

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of

CITY OF BROOKFIELD

Requesting a Declaratory Ruling
Pursuant to Section 111.70(4)(b),
Wis. Stats., Involving a Dispute
Between Said Petitioner and

BROOKFIELD PROFESSIONAL
FIREFIGHTERS ASSOCIATION
LOCAL 2051, I.A.F.F.

Case XLIII
No. 29904 DR(M)-231
Decision No. 19944

Appearances:

Godfrey, Trump & Hayes, Attorneys at Law, 1200 First Savings Plaza, 250 East Wisconsin Avenue, Milwaukee, WI 53202, by Mr. Tom E. Hayes, filing briefs on behalf of City of Brookfield.

Brendel, Flanagan, Sendik & Fahl, S.C., 6324 North Avenue, Milwaukee, Wisconsin 53213, by Mr. John K. Brendel, filing briefs on behalf of Brookfield Professional Firefighters Association, Local 2051, I.A.F.F.

FINDINGS OF FACT, CONCLUSIONS OF LAW
AND DECLARATORY RULING

The City of Brookfield filed a petition with the Wisconsin Employment Relations Commission on June 11, 1982 seeking a declaratory ruling, pursuant to Sec. 111.70(4)(b), Stats., as to whether certain bargaining proposals made to it by the Brookfield Professional Firefighters Association, Local 2051, I.A.F.F. relate to mandatory subjects of bargaining. The parties waived hearing and submitted written argument, the last of which was received on August 11, 1982, and the Commission, being fully advised in the premises, makes and issues the following

FINDINGS OF FACT

1. That the City of Brookfield, hereinafter referred to as the City, is a municipal employer and has its offices at 2000 North Calhoun Road, Brookfield, Wisconsin 53005.

2. That Brookfield Professional Firefighters Association, Local 2051, I.A.F.F., hereinafter referred to as the Association, is a labor organization and has its offices at W238 N4551 Woods Edge Drive, Pewaukee, Wisconsin 53072. At all times material herein the Association has been, and is the exclusive collective bargaining representative of all Firefighters, Equipment Operators, Lieutenants and Inspector positions employed by the City in its Fire Department.

3. That the City and the Association were parties to a collective bargaining agreement covering the wages, hours and conditions of employment of the employees represented by the Association, which agreement had an expiration date of December 31, 1981. Said agreement contained among its provisions the following material herein:

ARTICLE 2 - RECOGNITION

The City hereby recognizes the Association as the exclusive bargaining agent for all Firefighters, Equipment Operators, Lieutenants and Inspector positions in the Fire Department of the city of Brookfield.

. . .

ARTICLE 15 - SALARY SCHEDULE

15.02 An equipment operator shall be assigned for each shift to each of the first line engines at Stations 2 and 3 and to the pumper at Station 1; two additional equipment operators per shift shall be assigned to the ladder truck (driver and tiller) at Station One. An equipment operator so promoted and assigned shall be paid a monthly premium of 3% above the top firefighter's scale. In addition, the City may designate up to two relief operators per shift who have also passed the promotional procedures, who have not been assigned, to substitute for absent assigned operators.

. . .

ARTICLE 18 - PROMOTIONS

When (sic) an authorized vacancy exists in the following classifications of Inspector, Chief Inspector, Lieutenant and Equipment Operator, it shall be filled by promotion in the following manner:

1. A notice of vacancy shall be posted on the Department bulletin boards thirty (30) days prior to the last day on which applications are acceptable. The notice shall state the date, time and place of written examinations.
2. Only employees with more than three (3) years of employment on the Brookfield Fire Department can be applicants, except in the classification of inspector where all employees may be applicants. Only employees who have been on the department for more than five (5) years shall be eligible to make application for the position of Lieutenant.
3. Application forms will be provided by the Chief.
4. There shall be written examination and an oral interview and the written examination given first. The examination and interview shall include an orderly series of tests and evaluations to be applied equally and equitably to all applicants. Any eligible applicant who has made time (sic) application can take the examination.
5. Applicants who have received a grade of 75% or better on the written examination will have an oral interview. The interview will be given by a Board of not less than three (3), composed of the Chief and Staff officers.
6. The following weights shall be given to the examination interview and the prior department record of applicants:

Written Examination	50%
Oral Interview	25%
Department Record	25%

to determine final grades. The passing grade shall be 75% and applicants with a grade of 75% or better shall compose a list of qualified applicants, upon approval and certification by the Fire and Police Commission.

