STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petiton of CITY OF GREENFIELD Requesting a Declaratory Ruling Pursuant to Section 111.70(4)(b), Wis. Stats., Involving a Dispute Between Said Petitioner and TEAMSTERS UNION LOCAL NO. 695	Case LXVIII No. 29287 DR(M)-220 Decision No. 19872

Appearances:

Mulcahy & Wherry, S.C., 815 East Mason St., Suite 1600, Milwaukee, Wisconsin 53202, by Mr. John M. Loomis, filing briefs on behalf of the City.

Goldberg, Previant, Uelmen, Gratz, Miller, & Brueggeman, S.C., 788 North Jefferson St., P.O. Box 92099, Milwaukee, Wisconsin 53202 by Ms. Marianne Goldstein Robbins, filing briefs on behalf of the Union.

FINDINGS OF FACT, CONCLUSION OF LAW AND DECLARATORY RULING

City of Greenfield having, on February 11, 1982, filed a petition with the Wisconsin Employment Relations Commission pursuant to Sec. 111.70(4)(b) Stats., seeking a declaratory ruling as to whether certain proposals submitted to the City by Teamsters Union Local No. 695 as the collective bargaining representative of non-supervisory law enforcement personnel in the employ of the City relate to mandatory subjects of bargaining; and the parties having thereafter waived hearing, and having filed affidavits and written arguments by April 19, 1982; and the Commission having considered the record and the parties' arguments and being fully advised in the premises, makes and issues the following

FINDINGS OF FACT

1. That the City of Greenfield, herein the City, is a municipal employer and has its offices at 7325 West Forest Home Avenue, Greenfield, Wisconsin 53223.

2. That Teamsters Union Local No. 695, herein the Union, is a labor organization which has its offices at 1314 Stoughton Road, Madison, Wisconsin 53703.

3. That the Union is the collective bargaining representative of all employes of the City of Greenfield Police Department who have the power of arrest, but excluding Sergeants, Lieutenants, Captains and the Chief; and that in said relationship the Union and the City were parties to a 1980-1981 collective bargaining agreement, which included the following provisions material herein:

ARTICLE 5 - PROBATIONARY PERIOD AND SENIORITY

A. Definitions: Seniority shall be defined as the following:

1. The continuous length of service in the bargaining unit for layoffs, recall from layoffs, vacation and as a promotional consideration.

2. The continuous length of time an employee has been employed by the City for purposes of accrual of fringe benefits.

. . .

E. Layoff and Recall: In the event the City decides to reduce personnel in the Police Department, the employee with the least seniority in the bargaining unit shall be laid off first and recall shall be in reverse order.

F. Return to Unit: An employee shall be able to return to the bargaining unit without loss of seniority for a period of one (1) year after promotion out of the bargaining unit.

ARTICLE 6 - GRIEVANCE PROCEDURE

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E. Steps in Procedure:

Step 1: The grievant shall orally present his grievance to his immediate supervisor within ten (10) calendar days after he knew or should have known of such grievance or the grievance shall be deemed to have been waived. In the event of a grievance, the employee shall perform his assigned work task and grieve his complaint later. The grievant's immediate supervisor shall, within five (5) calendar days, orally inform the employee of his decision.

Step 2: If the grievance is not settled at Step 1, the grievant, alone or with one (1) Union representative, shall present his grievance in writing to the Captain within ten (10) calendar days after the oral decision of the grievant's immediate supervisor in Step 1. The Captain shall, within ten (10) calendar days, inform the employee of his decision in writing.

Step 3: If the grievance is not settled in Step 2, the grievant alone or with one (1) Union representative, shall present his grievance to the Chief within five (5) calendar days after the date of the decision of the Captain. The Chief shall meet with the employee and his Union representative within seven (7) calendar days. The Chief will inform the grievant in writing of his decision within ten (10) calendar days after meeting with the grievant.

Step 4: If the grievance is not settled in Step 3, any grievance which is not covered by Section 62.13 of the Wisconsin Statues (i.e., suspension, reduction in rank or discharge grievances) but rather relates only to the interpretation of this contract shall be submitted to the Personnel Committee. This appeal shall take place within five (5) calendar days after the date of the written decision of the Chief. The Personnel Committee shall inform the aggrieved employee and the Union in writing of the decision within fifteen (15) calendar days after receipt of the grievance by the Personnel Committee. If the grievance is covered by Section 62.13 it shall be appealed to the Greenfield Fire and Police Commission. The issue of determining whether there was cause for reduction in rank, suspension or the recommendation of dismissal may, at the option of the employee, be subjected to the terms and conditions of the Arbitration Procedure of this Agreement. However, the decision of the Arbitrator shall be advisory only. Such advisory opinion of the Arbitrator shall be delivered to the Police and Fire Commission upon receipt by the City. The Commission shall hold a hearing with respect to the reduction in rank, suspension or recommendation of dismissal after the Arbitrator's report in accordance with Section 62.13 if requested by the employee involved. Employees shall not be disciplined, suspended, demoted or discharged without just cause.

