STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of GREEN COUNTY Requesting a Declaratory Ruling Pursuant to Section 111.70(4)(b), Wis. Stats., Involving a Dispute Between Said Petitioner and GENERAL DRIVERS, DAIRY EMPLOYEES AND HELPERS, TEAMSTERS UNION LOCAL 579	Case LXIV No. 29937 DR(M)-233 Decision No. 20056

Appearances:

Melli, Shiels, Walker & Pease, S.C., Attorneys at Law, Suite 600, 119 Monona Avenue, P.O. Box 1664, Madison, Wisconsin 53701, by Mr. Jack D. Walker, appearing on behalf of the Petitioner.

Goldberg, Previant, Uelmen, Gratz, Miller & Brueggeman, S.C., Attorneys at Law, Room 600, 788 North Jefferson, P.O. Box 92099, Milwaukee, Wisconsin 53202, by Ms. Marianne Goldstein Robbins, appearing on behalf of General Drivers, Dairy Employees and Helpers, Teamsters Union Local 579.

FINDINGS OF FACT, CONCLUSION OF LAW AND DECLARATORY RULING

Green County having, on June 14, 1982, filed a petition with the Wisconsin Employment Relations Commission seeking a declaratory ruling, pursuant to Section 111.70(4)(b) of the Municipal Employment Relations Act, with respect to whether two proposals contained in a tentative final offer submitted by General Drivers, Dairy Employees and Helpers, Teamsters Union Local 579, in negotiations, constitute mandatory subjects of collective bargaining; and hearing having been held in this matter before Examiner Christopher Honeyman on July 29, 1982 in Madison, Wisconsin; and briefs having been filed by both parties by September 17, 1982; the Commission, having considered the entire record and briefs of counsel, and being fully advised in the premises, makes and issues the following

FINDINGS OF FACT

1. That Green County, herein referred to as the County, is a municipal employer having its principal offices at Green County Courthouse, Monroe, Wisconsin 53566.

2. That General Drivers, Dairy Employees and Helpers, Teamsters Union Local 579, herein referred to as the Union, is a labor organization having its offices at 2214 Center Ave., Janesville, Wisconsin 53545.

3. That at all times material herein the Union has been the certified collective bargaining representative of all employes of the Green County Highway Department, excluding all office clerical employes, guards, professional employes and supervisory employes.

4. That the Union and County have been parties to a collective bargaining agreement in effect from January 1, 1980 to December 31, 1981; that the parties have been unable to reach an accord in their negotiations on a successor collective bargaining agreement; that on November 23, 1981, the Union filed a petition

requesting the Wisconsin Employment Relations Commission to initiate a mediation-arbitration proceeding to resolve the alleged impasse in collective bargaining; and that during the pendency of said proceeding, and on June 14, 1982, the County filed the instant petition requesting the Commission to determine whether the following proposals contained in the Union's tentative final offer relate to mandatory subjects of collective bargaining:

> Article VI. MAINTENANCE OF STANDARDS
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> Section 1. Protection of Conditions. The County will not change any benefit, or condition of employment, which is mandatorily bargainable except by mutual agreement with the Union.
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> It is agreed that the provisions of this section shall not apply to inadvertent or bona fide errors made by the Employer or the Union in applying the terms and conditions of this Agreement if such error is corrected within ninety (90) days from date of error.
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> ARTICLE XXXI - WORK WEEK
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> a. First sentence of section 1 as follows:
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> "All employees shall be guaranteed forty (40) hours work per week for Monday through Friday work week."
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> b. Second sentence of section 2 as follows:
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> "This call in pay shall not be subtracted from guaranteed forty (40) hour work week."

5. That the County contends that the Union's proposal entitled "Maintenance of Standards" is indefinite and denies the County the right to challenge specific proposals in mediation-arbitration, and is therefore a permissive subject of bargaining; and that, however, the Union contends that said proposal relates explicitly to benefits and conditions of employment which are mandatorily bargainable and that said proposal accordingly constitutes a mandatory subject of bargaining.

6. That the County contends that the Union's proposal entitled "Work Week", in its references to a guaranteed forty hour work week, primarily relates to the County's ability to adjust its Highway Department employe complement according to changing weather and other requirements, and is therefore a permissive subject of bargaining; and that, however, the Union contends that said proposal relates primarily to wages and hours of such employes and is consequently a mandatory subject of bargaining.

7. That the Union's proposals set forth in paragraph 4, supra, relating to "Maintenance of Standards" and "Guaranteed Work Week" relate primarily to wages and hours of employes in the collective bargaining unit represented by the Union.

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

CONCLUSION OF LAW

1. That the proposals submitted by General Drivers, Dairy Employees and Helpers, Teamsters Union Local 579 in negotiations with Green County with respect to a new collective bargaining agreement covering employes of the County in the unit represented by the Union, pertaining to "Maintenance of Standards" and and "Work Week", and relating in particular to a guaranteed forty hour work week as described above, relate to mandatory subjects of bargaining within the meaning of Section 111.70(1)(d) of the Municipal Employment Relations Act.

