STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

CITY OF BROOKFIELD EMPLOYEES UNION LOCAL 20, AFSCME, AFL-CIO,	:	
Complainant,	:	Case XLVI No. 29977 MP-1349 Decision No. 19822-B
vs.	:	
CITY OF BROOKFIELD,	:	
Respondent.	:	

Appearances:

Mr. Richard Abelson, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 2216 Allen Lane, Waukesha, Wisconsin 53186, appearing on behalf of the Complainant.

Mr. Tom E. Hayes, Godfrey, Trump & Hayes, Attorneys at Law, 250 East Wisconsin Avenue, Suite 1200, Milwaukee, Wisconsin 53202, appearing on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

City of Brookfield Employees Union Local 20, AFSCME, AFL-CIO, having filed a complaint on June 25, 1982, with the Wisconsin Employment Relations Commission alleging that the City of Brookfield has committed an unfair labor practice within the meaning of Sec. 111.70(3)(a)4 of the Municipal Employment Relations Act; and the Commission having appointed Sherwood Malamud, a member of its staff, to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and Order in the matter; and hearing on said complaint having been held at Brookfield, Wisconsin on September 8, 1982; and the parties having filed briefs by July 22, 1983; and because of the unavailability of Examiner Malamud the Commission having appointed on July 29, 1983, a new Examiner, Carol L. Rubin, to make and issue Findings of Fact, Conclusions of Law and Order; and the Examiner having considered the evidence and the arguments of the parties, and being fully advised in the premises, makes and issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. That City of Brookfield Employees Union Local 20, AFSCME, AFL-CIO, hereinafter referred to as the Union, is a labor organization which functions as the exclusive bargaining representative of the following bargaining unit: the City of Brookfield Department of Public Works including the regular full-time and regular part-time employes in the Highway Department, the Park and Recreation Department, the Sewer Utility, the Water Utility and the custodial-maintenance employes in the City Hall; and that the principal representative for the Union is Mr. Richard W. Abelson, whose offices are at 2216 Allen Lane, Waukesha, Wisconsin 53186.

2. That the Respondent City of Brookfield, hereinafter referred to as the City, is a municipal employer with offices at 2000 North Calhoun Road, Brookfield, Wisconsin 53005, and that Mayor William Mitchell acted as a representative of the City at all times material herein.

3. That in negotiating a successor collective bargaining agreement for the calendar years 1980-81, the Union and City were unable to voluntarily agree to a contract and consequently utilized the statutory mediation-arbitration process provided in Sec. 111.70(4)(cm) of the Municipal Employment Relations Act, hereinafter MERA, including the selection of a mediator-arbitrator, Zel S. Rice II; that on February 25, 1981 a mediation session was held with Mr. Rice and the

parties but no agreement was reached; that at the conclusion of the mediation session the parties agreed that the Arbitrator would issue an award on those issues that were still in dispute without conducting a further hearing; that pursuant to that stipulation, Arbitrator Rice, on March 4, 1981 issued an arbitration award 1/ covering wages, starting time and compensatory time, which contained the following provision entitled "Starting Time":

> A side letter between the parties will be executed wherein they agree that between June 1, 1981 and September 1, 1981 they will undertake, on a trial basis, a starting time of 8:00 a.m. for employes of the park and recreation department. This agreement will terminate on September 1, 1981;

that in response to the Arbitrator's award, the following letter was appended to the 1980-81 collective bargaining agreement between the City and the Union:

> Dear Mr. Abelson:
>
> As part of his decision in the recent arbitration relating to a collective bargaining agreement between the City of Brookfield and Local 20, AFSCME, AFL-CIO, Mediator/Arbitrator, Zel Rice decided that a trial be undertaken between June 1st and September 1, 1981, of a later starting time (8:00 a.m. instead of 7:00 a.m.) for employees of the Park and Recreation Department. He directed that this determination be evidenced outside of the collective bargaining agreement itself.
>
> This letter is intended to comply with that direction of Mr. Rice. If it correctly reflects your understanding of this part of the discussion of Mr. Rice, please indicate your concurrence by signing and returning one of the copies of this letter.
>
> Very truly yours,
> CITY OF BROOKFIELD,
>
> William A. Mitchell, Jr.,
> Mayor

that the body of Article VIII of the 1980-81 collective bargaining agreement, entitled "WORK DAY AND WORK WEEK" was not itself altered or amended, and contained the following provision:

> 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.;

that Article XXXIII of the 1980-81 collective bargaining agreement, labeled "DURATION", provides, in part:

> 33.01 This Agreement shall become effective January 1, 1980, and shall remain in effect for a period of two (2) years through December 31, 1981.;

that during the summer months of 1981, the employes in the Park and Recreation Department did in fact start their work day at 8:00 a.m. rather than 7:00 a.m.; and that after September 1, 1981, said employes reverted back to their usual 7:00 a.m. to 3:30 p.m. schedule.

