STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

LOCAL UNION NO. 487, IAFF, AFL-CIO, LOCAL UNION NO. 29, PROFESSIONAL POLICE ASSOCIATION, POLICE COMMAND GROUP, LOCAL UNION NO. 9, EAU CLAIRE PROFESSIONAL POLICE ASSOCIATION (PATROL GROUP), Complainants, vs. CITY OF EAU CLAIRE, Respondent.	Case 137 No. 35138 MP-1727 Decision No. 22795-A

Appearances:

Lawton & Cates, Attorneys at Law, by Mr. Richard V. Graylow, 110 East Main Street, Madison, Wisconsin 53703, appearing on behalf of Complainants.

Mr. Ted Fischer, City Attorney, City Hall, 203 South Farwell Street, Eau Claire, Wisconsin 54701, appearing on behalf of Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Local Union No. 487, IAFF, AFL-CIO; Local Union No. 29, Professional Police Association (Police Command Group); and Local Union No. 9, Eau Claire Professional Police Association (Patrol Group) filed a complaint on June 10, 1985 with the Wisconsin Employment Relations Commission alleging that the City of Eau Claire had committed prohibited practices within the meaning of Sections 111.70(3)(a) 1, 2, 3 and 4, Wis. Stats., by creating a new job classification combining police and fire fighting duties and unilaterally implementing wages, hours and conditions of employment of that position. The Commission appointed Christopher Honeyman, a member of its staff, to act as Examiner in this matter and to make and issue Findings of Fact, Conclusions of Law and Order, as provided in Section 111.70(5), Wis. Stats. A hearing was held in Eau Claire, Wisconsin on September 10, 1985, at which time the parties were given full opportunity to present their evidence and arguments. The parties filed briefs and reply briefs, and the record was closed on November 11, 1985. The Examiner, having considered the evidence and arguments and being fully advised in the premises, makes and files the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. Local Union No. 9, Eau Claire Professional Police Association (Patrol Group), herein referred to as the Police Patrol Union, is a labor organization within the meaning of Section 111.70(1)(h), Stats., and has its principal office c/o Eau Claire Police Department, City Hall, Eau Claire, Wisconsin.

2. Local Union No. 29, Professional Police Association (Police Command Group), herein referred to as the Police Command Union, has its principal office c/o the Eau Claire Police Department, City Hall, Eau Claire, Wisconsin.

3. Local Union No. 487, International Association of Fire Fighters, AFL-CIO, herein referred to as the Fire Fighters Union, is a labor organization within the meaning of Section 111.70(1)(h), Wis. Stats., and has its principal office c/o the Eau Claire Fire Department, City Hall, Eau Claire, Wisconsin.

4. The City of Eau Claire is a municipal employer and has its principal offices at 203 South Farwell Street, Eau Claire, Wisconsin. Its City Manager is

Eric Anderson, its Director of Human Resourses is Everett Foss, and those named are the City's agents.

5. Complainant Police Patrol Union is the exclusive representative of all non-supervisory law enforcement personnel employed by the City of Eau Claire, and is signatory to a July 1, 1984 - June 30, 1986 collective bargaining agreement with the City. Its president is Brad Gough.

6. Complainant Police Command Union is the exclusive representative of all supervisory law enforcement personnel, excluding the Chief, employed by the City of Eau Claire. The Police Command Union and the City are signatories to a collective bargaining agreement in effect from July 1, 1985 to June 30, 1986. David Malone is President of the Police Command Group.

7. Complainant Fire Fighters Union is the exclusive representative of all non-supervisory fire fighters employed by the City of Eau Claire, and is signatory to a July 1, 1984 - June 30, 1986 collective bargaining agreement with the City. Its President is David Patrow.

8. About February, 1984 the City established an Emergency Services Committee as part of a general reassessment of its priorities. The Emergency Services Committee discussed various possible programs to resolve issues facing the police and fire services of the City, and in May, 1984 recommended a limited test of a new type of public safety employe, to be known as a public safety officer (PSO). This function was to be placed within the police department but to be cross-trained to serve also as a fire fighter. The City Council adopted the recommendation by resolution on July 25, 1984, and City Manager Anderson then established a Public Safety Officer (PSO) Committee to develop a test program of the PSO concept. By about late November, 1984, the PSO Committee reported its conclusions to the City Manager, including recommendations for the job description, number of employes, test period, test location, construction of a fire station and acquisition and refurbishing of equipment.

9. The record shows that upon receiving the recommendations of the PSO committee, the City offered to bargain with the police command union and police patrol union concerning the impact of the PSO test on wages, hours and working conditions, but that it did not make such an offer to the Fire Fighters Union and that it refused to negotiate with any of the unions concerning the decision to create the PSO classification. The record shows that after approximately nine meetings with each of the two police unions, the City made a final offer concerning issues related to the PSO test on or about April 18, 1985 to both unions. The record shows that both police unions subsequently made further offers and requested to continue bargaining, and that on June 20, 1985, the Police Patrol Union filed a request to initiate mediation and a petition for final and binding arbitration with the Wisconsin Employment Relations Commission pursuant to Section 111.77, Wis. Stats. The record shows that the City refused to participate in interest arbitration and proceeded to implement its final offers to the police unions.

10. Terry Spaeth is an attorney having his address at 116 West Grand Avenue, Eau Claire, Wisconsin. Spaeth represented both police unions in their negotiations with the City concerning the PSO test, and the record shows that Spaeth and Human Resources Director Foss agreed that disputes between these unions and the City concerning the test should be disposed of by means of the prohibited practice proceeding rather than by the processing of grievances. The record shows that none of the Complainant unions filed a grievance concerning the PSO test.

11. The record shows that the City sought volunteers for PSO training among existing police department personnel, but received none. The record shows that in implementing its final offers concerning the PSO test, the City unilaterally chose which employes were to be trained for the PSO function and eligible for that classification, unilaterally set a higher pay rate for that function than for police patrolmen, unilaterally established an incentive payment for completing the training and unilaterally established other working conditions related to the PSO test. The record does not show that there was a necessity to implement the PSO test prior to completing negotiations and, if necessary, interest arbitration concerning the wages, hours, selection and working conditions of employes involved.

12. The record shows that starting about late 1982 the City required all prospective new hires into the Police Department to sign a memorandum of

understanding indicating that the employe was aware that he/she might in future be required to become a PSO. The record shows that the City at one time argued to the unions that this document was a binding contract with said individuals and would be applied as such, but that Respondent abandoned that position prior to the hearing in this matter in favor of a position that the document was informational in nature. The memorandum of understanding on its face does not clearly indicate that it is intended as a binding agreement or waiver of an individual's rights. The requirement to sign it therefore did not interfere with, restrain or coerce employes in the exercise of their rights of self-organization and/or union activity, or constitute individual bargaining with employes.

13. The record shows that the decision to test the public safety officer function in the City and to design a program for so doing primarily relates to public policy and only secondarily to wages, hours or conditions of employment.

14. The record shows that the decision to implement PSO wages and other terms of employment, and to assign to PSO training police officers relate primarily to wages, hours and working conditions, and only secondarily to matters of public policy.

