STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of WISCONSIN RAPIDS WATER WORKS AND LIGHTING COMMISSION Requesting a Declaratory Ruling Pursuant to Section 111.70(4)(b), Wisconsin Statutes, Involving a Dispute Between Said Petitioner and INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 1147	Case LXII No. 33353 DR(M)-350 Decision No. 21889

Appearances:

Boardman, Suhr, Curry & Field, Attorneys at Law, First Wisconsin Plaza, Suite 410, One South Pinckney Street, P.O. Box 927, Madison, WI 53701-0927, by Mr. Paul A. Hahn, appearing on behalf of the Employer.

Goldberg, Previant, Uelman, Gratz, Miller & Brueggeman, S.C., Attorneys at Law, 788 North Jefferson Street, P.O. Box 92099, Milwaukee, WI 53202, by Ms. Marianne Goldstein Robbins, appearing on behalf of the Union.

FINDINGS OF FACT, CONCLUSION OF LAW AND DECLARATORY RULING

On May 25, 1984, the Wisconsin Rapids Water Works and Lighting Commission filed a petition with the Wisconsin Employment Relations Commission seeking a declaratory ruling pursuant to Sec. 111.70(4)(b), Stats., as to the Commission's duty to bargain with International Brotherhood of Electrical Workers, Local 1147 over a proposal submitted by Local 1147 during bargaining between the parties. The parties waived hearing in the matter and agreed that the Commission should proceed to rule upon the status of the disputed proposal based exclusively upon the legal arguments submitted by them. The parties filed written argument with the Commission, the last of which was received on July 17, 1984. Having considered the proposal and the parties' arguments with respect thereto, the Commission makes and issues the following

FINDINGS OF FACT

1. That the Wisconsin Rapids Water Works and Lighting Commission, herein the Employer, is a municipal employer having its offices at P.O. Box 399, 221 - 16th Street, South Wisconsin Rapids, Wisconsin 54494.

2. That International Brotherhood of Electrical Workers, Local 1147, herein the Union, is a labor organization having its offices at 111 Jackson Street, Wisconsin Rapids, Wisconsin 54494.

3. That at all times herein, the Union has been the exclusive collective bargaining representative of certain individuals employed by the Employer in classifications which include Journeyman Lineman, Equipment Operator, Groundman, Serviceman, Meter Tester, Operator, Maintenance, Meter Reader, and Common Laborer; and that the Union and the Employer have been parties to a series of collective bargaining agreements establishing the wages, hours and conditions of employment of said employes, the last of which covered the years of 1982 and 1983 and included the following provision:

> A standard day shall constitute eight (8) hours of work and forty (40) hours shall constitute a work week. Work necessary and done in excess of eight (8) and forty (40) per week shall be paid for at the rate of one and a half the regular rate. During day light savings time, hours of work by mutual agreement shall be from 7:00 a.m. to 3:30 p.m., except for Filter Plant Operators. (Emphasis added.)

4. That during collective bargaining between the parties over the terms of the agreement which would succeed their 1982-1983 contract, a dispute arose as to the Employer's duty to bargain with the Union over the following proposal:

> A standard day shall constitute eight (8) hours of work and forty (40) hours shall constitute a work week. Work necessary and done in excess of eight (8) and forty (40) per week shall be paid for at the rate of one and a half the regular rate. During day light savings time, hours of work shall be from 7:00 a.m. to 3:30 p.m., except for Filter Plant Operators.

5. That the disputed proposal set forth in Finding of Fact 4 primarily relates to wages, hours and conditions of employment.

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

CONCLUSION OF LAW

That the proposal referenced in Finding of Fact 5 is a mandatory subject of bargaining within the meaning of Sec. 111.70(1)(d), Stats.

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

DECLARATORY RULING 1/

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

Given under our hands and seal at the City of Madison, Wisconsin this 1st day of August, 1984.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Herman Torosian, Chairman

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Marshall L. Gratz, Commissioner

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Danae Davis Gordon, 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.
(Footnote 1 continued on Page 2)

1/ (Continued)

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.