4. During the course of negotiations between the parties on a successor to the above-noted collective bargaining agreement, the Association filed a petition with the Wisconsin Employment Relations Commission requesting that an interest arbitration proceeding be initiated, pursuant to Sec. 111.77 of the Municipal Employment Relations Act, to resolve an alleged impasse between the Association and the City in said negotiations, and during the course of the investigation on such petition by the Commission's Investigator, the parties exchanged tentative final offers. Following such exchange the Association contended that Articles 15.02 and 18, which the Association proposed be retained in the successor agreement, related to non-mandatory subjects of bargaining, and, as a result, the City on June 11, 1982, prior to the close of the investigation on the alleged impasse, filed the instant petition for declaratory ruling with the Commission, and therein set forth its arguments in support of its claim that the proposals related to non-mandatory subjects of bargaining. Said petition was signed on behalf of the City by its attorney, and it contained the following Acknowledgement:

Personally appeared before me this 10th day of June, 1982, the above named Tom E. Hayes, to me known to be the person who executed the foregoing instrument and acknowledged the same.

5. Thereafter, on July 8, 1982 the Association filed a response to the City's petition, wherein it contended that; (1) the Commission has no jurisdiction to issue a declaratory ruling herein inasmuch as "neither side did any bargaining whatsoever" with respect to Article 15.02; (2) and that declaratory ruling procedures "should not arise from a fact situation where a party unilaterally decides that a dispute exists and notifies its opposition that the dispute exists by filing a petition for such declaratory ruling"; and (3) the City's petition was "not sworn to as required by ERB 18.02 and is therefore defective". The Association also in its response attached modified proposals, with respect to the Articles in issue herein, set forth as follows:

• • •

PROMOTIONS

Article 18 Section I

Whenever an authorized vacancy exists (sic) for the classification of Motor Pump Operator, Lieutenant or Inspectors, such vacancies shall be filled at the earliest possible date from an eligibility list created in the following manner:

1. A notice of vacancy shall be posted on the department bulletin board at least 30 days prior to the last day on which applications are acceptable. The notice shall state the date, time and place of written examination, if any. It shall further state the eligibility requirements, the type and nature of the tests or test to be conducted, the written manuals or other materials, if any, which will to some extent be included, the general subject matters to be covered, the weight to be given each specific test, the grade needed to be qualified and the manner of grading to be used.
2. The promotional process as posted shall be adhered to. Those applicants found qualified, if any, shall be ranked in order of strict seniority. The top ranked qualified applicant by seniority shall thereupon be promoted to the vacant position or newly opened job classification and the balance of qualified applicants shall constitute an eligibility list in order of strict seniority which shall remain in effect for 2 years. All subsequent promotions during that period to that job classification shall be made therefrom in order ranked. The complete listing of those qualified, their respective scores per test and final scores, the amount of seniority attributed to each employee, and the ultimate ranking shall be made available to all applicants upon request.

6. On July 21, 1982 the City filed its response to the modified proposals of the Association, and therein set forth the arguments that said proposals continue to relate to permissive subjects of bargaining for the reason that (a) modified 15.02 "purports to prohibit the use of fire apparatus unless assignments are made by 8:00 A.M. It purports to prescribe how employees shall be assigned by the City. It requires the City to have the classification of equipment operators and to conduct a promotional procedure to fill such classifications", and (b) modified 18 "defines the job classifications which the City must utilize and at least by inference, presents the duties which are to be assigned to each classification". Further, the City contends that the Acknowledgement attached to its original declaratory ruling petition, while not a jurat, is sufficient to comply with the Commission's rules.