Upon the basis of the foregoing Findings of Fact, the Examiner makes and files the following

CONCLUSIONS OF LAW

1. The decision to cross-train police department employes to perform fire fighting duties and to establish a new classification of employes who are cross-trained is a permissive subject of bargaining, and Respondent has no duty to bargain with Complainants concerning said decision.

2. The decision to implement a selection of employes assigned to said training, their wage rates, their incentive payments and other terms and conditions of employment is a mandatory subject of bargaining, and Respondent has a duty to bargain with Complainant Police Patrol Union prior to implementation of said decision. By unilaterally implementing its final offer concerning these issues Respondent violated Section 111.70(3)(a) 1 and 4, Stats.

3. Respondent has no duty to bargain with Complainant Police Command Group, and did not violate Sec. 111.70(3)(a) 1 or 4 by unilaterally implementing its proposal to that organization.

4. Respondent did not have a duty to refrain from implementing the consequences of its public policy decision with respect to the Fire Fighters Union, and did not violate Sec. 111.70(3)(a) 1 or 4 by doing so.

5. The requirement that new hires sign an informational memorandum did not violate Secs. 111.70(3)(a)(1), (3), or (4) Stats.

Upon the basis of the foregoing Findings of Fact and Conclusions of Law, the Examiner makes and renders the following

ORDER 1/

IT IS ORDERED that the City of Eau Claire, its officers and agents shall immediately:

1. Cease and desist from implementing terms and conditions of employment of and relating to public safety officers, including selection of employes for training, wage rates, and incentive payments, prior to exhaustion of its duty to bargain same with Local Union No. 9, Eau Claire Professional Police Association (Patrol Group).

2. Take the following affirmative action, which the Examiner finds will effectuate the purposes and policies of the Municipal Employment Relations Act:

   (a) Bargain collectively with Local Union No. 9, Eau Claire Professional Police Association (Patrol Group) regarding the choice of employes to participate in the PSO test and with respect to wages, hours and conditions of employment.

(b) Rescind the appointment of any employes trained or classified as public safety officers, pending the results of the negotiations required under Section (a) above.

(c) Notify the employes by posting in conspicuous places on its premises, where notices to its employes are usually posted, a copy of the notice attached hereto and marked "Appendix A." Such copies shall be signed by a responsible official of the City and shall be posted immediately upon receipt of a copy of this Order, and shall remain posted for a period of thirty days thereafter. Reasonable steps shall be taken to ensure that said Notice is not altered, defaced, or covered by other material.

(d) Notify the Wisconsin Employment Relations Commission in writing within twenty days of the date of service of this Order as to what steps have been taken to comply herewith.

The remainder of the allegations in the complaint are dismissed.

Dated at Madison, Wisconsin this 30th day of January, 1986.

By _____
Christopher Honeyman, Examiner

1/ Any party may file a petition for review with the Commission by following the procedures set forth in Sec. 111.07(5), Stats.

Section 111.07(5), Stats.

(5) The commission may authorize a commissioner or examiner to make findings and orders. Any party in interest who is dissatisfied with the findings or order of a commissioner or examiner may file a written petition with the commission as a body to review the findings or order. If no petition is filed within 20 days from the date that a copy of the findings or order of the commissioner or examiner was mailed to the last known address of the parties in interest, such findings or order shall be considered the findings or order of the commission as a body unless set aside, reversed or modified by such commissioner or examiner within such time. If the findings or order are set aside by the commissioner or examiner the status shall be the same as prior to the findings or order set aside. If the findings or order are reversed or modified by the commissioner or examiner the time for filing petition with the commission shall run from the time that notice of such reversal or modification is mailed to the last known address of the parties in interest. Within 45 days after the filing of such petition with the commission, the commission shall either affirm, reverse, set aside or modify such findings or order, in whole or in part, or direct the taking of additional testimony. Such action shall be based on a review of the evidence submitted. If the commission is satisfied that a party in interest has been prejudiced because of exceptional delay in the receipt of a copy of any findings or order it may extend the time another 20 days for filing a

"APPENDIX A"

NOTICE TO ALL EMPLOYES

Pursuant to an Order of the Wisconsin Employment Relations Commission, and in order to effectuate the policies of the Municipal Employment Relations Act, we hereby notify our employes that:

> We will immediately cease and desist from implementing the choice of employes for training and classification as public safety officers, and wages, hours and conditions of employment for such employes, without bargaining said decisions with Local Union No. 9, Eau Claire Professional Police Association (Patrol Group).

Dated at Eau Claire, Wisconsin this ____ day of _____ , 1986.

By _____
On behalf of City of Eau Claire

THIS NOTICE MUST REMAIN POSTED FOR THIRTY (30) DAYS FROM THE DATE HEREOF AND MUST NOT BE ALTERED, DEFACED OR COVERED BY OTHER MATERIAL.

CITY OF EAU CLAIRE,

MEMORANDUM ACCOMPANYING
FINDINGS OF FACT, CONCLUSIONS
OF LAW AND ORDER

BACKGROUND:

The complaint as filed alleged that the City violated Sections 111.70(1)(2)(3) and (4) by

a. requiring newly hired police department employes to sign a document implying that they agree to be assigned as a public safety officer;

b. unilaterally assigning the historical duties of fire fighters to police officers and vice vera;

c. unilaterally soliciting volunteers from among police officers to begin training in the PSO program;

d. ordering police officers to undergo PSO training.

The complaint also alleged that by the same acts the City violated its own charter ordinances and Chapter 62, Wis. Stats., by combining the functions of police and fire departments. An amended complaint was filed on August 6, 1985, alleging in addition that the City violated the same sections of the Municipal Employment Relations Act by unilaterally requiring fire fighters to engage in training of police officers to do fire fighter work, some of which training was allegedly outside the normal hours of work. A second amended complaint was filed on September 4, 1985, adding as an allegation that the PSO program is unlawful under Wisconsin law and hence a prohibited subject of bargaining. At the hearing Complainants withdrew the allegation that fire fighters were being assigned police officers' duties.

The essential facts are not disputed. Sometime about 1982, officials of the City began discussing the possible adoption of a public safety officer program, whereby the same individual employe could be used for both police and fire fighting duties. Starting in about December of that year, new entrants into the police department were asked to sign a memorandum of understanding prior to hire, which indicated on its face that the signer understood that he could be required to perform fire fighting as well as police duties. A police recruit hired during that period testified that his understanding of the document was that it did not signify agreement to this concept or obligate him "unless he was hired." Of seventy-five prospective employes offered this document -- in the Police Chief's office, immediately prior to hire -- seventy-five signed.

A PSO program was thus already under discussion at the time a new City Manager, Eric Anderson, was hired on January 1, 1984. Anderson, a month later, established an Emergency Services Committee to explore various possible options for solving a variety of difficulties experienced or anticipated by the police and fire departments. The committee included Anderson's assistant manager, Director of Human Services Everett Foss, the Police Chief and Fire Chief, supervisors and employes in both the police patrol union and the fire fighters union. The committee proceeded to discuss a wide variety of problems, and held a number of meetings to develop different possible approaches. The committee evaluated ten alternative programs or changes which might solve various problems, including raising revenues; eliminating a service overlap between police and fire services; forming a common council of employe unions and management; contracting out for certain services; administrative consolidation of certain vehicle maintenance, investigation and records functions; consolidating fire and building inspection functions; spreading the fire fighting personnel in smaller groups but a larger number of locations; training volunteer police personnel to provide fire and EMT emergency support; testing a selected area of the City for consolidated functions; and restructuring facilities and working schedules. 2/ The final report of the

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2/ Joint Exhibit 10.