4. That during bargaining on a successor to the 1980-1981 agreement the Union proposed that the contractual provisions set forth in Finding of Fact 3 be maintained in the successor agreement; that during said bargaining the City asserted that both paragraph E of Article 5 and paragraph E of Article 6 relate to non-mandatory subjects of bargaining inasmuch as Sec. 62.13(5m) Stats., mandates layoffs be based on departmental rather than bargaining unit seniority, and advisory arbitration of grievances relating to actions subject to the Police and Fire Commission unduly interferes with the procedure set forth in Sec. 62.13(5) Stats., with respect to determining whether an officer is to be reduced in rank, suspended or discharged; and that inasmuch as the parties were unable to resolve their differences with respect to the proposed provisions in issue, the City filed the instant petition.

5. That Sec. 62.13(5m) Stats. provides as follows:

> (5m) Dismissals and Reemployment. (a) When it becomes necessary, because of need for economy, lack of work or funds, or for other just causes, to reduce the number of subordinates, the emergency, special, temporary, part-time, or provisional subordinates, if any, shall be dismissed first, and thereafter subordinates shall be dismissed in the order of the shortest length of service in the department, provided that, in cities where a record of service rating has been established prior to January 1, 1933, for the said subordinates, the emergency, special, temporary, part-time provisional subordinates, if any, shall be dismissed first, and thereafter subordinates shall be dismissed in the order of the least efficient as shown by the said service rating.
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> (b) When it becomes necessary for such reasons to reduce the number of subordinates in the higher positions or offices, or to abolish any higher positions or offices in the department, the subordinate or subordinates affected thereby shall be placed in a position or office in the department less responsible according to his efficiency and length of service in the department.
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> (c) The name of a subordinate dismissed for any cause set forth in this section shall be left on an eligible reemployment list for a period of two years after date of dismissal. If any vacancy occurs, or if the number of subordinates is increased in the department, such vacancy or new positions shall be filled by persons on such list in the inverse order of the dismissal of such persons.

6. That Sec. 62.13(5) Stats. provides as follows:

> (5) DISCIPLINARY ACTIONS AGAINST SUBORDINATES. (a) A subordinate may be suspended as hereinafter provided as a penalty. He may also be suspended by the commission pending the disposition of charges filed against him.
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> (b) Charges may be filed against a subordinate by the chief, by a member of the board, by the board as a body, or by an elector of the city. Such charges shall be in writing and shall be filed with the president of the board. Pending disposition of such charges, the board or chief may suspend such subordinate.
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> (c) A subordinate may be suspended for cause by the chief or the board as a penalty. The chief shall file a report of such suspension with the commission immediately upon issuing the suspension. No hearing on such suspension shall be held unless requested by the suspended subordinate. If the subordinate suspended by the chief requests a hearing before the board, the chief shall be required to file charges with the board upon which such suspension was based.
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> (d) Following the filing of charges in any case, a copy thereof shall be served upon the person charged. The board shall set date for hearing not less than 10 days nor more than 30 days following service of charges. The hearing on the charges shall be public, and both the accused and the com-

plainant may be represented by an attorney and may compel the attendance of witnesses by subpoenas which shall be issued by the president of the board on request and be served as are subpoenas under ch. 885.

(e) If the board determines that the charges are not sustained, the accused, if he has been suspended, shall be immediately reinstated and all lost pay restored. If the board determines that the charges are sustained, the accused, by order of the board, may be suspended or reduced in rank, or suspended and reduced in rank, or removed, as the good of the service may require.

(f) Findings and determinations hereunder and orders of suspension, reduction, suspension and reduction, or removal, shall be in writing and, if they follow a hearing, shall be filed within 3 days thereof with the secretary of the board.

(g) Further rules for the administration of this subsection may be made by the board.

(h) No person shall be deprived of compensation while suspended pending disposition of charges.

