and apply only to the successor 1982 agreement and not to the existing 1981 agreement.

In support of its motion to dismiss, the Union argues that negotiations on the successor agreement had not commenced and that therefore there existed no "dispute" between the parties as required in Section 111.70(4)(b) of MERA, and the pertinent rules of the Commission. In addition, since there is no dispute, negotiations on the successor agreement had not been disrupted. Under such circumstances, the Union contends that the ruling requested herein should have been initiated pursuant to Section 227.06, Wis. Stats.

With regard to the merits, the Union argues that the provision in issue is patterned after the wording expressed in MERA's definition of the term "collective bargaining", as set forth in Section 111.70(1)(d), and, further that the Rusk County case determination is not in point, since the provision involved herein attempts to maintain matters which are mandatory subjects of bargaining at the level of existing practices under the 1981 agreement.

2/ 87 Wis. 2d 819 (1979).

3/ 81 Wis. 2d 89 (1977).

4/ Decision No. ~~10573~~ 18593 (4/81).

Discussion

While the initial petition herein was filed some five days prior to the date set forth in the collective bargaining agreement for the exchange of initial proposals, the perfected amended petition was filed after the latter date, and by the time briefs were received herein it is apparent that the parties had commenced their negotiations on the successor agreement, although said status is not so reflected in the stipulated facts. Had the Commission dismissed the proceeding upon receipt of the Union's motion, the City could have timely filed a new petition upon receipt of the Commission's order of dismissal. Such dismissal, under the circumstances herein, would have elevated form over substance, and would have further delayed the collective bargaining process.

The issue as to whether a "maintenance of standards" provision relates to a mandatory or permissive subject of bargaining was involved in two decisions issued by the Commission. In City of Waukesha 5/ the following provision was in issue:

> The City will not unilaterally change any benefit or condition of employment which is mandatorily bargainable and heretofore enjoyed by a majority of unit employes . . . (Emphasis added)

In Rusk County, supra, the Commission was confronted with the following provision:

> The Employer agrees that all conditions of employment in his individual operation, relating to wages, hours of work, overtime differentials and general working condition, shall be maintained at not less than the highest standards in effect at the time of the signing of this agreement.

The provision in City of Waukesha was found to relate to a mandatory subject of bargaining, while in Rusk County we determined that the provision, as written, could be interpreted as relating to non-mandatory subjects of bargaining.

The language in the provision involved herein makes no distinction between those hours and conditions of employment which primarily relate to management policy (which are non-mandatory subjects of bargaining) and those which primarily relate to hours and conditions of employment (mandatory subjects of bargaining). While not couched in the terms in issue in the Rusk County case, the language in the provision involved herein is also open ended and susceptible to an interpretation that it applies to both permissive and mandatory subjects of bargaining. The mere fact that the term "wages, hours and conditions of employment" is set forth in the provision does not in itself convert the provision into a mandatory subject of bargaining. We have therefore concluded that the City has no duty to bargain collectively with the Union on the provision involved during their negotiations for a successor to the 1981 agreement.

Dated at Madison, Wisconsin this 30th day of June, 1982.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Gary L. Covelli, Chairman

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Morris Slavney, Commissioner

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Herman Torosian, Commissioner

5/ Decision No. 17830 (5/80).