Emergency Services Committee, dated May 17, 1984, evaluated all of these options and ultimately recommended a number of changes, as follows:

RECOMMENDATIONS SUMMARY

1. Establish a joint police and fire policy-making body for planning and implementing recommendations.

2. Consolidate police, fire and building inspections.

3. Combine police and fire public education activities.

4. Construct a fire station housing a mini-pumper (attack vehicle) in the Hwy. 93 area.

5. Establish a test area in accordance with map in Appendix B.

6. Restructure employee hours in the test area.

7. Add additional personnel to the present department organization and train sufficient personnel to staff the test area.

The committee realizes that this recommendation does not present one alternative which, by itself, would significantly change the manner in which emergency services are delivered. Rather, it presents a series of options which can be implemented, either partially or entirely. Nonetheless, these recommendations do address many of the goals identified by the committee and directly addresses the committee charge.

This report contains two recommendations for the implementation of a program of cross-training. One of these alternatives, that of cross-training police department personnel, received the highest overall rating by the committee. The use of a selected area in the southern sector of the City was rated third overall. The remaining recommendations both support these two alternatives and suggest real changes in the emergency service delivery system.

Anderson reviewed the committee's recommendations and then supported them to the City Council; on July 25, 1984, the council adopted the recommendations, in essence, by resolution. Anderson then established a PSO committee, consisting of two parts. The policy-making section was to be made up of the Police Chief, Fire Chief and Director of Human Resources; an advisory committee was to be composed of one member from the police patrol group, one from the fire fighters group ranked at equipment operator or lower and another ranked at Lieutenant or higher, one member of the police command group and the assistant to the City Manager. The PSO committee was duly formed, met and, as instructed, reported to Anderson with proposals for how to establish a test of the PSO function. In summary, the test was to run for a two-year period beginning January 1, 1986, in a limited geographical area comprising a developing area of the City in which the City had long planned to add a fire station eventually. Six additional police officers and four additional fire fighters were to be employed, and approximately thirty-five police officers were to be trained to serve as PSOs. A job description for PSO was prepared, identifying that position as a police department position but with requirements of fire fighting duty and knowledge. The supervision anticipated for the position was identified as being primarily the police chain of command, with fire command supervision "during training, designated emergencies or as designated by joint policy."

Upon receiving the specifications for the position and the suggested terms of the test, the City offered to bargain concerning the impact of the decision with the police command union and the police patrol union. The City did not offer to bargain with the fire fighters' union. Both of the non-supervisory unions had current collective bargaining agreements with the City, which had gone into effect on July 1, 1984 and continue until June 30, 1986. Negotiations with the police command group entertained wages and other subjects in general with a view towards a 1985-86 agreement; all of the evidence (discussed below) indicates that the parties jointly viewed the "regular" negotiations in a different light from the

negotiations over impact of the PSO test, and an agreement was concluded concerning wages, hours and working conditions with the police command group on or about April 8, 1985. Negotiations with the same group continued after that date with respect to the PSO test, in parallel with negotiations between the City and the police patrol group. Both police unions were represented by the same Eau Claire attorney, Terry Spaeth.

Both unions made proposals concerning wages and conditions of employment for PSO, but maintained throughout that their primary proposal was that the PSO program itself be abandoned. This position appears on the proposals made after the City's "final offer" to each union, and was supported by testimony of all of the witnesses. The City proposed wage increases and an incentive bonus for completing PSO training, among other items, and increased its offer during the bargaining until about April 18, 1985. On that date the City proposed to the police patrol union the following "final offer":

1. Wages for the public safety officer classification will be 10% above that of a police officer in the same step. Individuals will only receive the additional pay when assigned PSO responsibilities and assigned areas where the PSO classification is being tested.

2. Hours of work will not change and remain the same as the police officer.

3. The City will train up to 30 individuals in firefighting techniques (certification Level 1 and 2 see attachment) and pay those individuals a one time lump sum payment of $1,000.00 for successful completion of this training. Successful completion to be determined by receiving a passing grade in Levels 1 and 2.

4. Individuals trained as public safety officers will be provided safety equipment which will include safety shoes.

5. If the test is successful individuals assigned to the areas will continue to receive the additional compensation, however, if the test is unsuccessful the additional compensation and benefits will be eliminated.

6. Management will inform all individuals hired into the police department of the test program in operation and the possible impact of that test.

7. If it becomes necessary to lay off individuals at the completion of the test program, the lay off will be in accordance with Personnel Rule 25.17 which reads as follows:

   "At such times that it is necessary to reduce the number of employees currently employed by the City seniority within a class will be a primary consideration for lay off. The last employee to be laid off within such class will be the first to be rehired.

   Employees who are laid off may replace employees in a lower class provided that they have the qualifications necessary for the performance of the duties assigned to the lower class, and

3. The City will provide firefighting training (Certification Level 1 and 2 see attachment) for all command personnel assigned to the patrol division and pay those individuals a one time lump sum payment of $1,000.00 for successful completion of this training. Successful completion to be determined by receiving a passing grade in Level 1 and 2. If it is determined appropriate by management to train additional command personnel during the test period those individuals will receive the same lump sum payment for successful completion.

4. If the test is successful individuals assigned to the supervision of the program will continue to receive the additional compensation, however, if the test is unsuccessful the additional compensation and benefits will be eliminated.

It is undisputed that the police unions maintained thereafter their opposition to adoption of the PSO test in any form, but also modified proposals relating to the impact of that test and requested to bargain further. It is also undisputed that the City refused to bargain further and proceeded to implement its final offers. Training of some thirty-five police department officers to perform fire fighter duties began about the beginning of July, 1985.

RESPONDENT'S MOTION TO DISMISS:

On September 5, 1985 Respondent filed a motion to dismiss the complaint, on the grounds that the actions of the City described in the first amended complaint were contemplated and allowed under the collective bargaining agreements in effect with the unions and that the unions had failed or refused to exhaust the grievance procedures provided under their collective bargaining agreements. Ruling on the motion was withheld pending the completion of the record.

The bargaining spokesperson for both police unions, Terry Spaeth, testified that he had discussed the question of filing grievances with Human Services Director Foss, and that the two had agreed to dispose of questions relating to the propriety of the City's action by means of the instant complaint proceeding. Foss, in his testimony, confirmed Spaeth's account. The allegation that the police Complainants failed to exhaust the grievance procedure is therefore without merit. At the same time, two of the three collective bargaining agreements predated any decision by the City to adopt a PSO test, and the City's proposal to negotiate wages and other conditions of employment indicates that the establishment of the PSO position and its conditions of employment were not matters bargained previously by the unions. Respondent's contention that the collective bargaining agreements "contemplate and allow" Respondent's action is not persuasively supported in the record or in the agreements themselves. 3/ Furthermore, the fact that the City continued to make proposals relating to the PSO test, including its final offer, after reaching agreement with the police command group on the "normal" terms of a successor agreement shows that both parties to that negotiation understood that the contract did not address the PSO subject and that separate negotiations were appropriate. Accordingly, the motion to dismiss is without merit with respect to the police unions and is denied. With respect to the fire fighters' union the motion is treated separately below.

