STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

CITY OF BROOKFIELD EMPLOYEES UNION LOCAL 20, AFSCME, AFL-CIO,	:	
Complainant,	:	Case 46 No. 29977 MP-1349 Decision No. 19822-C
vs.	:	
CITY OF BROOKFIELD,	:	
Respondent.	:	

Appearances:

Lawton & Cates, Attorneys at Law, by Mr. Richard V. Graylow, 110 East Main Street, Madison, Wisconsin 53707-3354, appearing on behalf of the Complainant.

Godfrey, Trump & Hayes, Attorneys at Law, by Mr. Tom E. Hayes, Railroad Exchange Building, 229 East Wisconsin Avenue, Milwaukee, Wisconsin 53202, appearing on behalf of the Respondent.

ORDER MODIFYING EXAMINER'S FINDINGS OF FACT AND CONCLUSIONS OF LAW AND EXAMINER'S ORDER

Examiner Carol L. Rubin having, on February 6, 1984, issued Findings of Fact, Conclusions of Law and Order with Accompanying Memorandum in the above-entitled proceeding wherein she concluded that the Respondent had committed a prohibited practice within the meaning of Sec. 111.70(3)(a)4, Stats.; and the Respondent having, on February 23, 1984, timely filed a petition for Commission review of said decision; and the parties having filed briefs in the matter, the last of which was received on April 30, 1984; and the Commission having reviewed the record in the matter including the Examiner's decision, the petition for review and the briefs filed in support of and in opposition thereto, and being satisfied that the Examiner's Findings of Fact, Conclusions of Law and Order should be modified in certain respects.

NOW, THEREFORE, it is

ORDERED 1/

1. That the Commission affirms and adopts as its own the Examiner's Findings of Fact 1-5 and 7-9.

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.

(Continued on Page 2)

2. That the Examiner's Finding of Fact 6 is modified to read as follows:

> 6. That without further negotiation or consultation with the Union, the City on June 1, 1982, 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.

3. That the Commission modifies the Examiner's Conclusions of Law to read as follows:

MODIFIED CONCLUSIONS OF LAW

> 1. That the status quo which existed upon expiration of the 1980-81 collective bargaining agreement between the Union

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1/ (Continued)

> 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.
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> (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.
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> (b) The petition shall state the nature of the petitioner's interest, the facts showing that petitioner is a person aggrieved by the decision, and the grounds specified in s. 227.20 upon which petitioner contends that the decision should be reversed or modified.
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> . . .
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> (c) Copies of the petition shall be served, personally or by certified mail, or, when service is timely admitted in writing, by first class mail, not later than 30 days after the institution of the proceeding, upon all parties who appeared before the agency in the proceeding in which the order sought to be reviewed was made.

Note: For purposes of the above-noted statutory time-limits, the date of Commission service of this decision is the date it is placed in the mail (in this case the date appearing immediately above the signatures); the date of filing of a rehearing petition is the date of actual receipt by the Commission; and the service date of a judicial review petition is the date of actual receipt by the Court and placement in the mail to the Commission.

and the City included a 7:00 a.m. starting time year-round for all AFSCME bargaining unit Park and Recreation Department employes.

2. That the City, by unilaterally implementing an 8:00 a.m. summer starting time for its Park and Recreation Department employes prior to its receipt of the Sec. 111.70(4)(cm), Stats., mediator-arbitrator's award referred to in Finding of Fact 8, committed a prohibited practice within the meaning of Sec. 111.70(3)(a)4 of the Municipal Employment Relations Act.

MODIFIED ORDER

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

1. Cease and desist from unilaterally implementing changes in mandatory subjects of bargaining in violation of its duty to bargain as provided in the Municipal Employment Relations Act.

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

   (a) To the extent that it has not already done so, compensate all AFSCME bargaining unit 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 1982 by paying them time and one-half plus interest 2/ for those hours worked outside of their normal work schedule of 7:00 a.m. to 3:30 p.m.