(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, CONCLUSION OF LAW AND DECLARATORY RULING

Before entering into a specific consideration of a disputed proposal, it is useful to set forth the general legal framework within which the issue herein must be resolved. Sec. 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 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 "management direction of the governmental unit" upon wages, hours and conditions of employment. The Court found that bargaining is not required with respect to the "management and direction" of the governmental body. 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 disputed proposal reads as follows:

> A standard day shall constitute eight (8) hours of work and forty (40) hours shall constitute a work week. Work necessary and done in excess of eight (8) and forty (40) per week shall be paid for at the rate of one and a half the regular rate. During day light savings time, hours of work shall be from 7:00 a.m. to 3:30 p.m., except for Filter Plant Operators."

The Employer asserts that the Union's proposal, through its omission of the phrase "by mutual agreement" which was previously contained in the parties' 1982-1983 contract, precludes the Employer from requiring employes to work outside the hours specified in the proposal and thus must be found to be a permissive subject of bargaining. Contrary to the Union's assertions herein, the Employer contends that the first two sentences of the proposal do not indicate an intent to allow the Employer to require employes to work outside the hours specified in the proposal. The Employer notes in this regard that the proposal states that the hours of work "shall" be 7:00 a.m. to 3:30 p.m. The Employer further argues that by the inclusion of the phrase "by mutual agreement" in prior contracts, the parties had thereby given the Employer the flexibility to work employes outside the hours specified in the contract and that the Union, by seeking the exclusion of that phrase, is seeking to eliminate that flexibility.

The Employer asserts that the hours which it chooses to operate should not be subject to collective bargaining and that any language which contains enough ambiguity to raise a doubt as to the Employer's ability to unilaterally establish operating hours, and thus assure orderly operations and the health, safety and welfare of the public, must be found to be permissive. The Employer argues that it is inappropriate for the Commission to consider the modifications of the proposal at issue which the Union has proffered during the processing of this case. It asserts that a contrary conclusion would inhibit meaningful collective bargaining by the parties prior to involvement of the Commission in their dispute.

The Employer asserts that the Commission's prior decisions in City of Wauwatosa, Dec. No. 15917 (WERC, 11/77) and Milwaukee Board of School Directors, Dec. No. 17504 and 17508 (WERC, 12/79) support its position. It

argues that the Union's proposal herein is similar to, if not the same as, the language found permissive in the two above-cited cases in that the proposal would prevent the Employer from scheduling different hours for the employes and thus would interfere with its managerial decision making as to the hours during which services will be provided to customers. The Employer also alleges that the Commission's decision in City of Brookfield, Dec. No. 17947 (WERC, 7/80) supports the Employer's position herein because, unlike Brookfield, the instant proposal precludes the Employer from requiring employes to work hours outside those specified in the proposal. The Employer therefore requests that the Commission find the Union's proposal herein to be a permissive subject of bargaining.

The Union counters by asserting that its proposal does not limit the hours during which the Employer will operate and does not preclude the Employer from requiring employes to work outside the hours specified in the proposal subject only to overtime pay liability. It contends that the proposal does not contain any explicit restriction on assignments outside scheduled hours and that the sentence in question, when read in the context of the preceding sentences, cannot reasonably be interpreted as implicitly including such a restriction. The Union argues that the removal of the words "by mutual agreement" simply eliminates any ambiguity that the 7:00 a.m. to 3:30 p.m. schedule is to be the regular schedule without the need for a further, subsequent mutual agreement by the parties. The Union further notes that the overtime language which immediately precedes the disputed sentence would be rendered meaningless if, as the Employer contends, the daylight savings time schedule prohibited work outside the regularly scheduled time frame. If necessary, the Union stands ready to offer clarifying language which would be placed at the end of the disputed language as follows: "Nothing in this provision is intended to limit the employer's ability to assign necessary work outside the scheduled hours provided that employees are paid at the rate of one and one-half the regular rate for such work." The Union therefore asserts that it has done everything possible to make clear that its intent in proposing the disputed language is to establish a regular schedule of work hours during daylight savings hours and not to restrict the Employer's ability to operate outside those hours. Therefore, the Union submits that the proposal must be considered a mandatory subject of bargaining primarily related to wages, hours and conditions of employment.

