STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of MILWAUKEE METROPOLITAN SEWERAGE DISTRICT Requesting a Declaratory Ruling Pursuant to Sec. 111.70(4)(b), Stats., Involving a Dispute Between Said Petitioner and MILWAUKEE BUILDING AND CONSTRUCTION TRADES COUNCIL	Case CCX No. 31690 DR(M)-310 Decision No. 21268

Appearances:

Mr. Patrick Halligan, Senior Staff Attorney, 735 North Water Street, 4th Floor, Milwaukee, Wisconsin 53202, appearing on behalf of the District.

Goldberg, Previant, Uelmen, Gratz, Miller & Brueggeman, S.C., Attorneys at Law, by Ms. Marianne Goldstein Robbins, 788 North Jefferson Street, P.O. Box 92099, Milwaukee, Wisconsin 53202, appearing on behalf of the Milwaukee Building and Construction Trades Council.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECLARATORY RULING

Milwaukee Metropolitan Sewerage District having, on June 6, 1983, filed a petition with the Wisconsin Employment Relations Commission seeking a declaratory ruling pursuant to Sec. 111.70(4)(b), Stats., as to whether a certain proposal of the Milwaukee Building and Construction Trades Council relates to a mandatory or permissive subject of collective bargaining; and hearing with respect to said petition having been held before Lionel L. Crowley, a member of the Commission's staff, on August 30 and September 1, 1983; and the parties having submitted post-hearing briefs, the last of which was received on November 9, 1983; and the Commission having considered the record and the position of the parties and being fully advised in the premises, makes and issues the following Findings of Fact, Conclusion of Law and Declaratory Ruling.

FINDINGS OF FACT

1. That the Milwaukee Metropolitan Sewerage District, hereinafter referred to as the District, is a municipal employer pursuant to Sec. 111.70(1)(a), Stats., and operates waste water treatment plants in Milwaukee, Wisconsin; and that its principal offices are located at 735 North Water Street, Milwaukee, Wisconsin 53202.

2. That the Milwaukee Building and Contruction Trades Council, hereinafter referred to as the Union, is a labor organization which represents a bargaining unit of building trades employes employed by the District; and that the Union maintains its principal offices at 5900 West Center Street, Milwaukee, Wisconsin 53208.

3. That the District and the Union have been parties to a collective bargaining agreement covering the wages, hours and working conditions for employes of the District in the bargaining unit represented by the Union; that the predecessor collective bargaining agreement to the parties' instant agreement contained the following provision:

Part II, Section C, Management Rights

1. Except as otherwise specifically provided herein, the management of the plant and direction of the work force, including but not limited to the right of hire, the right to discipline or discharge for proper cause, the right to decide employee qualifications, the right to lay off for lack of work or other reasons, the right to discontinue jobs, the right to make reasonable work rules and regulations governing conduct and safety (the District agrees to notify the Union in advance of any changes in existing work rules), the right to determine the methods, processes and means of operation are vested exclusively in the employer. The employer in exercising these functions will not discriminate against any employee because of his or her membership in the Union. The District is in accord with the principle that District employees who are not classified as Building and Construction tradesmen should not, as a regular procedure or practice, be assigned Building and Construction Trades work, excluding, however, work involving normal or routine maintenance work historically performed by members of other bargaining units prior to the ratification of the 1976-1978 Agreement.

The Union, on the other hand, recognizes that the nature of the District's operations requires some degree of flexibility in making work assignments to its employees so that it can meet emergencies. To this end, the District may make assignments within their competence to its other employees when regular full-time trades employees are not readily available or are assigned elsewhere when such unavailability would cause losses to the District, delays or excessive waiting time for other employees to continue or to complete assignments.;

and that during the course of negotiations for a successor agreement, the District objected to including the underlined portion of that language into the successor agreement on the basis that it constituted a permissive or prohibited subject of bargaining.

4. That the parties' reached agreement on the terms of a successor agreement except for the above quoted language on which the parties agreed to seek a declaratory ruling from the Commission and if found mandatory, it would remain in the agreement, and if found permissive, it would be stricken from the agreement.

5. That the underlined language set forth in Finding of Fact 3 does not explicitly contradict any statutory provision.

6. That the underlined language as set forth in Finding of Fact 3 is primarily related to wages, hours and conditions of employment.

Based upon the above and foregoing Findings of Fact, the Commission makes the following

CONCLUSIONS OF LAW

1. That the underlined language as set forth in Finding of Fact 3 is not a prohibited subject of bargaining.

2. That the underlined language as set forth in Finding of Fact 3 is a mandatory subject of bargaining within the meaning of Sec. 111.70(3)(a)4, Stats.