   (b) Notify its AFSCME bargaining unit employes by posting in conspicuous places on its premises, where notices to such employes are usually posted a copy of the notice attached hereto and marked "Appendix A". Such copy shall be signed by an authorized representative 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.

Given under our hands and seal at the City of Madison, Wisconsin this 21st day of November, 1984.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Herman Torosian, Chairman

_____
Marshall L. Gratz, Commissioner

_____
Danae Davis Gordon, Commissioner

2/ The applicable interest rate is the Sec. 814.04(4), Stats., rate in effect at the time the complaint was initially filed with the agency. Wilmot Union High School District, Dec. No. 18820-B (WERC, 12/83), citing, Anderson v. LIRC 111 Wis.2d 245, 258-59 (1983) and Madison Teachers Inc v. WERC, 115 Wis.2d 623 (CtApp IV, 10/83). The instant complaint was filed on January 20, 1983, at a time when the Sec. 814.04(4), Stats., rate in effect was "12% per year." Sec. 814.04(4), Wis. Stats. Ann. (1983).

APPENDIX A

NOTICE TO EMPLOYES

Pursuant to an Order of the Wisconsin Employment Relations Commission, and in order to effectuate the policies of the Municipal Employment Relations Act, the City of Brookfield hereby notifies its employes that:

1. The City will not commit unlawful unilateral changes in the normal work hours of Park and Recreation Department employes in the bargaining unit represented by City of Brookfield Employees Union Local 20, AFSCME, AFL-CIO.

2. To the extent that the City has not already done so, the City will compensate all present and former AFSCME bargaining unit 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 1982 by paying them time and one-half plus interest for those hours worked outside their normal work schedule of 7:00 a.m. to 3:30 p.m.

Dated at _____ , Wisconsin this ___ day of _____ , 1984.

By _____
for the City of Brookfield

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

CITY OF BROOKFIELD

MEMORANDUM ACCOMPANYING
ORDER MODIFYING EXAMINER'S FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

BACKGROUND

In its complaint initiating this proceeding, the Union alleged that the City committed prohibited practices within the meaning of Sec. 111.70(3)(a)4 of the Municipal Employment Relations Act by unilaterally implementing part of its final offer to the Union, thereby changing the starting time of bargaining unit employes prior to a mediator-arbitrator's selection of either party's final offer. The City answered orally at the hearing, denying that it engaged in any prohibited practice.

THE EXAMINER'S DECISION

The Examiner found that the parties' 1980-81 collective bargaining agreement, which was the result of a mediator-arbitrator's award, contained an express provision that the starting time for employes in the Park and Recreation Department was 7:00 a.m. The award resulting in the 1980-81 collective bargaining agreement also provided for a side letter agreement whereby the parties agreed, on a trial basis, to an 8:00 a.m. starting time during the period of June 1, 1981 and September 1, 1981, which side letter expired by its terms on September 1, 1981. Pursuant to the side letter, employes started their workday at 8:00 a.m. during the summer months of 1981. Around September 1, 1981, the parties commenced negotiations for a successor agreement to the 1980-81 agreement. On November 25, 1981, the Union filed a petition to initiate mediation-arbitration. The 1980-81 agreement expired by its terms on December 31, 1981. After mediation and investigation by a Commisssion staff member who obtained final offers from the parties, the Commission on May 6, 1982, certified that the parties were at impasse. The City's final offer provided for an 8:00 a.m. starting time for employes in the Park and Recreation Department during the period June 1 through August 31. On June 1, 1982, the City required employes in the Park and Recreation Department to start their work day at 8:00 a.m. The Union filed the instant complaint on June 25, 1982. On August 8, 1982, the mediator-arbitrator conducted a hearing and on September 30, 1982, issued an award selecting the City's final offer.

