STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of GREEN COUNTY Requesting a Declaratory Ruling Pursuant to Sec. 111.70(4)(b), Stats., Involving a Dispute Between Said Petitioner and GREEN COUNTY DEPUTY SHERIFF'S ASSOCIATION	Case LXX No. 31406 DR(M)-300 Decision No. 21144

Appearances:

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

Kelly, Haus & Katz, Attorneys at Law, by Mr. William Haus, 302 East Washington Avenue, Suite 202, Madison, Wisconsin 53703, appearing on behalf of the Union.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECLARATORY RULING

Green County having on April 4, 1983 filed a petition requesting the Wisconsin Employment Relations Commission to issue a declaratory ruling pursuant to Sec. 111.70(4)(b), Stats., for the purpose of determining whether certain proposals submitted by Green County Deputy Sheriff's Association in its final offer in a Sec. 111.77, Stats., interest-arbitration proceeding involving such employes, are mandatory subjects of bargaining; and the parties having waived hearing in the matter; and briefs having been filed by July 25, 1983; and the Commission, being fully advised in the premises, makes and issues the following

FINDINGS OF FACT

1. That Green County Deputy Sheriff's Association, hereinafter referred to as the Union or Association, is a labor organization and has its offices at 2827 - 6th Street, Monroe, Wisconsin 53566.

2. That Green County, hereinafter referred to as the County, has its offices at the Green County Courthouse, Monroe, Wisconsin 53566; and that among its functions the County operates a Sheriff's Department.

3. That at all times material herein the Association has been, and is, the recognized collective bargaining representative of all regular full-time and regular part-time sworn deputies in the employ of Green County in its Sheriff's Department, excluding managerial, supervisory and confidential employes; and that the County and the Association were parties to a collective bargaining agreement covering the wages, hours and conditions of employment of said employes for the 1980-81 term of said agreement.

4. That during bargaining over a successor to their 1980-81 contract, the Union proposed to retain the existing Article 2.02 in the successor agreement, which Article states:

> Negotiations shall proceed in the following manner: the party requesting negotiations shall notify the other party in writing of its desire to negotiate a successor collective bargaining agreement one hundred twenty (120) days prior to the expiration of this contract. Within thirty (30) days of the request for such meeting, an initial meeting of the parties shall be held. At such meeting, the party making the

> request shall present its proposals. The party to whom the proposals are made shall have the opportunity to study such proposals and to respond and present proposals and counterproposals within fifteen (15) days thereafter; and negotiations shall continue thereafter upon a mutually agreeable basis with a view towards an amicable settlement.

that the County contends said provision is a permissive or prohibited subject of bargaining; and that the Commission finds that said provision primarily relates to wages, hours and conditions of employment.

5. That during bargaining the Union proposed to retain the existing Article 4.01 in the successor agreement, which Article states:

> All benefits and working conditions that the employees now have and are not specifically mentioned in this contract shall remain in full force unless changed by agreement of the parties.

that the County contends said provision is a permissive subject of bargaining; and that the Commission finds that said provision primarily relates to the formulation or management of public policy because it inextricably intertwines matters related to wages, hours and conditions of employment with matters related to the formulation or management of public policy.

6. That during bargaining the Union proposed to add the following new Article 18.06 to a successor agreement, which new Article states:

> Upon retirement employees shall, at their option, be permitted to participate in the group health insurance program provided under this agreement until they qualify for Medicare.

that the County contends said provision is a permissive subject of bargaining; and that the Commission finds that said provision is primarily related to wages, hours, and conditions of employment.

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

CONCLUSIONS OF LAW

1. That Article 2.02, as proposed by the Union as a provision of the successor agreement and as set forth in Finding of Fact 4, is a mandatory subject of bargaining within the meaning of Sec. 111.70(4)(b) of the Municipal Employment Relations Act, hereinafter referred to as MERA.

2. That Article 4.01, as proposed by the Union as a provision of the successor agreement and as set forth in Finding of Fact 5, is a permissive subject of bargaining within the meaning of Sec. 111.70(4)(b) of MERA.

3. That Article 18.06, as proposed by the Union as a provision of the successor agreement and as set forth in Finding of Fact 6, is a mandatory subject of bargaining within the meaning of Sec. 111.70(4)(b) of MERA.

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

DECLARATORY RULING 1/

1. That the County has a duty to bargain with the Association with respect to the proposals set forth in Findings of Fact 4 and 6.