4. That the side agreement establishing a trial period of an 8:00 a.m. starting time during the summer months of 1981 was null and void as of September 1, 1981; and that the status quo upon expiration of the 1980-81 collective bargaining agreement included a 7:00 a.m. starting time year-round for all Park and Recreation Department employes.

1/ Exhibit Number 1.

5. That in approximately September of 1981, the City and the Union commenced negotiations for a successor agreement to the 1980-81 contract; that on November 25, 1981, the Union filed a petition to initiate mediation/arbitration pursuant to Sec. 111.70(4)(cm), Stats.; that the 1980-81 contract expired on December 31, 1981, prior to the parties reaching agreement on a successor contract; that on May 6, 1982, following mediation and investigation by a member of its staff, the Wisconsin Employment Relations Commission issued its Findings of Fact, Conclusions of Law, Certification of Results of Investigation and Order Requiring Mediation-Arbitration 2/; that said decision certified that the City and the Union were at impasse; that the City and the Union subsequently followed the statutory process in selecting an arbitrator and scheduling a date for hearing; that said Order by the Commission included the final offers of both the City and the Union and that the City's final offer included a provision entitled "Starting Time," which stated:

> Starting Time - for Parks and Rec. Dept.-
> 8:00 AM from June 1st through August 31st.

and that the Union's final offer contained no new proposal regarding starting times.

6. That on June 1, 1982, without negotiation or consultation with the Union, the City unilaterally altered the summer hours of employes of the Park and Recreation Department by requiring that they report to work at 8:00 a.m. rather than 7:00 a.m.

7. That on June 25, 1982, pursuant to the parties' agreement to proceed via a prohibited practice complaint rather than through grievance arbitration, the Union filed the instant complaint alleging that the City had committed an unfair labor practice within the meaning of Sec. 111.70(3)(a)4.

8. That on August 8, 1982, an interest arbitration hearing was conducted by Arbitrator-Mediator Zel Rice pursuant to the provisions of Sec. 111.70(4)(cm); that on September 30, 1982, Arbitrator Rice issued his award which ordered that the City's final offer be incorporated into the parties' 1982-83 collective bargaining agreement.

9. That Article XII, "Overtime and Holiday Pay," of the 1980-81 collective bargaining agreement between the City and the Union provides, in part:

> 12.01 time and one-half (1-1/2) shall be paid for all hours worked outside of the employees regular shift of hours, and for time worked on Saturdays and Sundays, except as provided for in 12.07.

Based upon the above and foregoing Findings of Fact, the Examiner makes and issues the following

CONCLUSIONS OF LAW

1. That the status quo which existed upon expiration of the 1980-81 collective bargaining agreement between the Union and the City included, inter alia, a 7:00 a.m. starting time year-round for all Park and Recreation Department employes.

2. That the City, by unilaterally implementing its proposal of an 8:00 a.m. summer starting time for its Park and Recreation Department employes prior to taking part in all hearings and mediation/arbitration sessions required by Sec. 111.70(4)(cm), has committed a prohibited practice within the meaning of Sec. 111.70(3)(a)4 of the Municipal Employment Relations Act.

Based upon the above and foregoing Findings of Fact and Conclusions of Law, the Examiner makes and issues the following

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2/ Case XXXVI, No. 28943, MED/ARB-1458, Decision No. 19573.

ORDER

IT IS ORDERED that the City of Brookfield, its agents, officers and officials, shall immediately:

1. Cease and desist from unilaterally implementing all or part of its final offer at least prior to participating in the hearings and mediation/arbitration sessions required by Sec. 111.70(4)(cm), Wis. Stats.

2. Take the following affirmative action which will effectuate the policies and purposes of the Municipal Employment Relations Act:

   (a) Compensate all Park and Recreation Department employes who were obligated to begin work at 8:00 a.m. rather than 7:00 a.m. during the summer of 1981 by paying them time and one-half for those hours worked outside of their normal work schedule of 7:00 a.m. to 3:30 p.m.