The Examiner concluded that the status quo at the expiration of the 1980-81 agreement included a 7:00 a.m. starting time year round. The Examiner found that the side letter, which by its express terms expired on September 1, 1981, established a temporary trial period and did not become part of the status quo to be maintained after the 1980-81 collective bargaining agreement expired. The Examiner also concluded that the City's unilateral implementation of part of its final offer violated the duty to bargain in good faith with the Union in violation of Sec. 111.70(3)(a)4, Stats. The Examiner rejected the City's defense that its unilateral implementation was lawful once the parties had reached impasse. The Examiner reasoned that the purposes of the statutory impasse resolution procedures set forth in Sec. 111.70(4)(cm), Stats., would be frustrated if--absent waiver or necessity--unilateral implementations were permitted before the parties' participation "in all the hearings and mediation-arbitration sessions required by Sec. 111.70(4)(cm)." Finding the question one essentially of first impression for the full Commission, the Examiner found support for the above conclusion in the language and purposes of Sec. 111.70(4)(cm), in the rationale underlying the general rule against unilateral changes in mandatory subjects, and in decisions of other public sector jurisdictions. The Examiner also noted the specific Sec. 111.70(4)(jm) prohibition against unilateral changes between petition and successor agreement in Milwaukee Police disputes, but found that (4)(cm) was ambiguous by its silence and that her interpretation was more consistent with the underlying statutory purposes than that proposed by the City.

The Examiner ordered the City to cease and desist from implementing its final offer prior to participating in the hearings and sessions required under Sec. 111.70(4)(cm), Stats., and to pay all employes in accordance with the status quo, i.e., time and one-half for all hours worked outside their 7:00 a.m. to 3:30 p.m. schedule. The Examiner expressly avoided ruling on whether the unilateral change at issue would have been lawful had it been implemented after the statutory mediation-arbitration hearings and sessions but before the issuance of the mediator-arbitrator's award.

THE PETITION FOR REVIEW AND POSITIONS OF THE PARTIES

In its Petition for Review, the City contends that the Examiner erred in finding that the City had changed the starting time of employes "without negotiation or consultation." It contends this finding is contradicted by other findings that starting time was an issue in the 1980-81 contract, as well as negotiations for the 1982-83 contract, and that final offers had been certified which included the 8:00 a.m. starting time. The City concedes that it did not again attempt negotiations with the Union prior to implementation of the starting time contained in its final offer because there was nothing to suggest that any further discussion would be fruitful.

The City also claims that the Examiner's decision with respect to "status quo" is erroneous. It emphasizes that the "status quo" is not always or exclusively based on a continuation of contract terms or contract interpretation. It argues that the Examiner erred by concluding that the side letter had a shorter life than the 1980-81 agreement and by concluding that the 7:00 a.m. starting time became the status quo year-round. It maintains that the practice over the entire preceding year must be considered and that the City simply did in 1982 what it had done in 1981, thereby maintaining the status quo. The City contends that even if an interpretation of the contract is used to determine the status quo, the City's interpretation must not be rejected because it is supported by reason and was made in good faith.

The City also takes the position that the Examiner erred in basing her decision upon the broad questions related to impasse. It argues that a question of first impression involving significant policy decisions should not be decided in this case in light of the record and arguments of the parties. It asserts the main focus of the instant case was preservation of the status quo and not unilateral implementation after impasse.

The City alternatively argues that the remedy ordered by the Examiner is excessive and unjustified because (1) the City made a good faith judgment as to its duty to preserve the status quo (i.e., the City concluded it was only required to continue the 8 a.m. summer starting time in 1982, consistent with the side letter to the 1980-81 collective bargaining agreement) and (2) the mediator-arbitrator selected the City's final offer including the 8 a.m. starting time for summer 1982, such that the Examiner's sanction "deprives the City of this part of the award."