CONCLUSIONS OF LAW

1. The fact that the petition for declaratory ruling filed herein by the City of Brookfield, and signed by its Attorney, was not sworn to before the Notary Public, but rather was acknowledged by said Notary, does not constitute such a material non-compliance with Wis. Adm. Code ERB 18.02(2) as to warrant a dismissal of the petition by the Wisconsin Employment Relations Commission.

2. Since the objection of the City of Brookfield regarding its duty to collectively bargain with Brookfield Professional Firefighters Association Local 2051, IAFF, with respect to the equipment operator and promotion proposals was raised by the City at a time after the commencement of negotiations, but prior to the close of the informal investigation on the alleged impasse existing between the parties, the petition requesting the declaratory ruling filed herein is deemed to have been timely filed within the meaning of Sec. 111.70(4)(b) of the Municipal Employment Relations Act.

3. That the modified proposal of Brookfield Professional Firefighters Association Local 2051, IAFF, as set forth in Article 15.02, pertaining to the equipment operator, relates to a permissive, and not a mandatory, subject of collective bargaining within the meaning of Sec. 111.70(1)(d) of the Municipal Employment Relations Act.

4. That the modified proposal of Brookfield Professional Firefighters Association Local 2051, IAFF, as set forth in Article 18, pertaining to promotions of bargaining unit personnel, relates to a mandatory subject of collective 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 Conclusions of Law, the Commission makes and issues the following

DECLARATORY RULING 1/

1. That the City of Brookfield does not have the duty to bargain with Brookfield Professional Firefighters Association Local 2051, IAFF, with respect to the latter's modified proposal relating to the equipment operator.

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

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

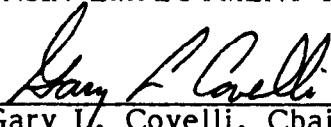
227.16 Parties and proceedings for review. (1) Except as otherwise specifically provided by law, any person aggrieved by a decision specified in s. 227.15 shall be entitled to judicial review thereof as provided in this chapter.

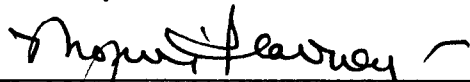
(a) Proceedings for review shall be instituted by serving a petition therefor personally or by certified mail upon the agency or one of its officials, and filing the petition in the office of the clerk of the circuit court for the county where the judicial review proceedings are to be held. Unless a rehearing is requested under s. 227.12, petitions for review under this paragraph shall be served and filed within 30 days after the service of the decision of the agency upon all parties under s. 227.11. If a rehearing is requested under s. 227.12, any party desiring judicial review shall serve and file a petition for review within 30 days after service of the order (Continued)

2. That the City of Brookfield has the duty to bargain with the Brookfield Professional Firefighters Association Local 2051, IAFF, with respect to the latter's modified proposal relating to promotion of unit personnel.

Given under our hands and seal at the City of
Madison, Wisconsin this 29th day of September, 1982.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By 
Gary L. Covelli, Chairman


Morris Slavney, Commissioner


Herman Torosian, Commissioner

1/ (Continued)

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

In this proceeding the Commission is asked to determine whether the disputed proposals primarily relate to wages, hours and conditions of employment, and thus are mandatory subjects of bargaining, as asserted by the Association, or primarily relate to the formulation and management of public policy and thus are permissive subjects of bargaining, as asserted by the City. However, before proceeding to that task, the Commission must respond to the procedural and jurisdictional arguments made by the Association.

The Association objected to the City's failure to comply with rule requiring that the petition be notarized. We find the acknowledgement on the petition to be compliance with the spirit, if not the letter, of the rule. The Association also contends that the Commission lacks jurisdiction to issue a declaratory ruling under Sec. 111.70(4)(b), MERA, because no "dispute" exists between the parties over the duty to bargain on the proposals in question. In this regard the Association asserts that as no objection to the allegedly permissive nature of its proposals was made until the exchange of final offers, there was no good faith bargaining with respect to the proposal and thus no "dispute" exists. The City counters by contending that it was not required to object to the permissive nature of the proposals prior to the exchange of tentative final offers and that its willingness to bargain on permissive subjects prior to that exchange serves to enhance the collective bargaining process and the prospects for agreement.