(i) Any person suspended, reduced, suspended and reduced, or removed by the board may appeal from the order of the board to the circuit court by serving written notice thereof on the secretary of the board within 10 days after the order is filed. Within 5 days thereafter the board shall certify to the clerk of the circuit court the record of the proceedings, including all documents, testimony and minutes. The action shall then be at issue and shall have precedence over any other cause of a different nature pending in said court, which shall always be open to the trial thereof. The court shall upon application of the accused or of the board fix a date of trial, which shall not be later than 15 days after such application except by agreement. The trial shall be by the court and upon the return of the board, except that the court may require further return or the taking and return of further evidence by the board. The question to be determined by the court shall be: Upon the evidence was the order of the board reasonable? No costs shall be allowed either party and the clerk's fees shall be paid by the city. If the order of the board is reversed, the accused shall be forthwith reinstated and entitled to his pay as though in continuous service. If the order of the board is sustained it shall be final and conclusive.

(j) The provisions of pars. (a) to (i) shall apply to disciplinary actions against the chiefs were (sic) applicable. In addition thereto, the board may suspend a chief pending disposition of charges filed by the board or by the mayor of the city.

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

CONCLUSIONS OF LAW

1. That although the proposal of Teamsters Union Local 695 relating to layoff and recall rights primarily relates to the working conditions of the non-supervisory law enforcement personnel of the City of Greenfield in the collective bargaining unit represented by the Union, said proposal is in irreconcilable conflict with the provisions contained in Sec. 62.13(5m) Stats., and that therefore said proposal relates to a prohibited subject of bargaining within the meaning of Sec. 111.70 (1)(d) of the Municipal Employment Relations Act.

2. That although the proposal of Teamsters Union Local No. 695 relating to advisory arbitration of grievances involving suspension, reduction in rank, or discharge of any bargaining unit employe, as written, primarily relates to the working conditions of the non-supervisory law enforcement personnel of the City of

Greenfield in the collective bargaining unit represented by the Union, said proposal is in irreconcilable conflict with Sec. 62.13(5)(d) and (3) Stats., in that said proposal does not require that any award issued by the advisory arbitrator must be issued at such time which will permit the Police and Fire Commission to conduct its hearing and issue its decision within the time constraints set forth in said statutory provisions, and that therefore said proposal relates to a prohibited subject of bargaining within the meaning of Sec. 111.70(1)(d) of the Municipal Employment Relations Act.

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

DECLARATORY RULING 1/

1. That the City of Greenfield has no duty to bargain collectively, within the meaing of Secs. 111.70(1)(d) and 111.70(3)(a)4 of the Municipal Employment Relations Act, with Teamsters Union Local No. 695, with respect to the latter's proposals relating to procedures for layoff and recall of bargaining unit personnel, and to advisory arbitration of grievances involving suspension, reduction in rank, or discharge of any bargaining unit employe.

Given under our hands and seal at the City of Madison, Wisconsin this 17th day of September, 1982.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Gary L Covelli
Gary L. Covelli, Chairman

Morris Slavney, Commissioner

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

(Continued on page six)

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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

The instant petition for declaratory ruling presents the Commission with the question of whether Sec. 62.13 Stats. renders the Union's proposals regarding order of layoff and advisory arbitration non-mandatory subjects of bargaining. The City generally alleges that both proposals are in irreconcilable conflict with Sec. 62.13 Stats. and thus cannot be found to be mandatory subjects of bargaining. The Union responds by asserting that no such irreconcilable conflict exists as both proposals clearly deal with mandatory subjects of bargaining. A more extensive exposition of the parties' positions is found in the discussion of each disputed proposal. Before entering into that specific consideration, it is useful to set forth the general legal framework within which this dispute must be resolved.

In Beloit Education Association v. WERC 73 Wis. 2d 43 (1976), Unified School District No. 1 of Racine County v. WERC 81 Wis. 2d 89 (1977) and City of Brookfield v. WERC 87 Wis. 2d 819 (1979), the court set forth the definition of a mandatory subject of bargaining under Sec. 111.70(1)(d) Stats. as a matter which is primarily related to employes' wages, hours, and conditions of employment. However there are occasions on which there is at least an arguable conflict between the scope of the duty to bargain under Sec. 111.70(1)(d) Stats. and the content of other statutory provisions. While the court in Glendale Professional Policeman's Association v. City of Glendale 83 Wis. 2d 90 (1978) noted that such conflicts are difficult to resolve because Sec. 111.70 Stats. does not contain any specific legislative resolution thereof, it reaffirmed its prior holdings in Muskego-Norway C.S.J.S.D. No 9 v. WERB 35 Wis. 2d 540 (1967) Joint School District No. 8 v. WERB 37 Wis. 2d 483 (1967) and Board of Education v. WERB 52 Wis. 2d 625 (1971) that (1) Sec. 111.70 Stats. should be harmonized within existing statutes when possible inasmuch as Sec. 111.70 is presumed to have been enacted with full knowledge of pre-existing statutes and (2) that a statutory construction which gives each provision force and effect should be made if at all possible. However if there is an irreconcilable conflict between a contract proposal made under the auspices of Sec. 111.70 Stats. and a specific statutory provision, the proposal must be found a prohibited subject of bargaining, because a contract provision which runs counter to an express statutory command is void and unenforceable. Board of Education v. WERB, supra; WERC v. Teamsters Local No. 563 75 Wis. 2d 602 (1977).