   (b) Notify the employes by posting in conspicuous places on its premises, where notices to all its employes are usually posted a copy of the notice attached hereto and marked "Appendix A". Such copy shall be signed by the Mayor of the City and shall be posted immediately upon receipt of a copy of this Order, and shall remain posted for a period of thirty (30) days thereafter. Reasonable steps shall be taken to insure that said notice is not altered, defaced or covered by other material.

   (c) Notify the Commission within twenty (20) days of the date of this decision as to the steps taken to comply herewith. 3/

Dated at Madison, Wisconsin this 6th day of February, 1984.

By Carol L. Rubin
Carol L. Rubin, Examiner

3/ Any party may file a petition for review with the Commission by following the procedures set forth in Sec. 111.07(5), Stats.

Section 111.07(5), Stats.

(5) The commission may authorize a commissioner or examiner to make findings and orders. Any party in interest who is dissatisfied with the findings or order of a commissioner or examiner may file a written petition with the commission as a body to review the findings or order. If no petition is filed within 20 days from the date that a copy of the findings or order of the commissioner or examiner was mailed to the last known address of the parties in interest, such findings or order shall be considered the findings or order of the commission as a body unless set aside, reversed or modified by such commissioner or examiner within such time. If the findings or order are set aside by the commissioner or examiner the status shall be the same as prior to the findings or order set aside. If the findings or order are reversed or modified by the commissioner or examiner the time for filing petition with the commission shall run from the time that notice of such reversal or modification is mailed to the last known address of the parties in interest. Within 45 days after the filing of such petition with the commission, the commission shall either affirm, reverse, set aside or modify such findings or order, in whole or in part, or direct the taking of additional testimony. Such action shall be based on a review of the evidence submitted. If the commission is satisfied that a party in interest has been prejudiced because of exceptional delay in the receipt of a copy of any findings or order it may extend the time another 20 days for filing a petition with the commission.

APPENDIX A

NOTICE TO ALL EMPLOYES

Pursuant to an Order of the Wisconsin Employment Relations Commission, and in order to effectuate the policies of the Municipal Employment Relations Act, we hereby notify our employes that:

> We will immediately cease and desist from unilaterally implementing all or part of our final offer in contract negotiations prior to participating in the hearings and mediation/arbitration sessions required by Sec. 111.70(4)(cm), Wis. Stats.

Dated this _____ day of _____, 1984.

By _____
On behalf of the City of Brookfield

THIS NOTICE MUST REMAIN POSTED FOR THIRTY (30) DAYS FROM THE DATE HEREOF AND MUST NOT BE ALTERED, DEFACED OR COVERED BY ANY OTHER MATERIAL.

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

POSITIONS OF THE PARTIES:

In support of its complaint, the Union makes two arguments. First, it contends that the status quo which the City was obligated to maintain included the schedule contained in Sec. 8.06 of the body of the 1980-81 collective bargaining agreement (i.e., 7:00 a.m. starting time), and not the starting time indicated in the side letter (i.e., 8:00 a.m.). The Union argues that that portion of the Arbitrator's 1980-81 award ordering the parties to execute a side letter wherein the parties agree to amend the starting time is limited by its own terms. The Union points out that the Arbitrator's award refers to the change in hours as a trial, and that the award specifically states that the agreement will terminate on September 1, 1981; the side letter itself also indicates that the agreement is an experiment for the summer of 1981 only. Relying on a prior Commission decision, 4/ the Union argues that the body of the collective bargaining agreement is the only specific statement of the status quo.

Secondly, the Union contends that in the hiatus period between an expired collective bargaining agreement and an Arbitrator's selection of one party's final offer which will determine the terms of the successor collective bargaining agreement, the status quo must be preserved. In other words, the Union asserts that the Municipal Employment Relations Act, Sec. 111.70, Wis. Stats. requires that the existing status quo be preserved during the entire pendency of the statutory mediation/arbitration process and that the City's unilateral implementation of a portion of its final offer constitutes a refusal to bargain within the meaning of Sec. 111.70(3)(a)4. The Union cites no cases in support of this portion of its argument.

As relief, the Union requests that the City be ordered to cease and desist from its unilateral alteration of the hours of work and that the City be ordered to compensate those employes whose hours were unilaterally altered by paying them the overtime rate of pay for all hours worked outside of the schedule of hours contained in Article VIII of the 1980-81 collective bargaining agreement, in conformity with the overtime provision found in Article XII of the 1980-81 agreement.