The Commission must reject the Association's argument and conclude that it has jurisdiction to issue a declaratory ruling herein. As the Association persists in its desire to have its proposals included in its final offer, and as the City persists in its contention that the proposals are permissive and thus cannot properly be included in the final offer, a "dispute" over the City's duty to bargain on such proposals has clearly arisen within the meaning of Sec. 111.70(4)(b), MERA.

Equipment Operator Proposal

The City objects to the Association's equipment operator proposal arguing that it (1) would prohibit use of fire apparatus unless assignments were timely made; (2) prescribes the manner in which employees shall be assigned by the City; (3) requires the City to maintain equipment operators; and (4) requires the City to conduct a promotional procedure to fill the equipment operator classification. The Association responds by contending that the proposal reflects current assignment practice and does not require the City to assign an equipment operator to equipment if the City chooses to go without the services provided by an employee in that classification. It further argues that equipment operator vacancies are currently filled via the promotional procedure.

The Association's proposal requires that any assignment of an equipment operator to firefighting apparatus be made at least one hour prior to the start of the duty day, and that unless an assignment is made in compliance with this time limitation, unit employees cannot operate the apparatus. The proposal also requires the use of an additional equipment operator as "tillerman". We believe that all three requirements primarily relate to the formulation or management of public policy and thus conclude that the proposal is permissive. As to the one hour notice requirement, we are not satisfied that the right to know in advance the piece of equipment to which an employee will be assigned primarily relates, in any significant way to, to conditions of employment. Furthermore, there may well be situations in which the City cannot know, within the time frame specified whether, and to which truck it will be required to assign an equipment operator. To deprive the City of the flexibility to make last minute assignments potentially interferes with its ability to make assignments of manpower which are adequate to meet the level of service needed. Such potential interference mandates a finding that the proposal is permissive. As to the prohibition against use of apparatus unless a timely assignment is made, it is difficult to conceive of a proposal which would more directly interfere with the City's ability to provide fire-fighting service. Such interference with the ability to provide service is akin to other proposals determined by the Commission to relate to permissive subjects

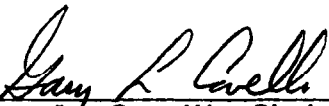
of bargaining because they effectively prevented the Employer from providing services. 2/ As to the portion of the proposal requiring the assignment of an additional equipment operator, we believe that the Association is in effect placing a manning requirement upon the City which, absent a showing of a substantial impact on employee safety, primarily relates to the City's policy choice of how to assign manpower to provide the desired service. 3/ As to the City's remaining objections, we do not view the simple use of the term "equipment operator" as requiring the existence of that classification. As in the promotional procedure proposal, it merely reflects an existing classification. Nor do we view the proposal as requiring the filling of vacancies. Rather, it defines equipment operators as employees who have been promoted, presumably after the City has decided to fill a vacancy.

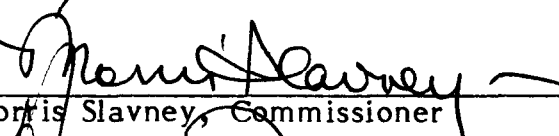
The Promotion Proposal


The City objects to the Association's promotion proposal, arguing that it defines the job classifications which the City must utilize and, at least by inference, presents the duties which are to be assigned to each classification. While the City is correct in concluding that both its organizational structure and the decision as to which classifications will perform the duties which are fairly within the scope of the work normally performed by the unit employees generally relate to permissive subjects of bargaining, 4/ we do not interpret the Association's proposal as requiring the maintenance of the existing classification, or as defining the duties which an employee in the classification will perform. Rather, it merely sets forth the current classifications (which are also contained in the recognition clause of the 1980-81 contract) to which employees may be promoted. As a provision relating to promotional procedures setting forth the selection criteria to be utilized when choosing between qualified employees has been determined to primarily relate to wages, hours and conditions of employment, the Association's modified proposal herein relates to a mandatory subject of bargaining. 5/

Dated at Madison, Wisconsin this ^{24th} day of September, 1982.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By 
Gary L. Covelli, Chairman


Morris Slavney, Commissioner


Herman Torosian, Commissioner