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 LOCAL 20, DISTRICT COUNCIL 40, AFSCME, AFL-CIO	Case LV No. 32957 DR(M)-344 Decision No. 21808

Appearances:

Godfrey, Trump & Hayes, Attorneys at Law, by Mr. Tom E. Hayes, Room 901, 229 East Wisconsin Avenue, Milwaukee, Wisconsin 53202, appearing on behalf of the City of Brookfield.

Mr. Richard W. Abelson, District Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 2216 Allen Lane, Waukesha, Wisconsin 53186, appearing on behalf of Local 20, District Council 40, AFSCME, AFL-CIO.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECLARATORY RULING

The City of Brookfield on February 22, 1984, filed a petition with the Wisconsin Employment Relations Commission, wherein it requested the issuance of a Declaratory Ruling, pursuant to Sec. 111.70(4)(b) of the Municipal Employment Relations Act, to determine whether certain proposals, contained in the offers submitted by Local 20, District Council 40, AFSCME, AFL-CIO, during the course of an investigation conducted by the Wisconsin Employment Relations Commission in a mediation-arbitration proceeding involving said parties, are mandatory subjects of collective bargaining. The parties waived hearing and filed briefs, the last of which was received on June 4, 1984. The Commission, having considered the record and the positions of the parties, makes and issues the following

FINDINGS OF FACT

1. That the City of Brookfield, herein the City, is a municipal employer having its offices at 2000 North Calhoun Road, Brookfield, Wisconsin 53005.

2. That Local 20, District Council 40, AFSCME, AFL-CIO, herein the Union, is a labor organization and has its offices c/o Richard W. Abelson, 2216 Allen Lane, Waukesha, Wisconsin 53186, and is the exclusive collective bargaining representative of all regular full-time and regular part-time employes of the City of Brookfield in the Highway Department, in the Maintenance Division of the Park and Recreation Department, in the Operating and Maintenance Division of the Sewer Utility and the Water Utility, and custodial-maintenance employes in the City Hall, excluding elected officials, department heads, professional and clerical employes, supervisors, recreation directors, seasonal employes, and all other City of Brookfield employes.

3. That the City and the Union have been parties to a series of collective bargaining agreements covering the employes described in Finding of Fact 2 above; that the most recent of these agreements expired on December 31, 1983; that the parties have been unable to negotiate a successor to the expired agreement; that on January 6, 1984, the Union petitioned for mediation-arbitration pursuant to Sec. 111.70(4)(cm), Stats.; and that during the investigation of said mediation-arbitration petition, the City filed the instant petition for declaratory ruling challenging certain language provisions which the Union desires to continue into the successor agreement.

4. That the provisions which the Union desires to continue in effect in the successor agreement, and to which the City objects, are as follows:

STANDBY SCHEDULE

11.01 Employees in the Water Utility shall be required to standby for emergency calls and respond thereto. Such standby duty shall be rotated equally among all employees in the Department (not including the Superintendent) providing, however, that if the assignment occurs more often that (sic) a six week rotation, volunteers shall be sought from among other qualified employees within the bargaining unit, and employees in the Water Department shall not be required to standby within less than six weeks if a qualified volunteer is found. The Water Department Superintendent shall determine the qualification, subject to challenge in the grievance procedure.

Standby duty shall commence at 7:00 a.m. on Monday and shall end at 6:59 a.m. on the following Monday.

Adjustment in Standby Schedule: The standby rotation list shall be adjusted whenever a particular employee is to be absent for several days or more because of illness, injury, vacation, jury duty, etc., by contracting the list. The rotation list shall be expanded upon the return of such employee.

OVERTIME RECALL LIST

12.03 Overtime shall be divided as equally as practical among the employees in a particular department qualified to do the work involved, and who desire to work overtime.

Employees may place their names on a list of employees who do not desire to be called in for overtime except on a general recall, and employees on such list shall not be required to respond to a call to report to work unless no volunteers or an insufficient number of volunteers are available.

Employees available for recall to work shall be called in the reverse order of their accumulated overtime, except that the Employer shall be required to make only one telephone call to recruit a particular employee and any employee who receives notice of the availability of overtime work and does not report shall be deemed, in respect to his position on the calling list, to be charged with the work time he would have received had he reported. An employee who desires to be called if work is available and who knows he will not be home may provide a substitute number for call.

A list of the accumulated overtime of each employee shall be posted, and such list shall be updated on a monthly basis.

In Highway Department between November 1st and May 15th, employees who intend to be away from home during the weekend or on a holiday, shall notify their supervisor of their intended absence whenever possible.

HEALTH INSURANCE

21.01 The Employer shall provide, without cost to the employees, the Blue Cross-Blue Shield Hospitalization and Surgical Insurance Plan now in effect (Hospital portion Series 2000, Surgical and Medical portion SM 100 with full maternity, diagnostic, x-ray and laboratory benefits plus package amendments and $50,000 Major Medical program with $50.00 deductible).