The City denies that its actions constitute a refusal to bargain. First, the City contends that it did, in fact, maintain the status quo because the status quo indicated an 8:00 a.m. starting time during the summer months. Citing general contract law, 5/ the City argues that the agreement between the parties is determined by all of the relevant documents and one document is not to be given greater weight than the other, unless the documents themselves so provide. Therefore, at the time of the expiration of the 1980-81 collective bargaining agreement, the status quo included an 8:00 a.m. summer starting time for Park & Recreation employes, even though that practice had only been in existence for one year and resulted from an Arbitrator's award. The City argues that not to have maintained the 8:00 a.m. starting time would have left it subject to an allegation that it was not abiding by an Arbitrator's decision.

Alternatively, the City argues that case law has established that an employer may unilaterally implement up to the level of its final offer once the parties are at impasse. 6/ The City contends that good faith bargaining requires maintenance of the status quo during an organization phase, and before and during active collective bargaining, but not post-impasse. The City points out that in this

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4/ City of Sheboygan, 17823-A.

5/ Vol. 4, Williamson Contracts, 628, page 913.

6/ The City relies on Racine Unified School District, 3696-A, B and C (4/78); Milwaukee Board of School Directors, 15829 (3/80); Winter Joint School District, 14982-B (3/77).

case, the Commission itself had certified impasse, and that there has been no allegation of bad faith bargaining, anti-union bias or interference with the exercise of employe rights. The City distinguishes the Sheboygan decision relied upon by the Union as involving changes in the status quo during negotiations rather than after impasse.

The City also notes that its final offer for 1982-83 was ultimately selected by the Arbitrator, with the terms retroactive to January 1, 1982. Thus, its unilateral actions ultimately coincided with the Arbitration award.

DISCUSSION:

I. STATUS QUO

The Commission has previously established that an employer must, pending discharge of its duty to bargain, maintain the status quo on terms of the expired agreement which govern mandatory subjects of bargaining. 7/ Although the obligation to maintain the status quo is statutory rather than contractual, the determination of what constitutes the status quo is generally based upon the terms and conditions of employment contained in the expired collective bargaining agreement.

The City's first argument is that it has not unilaterally implemented a new proposal but rather has simply maintained the status quo as it is reflected in Arbitrator Rice's award of March 4, 1981, and in the side letter executed by the parties and appended to the 1980-81 agreement. According to the City, it was allowed and even obliged to continue to require that, during the summer months, Park and Recreation employes report to work at 8:00 a.m. rather than 7:00 a.m. Thus, whether the City breached its duty to bargain with the Union depends initially upon a determination of what the status quo was.

In this instance, two different provisions exist which arguably define the status quo: 1) the side letter appended to the contract, and 2) Article VIII, entitled "Work Day and Work Week," which establishes a single consistent shift of 7:00 a.m. to 3:30 p.m. for Park and Recreation employes. The fact that Article VIII remained unchanged in the body of the contract suggests that the side letter was limited in its application. This is confirmed in considering the actual language of both the Arbitrator's award and the side letter itself. The award not only states that the change in hours is on a trial basis, but specifically directs that the side agreement will terminate on September 1, 1981. The side letter actually executed reflects these overall terms and states that it is intended to comply with the Arbitrator's direction.

It is the Examiner's conclusion that in this fact situation the side letter is null and void by its own terms and does not define the status quo as it existed at the end of 1981. The Examiner agrees with the City that the mere fact that the issue of summer hours is addressed in a separate side document is not conclusive. However, the fact that the Arbitrator expressly ordered the side letter agreement to terminate on September 1, 1981, while allowing Article VIII to stand unaltered in the body of the contract indicates that this was a temporary trial period which did not extend for the full duration of the contract, 8/ and was not a part of the status quo to be maintained upon expiration of the contract. 9/

For the above reasons, the Examiner concludes that the City did in fact alter the status quo by ordering its Park and Recreation employes to report to work at 8:00 a.m. during the summer of 1982.

7/ Greenfield Education Association vs. School Board, School District No. 6, City of Greenfield, 14026-B (11/77).

8/ Because the Arbitrator's award was not issued until March of 1981, the later summer hours also were not in effect during the first year of the 1980-81 agreement.

9/ This situation is arguably distinguishable from one where the specific date on which a contractual provision or a side agreement expires is coincidental with the expiration of the entire collective bargaining agreement.