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

DECLARATORY RULING 1/

1. That Green County has a duty to collectively bargain with General Drivers, Dairy Employees and Helpers, Teamsters Union Local 579 with respect to the latter's proposals relating to "Maintenance of Standards" and "Guaranteed Work Week", and if no agreement is reached on said proposals, said proposals may be properly submitted to mediation-arbitration.

Given under our hands and seal at the City of Madison, Wisconsin this 12th day of November, 1982.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Gary L. Covelli, Chairman

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Morris Slavney, Commissioner

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Herman Torosian, Commissioner

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

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

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

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

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

The instant petition presents the question of the bargainability status of two proposals contained in the Union's tentative final offer as amended on June 14, 1982. The County contends that the disputed proposals relate to non-mandatory subjects of bargaining.

The test to be used in determining whether a proposal relates to a mandatory subject of bargaining is whether the subject is "primarily" or "fundamentally" related to wages, hours, or conditions of employment. Subjects which are "primarily related to the formulation or management of public policy" are non-mandatory subjects. 2/ A municipal employer cannot be compelled to bargain, or submit to mediation-arbitration, any matter which is primarily related to the formulation or management of public policy.

Maintenance of Standards

The County contends that the following sentence in the Union's proposal relates to a non-mandatory subject of bargaining:

> The County will not change any benefit, or condition of employment, which is mandatorily bargainable except by mutual agreement with the Union.

Both this language and the arguments raised by the parties virtually mirror the language and arguments discussed in City of Waukesha (Fire Department), 3/ wherein the Commission stated, inter alia, as follows:

> The City insists that the following sentence of the Association's proposal on Hours/Duties relates to a non-mandatory subject of bargaining:
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> > . . . The City will not unilaterally change any benefit or condition of employment which is mandatorily bargainable and heretofore enjoyed by the majority of unit employees during the life of this Agreement.
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> First, it argues that while there may be a duty to bargain with respect to the impact or effects of the exercise of a fundamental management right, this proposal prevents the City from taking any action that affects or modifies a condition of employment even though the law permits the City to make the change and bargain about the effects later. The City also contends that the proposal is so broad as to include "work rules," which are exclusively managerial prerogatives and thus themselves permissive subjects. Consequently, the effect of the language is to implicitly reserve the right to negotiate during the contract term about non-mandatory subjects. The City also notes that the test of "mandatorily bargainable" included in this proposal, would necessarily have to be interpreted by an arbitrator but involve judgments and standards established by this Commission. This it claims would not be in furtherance of a viable contract grievance procedure, and would result in multiple proceedings. Last, it avers that the test as to whether a "condition of employment" was "enjoyed by the majority of unit employes" is improper and in violation of Wisconsin law, in that if a duty to bargain exists, it exists regardless of whether a majority of employes "enjoyed" this benefit or condition of employment.
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> The Association, contrariwise, argues that merely becasue a dispute requiring arbitration may sometimes arise as a consequence of inclusion of said language in the agreement is not a basis for concluding that the proposal relates to a non-mandatory subject. Rather, the test is

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2/ Unified School District No. 1 of Racine County v. WERC, 81 Wis. 2d 89.

3/ Dec. No. 17830, (May, 1980).

whether the proposal is properly worded "so as to be within the rules as provided in this State." The purpose of the clause is to "elminiate (employe) fears from threats of loss of privileges in the event tha the Association's final offer should be acceptable to the arbitrator." Furthermore, the clause was limited to avoid the probability of a request for a declaratory ruling and it is not an attempt to "ursurp (sic) any rights of management" with regard to policy decisions.

The Association's proposal on its face is limited to matters which are mandatory subjects of bargaining. The City's principal argument, however, is that the clause would preclude it from taking action on non-mandatory subjects, such as work rules, 2/ that impact on or affect "benefits" and "conditions of employment" and bargain about the effects thereafter.

We have previously held that an employer is not prohibited from implementing a matter relating to a permissive subject of bargaining even though it would result in a change in the impact thereof, which impact is a mandatory subject of bargaining if the latter is not covered by the agreement. 3/ Certainly the City cannot change any benefit or condition of employment established in the agreement, nor does the Association have any duty to bargain during the term of the agreement concerning changes in express contractual provisions. Notwithstanding the foregoing, we do not believe that the disputed proposal bars the City from taking action on permissive subjects. It does not, as the City suggests, reserve the right to negotiate during the term of the agreement with respect to permissive subjects of bargaining not included in the collective bargaining agreement.

The determination as to whether a particular matter relates to a mandatory subject of bargaining is generally subject to the jurisdiction of the Commission and such issues are not determined by arbitrators.

Furthermore, we consider the County's argument that the Union's proposal states a test contrary to law to be without merit. The purpose of the Union's language stating:

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

is not to propose a test for determining what subjects are mandatory subjects of bargaining, but rather, states what mandatorily bargainable benefits or conditions of employment the County cannot unilaterally change during the term of the agreement. Stated differently, the language provides that where a majority of the employes enjoy a benefit or condition of employment which is mandatorily bargainable, said benefit or condition of employment cannot be unilaterally changed by the City. Conversely, if a mandatorily bargainable benefit or condition of employment is not enjoyed by a majority of employes, then the City can change same.