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

(footnote continued on page 3)

2. That the County has no duty to bargain with the Association with respect to the proposal set forth in Finding of Fact 5.

Given under our hands and seal at the City of Madison, Wisconsin this 1st day of November, 1983.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Herman Torosian, Chairman

_____
Gary L. Covelli, Commissioner

_____
Marshall L. Gratz, Commissioner

1/ (footnote continued)

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.

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.

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

Before entering into consideration of each proposal specifically, it is useful to set forth the general legal framework within which the issues herein must be resolved. As the Commission stated in Crawford County (Sheriff's Department), 20116 (12/82):

> In Beloit Education Association v. WERC 73 Wis. 2d 43 (1976), Unified School District No. 1 of Racine County v. WERC 87 Wis. 2d 819 (1979) the court set forth the definition of mandatory and permissive subjects of bargaining under Sec. 111.70(1)(d), Stats., as matters which primarily relate to "wages, hours, and conditions of employment" or to the "formulation or management of public policy", respectively. When it is claimed that a proposal is a prohibited subject of bargaining because it runs counter to express statutory command, Board of Education v. WERB 52 Wis. 2d 625 (1971); WERC v. Teamsters Local No. 563 75 Wis. 2d 602 (1977), the court has held that proposals made under the auspices of the Municipal Employment Relations Act (MERA) should be harmonized with existing statutes "whenever possible" and that only where a proposal "explicitly contradicts" statutory powers will be found to be a prohibited subject of bargaining.

In that light, each of the proposals shall be considered in turn.

PROCEDURE FOR SUCCESSOR AGREEMENT NEGOTIATIONS DURING CONTRACT TERM

Parties' Positions:

The County argues that the proposal in question is permissive because it attempts to regulate the outcome of future negotiations, an effort which the Commission has previously found to be a permissive subject of bargaining in City of Milwaukee 19091 (10/81). The County also asserts that the proposal is permissive because it believes that the last sentence of the proposal is a "voluntary impasse resolution procedure" within the meaning of Sec. 111.70 (4)(cm)5, Stats. In addition, the County generally contends that the proposal is permissive because it does not primarily relate to wages, hours and conditions of employment. Thus it asserts that even if the Commission were to agree with the Union that the proposal does nothing more than parallel the definition of collective bargaining contained in Sec. 111.70(1)(d), Stats., the proposal is still permissive.

The County argues in the alternative that the proposal is a prohibited subject of bargaining because: (1) the last sentence creates a contractual obligation to bargain which could exceed the three year limitation upon a contract's duration contained in Sec. 111.70(3)(a)4, Stats.; and (2) because the timelines set forth in the proposal differ from those created by Sec. 111.77 (1)(a), Stats.

The Union counters by contending that the proposal is mandatory because it primarily relates to wages, hours and conditions of employment. It argues that the clause simply sets forth a procedure specifying when the parties will begin and continue their negotiations and alleges that if the clause is found to be permissive, an employer could avoid bargaining by refusing to schedule negotiations sessions. The Union argues that it is fundamental to the maintenance of wages, hours and conditions of employment that a successor agreement be concluded prior to the expiration of an existing contract because certain matters which are mandatory subjects of bargaining do not survive the expiration of the agreement. Negotiating a time frame for the presentation of proposals and collective bargaining has as its purpose the avoidance or minimization of a hiatus period during which no collective bargaining agreement is in force. It is an attempt to assure timely and effective bargaining by requiring, through agreement, that bargaining will begin early enough to avoid a hiatus between contracts.

The Union further argues that the procedure for the exchange of proposals is aimed at achieving efficient and effective bargaining by requiring both sides to present their respective proposals so that bargaining can occur. It asserts that agreeing on dates for bargaining is part of collective bargaining. Without agreement on that issue there can be no other bargaining. Similarly, the Union argues that agreeing on some agenda is essential for effective bargaining. It believes that parties are going to have to agree on when to talk and what to talk about before they can bargain meaningfully on terms for a collective bargaining agreement.