THE PARTIES' POSITIONS:

Complainants' Arguments

Complainants argue that the PSO program as a whole is primarily related to wages, hours and conditions of employment, and is therefore a mandatory subject of bargaining. Complainants argue that the City has implemented unilateral wage rates and incentive rates for those completing the training for the PSO position, and that conditions of employment have also been altered. In that respect Complainants argue that the assignment of non-traditional job duties is a mandatory subject of bargaining and that the record shows clearly that police officers have never before been required to be trained for or perform fire

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3/ See also the discussion below of Respondent's argument of waiver and estoppel.

fighting duties. Complainants note that the record shows that participation in the PSO program is required under penalty of discipline. Complainants contend that the PSO program is far more significant than a mere work rule.

Complainants contend that the PSO program directly impacts employes' health, safety and welfare, because of the hazardous nature of fire fighting. Complainants argue that the City was committed to adoption of the PSO test no later than July 25, 1984 and that the record shows clearly that the City has refused to bargain concerning the decision to impose such a program. Complainants argue that following a round of bargaining at which the unions did attempt to bargain, the City withdrew from the bargaining table and unilaterally established a number of conditions of employment, including dates of training, the employes to receive the training, the date of implementation, the area of implementation, the hours and days of training, wages and the incentive payment for successful completion of the training.

Complainants further contend that the City engaged in individual bargaining by requiring prospective employes to sign the "memorandum of understanding" committing them to participation in the PSO program, without bargaining such an agreement with the police patrol group.

Complainants contend that the City implemented the terms of a final offer without reaching impasse with the unions, but that even if impasse was reached, under City of Brookfield 4/ an impasse is not a sufficient defense to a unilateral change in a mandatory subject of bargaining where final and binding interest arbitration exists.

With respect to Respondent's argument of waiver and estoppel, Complainants contend that the elements of waiver, particularly an intentional act by the unions, are not present; and that there is nothing which the unions have done or failed to do which has caused any detriment to the City, and therefore that estoppel is absent.

Finally, Complainants argue that both Chapter 62, Wis. Stats. and the City's own ordinances provide for entirely separate and autonomous police and fire departments, and that Respondent has violated both by commingling the functions of the two public safety services.

Respondent's Arguments

With respect to the "memorandum of understanding," Respondent argues that the memo was not an order and that the only police recruit who testified stated that he did not agree to anything by signing it. The City argues that the memo did nothing more than advise prospective employes of a possible future requirement, and that it is not an agreement in derogation of a collective bargaining agreement.

Respondent contends that with respect to the request for volunteers for PSO training, the letter sent was palpably not an order, since not a single employe responded favorably, and that nothing in the letter modified wages, hours or conditions of employment of bargaining unit employes.

Respondent contends that the City properly refused to bargain with the unions the "basic decision to implement" the PSO program, because this was a management decision primarily related to public policy. Respondent contends that Chapter 62, Wis. Stats., expressly allows the City Council to create officers other than those specifically set forth in that section, and that it has the authority to establish a new position within its police department; and further that such a decision is a matter primarily related to public policy considerations. Respondent points to testimony to the effect that the purpose of establishing the PSO position was to achieve greater efficiency, effectiveness and economy in the delivery of City services, and argues that these are classic considerations "basic to the executive decision-making process governing the level of municipal protective services."

4/ City of Brookfield, Dec. No. 19822-C (WERC, 11/84).

Respondent argues that the police patrol group demanded in 1984 negotiations that "any new position or job classification created for a police officer will be negotiated at that time" and that this issue was dropped by the union. Respondent contends that the police patrol group was aware of the oncoming PSO program at that time and consciously raised that issue, and that therefore its failure to obtain such language in its collective bargaining agreement constitutes waiver and estoppel. On the same basis, the Respondent contends that by concluding negotiations on April 8, 1985 regarding wages, hours and conditions of employment, the police command group waived bargaining over the decision to establish the PSO program, because it was apparent to all concerned that the City had taken the position that this decision was permissive, and that the parties were proceeding with negotiations solely with respect to impact of that decision.

Respondent argues that it bargained in good faith concerning the impact of the decision to proceed with a PSO program, engaged in numerous and lengthy meetings with both police unions, and reached impasse with both unions. Respondent argues that its unilateral imposition of its final offer was legitimate under the circumstances of an existing collective bargaining agreement with the unions involved, contending that City of Brookfield 5/ applies only where there is current bargaining over the collective bargaining agreement as a whole. Respondent cites City of Green Bay 6/ and Greendale School District 7/ among other cases for this point. Respondent contends that as it was not seeking to "terminate or modify" the collective bargaining agreement, there is no right of the unions to proceed to municipal interest arbitration and that therefore the right to implement a final offer following impasse is preserved in this situation.

Respondent argues that the PSO program does not combine police and fire departments, and that the WERC lacks jurisdiction to determine whether such a decision would in any event violate either Chapter 62, Stats. or the City's own ordinance.

Respondent contends that the fire fighters' union, at least, failed to exhaust its grievance procedure, and that its defense against the complaint concerning the fire fighters is intact, because Attorney Spaeth did not represent the fire fighters in his discussions with Foss and the agreement between the two to handle the matter pursuant to the prohibited practice proceeding related only to the two police unions.

ANALYSIS:

The principle controlling mandatory or permissive status of a subject of bargaining, under Wisconsin law, is whether the subject is primarily related to the formation and choice of public policy or to wages, hours and conditions of employment. The Wisconsin Supreme Court has stated that "where the governmental or policy dimensions of a decision predominate, the matter is properly reserved to decision by the representatives of the people . . . " 8/ The court noted that "drawing the line or making the distinction is not easy." 9/ In this case the line to be drawn is particularly complex, because the complaint here concerns not a single decision but a sequence of decisions made and carried out over a period of time.

The first and central decision was the City's determination to test the PSO concept. Complainants have challenged this decision as being in and of itself primarily related to wages, hours and conditions of employment. I do not agree. It is apparent that the decision to undertake the PSO test was a necessary precursor to a series of decisions which affect wages, hours and conditions of

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5/ Supra

6/ City of Green Bay, Dec. No. 12307-A, WERC, 2/74.

7/ Greendale School District, Dec. No. 20184, WERC, 12/82.

8/ Unified School District No. 1 of Racine County v. WERC, 81 Wis. 2nd 89 (1977); Beloit Education Association v. WERC, 73 Wis. 2nd 43.

9/ Beloit, supra at page 53.

employment substantially; these are discussed below. But the decision to adopt for testing purposes the PSO classification and to carry out such a test with a view toward wider application in the future, by itself, is primarily related to public policy.