The Union contends that the decision of the Examiner must be affirmed in its entirety. The Union notes that the City, in its oral answer at the hearing, admitted paragraph 9 of the Union's complaint which alleged that the June 1, 1982, change in starting times was unilaterally effected by the City "without negotiation or consultation with the Union". The Union therefore asserts that the Examiner's Finding of Fact 6 was correct. The Union argues that the Examiner's decision on the City's partial implementation of its final offer is in conformity with Moreno Valley Unified School District, Public Employment Relations Board of the State of California, Case No. LA-CE-398-78/79, as cited by the Examiner. The Union claims that lack of animus, bad faith or other unlawful motivation is not a defense to a complaint of unilateral change refusal to bargain. It requests an order affirming the Examiner's decision in all respects.

DISCUSSION

MODIFICATION OF FINDING 6

We agree with the City that the Examiner's language in Finding 6 was arguably inaccurate in light of the record as a whole. Therefore we have added the word "further" so that Finding 6 states that the City implemented the change in question "without further negotiation or consultation" besides that described in the Examiner's findings preceding her Finding 6. In doing so, however, we recognize (as the Union argues) that the wording of the Examiner's finding replicates the language of a complaint allegation that was admitted by the City as a part of its answer stated orally on the record at the outset of the hearing before the Examiner. We have nonetheless found it appropriate to reword the clause in question to remove a possible source of uncertainty as to the factual basis upon which our decision herein rests.

DISPUTE AS TO WHETHER THE CITY CHANGED THE STATUS QUO

A previous declaratory ruling proceeding involving the instant parties established that the question of whether the City's Park and Recreation employes would be regularly scheduled to start work at 7:00 a.m. or 8:00 a.m. is a mandatory subject of bargaining. 3/ Of course, if the City were correct in its assertion that it did not make a change in the status quo with respect to that subject when it implemented an 8:00 a.m. time for the summer of 1982, then it would follow that the Examiner erred in concluding that the City had thereby committed a unilateral change refusal to bargain in violation of Sec. 111.70(3)(a)4.

The City claims that the Examiner erred in finding that the change in starting times constituted a change in the status quo. In particular, the City takes issue with the Examiner's finding that the side letter did not continue to define the status quo after expiration of the 1980-81 agreement. We have reviewed the record and find no basis to reverse or modify the Examiner's conclusion on this issue. The terms of the parties' expired 1980-81 agreement clearly provide for a 7:00 a.m. starting time. The parties' side letter agreement provided for an exception to that provision for a set period, to wit, for a "trial" period ending September 1, 1981. Thus, the 8:00 a.m. "trial" summer hours in 1981 were, by the express terms of the side agreement, to have no effect after the summer of 1981; and the general 7:00 a.m. to 3:30 p.m. hours provision in the 1980-81 agreement became the year-round status quo after September 1, 1981. The Examiner properly so concluded.

We agree with the City that the terms of the expired 1980-81 agreement ought not be viewed in isolation in determining what the status quo was regarding summer hours as of the beginning of the summer of 1982. On the other hand, the terms of that agreement cannot be entirely ignored in determining the status quo, either. In addition to their expired overall agreement, the parties' practices and history of negotiation (including side agreements) on the subject in question can also have a bearing on what the status quo is on a given subject as of a given point in time. The Examiner did not assert the contrary, but rather observed (at p. 1 of her Memorandum) only that 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." (Emphasis added).

When the expired 1980-81 agreement is considered along with the side letter agreement, the history of the negotiation and establishment of those agreements and the history of the parties' administration of those agreements, the Examiner's conclusion remains clearly correct in our view. The fact that an 8:00 a.m. starting time had been in effect during the summer of 1981 was directly attributable to the "trial" arrangement established in the side letter. That trial expressly ended on September 1, 1981, leaving 7:00 a.m.-3:30 p.m. as the normal hours year-round for the employes in question thereafter.

DISPUTE AS TO THE LAWFULNESS OF THE CHANGE

Given the above-noted propriety of the Examiner's conclusion that the City implemented a change in the status quo and the fact that the City nonetheless asserts that it did not violate MERA under all of the circumstances of this case, we have no choice but to reach the question of whether the City's unilateral change was lawful by reason of the status the parties' bargaining had reached when the change was implemented.