The Layoff Proposal

Article 5 of the parties' 1980-1981 contract, which the Union proposes be included in a successor agreement, defines seniority for the purposes of layoff as continuous length of service in the bargaining unit. Article 5 also provides that the unit employe with the least amount of seniority be laid off first.

The City contends that Sec. 62.13(5m) Stats. requires the use of department wide seniority for the purposes of layoff. It argues that under the Union's proposal, a non-unit employe might be laid off instead of a less senior unit employe and that such a requirement would infringe upon the statutory rights of supervisory employes and irreconcilably conflict with the lay off procedure mandated by Sec. 62.13(5m) Stats.

The Union counters by claiming that Sec. 62.13(5m) Stats. is sufficiently broad and non-specific so as to allow harmonization with the subsequently enacted provisions of Sec. 111.70 Stats. It asserts that in Beloit the court found that a proposal setting forth the order of layoff was a mandatory subject of bargaining under Sec. 111.70 Stats. The Union further argues that because in Brookfield the court found that the effects of a layoff were mandatory subjects of bargaining under Chapter 62, there can be no doubt that there is no irreconcilable conflict between a proposal specifying order of layoff and Sec. 62.13(5m) Stats. Finally the Union points to the grant of organizational rights to supervisory law enforcement employes by Sec. 111.70(8) Stats. as evidence of a legislative intent to recognize the distinct interests of supervisors and unit employes. It argues that the City's interpretation of Sec. 62.13(5m) Stats. would improperly run afoul of this legislative intent as it would tend to merge the separate interests which Sec. 111.70(8) Stats. seeks to protect.

In its reply brief, the City contends that the Union's reliance upon Brookfield is misplaced inasmuch as the court was not specifically confronted with the impact of Sec. 62.13(5m) Stats. upon its general holding that the effects of a layoff are mandatory subjects of bargaining. While admitting that the order of layoff is normally a mandatory subject of bargaining, the City renews its argument that by Sec. 62.13(5m) Stats., the legislature has elected to remove that subject from the scope of bargaining. Said statutory provision is set forth in the Findings of Fact.

Said legislation was enacted in 1933 in response to two situations involving police department employes in Superior, Wisconsin who were laid off in 1919 without regard to length of service in the department, and in 1929 ahead of temporary department employes. See State ex rel Miller v. Baxter 171 Wis. 193 (1920); Rogner v. Zielke 86 Wis. 2d 542 (1978) and Wis. Legislative Reference Bureau file on Ch. 58, Laws of 1933. Sec. 62.13(5m)(a) Stats. establishes the order of layoff for subordinates as being emergency, special temporary, part-time or provisional employes first followed by full-time subordinates in order of length of service in the department. Sec. 62.13(5m)(b) Stats. specifies that when the number of subordinates "in the higher positions or offices" are reduced, the affected employes shall be placed "in a position or office in the department less responsible . . .". The statute does not specify whether a subordinate placed in a "less responsible" position would bump an employe in the "less responsible position" with more department seniority or whether said subordinate could be laid off entirely if less senior than his new comrades. The City in its brief adopts the latter interpretation. Neither legislative history nor cases interpreting the statute provide any guidance on this subject.

The Commission need not answer all the questions created by Sec. 62.13(5m) Stats. and the subsequent passage of Sec. 111.70 Stats. With the context of the instant proceeding, the Commission is only confronted with the question of whether the Union's proposal specifying unit seniority as the measure to be utilized for unit layoffs can be harmonized with Sec. 62.13(5m) Stats. reference to service in the department. The City believes not, claiming that the proposal destroys the statutory right of a supervisor who ends up back in the bargaining unit to have his non-unit seniority considered.