Thus we conclude that the Association's proposal relates to a mandatory subject of bargaining, and therefore it may be included in the Association's final offer for the purpose of mediation-arbitration.

2/ We have previously held that certain work rules are mandatory subjects of bargaining. City of Wauwatosa (15917) 11/77.

3/ Milwaukee Sewerage Commission (17302) 9/79.

In addition, the County argues herein that the proposal is not fit to proceed to mediation-arbitration because it is "indefinite". We reject this argument. The language on its face applies only to benefits or conditions of employment which already exist, and despite the difficulties experienced at the hearing by the Union's chief witness in identifying items which might be covered by this language, but not by other provisions in the contract, a presumption of mutual knowledge attaches to existing benefits and conditions of employment. To the extent that the County's arguments against this proposal go beyond those stated, such arguments have more to do with whether the proposal is reasonable rather than whether it is directed towards mandatory subjects of bargaining.

For these reasons we conclude that the Union's proposal falls fairly within our prior decision in Waukesha, that it relates to mandatory subjects of bargaining, and that it may therefore be included in the Union's final offer in the mediation-arbitration proceeding.

Guaranteed Work Week

The County contends that the work week proposal of the Union is not primarily related to mandatory subjects of bargaining insofar as section 1 of that proposal states "All employees shall be guaranteed forty (40) hours work per week for Monday through Friday work week." and in section 2 that "This call in pay shall not be subtracted from guaranteed forty (40) hour work week." The County presented testimony tending to establish that, particularly during the winter and summer, the County's workload in the Highway Department fluctuates according to rapidly changing weather. From this, primarily, the County argues that a provision guaranteeing forty hours work per week for employes improperly restricts the County in its ability to determine whether work will be performed, and requires it to make a choice between the "devil" of risking idle and unproductive time and the "deep blue sea" of risking insufficient employes on hand for a heavy workload. The County cites City of Brookfield 4/ as establishing its right to lay-off employes as necessary to accomplish the efficient management of public policies inherent in the County's rapidly shifting workload.

The Union presented evidence tending to show that under the agreement employes, unless on lay-off status, are required to be available on call at any time, and argues that without a guaranteed work week employes are caught between the "rock" of required availability to the County and the "hard place" of unpaid time during which they are not free to devote their time to other pursuits.

There is no dispute that the agreement, no matter which final offer is adopted by the mediator-arbitrator, will contain a lay-off provision clearly specifying that the County has the right to lay-off employes, as follows:

> ARTICLE IV. SENIORITY
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> Section 3. In laying off employees because of a reduction in forces, the employees with the least seniority shall be laid off first provided that those remaining are capable of carrying on the Employer's usual operations effectively. In re-employing those employees with the greatest length of service shall be called back first provided they are capable of performing the available work.
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> Section 6. Seniority Lay-Off Preference. The inverted seniority system shall be used for seasonal lay offs and possible lay offs due to shortage of work. In the event such lay offs should occur they shall be posted, bid and awarded according to employee seniority. Copies of the posting, bids and awards shall be sent to the Local Union.
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> Such lay offs shall be for no more than a thirty (30) day period, but may be extended by mutual agreement between the Company and Union for like periods.
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> It shall be the responsibility of the employee to call in every two (2) weeks and make himself available for recall in the event of an emergency or an increase in work load.

It is clear from the above provisions that the County has the rights for which the City of Brookfield argued. A distinction must be drawn between lay-off provisions, such as that discussed in Brookfield, which address primarily the employer's ability to determine the size of its working forces, and provisions fundamentally relating to the hours to be worked and the pay to be received therefor. It is undeniable that the provision here sought by the Union could impose costs for unworked time upon the County, or pay for time spent working at jobs which the County deems less than essential. But the same could be said about

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4/ Dec. No. 17947 (July, 1980).

vacations and holidays, and the County's argument that the challenged language restricts its ability to lay-off employes, carried to its logical conclusion, would vitiate any set hours whatever in any labor contract, since by definition set hours restrict an employer's ability to lay-off an employe at one hour and call him back the next. The County's objection would thus expand vastly the rule of Brookfield and, in the process, eliminate, to all intents and purposes, the right to bargain hours, which is fundamental in the statute. And to the extent that the challenged language does not identify precisely what hours are to be worked, it both allows the County discretion, which the County presumably would desire, and identifies that forty hours per week shall be paid for. Accordingly, to whatever degree the proposal fails to relate directly to specified hours, it relates directly to specified pay. Thus, the proposal, in its entirety, relates primarily to wages and hours of employes. The remainder of the County's arguments concerning this proposal have to do with its alleged unreasonableness, rather than whether it primarily relates to wages, hours and conditions of employment, and we do not, therefore, address them.

For these reasons, we conclude that the guaranteed work week proposal of the Union is primarily related to wages, hours and conditions of employment of employes and therefore that said proposal also relates to mandatory subjects of bargaining.

Dated at Madison, Wisconsin this 12th day of November, 1982.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Gary L. Covelli, Chairman

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Morris Slavney, Commissioner

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Herman Torosian, Commissioner