II. UNILATERAL IMPLEMENTATION

Hence, we reach the second issue: Was it a prohibited practice for the City to implement a portion of its final offer by unilaterally changing the summer work hours of its Park and Recreation employes in June of 1982?

Initially, the Examiner notes that many factors which have been interwoven with the issue of unilateral implementation in past decisions, under both MERA, WEPA and federal law, are not in issue here. Here there is no dispute that the matter of regularly scheduled starting times is a mandatory subject of bargaining. 10/ There is also no factual dispute as to the existence of "impasse": 11/ a petition for mediation/arbitration was filed which eventually resulted in the Commission concluding in May of 1982 that impasse, within the meaning of Sec. 111.70(4)(cm) of MERA, existed between the parties, and in the Commission ordering that the parties proceed to mediation/arbitration as required by Sec. 111.70(4)(cm)6 of MERA. Third, there has been no allegation of bad faith negotiations which, if proven, would negate the possibility of legitimate impasse. There is also no allegation that the change in hours actually implemented by the employer was not consistent with its final offer.

There is, however, one fact which neither party addresses in its brief and which does cast some doubt about the legality of the City's implementation apart from the broader legal issue. The Union alleged in its complaint, and the City admitted at hearing, without any further comment, that the City altered the summer hours "without negotiation or consultation with the Union." In the private sector this failure to notify of intent to implement before actual implementation might be fatal to an employer's right to implement since it negates one last opportunity for bargaining with the Union. 12/ In this case, if the Examiner had concluded that the actual implementation was permissable, or if the City had argued and proven that it implemented the change in hours because of necessity, then the lack of notification prior to implementation would itself constitute a violation of the duty to bargain. However, because of the ultimate conclusion that the implementation was itself prohibited, the Examiner has not found the lack of notice prior to implementation to be an independent violation of Sec. 111.70(3)(a)4, MERA.

In its brief the City relies upon several previous decisions by the Commission in contending that its implementation after impasse of a provision of its final offer was lawful. 13/ The Examiner notes, however, that each of the cited cases involved events which occurred in a period prior to the effective date of the detailed statutory impasse procedure embodied in Sec. 111.70(4)(cm), commonly known as the mediation/arbitration law. The same is true of other

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10/ In fact, in 1980, the City filed a petition with the Wisconsin Employment Relations Commission requesting that it issue a declaratory ruling with respect to whether a proposed change in starting times and working hours for this very unit was a mandatory subject of bargaining. The Commission concluded that although the hours during which the City wishes to serve the public through its Park and Recreation Department is a permissive subject of bargaining, a proposal relating to regularly scheduled hours of work constitutes a mandatory subject of bargaining. City of Brookfield, 17947 (7/80).

11/ The factual existence of impasse is often a central issue in both private and public sector cases. See, e.g., NLRB v. Tex-Tan, Inc., 318 F.2d 472, 53 LRRM 2298 (CA5, 1963); Winter Joint School District No. 1, Dec. No. 14432-B (3/77); Green County, Dec. No. 20308-A (8/83).

12/ See, e.g., the reasoning in NLRB v. Katz; infra, Print-Quic, 111 LRRM 1055 (1982), Massey-Ferguson, Inc., 74 LRRM 1566 (1970).

13/ See footnote number 6 for cases cited by the City.

Commission decisions, not cited by either party, which deal with unilateral implementation after contract expiration. 14/ It is also true that several decisions which have been issued since implementation of the statutory mediation/arbitration process have assumed, while deciding other issues, the continued application of the general rule that an employer can implement all or part of its final proposals to a Union once impasse has been reached. 15/

The Commission as a whole, however, has yet to expressly address the issue of whether the legislative creation of the statutory impasse procedure embodied in Sec. 111.70(4)(cm) modifies the general rule that an employer can unilaterally implement once impasse had been reached. More specifically, the Commission has yet to decide whether the creation of the statutory impasse procedure modified the parameters of an employer's "duty to bargain" such that the duty now requires maintenance of the status quo throughout some or all of that statutory impasse procedure. It is evident that significant policy questions are involved in the resolution of this issue.