For reasons aptly stated by the Examiner and not disputed in the Petition for Review, the record would not support a City defense based on waiver or necessity. Moreover, because a unilateral change is a per se refusal to bargain, the City's assertion that it was acting in good faith is also not a valid defense to the instant complaint. Therefore, in our view, the case turns on whether impasse, however defined, can be a valid defense to a unilateral change in a mandatory subject of bargaining in a dispute subject to compulsory final and binding interest arbitration under Sec. 111.70(4)(cm), Stats.

3/ City of Brookfield, Dec. No. 17947 (WERC, 7/80).

We also agree with the Examiner's analysis and conclusion that this is the first case in which the Commission as a whole has been required to decide "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 has been reached." As the Examiner noted, a right to implement a previously proposed mandatory subject change at the point of a bona fide impasse has been recognized in the private sector and in a number of Commission cases arising in the public sector under MERA; but no previous case has squarely presented that question to the full Commission in the context of a dispute subject to the final and binding Sec. 111.70(4)(cm) procedures established by the Legislature in ch. 178 Laws of 1977. 4/ Indeed, the full Commission has not had occasion to squarely address the question of whether and in what circumstances nonbinding fact finding and/or a reasonable period of post-fact finding bargaining must be exhausted before a right to implement a previous proposal arises under MERA. 5/

Thus, while we share the City's preference that policy matters of first impression be decided with the benefit of as complete a record and as thorough a set of arguments as possible, we find ourselves unable to avoid reaching the question noted above in order to resolve the instant dispute.

For the following reasons, we share the Examiner's conclusion that the compulsory final and binding interest arbitration provisions of Sec. 111.70(4)(cm) make inappropriate an application of the private sector impasse defense principles to disputes subject to mediation-arbitration. Instead, we interpret MERA to mean that where, as here, there is a statutory means for obtaining a final and binding resolution of a contract negotiation dispute, a self-help unilateral change in a mandatory subject, absent waiver or necessity, constitutes a per se refusal to bargain violative of the MERA duty to bargain. 6/ In other words, in negotiations

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4/ See, Examiner's Notes 6, 14 and 15 and the text accompanying the latter two.

5/ While differences in underlying statutory provisions make direct comparisons difficult, it can be noted that for the most part, public sector tribunals in other jurisdictions have limited impasse-based defenses to situations in which available statutory impasse resolution procedures have been exhausted. See, State of Washington, Public Employment Relations Commission Rule 391-45-552 WAC (12-1-83) (by rule agency provides that in disputes involving teachers, employer must exhaust mediation and fact finding prior to unilateral change in status quo where specific statute--1983 Laws, Ch. 41.56.470 RCW--states that in disputes involving uniformed personnel, neither party may make unilateral changes in status quo "during pendency of proceedings before arbitration panel"); Pennsylvania Labor Relations Board v. Millcreek School District, 8 PPER 47 (Pennsylvania L.R.B. 1976); AFSCME Local No. 2752 v. WASCO County, 4 PECBR 2397 (Oregon PECBR, 1979) aff'd 46 Ore. App 859 (1980); School Board of Orange County v. Palowitch, 367 S.2d 730 (Fla. CtApp., 1979); In Re Piscataway Township Board of Education, PERC No. 91 (N.J. PERC, 1975); and Moreno Valley Unified School District v. Public Employment Relations Board, 142 Cal.App.3d 191 (1983). See also, In the Matter of Triborourgh Bridge and Tunnel Authority, 5 PERB 3064 (N.Y. PERB, 1972) prior to legislation specifically prohibiting unilateral changes, N.Y. PERB held that employer was prohibited from unilaterally changing mandatory subject of bargaining contained in expired contract prior to exhaustion of statutory conciliation procedures). But see, Commonwealth of Massachusetts (Unity), MLC Case No. Sup-2497 (1982); Southwest Michigan College, 1979 Michigan ERC Lab OP 908 (citing private sector cases, agencies hold unilateral implementation lawful once parties are deadlocked, i.e., exhaustion of mediation and fact finding is not required).