21.02 The Employer shall have the right to change insurance carriers under the following conditions:

A) The benefits of the policy are not diminished below those recited in the brochure entitled "Group Health Protection Program for Employees of the City of Brookfield -- Blue Cross & Surgical Care Blue Shield" numbered 88832 and dated 9/74.

B) The Union is notified at least sixty (60) days in advance of any contemplated changes and permitted to bargain on such change.

C) The Employer shall not change to an insurance carrier that has not:

1. Been providing similar coverage to a sizable number of insureds in Wisconsin for at least five (5) years;

2. Has a reputation for slow or unjust handling of claims; or

3. Has not (sic) accepted as an insurer by a Metropolitan Milwaukee hospital or physician.

5. That the proposal of the Union relating to standby duty does not prevent the City from maintaining a continuous rotating assignment among qualified employes, and accordingly does not significantly interfere with availability of repair personnel at short notice for emergency repairs; and that said proposal relates primarily to the hours at which employes are to work.

6. That the proposal of the Union related to the overtime recall list does not prevent the City from calling in to work any and all employes on overtime when the occasion demands, and therefore does not interfere significantly with weather-related or any other emergency needs for overtime work; and that said proposal relates primarily to working hours and conditions of employment.

7. That the Sec. 21.02(C)1. proposal of the Union relating to a five year experience requirement for insurance carriers would have the effect of reducing the City's choices of health insurance companies generally and of health maintenance organizations in particular; that the record does not establish a relationship between the period of time an insurance carrier has been providing similar coverage to a sizable number of insureds in Wisconsin and the quality of service or level of coverage that would be provided by that carrier to the employes in the instant bargaining unit; that the clause's effect of limiting the number of insurance companies and particularly the number of health maintenance organizations with which the City could choose to do business would have an effect on the City's formulation and management of public policy in the health care cost containment and health insurance purchase areas; and that, therefore, the cited proposal is not primarily related to wages, hours and conditions of employment but rather is primarily related to the City's formulation and management of public policy.

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

CONCLUSIONS OF LAW

1. That the standby and overtime recall list proposals set forth in Finding of Fact 4 are mandatory subjects of bargaining within the meaning of Sec. 111.70(1)(d), Stats.

2. That the health insurance proposal set forth in Finding of Fact 4 is a permissive subject of bargaining within the meaning of Sec. 111.70(1)(d), Stats.

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

DECLARATORY RULING 1/

1. That the City and the Union have a duty to bargain under Sec. 111.70(1)(d), Stats., about the disputed proposals referenced in Conclusion of Law 1.

2. That the City and the Union have no duty to bargain under Sec. 111.70(1)(d), Stats., over the disputed proposal referenced in Conclusion of Law 2.

Given under our hands and seal at the City of Madison, Wisconsin this 22nd day of June, 1984.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Herman Torosian, Chairman

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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), 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.

(Continued on page 5)

1/ (Continued)

(b) The petition shall state the nature of the petitioner's interest, the facts showing that petitioner is a person aggrieved by the decision, and the grounds specified in s. 227.20 upon which petitioner contends that the decision should be reversed or modified.

. . .

(c) Copies of the petition shall be served, personally or by certified mail, or, when service is timely admitted in writing, by first class mail, not later than 30 days after the institution of the proceeding, upon all parties who appeared before the agency in the proceeding in which the order sought to be reviewed was made.

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

The City asserts that all three of the disputed proposals relate to permissive subjects of bargaining and that, therefore, they cannot, over the City's objections, be included in the Union's final offer in the related mediation-arbitration proceeding.

The Union contends that all three of the disputed proposals are primarily related to wages, hours and conditions of employment and that they are therefore mandatory subjects of bargaining.

Before entering into a specific consideration of each proposal, it is useful to set forth the general framework within which the issues herein must be resolved. Section 111.70(1)(d), Stats., defines collective bargaining as ". . . the performance of the mutual obligation of a municipal employer, through its officers and agents, and the representatives of its employees, to meet and confer at reasonable times, in good faith, with respect to wages, hours and conditions of employment with the intention of reaching an agreement , . . . the employer shall not be required to bargain on subjects reserved to management and direction of the governmental unit except insofar as the manner of exercise of such functions affects the wages, hours and conditions of employment of the employees . . ." (emphasis added)

When interpreting Sec. 111.70(1)(d), Stats., the Wisconsin Supreme Court has concluded that collective bargaining is required with regard to matters "primarily", "fundamentally", "basically" or "essentially" related to wages, hours or conditions of employment. The Court also concluded that the statute required bargaining as to the impact of the "establishment of educational policy" affecting the "wages, hours and conditions of employment." The Court found that bargaining is not required with regard to "educational policy and school management and operation" or the "'management and direction' of the school system." Beloit Education Association v. WERC, 73 Wis. 2d 43 (1976), Unified School District No. 1 of Racine County v. WERC, 81 Wis. 2d 89 (1977) and City of Brookfield v. WERC, 87 Wis. 2d 819 (1979).