Based upon the above and foregoing Findings of Fact and Conclusion of Law, the Commission makes the following

DECLARATORY RULING 1/

That the District has a duty to bargain collectively with the Union about the objected to (underlined) portion of the proposal as set forth in Finding of Fact 3.

Given under our hands and seal at the City of Madison, Wisconsin this 27th day of December, 1983.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Herman Torosian, Chairman

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Gary L. Covelli, Commissioner

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Marshall L. Gratz, 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.

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

In its petition, the District contends that the Union's proposal is not a mandatory subject of bargaining as it primarily relates to the determination of policy, assignment of work and allocation of resources which are exclusive responsibilities of the District. It further contends that the proposal imposes a condition of employment on other employes without an opportunity to bargain same, impinges on the District's organizational structure, and imposes qualifications for work. In its post hearing briefs, the District argues that the proposal is not fundamentally related to the economic interests of present employes as it does not affect the wages, hours or conditions of employment of present tradesmen because the projected workload assures that tradesmen will not be laid off but will have ample work opportunities. The District asserts that the proposal is made to increase the number of tradesmen employed and thereby inextricably mixes illegal objectives and consequences, i.e., illegal union security along with the objectives of present tradesmen, thereby rendering the entire clause illegal. The District takes the position that the proposal is not comparable to either a situation of subcontracting or promotion but rather deals with work assignment.

The District claims that public policy would be harmed by the proposal as the Union would have the right to engage in obstructive behavior by claiming the exclusive right to perform unskilled work which is only incidental to tradesmen's skills and which is within the competence of other workers. It also claims that the Union seeks the division of work into unrealistically minute parts with an excessive expansion of crews. It contends that the result is improper interference with the rights of other units as the Union would preempt common ground, slow needed repairs, prevent the work of other persons, and impermissibly interfere with the recognition of bargaining units, all resulting in a lack of productivity. The District points out that there is no statutory procedure or administrative rule on jurisdictional dispute settlement. It contends these disputes must be resolved by balancing the interest of the public employer in productivity and economy with the rights of bargaining agents. It takes the position that, on balance, the local government's discretion to make assignments should control, otherwise certain problems would arise, such as violating the law of arbitration and award. It contends the clause would interfere with awards in favor of other bargaining units and the District would be subject to inconsistent awards and would invite arbitrators to make decisions concerning the assignment of new tasks. The District argues that the proposal is so vague and broad that it would frustrate the central mission of the District, which is the continuous operation of a waste water treatment plant, along with technological improvement and environmental reliability. It also asserts that the clause would lead to unrest and constant disputes between the various labor organizations and the considerations of public policy and labor peace dictate a finding that the proposal is illegal or permissive.

The Union contends that the proposal is a mandatory subject of bargaining because it relates primarily to wages, hours and conditions of employment. It argues that on its face, the proposal has no effect on management policy but merely provides that bargaining unit employes will perform work they have historically performed. The Union claims that bargaining unit employes would be fundamentally affected if their duties were assigned elsewhere, and the proposal merely maintains assignments for unit employes. The Union maintains that the proposal is analogous to the issue of subcontracting, where the level of services is not in question, but merely the substitution of one group of employes for another, which the Commission has found to be a mandatory subject of bargaining as to both the decision and impact. The Union avers that the District's argument, that other units would be affected, has not been proved because there was no showing that anyone else claimed the Union's traditional work. It claims that any problems concerning jurisdiction have been caused by the District. It asserts that the District's arguments with respect to efficiency go to the merits of the proposal and not to whether it is mandatory or permissive. It further contends that the proposal does not involve a claim to new work but merely applies to existing work. It argues that the proposal merely restrains the District's ability to transfer work to less skilled and lower paid employes, which is not a

sufficient basis for determining the proposal to be permissive. It requests the Commission to declare the proposal a mandatory subject of bargaining.

DISCUSSION:

The Wisconsin Supreme Court 2/ has established the test for determining whether a specific proposal is a mandatory, permissive or prohibited subject of bargaining. If a proposal primarily relates to wages, hours and conditions of employment, it is mandatory; if it primarily relates to the formulation or management of public policy, it is permissive; and if it explicitly contradicts statutory provisions, it is prohibited. Here, the proposal seeks to protect job assignments, which are performed by bargaining unit employes, from being assigned to non-unit personnel. We have previously held that, absent evidence that the decision represents a choice among alternative social or political goals or values, the decision to substitute non-unit for unit personnel is a mandatory subject of bargaining. 3/ The instant proposal reserves what has historically been this bargaining unit's work to this bargaining unit. It does so expressly and thereby avoids potential District arguments in the absence of the clause that the District is less restricted or not at all restricted from assigning the work of the unit to non-unit personnel and from thereby eroding or eliminating the need for bargaining unit employes.