6/ As noted in the text following Note 10, infra, a possible exception to this general rule might be made in an extreme case of unlawful abusive delay of the statutory dispute resolution process. For a discussion of the waiver defense see, e.g., City of Brookfield, Dec. No. 11406-A, -B, (WERC, 9/73) aff'd, (CirCt Waukesha, 6/74) The Examiner aptly discussed the necessity defense at Note 28 of her decision. The possible availability of such a defense under MERA was noted in Racine Schools, Dec. Nos. 13696-C (Continued on Page 9)

subject to compulsory final and binding interest arbitration under Sec. 111.70(4)(cm), Stats., impasse, however defined, is not a valid defense to a unilateral change in a mandatory subject of bargaining. 7/

In our opinion, the foregoing interpretation of the MERA duty to bargain is consistent with both the language of MERA, including Sec. 111.70(4)(cm), and with the underlying purposes of that legislation.

We are cognizant that, as the Examiner also noted, the separate (conventional) interest arbitration procedure for Milwaukee Police personnel in Sec. 111.70(4)(jm) contains an express provision prohibiting unilateral changes in any mandatory subject of bargaining once either party has filed a petition to initiate the final and binding interest arbitration process. 8/ In our view, however, the silence on that subject in Sec 111.70(4)(cm) neither requires nor warrants the conclusion that the Legislature made any specific judgment as to the availability of an impasse defense in disputes subject to (4)(cm) mediation-arbitration.

The Legislature surely cannot, for example, be deemed by its silence to have intended that disputes subject to mediation-arbitration under Sec. 111.70(4)(cm) be subject to a rule that is just the opposite of that expressly contained in the Milwaukee Police procedure. For that would mean that either party is free at any time after the petition for mediation-arbitration is filed to make any unilateral changes it chooses, whether previously proposed or not, and regardless of the status of the bargaining. Such would obviously be inconsistent with the duty to bargain in good faith and with the underlying purposes of MERA.

It could be argued that the Legislature's silence on the subject represents its intention that the pre-existing case law on the subject continue in effect. As the Examiner noted however, 9/ the Commission case law under MERA prior to the enactment of Sec. 111.70(4)(cm) was not developed to such a point as would clearly define when the duty to bargain was exhausted or when an "impasse" had been reached such as would entitle a party to implement a proposal it had previously offered in bargaining.

We conclude that the Legislature, by its silence in Sec. 111.70(4)(cm) as compared with the Milwaukee Police language concerning unilateral changes, was leaving the question of whether there is an impasse defense available in disputes subject to mediation-arbitration for interpretation by the Commission and the Courts in the subsequent administration and interpretation of the mediation-

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6/ (Continued)

and 13876-B (Fleischli with final authority for WERC, 4/78) at 56. In the private sector, see, e.g., Standard Candy Co., 147 NLRB 1070 (1964) (change justified as good faith response to need to conform with minimum wage provisions of the Fair Labor Standards Act); and AAA Motor Lines, 215 NLRB 793, 88 LRRM 1253 (1974) (change justified by union's dilatory and unlawful bargaining tactics combined with need to change in order to avoid employe losses of certain fringe benefits after contract expiration).

7/ In another decision issued today, we have reached the same conclusion as regards disputes subject to the Sec. 111.77 provisions for compulsory final and binding interest arbitration of certain disputes involving bargaining units of law enforcement and firefighter employes. Green County, Dec. No. 20308-B (WERC, 11/84). That conclusion also draws general support from the majority of decisions in other jurisdictions noted in Note 5, above.

8/ Section 111.70(4)(jm)13, Stats., reads as follows:

> 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.