Said legislation makes no distinction between non-supervisory and supervisory law enforcement personnel within a police department. Thus, there can be no doubt that the term "department" set forth therein refers to all personnel in the department, with the exception of the Chief. Clearly a definition of seniority for purposes of layoff and recall which is limited to service in the bargaining unit represented by the Union is more limited than that contained in Sec. 62.13(5m) Stats. Did the Legislature intend the enactment of the Municipal Employment Relations Act to allow for the bargaining of differing definitions of seniority? The Commission thinks not.

The legislature has specifically established the right of police department employes to have their length of service with the department be a determining factor in the event of a layoff or recall. The statute specifically provides that ". . . subordinates shall be dismissed in order of the shortest length of service in the department . . ." (emphasis added) and as stated is an expressed command of law. This is a statutory right applicable to both non-unit and unit employes. It cannot reasonably be presumed that by passage of a general statute authorizing bargaining, the legislature wished to allow unions or employers the opportunity to limit this specific statutory right at the bargaining table. As the proposal at hand would restrict the right of employes to have service in non-bargaining unit positions utilized when determining the order of employe layoffs, it runs counter to an express command of law and is therefore void. WERC v. Teamsters Local No. 563, supra. Thus the Commission has concluded that a layoff proposal which seeks to exclude periods of service outside the bargaining unit from a definition of seniority is a prohibited subject of bargaining.

The Advisory Arbitration Proposal

Article 6(E) of the parties' 1980-1981 contract, which the Union proposes be included in a successor agreement, provides for advisory arbitration of disputes over whether the reduction in rank, suspension or the recommendation of dismissal of an employe was for cause. After receipt of the advisory award, the Greenfield Police and Fire Commission would proceed under Sec. 62.13 Stats. to determine the legitimacy of the disciplinary action.

The City contends that the availability of advisory arbitration prior to Sec. 62.13 proceedings creates the potential for undue delay of statutory proceedings which were constructed to ensure a speedy resolution of disciplinary issues. It further argues that the employes' interests are adequately protected by various statutory, constitutional, and judicial safeguards and that advisory arbitration is thus a redundant, unnecessary and essentially meaningless procedure. The City also alleges that in Milwaukee County 17832 (1980) the Commission recognized that statutory disciplinary procedures remove contrary contractual procedures from the scope of mandatory bargaining. Thus, the City urges that the proposal in question must be found to be a non-mandatory subject of bargaining due to an irreconcilable conflict with Sec. 62.13 Stats.

The Union responds by broadly arguing that there is no conflict between the availability of binding arbitration provisions and the Sec. 62.13 procedure. It cites the Commission's finding in City of Sun Prairie 11703 (1973) as squarely supporting the mandatory nature of a proposal which allows employe access to arbitral review of discipline despite the availability of Sec. 62.13 Stats. The Union argues that Sun Prairie has not been overturned by the subsequent Commission decision in Milwaukee County. It contends that the absence of any legislative challenge to Sun Prairie is evidence of the accuracy of the Commission's Sun Prairie conclusion. The Union also calls attention to Teamsters Local 695 v. County of Sauk, an unpublished decision of the Court of Appeals, District IV, as evidence of judicial acceptance of binding arbitration when a statutory procedure also exists for the review of discipline.

Turning to the specific clause at hand, the Union argues that even if some conflict exists between binding arbitration and Sec. 62.13 Stats., no conflict can be found if the arbitral review is only advisory. It contends that such procedure provides the Police and Fire Commission with the benefit of the analysis of a knowledgeable neutral and encourages the parties to honestly assess their respective positions and hopefully settle their dispute short of Police and Fire Commission action. The Union submits that the potential for delay of the Sec. 62.13 proceedings until the advisory arbitration process is completed does not form a basis for finding the advisory arbitration proposal to be non-mandatory.

But for the existence of this statutory procedure, there would be no question that a proposal setting a mechanism to challenge a municipal employer's disciplinary decisions would constitute a mandatory subject of bargaining. It is hard to imagine anything more primarily related to working conditions than the ability to challenge an employer decision that an employe be disciplined or discharged. See Beloit, supra; Racine Unified School District 11315-B, D (4/74).

However, the proposal of the Union does not require that the advisory arbitration proceeding be completed within any time frame. There are time contraints on the Police and Fire Commission in its Sec. 62.13 proceeding. As a result the proposal as written cannot be harmonized with said procedure, and therefore we have concluded that it relates to a prohibited subject of bargaining. If the proposal would have been worded so as to meet the "time constraints" in the statute, we would have concluded that the proposal related to a mandatory subject of bargaining.

Dated at Madison, Wisconsin this 17th day of September, 1982.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Gary L. Covelli, Chairman

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Morris Slavney, Commissioner

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Herman Torosian, Commissioner