The main thrust of the District's position is that the proposal impermissibly conflicts with the rights of other groups of employes. It cites Sewerage Commission of the City of Milwaukee, 4/ hereinafter referred to as Sewerage II, as supporting its argument that the proposal is illegal because it interferes with the rights of other labor organizations, to wit, that this bargaining unit's work could not be assigned to other employes of the District. We find no impermissible interference with the rights of other bargaining units. The proposal specifically excludes work involving normal or routine maintenance work performed by other bargaining units. Furthermore, we interpret the proposal to involve the assignment of work that previously has been assigned to this bargaining unit. It does not apply to assignments to new equipment, operations or positions which may occur in the future.

The District focuses on the problem where separate bargaining units have the same contractual provision in question as here and each objects to the assignment of certain work to the other. This situation does not involve mutually incompatible obligations on the part of the District. Resolution of this conflict would be based on a factual determination as to which unit had been assigned such work. Although such conflicts may arise, this does not affect the nature of the proposal. Conflicts as to contractual interpretations arise frequently, but the frequency and amount of conflict do not convert a mandatory subject into a permissive subject. Instead, such conflicts might be a reason for not agreeing to such proposal on its merits, but this does not alter the conclusion that the instant proposal, on balance, predominately relates to wages, hours and conditions of employment. Likewise, the District's arguments with respect to inconsistent arbitration awards, the Union's motivation for proposing the language, and the loss of productivity and inefficiency, all go to the merits of the proposal rather than to the fundamental determination of its mandatory or permissive nature. 5/

2/ Beloit Education Association v. WERC, 73 Wis. 2d 43 (1976); Racine Unified School District v. WERC, 81 Wis. 2d 89 (1977); Glendale Professional Policeman's Association v. City of Glendale, 83 Wis. 2d 90 (1978).

3/ Milwaukee Board of School Directors, 20093-B (8/83).

4/ Decision No. 17302 (9/79). In this case an insurance proposal applied to "all employes" which could have been interpreted to involve application to employes in other units which also had the right to bargain on this issue, thereby impermissibly interfering with that right. It was determined that "all employes" meant bargaining unit employes and the proposal was found to be mandatory.

5/ Green County, 20056 (11/82); City of Wauwatosa, 18917 (11/77).

The District also contends that the proposal frustrates its mission of providing continuous treatment of wastewater. The District argues that the proposal, with its attendant potential conflicts between employe groups, could interfere with its mission. While the possibility exists that the conflicts might interfere with the District's mission, this relationship is rather tenuous and does not override the proposal's more intimate relationship to wages, hours and conditions of employment. Otherwise, anything, however remotely connected with the District's operation of its plant, might arguably interfere with its mission and could be brought within the ambit of "the management and formulation of public policy." Management of public policy is not all encompassing but must be weighed against the factors related to wages, hours and conditions of employment to determine which predominates. The evidence is not convincing that such conflicts greatly interfered with the District's mission. Additionally, the potential conflict referred to by the District involved the acquisition of work, which the proposal does not address. Here, the proposal merely establishes restraints on the District's ability to change present work assignments. It does not limit the District's ability to determine what level of work should be done, but merely requires that if work is required, it will be performed by those who normally do it, as opposed to the use of other employes. It does not relate to new assignments whether within or outside the scope of employment. The proposal also provides an exception in cases of emergency. It appears that, on balance, the policy considerations proferred by the District are not as substantial as the wages, hours and conditions of employment interests of employes. While we find that the proposal is a mandatory subject of bargaining, the merits of the proposal are left to the bargaining process. As with many mandatory subjects of bargaining, conflicts with respect to application of such proposals may be factors weighed by the parties as to whether they should be included in an agreement. The instant proposal might raise such conflicts for the District but that is a factor as to whether it agrees to such proposal and not to its bargainability. Therefore, we find the proposal to be a mandatory subject of bargaining.

Dated at Madison, Wisconsin this 27th day of December, 1983.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Herman Torosian, Chairman

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Gary L. Covelli, Commissioner

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Marshall L. Gratz, Commissioner