9/ See Examiner's decision at Note 31 and accompanying text.

arbitration provisions consistent with the underlying purposes of the legislation. We proceed below with an analysis of what interpretation best serves the underlying purposes of the statutory provisions involved.

The Legislature has included in Sec. 111.70(6) of MERA an express DECLARATION OF POLICY as follows:

> The public policy of the state as to labor disputes arising in municipal employment is to encourage voluntary settlement through the procedures of collective bargaining. Accordingly, it is in the public interest that municipal employes so desiring be given an opportunity to bargain collectively with the municipal employer through a labor organization or other representative of the employes' own choice. If such procedures fail, the parties should have available to them a fair, speedy, effective and, above all, peaceful procedure for settlement as provided in this subchapter.

We agree with the Examiner that an application of private sector impasse defense principles to disputes subject to mediation-arbitration would provide an incentive for parties to render nonspeedy and ineffective the statutory processes for peaceful resolution of the disputes subject to mediation-arbitration that the parties are unable to resolve voluntarily through collective bargaining. For example, in the absence of a collective bargaining agreement in force, a party could propose any change in the status quo that is unacceptable to the other side, maneuver to an impasse in the private sector sense, implement the proposed change, and simultaneously prevent the immediate referral of the dispute to a mediator-arbitrator by filing a petition for a declaratory ruling on the mandatory/non-mandatory status of certain of the other party's proposals or otherwise delaying the issuance of a mediation-arbitration award. That is not a scenario consistent with or promotive of peaceful resolution of disputes.

It could be argued that the further into the bargaining and mediation-arbitration process a party must go before it may lawfully implement a previously proposed change in the status quo, the greater the incentives for the party favored by the status quo to (1) avoid or delay reaching that point in the statutory process at which the other party is permitted to implement its proposed change in the status quo; and (2) avoid or delay reaching a voluntary settlement on other, less favorable terms. We note in that regard, however, that the Sec. 111.70(4)(cm) legislative scheme incorporates arrangements designed to reduce that potential for delay (halting it only for timely declaratory ruling petitions but not, e.g., for prohibited practice complaints). 10/ Moreover, in our view, creative retroactivity proposals can be proposed which--if agreed upon or included in the final offer selected by the arbitrator--would eliminate much of the advantage of such delaying tactics. In an extreme case, unlawful abusive delay of the statutory process (not present here) might be sufficient to render lawful a unilateral change previously proposed. We recognize that in many instances where both parties are acting in exemplary good faith the statutory processes continue well beyond expiration of any predecessor agreement and that some changes will be difficult to implement retroactively. Nevertheless, we are persuaded that the underlying purposes of MERA and Sec. 111.70(4)(cm) are better served if the parties focus on achieving solutions to retroactivity problems and the rest of their bargaining objectives through bargaining and the statutory procedures rather than through unilateral action.

Thus, although the mediation-arbitration provisions specifically provide for a formal Commission determination that an impasse exists, we find it more

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10/ Section 111.70(4)(cm)6.e., reads as follows:

> Mediation-arbitration proceedings shall not be interrupted or terminated by reason of any prohibited practice complaint filed by either party at any time.

consistent with the language of Sec. 111.70(4)(cm) 11/ as well as with the underlying purposes of MERA to conclude that there is no available impasse-based defense to a unilateral change in a mandatory subject in disputes that are subject to final and binding Sec. 111.70(4)(cm) interest arbitration. 12/ That conclusion, in our view, will encourage the parties to utilize the fair and peaceful statutory procedure to achieve proposed changes in the status quo regarding mandatory subjects rather than resort to self-help unilateral action to that end. Making changes in the mandatory subject status quo achievable for the most part 13/ only through the procedures provided by law will encourage voluntary agreements and will promote the speed with which such disputes are processed in Sec. 111.70(4)(cm) mediation-arbitration, rather than focusing the attention of the parties on potentially less peaceful self-help methods (e.g., unilateral changes) of pursuing their bargaining objectives. This holding does not, of course, affect the municipal employer's rights to implement changes in permissive subjects of bargaining. 14/

In the instant case, the hours change implemented by the City--while consistent with the City's final offer to the Union and implemented after the Commission had formally issued its determination that an impasse existed in the matter--was nonetheless a unilateral change in a mandatory subject implemented prior to issuance of an award in the pending mediation-arbitration proceeding in a negotiation subject to Sec. 111.70(4)(cm). Accordingly, we have concluded that the City has no impasse-based defense to the Union's complaint of Sec. 111.70(3)(a)4 unilateral change refusal to bargain.