The whys and wherefores of the decision to test the PSO concept are well laid out in the report of the Emergency Services Committee. 10/ The charge to the committee was quintessentially public policy in nature: The committee was given free rein to examine a wide variety of options, with a view to resolving a substantial number of potentially conflicting needs and constrictions of the City. Among the conditions noted by the committee to be changing were expansion of the City in land area and population, budget cuts in State aids, increasing numbers of hazardous materials to which emergency services personnel were exposed, increased need for specialization of public safety personnel, heavy use of overtime and possible unsafe working conditions resulting from fatigue, increasing need for paramedics, and changing communications technology. The alternative programs or other solutions to these various problems considered by the committee have been noted briefly above; and the eventual recommendation to try out the PSO program was one of a group of recommendations also noted above. The recommendations extended throughout the operations and policies of the police and fire departments and presaged a radical shift in thinking as to how those departments should be organized and cooperate with one another. The PSO recommendation was part and parcel of these concerns, and cannot be fully separated from other recommendations such as the construction of a fire station of a particular size in a particular area, and establishing a joint police and fire policy-making body.

In determining to test the PSO concept, the City essentially adopted the recommendations of the Emergency Services Committee. A reading of the committee's discussion discloses a substantial emphasis on service needs and changing priorities within the City, and only a secondary interest in wages, hours or working conditions. The primary area in which wage savings were anticipated by the committee was in overtime usage, but the overtime discussion was phrased primarily in connection with safety of fatigued officers, and saving on overtime costs does not appear to have been a major focus of the committee. I conclude that in and of itself the decision to test the PSO concept was primarily related to the City's desire to respond to changing conditions and service needs and only secondarily to wages, hours and working conditions.

With respect to Complainants' argument that the City's actions violated Chapter 62, Stats. and the City's own ordinances, essentially by forging a combined police and fire department, I note that the parties have not focused this proceeding on these allegations and that the Supreme Court has pointed out that the WERC is not the most appropriate forum for such allegations. 11/ As the argument has been made to some extent, however, I will note that the record fails to demonstrate a substantial diminution in the autonomy of fire and police departments: The job description of the public safety officer classification states that it may be commanded at <u>different times</u> by the police and fire chains of command; the establishment of a joint police-fire policy making body is not the subject of this proceeding, and therefore the fact that the PSO classification overlaps the two departments does not, on this record, warrant a finding that the City has commingled the two departments in a fundamental sense.

For these reasons, I conclude that the City's refusal to bargain with any of the unions concerning the creation of a PSO classification and testing of the PSO method of operation for two years is not unlawful.

<u>The Negotiations Up To The City's Declaration Of Impasse</u>:

In considering the sequence of Respondent's actions, it is important to draw a distinction not stressed by either party: The three unions do not stand in this matter upon the same footing. The relationship of the decisions involved here to the three Complainant unions is sharply different in each case, and the rights of each union must therefore be assessed separately.

10/ Joint Exhibit 10.

11/ See <u>City of Brookfield</u>, 87 Wis. 2nd 804.

Fire Fighters

By the time the City announced its readiness to negotiate with two of the unions, in late 1984, it was evident what the City's decision had been with respect to bargaining unit placement and the general job duties of the PSOs. The City had determined to place the PSOs in the police department, responsive to the police department chain of command for most purposes, and contrary to the initial complaint no cross-training of fire fighters was involved. The fire fighters' union thus faced the potential loss of bargaining unit work to members of the police patrol group. But the facts do not establish an actual loss of employment in the fire fighters' bargaining unit: Because the issue arises at a time of expansion of city services, four additional fire fighters were in fact hired in connection with the PSO test. The "replacement" of employes in the fire fighters' unit by police department employes is thus more significant as a matter of theory than of substance.

There is at least a theoretical similarity between the replacement of employes in one bargaining unit by employes in a different bargaining unit and subcontracting. The Racine case cited above determined that the decision to subcontract is a mandatory subject of bargaining when motivated by concern over wages and benefits rather than "alternative social or political goals or values." In Racine and various subsequent cases the "primarily related" test resulted in a finding that the employer was engaging in subcontracting primarily in order to save money on labor costs. But here, for the reasons noted above, the shift in work from the bargaining unit represented by the fire fighters to that represented by the police patrol group was motivated primarily by shifting service needs. Wages, in fact, were to be raised for the PSO classification; and while the eventual number of employes (per capita relative to the City's increasing population) might be lower using the PSO classification for much of the work, the decision to shift the work from one bargaining unit to the other is clearly part and parcel of the creation of the public safety officer classification. This, I have concluded, was primarily related to public policy. The weighing process expressly required by Racine and Beloit demands consideration of the magnitude of a decision's relationship to wages, etc. as well as the fact of a relationship, and here the loss of "employment", as noted above, is theoretical rather than substantial. 12/ In this case, therefore, the "subcontracting" involved of fire fighters'-unit work is primarily related to public policy. The decision to transfer that work would therefore not be a mandatory subject of bargaining.

Other than the prospective loss of bargaining unit work, the relationship of the whole series of Respondent's decisions to the fire fighters' bargaining unit appears on this record to be limited to a somewhat lesser amount of training time available to fire fighters (because of the use of fire department supervisors to train the PSO trainees) and the temporary training assignments' effect on working conditions of the trainers themselves. Complainants do not argue that these are major impacts on the fire fighters; and the record does not show that the fire fighters' union demanded to bargain with the City at or prior to the times that these decisions were reached and implemented. 13/ For all of these reasons, I conclude that the City's actions do not violate its duty to bargain with the fire fighters' union on any subject primarily related to wages, hours or conditions of employment. It is therefore unnecessary to address the City's motion to dismiss the complaint specifically.

Police Command

The police command group stands neither to be expanded nor contracted as a direct result of the decision to train and test public safety officers. The supervisors comprising that union are not expected to be reclassified in the same way as public safety officers, although the policy decision does impact them in terms of salaries and incentive payments for those chosen to undergo "matching" training to PSOs.

12/ See f.i. Dane County, Dec. No. 22681-A, 11/85.

13/ See discussion of Milwaukee Sewerage and related cases below.

The statute, however, does not treat supervisory and non-supervisory bargaining units alike with respect to a municipal employer's duty to bargain. Section 111.70(8) provides that law enforcement supervisors are free to establish labor organizations:

> (8)SUPERVISORY UNITS. This subchapter does not preclude law enforcement or fire fighting supervisors from organizing in separate units of supervisors for purposes of negotiating with the municipal employers. The commission shall by rule establish procedures for certification of such units of supervisors and the levels of supervisors to be included in the units. The commission may require that the representative in a supervisory unit shall be an organization that is a separate local entity from the representative of the nonsupervisory municipal employes, but such requirement does not prevent affiliation by a supervisory representative with the same parent state or national organization as the nonsupervisory municipal employe representative. In cities of that 1st class, this section applies to law enforcement supervisors. For such purposes, the term "municipal employe" includes law enforcement supervisors in cities of the 1st class. 14/

But Sec. 111.70(3)(a)(1) and (4) speak in terms of rights of "employees":

> (3) PROHIBITED PRACTICES AND THEIR PREVENTION. (a)It is a prohibited practice for a municipal employer individually or in concert with others:
>
> 1. To interfere with, restrain or coerce municial employes in the exercise of their rights guaranteed in sub.(2).
>
> 4. To refuse to bargain collectively with a representative of a majority of its employes in an appropriate collective bargaining unit. Such refusal shall include action by the employer to issue or seek to obtain contracts, including those provided for by statute, with individuals in the collective bargaining unit while collective bargaining, mediation or fact-finding concerning the terms and conditions of a new collective bargaining agreement is in progress, unless such individual contracts contain express language providing that the contract is subject to amendment by a subsequent collective bargaining agreement. Where the employer has a good faith doubt as to whether a labor organization claiming the support of a majority of its employes in an appropriate bargaining unit does in fact have that support, it may file with the commission a petition requesting an election to that claim. An employer shall not be deemed to have refused to bargain until an election has been held and the results thereof certified to the employer by the commission. The violation shall include, though not be limited thereby, to the refusal to execute a collective bargaining agreement previously agreed upon. The term of any collective bargaining agreement shall not exceed 3 years.