The Standby Schedule Proposal:

The City contends that this provision significantly inhibits the City's ability to provide water service to its residents. The City argues that there are only four bargaining unit employes who work in the Water Utility 2/ and that this number is insufficient to cover, on the specified six-week rotation cycle, the necessary continuous standby service. The City contends that even with a supervisor added into the rotation and the Union's proposed reduction of the cycle to five weeks accepted, the provision would still interfere with the City's ability to provide this service at predictable intervals because of vacations, illnesses and so forth.

We note, however, that the provision as written does not mandate a six-week rotation. The provision specifies that if the assignment occurs more often than a six-week rotation, "volunteers shall be sought from among other qualified employees within the bargaining unit, and employees in the Water Department shall not be required to standby within less than six weeks if a qualified volunteer is found." This language clearly implies that the cycle may in fact occur on a less than six-week basis; that qualified unit volunteers will then be used; and that if there are no such qualified volunteers, employes from the Water Utility may be utilized on less than a six week cycle. The City's contention that employes

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2/ It appears that the total of all employes in the bargaining unit is forty-three, but that this includes employes with a variety of other work assignments and work experience.

volunteering are not qualified to do this work is expressly answered by the proposal's provision that the Water Department Superintendent makes the decision as to the qualifications of any volunteer to participate in the standby cycle, subject only to the grievance and arbitration procedure. The possibility that a dispute over a volunteer's qualification might be arbitrated works no greater hardship on the Employer's ability to determine that the work shall be performed by qualified employes than is commonly the case with clearly mandatory provisions specifying that only qualified employes may be promoted, which often generate disputes over qualifications to grievance and arbitration procedures. There is, therefore, nothing in this provision that would operate to prevent the City from assigning standby service to qualified employes at all times. At the same time, it is apparent that the standby proposal is an attempt to spread the burden of being on standby status (rather than entirely off duty) among a larger number of unit employes. 3/ We therefore find that this proposal relates primarily to hours and conditions of employment and is thus a mandatory subject of bargaining.

The Overtime Recall List Proposal:

The City argues here that the Highway Department of the City has only twenty-two equipment operators and laborers, of whom fourteen have currently asked to be placed on the non-overtime list, and that in the past as many as sixteen have requested inclusion on that list. The City argues that, therefore, only six to eight employes are prepared to respond to overtime needs, and that this is clearly an insufficient number to cope with approximately 224 miles of highway in adverse weather conditions. The City argues that, therefore, this provision significantly interferes with the City's ability to recruit a force after regular working hours to cope with a need or an emergency.

It is plainly stated in the disputed provision that the function of the list is that the listed employes "shall not be required to respond to a call to report to work unless 4/ no volunteers or an insufficient number of volunteers are available." This phrase establishes that the function of the overtime list is to establish an order for the calling in of employes who desire overtime rather than to limit the number of employes available for overtime work in the event that management decides that a larger number or even the entire crew is required. Nothing in this provision would prevent the City from calling in the entire crew on overtime as and when it found such work necessary. The provision merely establishes a method of identifying those employes who wish to work overtime and insuring that first preference will go to them. We find, accordingly, that this provision relates primarily to working hours and conditions of employment and that it is a mandatory subject of bargaining.

The Health Insurance Proposal:

In its statement supporting the petition and in its brief, the City has referred only to the five-year requirement specified in Sec. 21.02(C)1. of the provision as being objected to. We therefore limit our discussion to that section.

The City contends that the five-year requirement of this clause has no relationship to hours, wages or conditions of employment. The City argues that an insurance company, for example, might never have operated within Wisconsin and still might have every capability of carrying out all of its duties under its policies. The City further contends that the declared policy of both the federal and state governments 5/ is to encourage the formation of new and more economical insurance arrangements, particularly including health maintenance organizations and preferred provider organizations, and that this provision would materially interfere with these aspects of public policy. The City alleges that the provision is therefore illegal as well as permissive.

3/ City of Wauwatosa, Dec. No. 15917 (WERC, 11/77).

4/ Emphasis added.

5/ The HMO Act of 1973, Public Law 93-222, 42 USC para. 300-E at the federal level, and Chapter 27, Laws of 1983 at the state level.

The Union contends that under the applicable federal laws the offering of health maintenance organizations is limited to those employers who are covered under the Fair Labor Standards Act, and that the City is not such an employer. The Union further contends that there are health maintenance organizations active in the Milwaukee area which meet all of the criteria in Sec. 21.02.

But the Union does not offer to prove that there is any relationship between the quality of service provided by a given insurance carrier or health maintenance organization and the length of time that carrier or organization has been active in the State of Wisconsin. There is no basis herein for us to find that the specific provision objected to, the five-year requirement, is related in any significant degree to wages, hours and conditions of employment. On the other hand, the clause would limit the number of insurance companies and particularly the number of health maintenance organizations with which the Employer could choose to do business, with consequences for the City's formulation and management of public policy. For that reason, we find that the five-year experience requirement is a permissive subject of bargaining. We do not find it necessary in this case to determine whether that clause is also an illegal subject of bargaining. We further note that the record is inadequate for making such a determination.

Dated at Madison, Wisconsin this 22nd day of June, 1984.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Herman Torosian, Chairman

Marshall L. Gratz
Marshall L. Gratz, Commissioner