The Union disputes the County's assertions that the clause is a prohibited subject of bargaining. It does not believe that the clause is capable of extending bargaining beyond three years because if either party felt that the bargaining was not going to resolve their dispute, a petition for interest arbitration could be filed. The Union argues that its proposal can coexist with Sec. 111.77(1)(a), Stats., in that nothing in that statutory provision prohibits bargaining over a negotiations schedule. As to the County's arguments that the proposal is permissive, the Union denies that its proposal is an impasse resolution procedure or that the proposal somehow regulates the outcome of future contract negotiations. Instead, the Union believes that its clause simply paraphrases the parties' statutory duty to bargain. The Union therefore urges the Commission to reject the County's arguments.

Discussion:

As we read it, the proposal at issue imposes specific contractual bargaining obligations in effect only through the expiration of the agreement, and it makes those obligations enforceable under the agreement grievance procedure. The proposal also calls for a 120-day notice-of-desire-to-negotiate-a-successor-agreement, which we read as in addition to rather than in place of the 180-day notice requirement in Sec. 111.77(1)(a), Stats. We also read the proposal to provide for initial proposal submissions but not to preclude either party from modifying its position after initial proposal submission in such a way as to address other matters than those covered in the parties' initial proposals. And we read the last clause of the proposal, "and negotiations shall continue thereafter upon a mutually agreeable basis with a view towards an amicable settlement", as providing only: (1) that the agreement is not imposing a time frame for subsequent negotiations activities; and (2) a precatory objective for such negotiations. We do not read that clause as relieving either of the parties of (1) their statutory obligation to bargain in good faith within the meaning of Sec. 111.77, Stats., and (2) their statutory rights to proceed to Sec. 111.77, Stats., final offer arbitration in the event of a deadlock in negotiations.

So interpreted, the proposal is, in our view, mandatory in all respects. Since it does not apply to the parties' conduct after the expiration of the agreement, it would not have the perpetual duration attributed to it by the County and is therefore not a prohibited subject on that theory. Since it in no way departs from the Sec. 111.77, Stats., procedures for impasse resolution and is wholly consistent with the Sec. 111.77, Stats., definition of the duty to bargain in good faith, we do not find the instant proposal to be a "voluntary impasse resolution procedure." Hence, even if the permissive subject status of "voluntary impasse resolution procedures" expressed in Sec. 111.70(4)(cm)5, Stats., is deemed appropriate under Sec. 111.77, Stats., which includes no such expression, the instant proposal would not be permissive in any respect on that theory, and the holding in City of Milwaukee, supra, cited by the County is not applicable or controlling herein. 2/ The fact that the proposal adds another notice requirement to that in Sec.111.77, Stats., and makes certain provisions for a meetings timetable, we do not find the proposal deviates in any way from the requirements of Sec. 111.77, Stats. We therefore reject the County's theory that the proposal contravenes Sec. 111.77 so as to be a prohibited subject of bargaining.

2/ In that case, the Commission dealt with a proposed compulsory fact finding procedure designed to provide, during the term of the parties' agreement, recommendations for resolving disputes as to how certain issues should be resolved in a successor agreement.

The Union's arguments to the contrary notwithstanding, it is not true that the clause in question is essential to collective bargaining or that an employer could per se refuse to negotiate in its absence. Section 111.70(3)(a)4, Stats., requires the parties to bargain "at reasonable times . . . with the intention of reaching an agreement . . ." This statutory duty is further refined by Sec. 111.77(1), Stats., for law enforcement bargaining units such as that represented by the Union herein. However, the issue of need is irrelevant to our deliberations over the status of the clause. What is relevant are the relationships, if any, of this clause to "wages, hours, and conditions of employment" and to the formulation or management of public policy.

Applying the "primarily related" test to the proposal, we conclude that its relationship to wages, hours and conditions of employment predominates as compared to its relationship with the formulation or management of public policy. We reject the County's argument that a proposal to incorporate elements of the MERA duty to bargain would not primarily relate to wages, hours and conditions of employment. For, such a proposal would constitute a significant means of enhancing and protecting the interests of bargaining unit employes in wages, hours and conditions of employment. Thus, proposals for contractual grievance procedures are mandatory subjects of bargaining 3/ despite the fact that there exists a statutory duty to bargain during the term of collective bargaining agreements concerning "questions arising" under such agreements. 4/ Grievance procedures channel the parties' fulfillment of that duty to bargain just as the instant proposal provides a procedure (consistent with the MERA duty to bargain prior to expiration of the existing agreement) by which the parties shall commence their bargaining about wages, hours and conditions of employment in a successor agreement. In that respect, the instant proposal also constitutes a significant means of enhancing and protecting the interests of bargaining unit employes in wages, hours and conditions of employment. That relationship to wages, hours and conditions of employment predominates over the public policy dimensions at stake as regards the manner in which the parties begin to fulfill their duty to bargain prior to expiration of the existing agreement. Accordingly, we have held that the proposal is a mandatory subject of bargaining.