Meanwhile, Section 111.70(1)(i) defines "municipal employe" as <u>excluding</u> supervisors:

> (i) "Municipal employe" means any individual employed by a municipal employer other than an independent contractor, supervisor, or confidential, managerial or executive employe.

While the City may bargain an agreement with the police command group, the

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14/ Eau Claire is a city of the third class.

statute does not establish a duty to bargain. 15/ Consequently, the City cannot violate MERA by bargaining in bad faith with this union even if it is proven to do so. For this reason, the complaint is dismissed with respect to the police command group.

Waiver and estoppel

The Commission has stated that a waiver of a statutory right to bargain must be established by "clear and unmistakable" contract language or bargaining history. 16/

Foss testified without contradiction that the police patrol union did not propose to bargain the existence of the PSO classification during the 1984 negotiations, even though the potential creation of the PSO program was common knowledge by that time. The union proposed the following item during these negotiations: "Any new position or job classification created for a police officer will be negotiated at that time." To this the City responded "We have agreed to negotiate wages, hours and conditions of employment for any newly created position which this group would represent." 17/ Both statements were made in written proposals; no language relating to PSOs appears in the 1984-86 contract.

The City contends that this sequence of events shows that the union waived any right to object to the creation of the PSO classification. It is unncessary to predicate any finding on this contention, as I have determined above that the decision to create and test the PSO classification was a permissive subject of bargaining. But in its brief the City implies further that the 1984 bargaing should be interpreted as a waiver of negotiations relating to wages and terms of employment, on the ground that the union "abandoned" the subject by not obtaining language in the 1984-86 agreement relating to it.

The evidence does not, however, establish that "abandonment" was the result of the parties' 1984 exchange of proposals. It is equally possible to interpret the union's apparent silence following the City's counterproposal as acceptance of the City's position that negotiations would be entered into when that became appropriate. Certainly the City's subsequent actions are more consistent with that interpretation. The City has plainly not relied on the asserted waiver, as it proceeded to hold some nine bargaining sessions with the union on the subjects it claims the union had waived. I conclude that the union's 1984 proposal and the evidence surrounding it do not constitute the clear and unmistakable evidence required for a finding of waiver. For similar reasons, I find insufficient evidence in the record to indicate that the union is estopped from bargaining concerning the wages, hours and conditions of employment of employes affected by the PSO test. There is nothing in the record to indicate that the City acted or relied in any way based on a position taken by the union when it proceeded to implement wages, hours and terms of employent relating to PSOs, and Foss's testimony that the City was not ready to bargain until late 1984 undercuts the City's implied contention that the union had and missed the opportunity to bargain earlier.

Police Patrol

With the police patrol union the City followed, as noted above, essentially the same sequence of action as with the police command group. But major differences exist here: First, wages, hours and conditions of employment may be submitted by the police patrol union to interest arbitration pursuant to Section 111.77, Stats., and the union has sought to do so. Second, the relationship of the decision to proceed with a PSO test to this bargaining unit's

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15/ See City of Milwaukee, Dec. No. 12742-A (WERC, 4/75). While the statute was later amended with respect to Milwaukee, as shown above, the Commission's original analysis still holds as it applies to police supervisory unions in non-1st class cities.

16/ City of Wauwatosa, Dec. No.s 19310-C, 19311-C, 19312-C, WERC, 4/84.

17/ Respondent's Exhibits 3, 2 respectively.

wages, hours and conditions of employment far exceeds the same decision's relationship to either of the other units' terms of employment.

The thrust of the City's policy decision should not be obscured by the fact that the City has begun the process with a mere test. It is apparent from the record, particularly the report of the Emergency Services Committee, that the City is undergoing the PSO test with a view toward eventual large-scale replacement of police officers with PSOs. The establishment of wages, hours and working conditions, in the broadest sense, for the first group of PSOs to be trained is likely to have a major influence in the determination of those matters for the bulk of the police department's rank and file employes in the future. In arriving at a test of the PSO classification, a number of decisions are necessary. Whether to have such a classification in the first place I have found above to be a permissive subject of bargaining; but the remainder of the decisions to be made must be analysed also. These decisions include whom to assign to the training and eventual classification as PSO; the hours they are to work; the wages they are to be paid; what rights of job tenure they should have; and other terms of employment. All of these save the decision to create the classification were initially bargained between the City and the police patrol group. In unilaterally determining that an impasse existed and implementing its "final offer", the City unilaterally established which employes are assigned as PSO trainees and ultimately PSOs, how much they should be paid, and - significantly -layoff language providing that "at such times that it is necessary to reduce the number of employes currently employed by the City seniority within a class 18/ will be a primary consideration for layoff. The last employe to be laid off within such class will be the first to be rehired. Employes who are laid off may replace employes in a lower class provided that they have the qualifications necessary for the performance of the duties assigned to the lower class, and that they have greater seniority than the employe being replaced." Such language would presumably allow the layoff of police officers without touching the PSO classification even if that group had lower seniority, because the PSOs would be a higher-paid class.

The essential effect of the City's proposals, including the 10% wage increase for PSOs above that of police officers at the same step of the salary schedule and the thousand-dollar lump sum payment for successful completion of the PSO training, is to create a superior classification of employes with bumping rights over the regular police officer classification. This the City proposes to introduce, together with a choice of those who are to receive this classification, unilaterally. And the record as a whole gives the impression that the City's intent is to apply this general schema, assuming the test proves successful, to the bulk of the bargaining unit.

It is a general principle that an employer commits a per se refusal to bargain by making a unilateral change in a condition of employment. 19/ Respondent has argued in part that legal interpretations developed by the National Labor Relations Board and the Federal Courts have established that when an impasse in bargaining is reached, an employer is permitted to implement its final offer to the union unilaterally, as a means of breaking the deadlock. But the difference between resolution of impasses by economic pressure in the private sector and by interest arbitration under MERA has contributed to differently evolving interpretations of the duty to bargain.

The Commission has determined that the assignment of duties "not fairly within the scope of responsibilities" of a job is a mandatory subject of bargaining. 20/ And in Sewerage Commission of the City of Milwaukee 21/ the Commission found that where new, changed, additional or increased duties not fairly within the scope of a job were applied to that job, a municipal employer has the duty to "commence" bargaining prior to implementing same. It is clear on this record that police patrol employes have never been expected to undergo fire fighting training or to perform as fire fighters. And there is nothing in the record to suggest that such employes have historically been expected to be

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18/ Emphasis added.