The Union further contends that, as reasonably interpreted, its proposal is virtually the same as that found mandatory by the Commission in City of Brookfield, supra. In that case, involving Water Utility employes, the Commission found the following language to be mandatory: "The established work schedule for employees . . . shall be from 7:00 a.m. to 3:30 p.m. from Monday through Friday." The Union notes that similar findings have been made by the Commission in City of Green Bay, Dec. No. 12402-B, (WERC, 2/75); City of Wauwatosa, supra; Crawford County, Dec. No. 20116 (WERC, 12/82) and School District of Janesville, Dec. No. 21446 (WERC, 3/84). Given the foregoing cases, the Union asserts that it could not be clearer that a provision establishing regular work hours or work schedules is a mandatory subject of bargaining. As the Union admits that its proposal does not preclude the Employer from requiring employes to work outside the schedule of hours specified therein, the Union does not find the Milwaukee Board of School Directors or City of Wauwatosa cases cited by the Employer to be persuasive. The Union therefore submits that the Commission should find its proposal to be a mandatory subject of bargaining.

DISCUSSION

The Employer's contention that this proposal is permissive is premised upon

The Commission has consistently concluded that a proposal which specifies the timing and length of the workday and which does not preclude the Employer from providing basic service is a mandatory subject of bargaining. City of Wauwatosa, supra.; City of Brookfield, supra.; Madison Metropolitan School District, Dec. No. 16598 (WERC, 10/78) and School District of Janesville, supra. In Janesville, the Commission set forth its basic rationale for such a conclusion as follows:

> . . . the Commission has previously found language which specified both the timing and length of the work day to be mandatory. Indeed, bargaining over "hours" is a basic employe interest because the amount of time which an employe must work has an obvious and direct relationship upon the time which that employe has available for non-work related activities upon which the employe may well place far greater value in his or her life. In addition, there is the intimate relationship between the number of hours an employe works and the amount of compensation which the employe and the bargaining representative will seek as compensation.
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> . . . Although we have earlier concluded that this proposal does not prevent the District from requiring employes (even on a daily basis) to perform duties outside of the hours specified in the proposal, we have also noted that under the terms of the proposal, such would be compensable by overtime pay in addition to the starting and ending time of his or her work day fall outside those preferred by the employe relate to employe preferences as to the scheduling of their own non-work activities with family members or friends. The Association's proposal presumably reflects an employe interest in not working--except at overtime rates--at times such as evening or night whch might conflict with the non-work time of family or friends or early morning which might conflict with daily family preparations or other preferred personal or transportation routines. (at pp. 81-82)

We find the foregoing rationale to be applicable herein and, given our interpretation of the proposal at issue, we do not find that this proposal will prevent the Employer from providing services to customers of the utility. Therefore we find that the Union's proposal primarily relates to employe wages, hours, and conditions of employment and therefore is a mandatory subject of bargaining. 2/

Dated at Madison, Wisconsin this 1st day of August, 1984.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Herman Torosian, Chairman

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Marshall L. Gratz, Commissioner

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Danae Davis Gordon, Commissioner

2/ When reaching this conclusion, we have not considered the Union's amended proposal proffered during the course of this proceeding. However, we do wish to indicate that, contrary to the Employer's argument herein, amendments of challenged proposals are appropriate during declaratory ruling proceedings and, to the extent that they often eliminate the need for further processing of the declaratory ruling petition, substantially enhance the collective bargaining process.