We would emphasize, however, that we would not have held the proposal to be a mandatory subject of bargaining if, in our view, it had been inconsistent with the requirements of the statutory duty to bargain. 5/

MAINTENANCE OF STANDARDS

Parties' Positions:

The County, citing City of Glendale, 19719 (6/82), argues that this proposal is permissive because it can be interpreted to obligate the County to maintain working conditions which are both permissive and mandatory subjects of bargaining. Moreover, though the Association contends otherwise, it is irrelevant, according to the County, that the provision was included in prior agreements or that the Union intends it to have limited application, for it is the language of the proposal itself that controls. While the Association suggests the County should propose alternatives, the County argues it is not obligated to give counter proposals, particularly when the matter is a non-mandatory subject.

The Association argues the provision, which has been in prior bargaining agreements, was never intended to intrude on appropriate management prerogatives. The Association also notes the proposal was not objected to by the County until the "Eleventh (11th) hour of negotiations," and it was a dilatory tactic which abuses the Commission's procedures and which was used in retaliation because the Association did not concede to the County's bargaining position. Moreover, the Association believes its proposal relates primarily to wages, hours or conditions

---

3/ School District No. 6, City of Greenfield 14026-A, B (11/77).

4/ Section 111.70(1)(d), Stats.

5/ E.g., City of Sparta and City of Sparta Water Utility, 14520 (4/76).

of employment, and if the County feels the provision intrudes on management prerogatives, then the Association suggests it should address its concern during bargaining. Even though the County may object to a particular phrase within the proposal, the Association asserts the County should still be required to bargain on the subject of maintenance of standards.

Discussion:

The Association has initially contended that as the parties did not intend the language from their previous agreement to apply to permissive subjects of bargaining, the proposal is mandatory. However, the language of the proposal does not include such a limitation and is susceptible on its face to being more broadly interpreted. The Union has further asserted the County is acting in a dilatory fashion because it only objected to the Union's proposal at the last moment and failed to propose alternative language. Such assertions are not probative as to the issue of the proposal's mandatory or permissive nature. As the Union does not argue that the instant petition was untimely filed under the deadlines established during the processing of the Union's Sec. 111.77, Stats., petition for arbitration, and as it is undisputed that the instant proposal remains on the bargaining table, it remains the Commission's function to decide the merits of the County's objections thereto. We thus proceed to that task.

In City of Glendale, supra, the Commission stated the following, which we find to be the appropriate analysis for the issue at hand herein:

> The issue as to whether a "maintenance of standards" provision relates to a mandatory or permissive subject of bargaining was involved in two decisions issued by the Commission. In City of Waukesha the following provision was in issue:
>
> > 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 ... (Emphasis added)
>
> In Rusk County, supra, the Commission was confronted with the following provision:
>
> > The Employer agrees that all conditions of employment in his individual operation, relating to wages, hours of work, overtime differentials and general working condition, shall be maintained at not less than the highest standards in effect at the time of the signing of this agreement.
>
> The provision in City of Waukesha was found to relate to a mandatory subject of bargaining, while in Rusk County we determined that the provision, as written, could be interpreted as relating to non-mandatory subjects of bargaining.
>
> The language in the provision involved herein makes no distinction between those hours and conditions of employment which primarily relate to management policy (which are non-mandatory subjects of bargaining) and those which primarily relate to hours and conditions of employment (mandatory subjects of bargaining). While not couched in the terms in issue in the Rusk County case, the language in the provision involved herein is also open ended and susceptible to an interpretation that it applies to both permissive and mandatory subjects of bargaining. The mere fact that the term "wages, hours and conditions of employment" is set forth in the provision does not in itself convert the provision into a mandatory subject of bargaining. We have therefore concluded that the City has no duty to bargain collectively with the Union on the provision involved during their negotiations for a successor to the 1981 agreement. (Footnote omitted).

As we have previously found herein, the instant maintenance of standards proposal makes no distinction between those benefits and conditions which primarily relate to management policy or to those which primarily relate to wages, hours and conditions of employment. As such, under the City of Glendale formulation, the proposal is a permissive subject of bargaining.