19/ NLRB v. Katz, 369 US 736.

20/ City of Wauwatosa (Fire Dept.). Dec. No. 15917, WERC, 11/77.

21/ Dec. No. 17302, WERC, 9/79.

familiar with the fire fighting procedures and the details of a fire fighter's work. It is clear, therefore, that the new duties assigned to certain employes in this unit are not "fairly within the scope of the job." The fact that union witnesses conceded that it could be useful for a police officer to have this training does not alter this finding: the scope of the job is clearly established by long practice. Accordingly, if the Milwaukee Sewerage rationale applies here, the City has a duty to "commence" bargaining prior to implementing these changes. This the City did.

The selection criteria for promotion among bargaining unit employes has also been found a mandatory subject of bargaining by the Commission. 22/ After initially considering altered work weeks and work hours, the City determined prior to bargaining not to propose changes in this area. But wages and incentive payments are clearly mandatory subjects of bargaining, and admitted as such by Respondent. The choice of employes for retention in the event of layoff, meanwhile, has been repeatedly found a mandatory subject of bargaining, and Respondent does not dispute this.

Respondent bases its argument as to the propriety of unilateral implementation of its final offer on two grounds. First is argued a line of cases arising in the private sector and noted above. The applicability of private-sector concepts to this area of dispute, however, has been clearly rejected in Racine 23/ by the Wisconsin Supreme Court. The second ground is that a municipal employer's obligations differ depending on when in the contract cycle the dispute arises.

In City of Brookfield 24/ the Commission determined that unilateral implementation of a mandatory subject of bargaining prior to completion of the bargaining process was a per se violation of the duty to bargain, in a case where mediation-arbitration had been invoked to settle a contract dispute. The Commission then reasoned:

> For the following reasons, we share the Examiner's conclusion that the compulsory final and binding interest arbitration provisions of Sec. 111.70(4)(cm) make inappropriate an application of the private sector impasse defense principles to disputes subject to mediation-arbitration. Instead, we interpret MERA to mean that where, as here, there is a statutory means for obtaining a final and binding resolution of a contract negotiation dispute, a self-help unilateral change in a mandatory subject, absent waiver or necessity, constitutes a per se refusal to bargain violative of the MERA duty to bargain. In other words, in negotiations subject to compulsory final and binding interest arbitration under Sec. 111.70(4)(cm), Stats., impasse, however defined, is not a valid defense to a unilateral change in a mandatory subject of bargaining.
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> . . .
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> . . . the Commission case law under MERA prior to the enactment of Sec. 111.70(4)(cm) was not developed to such a point as would clearly define when the duty to bargain was exhausted or when an "impasse" had been reached such as would entitle a party to implement a proposal it had previously offered.
>
> We conclude that the Legislature, by its silence in Sec. 111.70(4)(cm) as compared with the Milwaukee Police language concerning unilateral changes, was leaving the question of whether there is an impasse defense available in disputes subject to mediation-arbitration for interpretation by the Commission and the Courts in the subsequent administration and interpretation of the mediation-arbitration provisions consistent with the underlying purposes of the

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22/ Brown County, Dec. No. 19042, WERC, 11/81; City of Waukesha, Dec. No. 17830, WERC, 5/80.

23/ Supra.

24/ City of Brookfield, Dec. No. 19822-C (WERC, 11/84).

legislation. We proceed below with an analysis of what interpretation best serves the underlying purposes of the statutory provisions involved.

The Legislature has included in Sec. 111.70(6) of MERA an express DECLARATION OF POLICY AS follows:

> The public policy of the state as to labor disputes arising in municipal employment is to encourage voluntary settlement through the procedures of collective bargaining. Accordingly, it is in the public interest that municipal employes so desiring be given an opportunity to bargain collectively with the municipal employer through a labor organization or other representative of the employes' own choice. If such procedures fail, the parties should have available to them a fair, speedy, effective and, above all, peaceful procedure for settlement as provided in this subchapter.

We agree with the Examiner that an application of private sector impasse defense principles to disputes subject to mediation-arbitration would provide an incentive for parties to render nonspeedy and ineffective the statutory processes for peaceful resolution of the disputes subject to mediation-arbitration that the parties are unable to resolve voluntarily through collective bargaining. For example, in the absence of a collective bargaining agreement in force, a party could propose any change in the status quo that is unacceptable to the other side, maneuver to an impasse in the private sector sense, implement the proposed change, and simultaneously prevent the immediate referal of the dispute to a mediator-arbitrator by filing a petition for a declaratory fuling on the mandatory/non-mandatory status of certain of the other party's proposals or otherwise delaying the issuance of a mediation-arbitration award. That is not a scenario consistent with or promotive of peaceful resolution of disputes.

It could be argued that the further into the bargaining and mediation-arbitration process a party must go before it may lawfully implement a previously proposed change in status quo, the greater the incentives for the party favored by the status quo to (1) avoid or delay reaching that point in the statutory process at which the other party is permitted to implement its proposed change in the status quo; and (2) avoid or delay reaching a voluntary settlement on other, less favorable terms. We note in that regard, however, that the Sec. 111.70(4)(cm) legislative scheme incorporates arrangements designed to reduce that potential for delay (halting it only for timely declaratory ruling petitions but not, e.g., for prohibited practice complaints). Moreover, in our view, creative retroactivity proposals can be proposed which--if agreed upon or included in the final offer selected by the aarbitrator--would eliminate much of the advantage of such delaying tactics. In an extreme case, unlawful abusive dalay of the statutory process (not present here) might be sufficient to render lawful a unilateral change previously proposed. We recognize that in many instances where both parties are acting in exemplary good faith the statutory processes continue well beyond expiration of any predecessor agreement and that some changes will be difficult to implement retroactively. Nevertheless, we are persuaded that the underlying purposes of MERA and Sec. 111.70(4)(cm) are better served if the parties focus on achieving solutions to retroactivity problems and the rest of their bargaining objectives through bargaining and the statutory procedures rather through unilateral action.

Thus, although the mediation-arbitration provisions specifically provide for a formal Commission determination that an impasse exists, we find it more consistent with the language of Sec. 111.70(4)(cm) as well as with the underlying purposes of MERA to conclude that there is no available impasse-based defense to a unilateral change in a mandatory subject in disputes that are subject to final and binding Sec. 111.70(4)(cm) interest arbitration. That conclusion, in our view, will encourage the parties to utilize the fair and peaceful statutory procedure to achieve proposed changes in the status quo regarding mandatory subjects rather than resort to self-help unilateral action to

that end. Making changes in the mandatory subject status quo achievable for the most part only through the procedures provided by law will encourage voluntary agreements and will promote the speed with which such disputes are processed in Sec. 111.70(4)(cm) mediation-arbitration, rather than focusing the attention of the parties on potentially less peaceful self-help methods (e.g., unilateral changes) of pursuing their bargaining objectives. This holding does not, of course, affect the municipal employer's rights to implement changes in permissive subjects of bargaining.