As noted above, we share the Examiner's conclusion that the record permits the City no other valid defense to the per se violation of its duty to bargain noted above. We have therefore affirmed the Examiner's ultimate conclusion that the City has committed a refusal to bargain, though we have modified her Conclusions of Law to conform them more closely to our analysis above. In particular, the Examiner's statutory interpretation and related rationale permitted her to narrow her holding to the period prior to the parties' participation in all of the mediation-arbitration hearings and sessions. Our rationale is predicated on the availability of a compellable final and binding arbitration procedure to resolve the summer hours question. Hence, our holding--as reflected in Modified Conclusion of Law 2--is somewhat broader than the Examiner's.

REMEDY

The City has argued that the make whole remedy fashioned by the Examiner is inappropriate in light of the nature of the conduct involved and the subsequent decision of the mediator-arbitrator adopting the City's final offer including the 8:00 a.m. summer starting time.

We have found that the City committed a prohibited practice by changing the hours of employes prior to the issuance of the mediator-arbitrator's award. In

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11/ As the Examiner noted, Sec. 111.70(4)(cm)6.b. expressly contemplates continued attempts at voluntary resolution, short of a final and binding arbitration award, even after "impasse" has been certified by the Commission.

Section 111.70(4)(cm)6.b. reads, in part, as follows:

> 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.

12/ See Note 7, supra.

13/ See Note 6, supra.

14/ See e.g., City of Madison (Police), Dec. No. 17300-C (WERC, 10/83).

our view, the employes affected by the unlawful unilateral change should be compensated as if the change had not been made in order to remedy the City's interference with their Sec. 111.70(2) rights, with the exclusivity of their representative's status and with the integrity of the bargaining process that the instant violation inherently involves. If monetary relief were not provided, the order would not meaningfully prevent similar violations by the City or others in the future.

The Sec. 111.70(4)(cm) final offer selection process determined which of the two offers was more reasonable as a whole when considered in light of the statutory criteria. The mediator-arbitrator was not responsible for remedying the City's unlawful conduct. That was and is the function of the Commission pursuant to Secs. 111.70(4)(a) and 111.07(4), Stats. While making whole the employes in the instant circumstances gives them a benefit they were unable to achieve through the collective bargaining and mediation-arbitration processes, we find that to be the necessary and appropriate consequence of the City's unlawful conduct. 15/

We have modified the Examiner's Order to include the Commission's customary interest on back pay element, 16/ to correct the Examiner's Order paragraph (2)(a) reference to summer of 1981 (to read summer of 1982), to incorporate the modifications we made in Conclusion of Law 2, to make it clear that double payment of overtime premiums is not being ordered, and to leave to the City the selection of which of its authorized representatives shall sign the notice set forth in the modified Appendix A.

Dated at Madison, Wisconsin this 21st day of November, 1984.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Herman Torosian, Chairman

_____
Marshall L. Gratz, Commissioner

_____
Danae Davis Gordon, Commissioner

15/ Examiner McCrary reached a different conclusion in Turtle Lake Schools, Dec. No. 16030-B (3/79). The Commission's affirmance in that case was by operation of law rather than by decision upon the filing of a petition of review. In any event, we do not find his rationale in that case persuasive. To the extent that it is inconsistent with our holding and rationale above, that aspect of that decision is overruled.

16/ See, Note 2, supra, and cases cited therein.