In evaluating whether the law under MERA, once amended to include the statutory impasse procedure, was intended to follow the general principles established under the federal law, it is useful to review the rationale articulated in the cases decided under federal law. 16/

In the private sector an employer is required as part of its duty to bargain, to maintain the status quo on mandatory subjects of bargaining during contract negotiations. 17/ In NLRB v. Katz, 18/ the U.S. Supreme Court elaborated on this requirement in finding that certain actions by an employer are inherently damaging to the collective bargaining process regardless of whether they were taken in good or bad faith. In finding that a unilateral change in a condition of employment under present negotiation was a per se refusal to bargain, i.e. not dependent upon good or bad faith, the court in Katz stated:

> An employer's unilateral change in conditions of employment under negotiation is similarly a violation of (Sec.) 8(a)(5), for it is a circumvention of the duty to negotiate which frustrates the objectives of (Sec.) 8(a)(5) much as does a flat refusal.

In arriving at this conclusion, the court considered closely the actual impact of unilateral changes on the collective bargaining process, such as the obstruction of bargaining, the undermining of the Union's role as exclusive bargaining representative, the dissipation of useful bargaining chips, the aggravation of issues in contention, the likelihood of vague, defensive posturing, etc. The Court concluded that the NLRB was authorized to order the cessation of behavior which directly obstructs or inhibits the actual process of negotiation.

14/ See, especially, Greenfield School District No. 6, 14026-A, B (10/76, 11/77) in which the Commission's order revising the Examiner's Conclusions of Law and Order indicated that under MERA, at least as it existed prior to the enactment of the mediation/arbitration law, an employer could unilaterally implement after the parties had reached impasse.

15/ See, for example, Green County Deputy Sheriff's Association v. Green County, 20308-A (8/83).

16/ Section 8(a)5 of the National Labor Relations Act makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees . . ." Section 111.70(3)(a)4 of MERA makes it a prohibited practice for a municipal employer" to refuse to bargain collectively with a representative of a majority of its employes . . ."

17/ NLRB v. Crompton-Highland Mills, 337 U.S. 217, 24 LRRM 2088 (1949).

18/ 369 U.S. 736, 50 LRRM 2177 (1962).

Consistent with this decision and its rationale, one major exception to the prohibition on unilateral implementation formulated in private sector cases is where the parties are at impasse. 19/ In situations where the collective bargaining agreement has expired, where the parties have bargained in good faith and are at legitimate actual impasse, and where the employer has given notice of its intent to implement, then case law has generally held that an employer can unilaterally implement a change in wages, hours or working conditions as long as that change is consistent with its last proposal to the Union. 20/ This exception is consistent with the policy rationale discussed above because once the collective bargaining process has been exhausted but no agreement has been reached, unilateral implementation does not undermine the potential for voluntary settlement. In fact, after legitimate impasse, unilateral implementation is part of an arsenal of valid economic weapons and self-help measures available to an employer, just as a union can exert economic pressure through a full or partial strike, work slow-down, etc.

In examining the substance and application of MERA, it is evident that certain significant modifications in the collective bargaining process have occurred. Most obvious is the fact that the balance of self-help measures has been altered in that labor organizations in the public sector are prohibited from striking except in certain, very limited circumstances. 21/ Secondly, MERA has modified the very process of collective bargaining established under the NLRA by establishing a mandatory and detailed mediation-arbitration procedure which the parties must follow once one or both parties petition for mediation/arbitration. It is well established that the parties must participate in the process outlined in Sec. 111.70(4)(cm) unless they mutually establish alternative procedures. The question is whether the enactment of the statutory impasse procedure was intended to, or can best be interpreted to, modify the usual self-help measures available to parties in the private sector, and if so, to what extent. Lacking any express statement of legislative intent, this Examiner concludes that the overall purposes of MERA can best be served by holding that the statutory impasse procedure limits an employer's right to unilaterally implement a portion of its final offer, at least prior to the statutory mediation-arbitration sessions.

The language of Section 111.70(4)(cm) suggests such a conclusion. Subparagraph b. of the mediation/arbitration process outlined in Sec. 111.70(4)(cm)6 provides, inter alia:

> The final offers of the parties, as transmitted by the Commission to the mediator-arbitrator, shall serve as the initial basis for mediation and continued negotiations between the parties with respect to the issues in dispute. During such time, the mediator-arbitrator, and upon his or her request the Commission or its designee, shall endeavor to mediate the dispute and encourage a voluntary settlement by the parties.

19/ The other most common exception is waiver. See Katz, supra, and discussion and case cites in Morris, The Developing Labor Law, 2nd Ed., Vol. 1, pp. 563-566.