HEALTH INSURANCE FOR RETIREES

Parties' Positions:

The County maintains this proposal creates a health insurance benefit for retired employes, not a retirement benefit for current employes, as the Union asserts. As in City of Milwaukee, 19091 (10/81), where the Commission held that a retiree is not an employe under MERA, nor a member of the bargaining unit, the County argues that such a proposal is a non-mandatory subject for bargaining. The Commission in City of Milwaukee, and the County here, rely on Chemical Workers v. Pittsburgh Plate Glass Co., 404 U.S. 157 (1971). The County asserts that the Supreme Court in Pittsburgh Plate Glass Co. held the subject of retirees health insurance benefits to be a permissive subject, and not a mandatory bargainable future benefit for current employes, as the Union here suggests. If the Union's position were sustained, the County asserts an employer may also have to bargain over the rights of employes who quit or were discharged. The County maintains that a typical retirement plan includes current payments for bargaining unit employes and is similar to escrowed funds for vacation or sick pay, while the instant proposal is only operative after the employment relationship ends.

The Association claims the proposal is a future retirement benefit for current employes and as such is part of the overall compensation of active employes. It cites City of Appleton, 14615-A (1/77), where the Commission held a retirement policy is mandatory because it affects wages, hours and conditions of employment of bargaining unit employes. City of Milwaukee, supra, according to the Union, is not determinative because that case stated an employer does not have to bargain regarding health insurance benefits for retired employes who at the time of bargaining were no longer members of the bargaining unit. The instant proposal does not provide for participation in health insurance programs by already retired employes. The Union believes its proposal is mandatory because the right to retirement benefits is earned and bargained during one's employment relationship.

Discussion:

The decisions of both the Commission and the United States Supreme Court have noted a distinction between a retirement benefit for those employes who have already retired and those who will retire in the future. As the Commission stated in City of Milwaukee, supra:

> Although, for existing employes, the Commission has held that the level and scope of health insurance benefits constitute a mandatory subject of bargaining and that retirement benefits for existing employes are mandatory subjects of bargaining, the Commission has never held that these same subjects are mandatory when they apply to non-unit members exclusively. In fact, consistent with the Supreme Court's decision in Pittsburgh, the Commission has concluded that proposals that have a primary impact on non-bargaining unit members and only indirect impact on unit members are permissive subjects of bargaining. Also, consistent with the decision in Pittsburgh, we conclude that an individual who is no longer employed due to retirement and without an expectation of further employment is not an "employe" within the meaning of MERA, nor is that person a member of the bargaining unit. (Footnotes omitted).

Clearly, retirement benefits bargained as part of an overall compensation package need not be limited to the payment of a pension, but they may well include payments of health insurance premiums or, as here, the right to continue in a group health insurance program. Wages bargained in exchange for the performance of work as an active employe (prior to retirement) can take the form of payments and fringe benefit privileges paid to the employe contemporaneously with the

active service or deferred so that payment to the employe occurs at a later date. Whether contemporaneous or deferred, the compensation involved is in exchange for the work performed by the employe during the term of the contract prior to retirement. Deferred compensation can be funded through an escrow or trust fund arrangement or on a pay-as-you-go basis, absent provisions of law to the contrary not present herein. Decisions as to what payments and fringe benefit privileges employes will receive for their work and when they will receive those payments and be entitled to those fringe benefit privileges are all matters primarily related to wages of bargaining unit employes for work performed during the contract term regardless of how much of the compensation package is payable contemporaneously with the work performed as opposed to at and during retirement or some portion thereof.

Thus, in our view, if the instant clause applies only to current employes who retire during the term of the agreement, it would be a mandatory subject even though the County's obligations to such individuals would begin only at the time of the individuals' retirement.

The proposal at issue herein states in pertinent part: "Upon retirement, employes shall, at their option be permitted to participate in the group health insurance program . . ." As written, we interpret the proposal as applying only to current members of the bargaining unit, who retire while the terms of the agreement at issue are in effect, as a future retirement benefit; because the proposal, by its terms, covers only "employes". Those who have retired prior to the effective date of the new agreement are no longer employes of the County.

We therefore conclude that the proposal is a mandatory subject of bargaining.

Dated at Madison, Wisconsin this 1st day of November, 1983.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Herman Torosian, Chairman

_____
Gary L. Covelli, Commissioner

_____
Marshall L. Gratz, Commissioner