20/ NLRB v. Crompton-Highland Mills, supra; Almeida Bus Lines, Inc., 333 F.2d 729 56 LRRM 2548 (CA 1, 1966); Continental Nut Co., 195 NLRB No. 158, 19 LRRM 1575 (1972).

21/ See section 111.70(4)(l) and the exceptions contained therein.

Clearly the Legislature created a process which assumes continued attempts at voluntary resolution, short of a final and binding arbitration award, even after "impasse" has been certified by the Commission. 22/ This legislated process is significantly different from the collective bargaining process found in the private sector. On June 1, 1982, when the City unilaterally implemented its new summer hours for employes of the Park and Recreation Department, the parties had not yet taken part in the mediation-arbitration session provided for above. To allow such unilateral implementation prior to the hearings and mediation-arbitration sessions provided for in the above-cited provisions, absent proof of necessity for such implementation, is likely to frustrate the very objectives of MERA by making voluntary resolution less likely. Therefore, the City's unilateral implementation of a change in scheduled hours constitutes a per se violation of the duty to bargain.

A pragmatic consideration of the actual dynamics of the collective bargaining process reinforces this conclusion. Unilateral implementation is by and large an economic weapon available to an employer and not to a union because it is the employer who controls operations, determines what wage scale is the basis for payroll, determines schedules, etc. A Union is relatively unable to effect unilateral changes. 23/ In addition, in Wisconsin under MERA a Union in the public sector does not have available to it its most formidable self-help measure, a strike. 24/ The denial of the right to strike coupled with an employer's right to unilaterally implement prior to the mediation/arbitration hearing in a situation where the parties have bargained in good faith and are adhering to the statutory impasse procedure in good faith could seriously undermine the balance in the bargaining relationship.

In addition, in a manner distinct from the private sector, the collective bargaining process under MERA contains a potential for delay because of the multiple stages of the mandatory procedure and because of the statutory declaratory ruling procedure. 25/ The statutes provide that if either party petitions the Commission for a declaratory ruling as to whether a particular proposal relates to a mandatory or permisive subject of bargaining, the mediation/arbitration proceedings shall be delayed until the Commission renders a decision in the matter. Such a potential for delay, coupled with a general right to unilaterally implement, could put employers in an advantageous position detrimental to voluntary settlement.

It is also possible that problems of retroactivity and remedy could arise if unilateral implementation is permitted in situations such as this if a subsequent arbitration results in the selection of a union's final offer. In the private sector, where the parties themselves control the exact form of the new or successor bargaining agreement voluntarily agreed to and any side agreements, specific issues regarding retroactivity can be hammered out between the parties.

22/ In fact, a significant percentage of med-arb cases do settle even after "impasse" has been certified but prior to the issuance of an arbitrator's award. The Examiner has taken administrative notice of the "MED-ARB Statistics" prepared and maintained by the Commission, relating to the disposition of all closed med-arb cases. In fiscal year 1980-81, over 13% of cases closed were resolved after certified impasse and prior to an award; in 1981-82, over 11% of cases were resolved in this portion of the med-arb process. Furthermore, an additional percentage of closed cases (4.6% in 1980-81 and 6.4% in 1981-82) were resolved through consent awards, which are typically the result of additional mediation and compromise before the mediator-arbitrator.

23/ One can only speculate as to the arguments likely to be made if the Union proposed a new summer work schedule and attempted to unilaterally implement it prior to participation in the statutory impasse procedure. There are a few cases, however, where a union has been found to violate its duty to bargain by unilateral implementation. See e.g., IATSE Local 702 (Deluxe General, Inc.) 197 NLRB 937 (1972).

24/ While there is provision for a legal strike in Sec. 111.70(4)(cm)5 and 6.c., it requires the agreement of the municipal employer to the strike.

25/ See Sec. 111.70(4)(b) and (cm)(g) of MERA.

Under MERA, however, an independent arbitrator choses one complete final offer or another. Such an arbitrator does not generally have the authority to dictate the specifics of how the successor agreement applies retroactively to the hiatus period. The exact extent of retroactive application would be left to a grievance arbitrator assuming the successor agreement provides for one. 26/ Generally, retroactivity is considered to include economic items and not language items. To allow unilateral implementation as a general practice would be likely to lead to increased grievance arbitration regarding the extent of retroactivity, or to situations in which employes would effectively be denied a benefit even though they may ultimately win the benefit through interest arbitration.

Obviously, it can be argued that maintenance of the status quo might result in an irremediably lost opportunity or lost benefit for the employer. 27/ However, this risk of possible irremedial loss is more equally shared by both parties if unilateral implementation is not allowed. Moreover, given that a defense of necessity could be argued as an exception to a requirement that the status quo be maintained, 28/ an employer already has some limited flexibility with regard to implementation if necessity exists. 29/

The Examiner is aware that an argument could be made that had the Legislature intended to prohibit unilateral implementation during some phase of the statutory mediation/arbitration process provided for in Sec. 111.70(4)(cm), it could have expressly provided so, as it did in Sec. 111.70(4)(jm)13. 30/ Such an argument has several weaknesses. This latter section is applicable only to members of the Milwaukee Police Department. It was not enacted concurrently in 1977 with the impasse procedure provided for in Sec. 111.70(4)(cm), but six years earlier. Thus, it cannot be easily inferred that the statutory silence regarding unilateral implementation in Sec. 111.70(4)(cm) automatically indicates that unilateral implementation was deemed appropriate after impasse. The Legislature also cannot be deemed to have had full knowledge in 1977 when the statutory impasse procedure was discussed and finalized that the private sector principle allowing implementation after impasse would be incorporated into public sector law since the Commission's decision in Greenfield had not yet been issued. 31/ The statutory

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26/ See Greenfield, 14026-B, footnote 3.

27/ For example, in the present case, the City might have argued that if the successor agreement was only of one years duration, and if it had not unilaterally implemented a change in summer hours for 1981, the City's ultimate victory in arbitration in September would have been a hollow one as far as the change in summer hours.

28/ In Board of School Directors of Milwaukee Dec. No. 15829-D,E (1980), it was noted that some form of a proposed student evaluation program had to be implemented because of the imminent beginning of the school session. Similarly, some proposal covering school calendar has to be implemented if a school session is commencing prior to agreement on a successor contract.

29/ In the present case, the Employer neither argued nor proved that its implementation was necessary, although it did argue that the implementation arose out of its preference to have summer work hours more closely correspond to summer time use of parks.

30/ Sec. 111.70(4)(jm)13 provides that:

> 13. Subsequent to the filing of a petition before the commission pursuant to subd. 1 and prior to the execution of an agreement pursuant to subd. 9, neither party may unilaterally alter any term of the wages, hours and working conditions of the members of the police department.

31/ Sections 111.70(4)(cm) was created by L. 1977, c. 178 para. 3, and effective January 1, 1978. The final legislative action on Senate Bill 15 was on September 28, 1977. The Commission's decision revising the Examiner's Conclusion of Law and Order in City of Greenfield, Dec. No. 14026-B, was issued on November 18, 1977.

silence on the issue is ambiguous, but it can most reasonably be interpreted as allowing the Commission the discretion to determine what position on unilateral implementation best effectuates MERA's broader purposes of encouraging voluntary settlement and promoting labor peace. 32/

CONCLUSION

While the Union has argued that unilateral implementation of part or all of a final offer should be prohibited at any stage of the med-arb process prior to the issuance of the arbitrator's award, the facts in this record require a decision only as to whether unilateral implementation is permitted prior to the parties' participation in the full range of hearings and mediation-arbitrations sessions required by statute. The broader legal issues can best be addressed in a case which presents broader facts and which is more thoroughly argued. This Examiner has only concluded that prior to full participation in all of the hearings and mediation-arbitration sessions required by statute, and absent proven necessity, it is a violation of the duty to bargain in good faith for an employer or union to unilaterally implement all or part of its final offer.

Dated at Madison, Wisconsin this 6th day of February, 1984.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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32/ It is evident that resolution of this issue must be grounded in the interpretation and application of Wisconsin law to the public sector collective bargaining situation in Wisconsin. It should be noted, however, that several other states whose statutes provide for impasse resolution procedures have decided that such statutes require modification of the private sector principle, and instead require exhaustion of the statutory impasse procedures prior to implementation. See, for example, Moreno Valley Unified School District, Public Employment Relations Board of the State of California, Case No. LA-CE-398-78/79 (unilateral changes may not, absent a valid defense, be implemented prior to exhaustion of the impasse procedures established by Educational Employment Relations Act); AFSCME, Local No. 2752 v. Wasco County (Oregon 1979) 4 DECBR 2397 (County's implementation of final wage offer after fact finding but prior to exhaustion of complete statutory dispute resolution procedures, i.e. mediation, factfinding and 30-day cooling off period, was inconsistent with its duty to bargain in good faith).