The section of the statute providing for mediation-arbitration 25/ is not notably different in effect from that providing for municipal interest arbitration in police and fire bargaining units, 26/ neither party argues that any practical difference exists, and the Commission's Brookfield analysis is fully applicable to police and fire bargaining units as well as the non-public safety units to which the later mediation-arbitration section of the statute applies. 27/ But whether Brookfield could under any circumstances apply to a situation in which an existing collective bargaining agreement had yet to reopen for negotiations was not discussed.

Throughout the complex series of cases in the difficult area of the "primarily related" test, the Commission and courts have attempted to give effect simultaneously to bargaining rights under MERA and to the right of public employers to act on questions of public policy, by distinguishing between these rights to the extent possible. The present case illuminates the traps which exist on either side of a fine line. If it were required that a municipal employer bargain to completion the impact on terms of employment of any public policy decision prior to implementation of that decision, the union might be able to delay implementation of even the most routine public policy decision, with the most minor impact on wages, hours and working conditions, for a substantial period. But to go to the opposite extreme, and say that an initial public policy determination allowed unilateral implementation of any resulting decisions relating primarily to wages, hours or conditions of employment, would be to create a loophole through which an adroit public employer could avoid bargaining even the most far-reaching changes until it had established a fait accompli, by choosing the moment at which it formally determined an emerging public policy to coincide with a "locked-up" collective bargaining agreement.

Brookfield expressly left open to an employer a defense of necessity, which would allow the employer to proceed immediately to implementation of a decision even if the decision was primarily concerned with wages, hours and working conditions. 28/ The availability of that defense clarifies the relationship between Brookfield and a line of earlier cases, not expressly overturned by Brookfield, in which employers were permitted to implement wage, etc. decisions without completing bargaining.

Milwaukee Sewerage, cited above, was one of these: it involved, as noted, the assignment of duties not fairly within a certain job's scope. In City of Appleton 29/ the Commission arrived at the same result in a case involving the removal of two vehicles from parking meter attendants, and in City of Madison 30/ a similar rationale was applied to the employer's decision to require cardio-pulmonary resuscitation training and certification of police officers.

All of these cases present fact situations in which the necessity to move ahead, in one way or another, is shown. This is particularly true if it is accepted that a public employer has a "necessity" to get on with its business

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25/ Section 111.70(4)(cm)(6).

26/ Section 111.77.

27/ Green County, Dec. No. 20308-B, WERC, 11/84.

28/ CF Dane County, Dec. No. 22681-A, (11/85).

29/ City of Appleton, Dec. No. 17034-D, (WERC), 5/80.

30/ City of Madison, Dec. No. 17300-C, (WERC), 7/83.

promptly when that involves the ordinary and predictable evolution of the employer's function, and does not involve major changes in the use of the employes. All of the cited cases are consistent with the "ordinary evolution" view except perhaps Madison, and in that case the Commission expressly noted that the CPR service to be provided by police officers was literally a matter of life or death to those receiving the service. That, also, constitutes "necessity".

While Brookfield, as noted above, did not address an employer's unilateral implementation of changes in mid-contract, the availability of the "necessity" defense undercuts an assertion that an employer has greater rights to impose unilateral changes during the contract's term than during bargaining, for it allows an exception from delay when that is proven important to the public purpose. But absent a showing of necessity to move immediately, there would be little logic to a claim that an employer may take unilateral action at a time when the union is powerless to act or bargain, but not free to do so at a time when the union actually has greater power to react.

Situations in which the union has arguably already addressed the employer's proposed changes, by bargaining in a previous contract negotiation, of course exist. These instances, however, are generally recognized as a waiver of further bargaining and are argued as such--as indeed Respondent has argued here. When no waiver is found, and no necessity to move immediately either, there is no persuasive reason why the Brookfield rationale would not apply in mid-contract as at its end. Respondent has not given a logical reason for such a distinction, and it is difficult to see why the legislative preference for neutral arbitral resolution of otherwise unresolvable disputes noted in Brookfield should be in effect amended to add "unless the employer can arrange the timing to its advantage."

For these reasons I conclude that, unless waiver or estoppel exists, a necessity to move toward implementation of a decision immediately must be shown in order to avoid the logic of the Brookfield analysis.

As shown by the cases noted above, "necessity" is not an impossible standard. Indeed, the facts may change during the course of a given dispute so that the pressures to make an immediate change rise. As the Commission noted in Madison, such questions can only be addressed on a case-by-case basis. "Necessity", however, is in the nature of an affirmative defense, and it is incumbent on the employer to show it.

In the present case it is clear that the changes implied by the decision even to test the PSO program are far-reaching. Nothing less than the eventual replacement of the bulk of the bargaining unit by a new classification is contemplated, and seniority, wage, incentive, and other terms of employment are involved even according to the Employer's view of the proper bargaining response.

That being so, it is noteworthy that there is nothing in the record to indicate that there was any operational necessity or public need compelling the implementation of terms and conditions of employment, including selection of employes, prior to the completion of the bargaining process here. The City's claim that the training had to begin by July, 1985 in order to commence the test by January, 1986 is logical enough. But the underlying contention, that January, 1986 was the necessary date for commencement of the test, is unsupported in the record. That date appears to be an arbitrary "target date." The record shows that what the City as a matter of public policy seeks here is a long-term and widespread change in the system of operation of its public safety services, and nothing in the record demonstrates that significant harm is suffered by the City or the public it serves by the degree of delay necessary to permit the bargaining process to be completed prior to implementation of this series of changes. In this respect I note particularly testimony by City Manager Anderson 31/ concerning the City's need for the new fire station involved: "The station was originally planned, I believe, for 1988, 1989. Without this test, that's the time frame that

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31/ Given in Eau Claire County Circuit Court, during a hearing on Complainants' request for a temporary restraining order relative to the PSO program. Joint Exhibit 20, pp. 80-81.

we would have followed. Essentially as part of the PSO test, we're accelerating the installation of that station."

For these reasons, I conclude that the record here fails to show the necessity to act swiftly which characterizes the line of cases from Milwaukee Sewerage to Dane County. 32/ The rationale applied by the Commission in Brookfield therefore applies here, and by unilaterally implementing changes in wages and other terms of employment relating to PSOs, the City violated its duty to bargain and Sec. 111.70(3)(a)(1) and (4) of MERA.

Having arrived at the conclusion that the City is obligated to restore the status quo, I must note that it is uncertain at present how long the City's duty to refrain from unilateral implementation of the PSO test lasts. This is because that duty may be discharged in any of three ways: By negotiation of the collective bargaining agreement (which is to reopen shortly); by interest arbitration following good faith bargaining; or by changes in the underlying conditions which, as noted above, could introduce a need to act immediately where none exists now. In any of these circumstances, the balance required by Beloit between the rights of the public employer and those of the collective bargaining representative would be preserved .

While the union's petition for interest arbitration concerning the wages, etc. of the PSOs is pending before the Commission, the question of whether it is proper at this time is not before me, nor does the complaint specifically allege that Respondent violated its duty to bargain by refusing to proceed to interest arbitration. I therefore make no finding whether or not Respondent has such a duty at this time. The discussion above makes it appropriate to note, however, that the Commission has previously found that an agreement to reopen negotiations in mid-contract can give the union the right to proceed to interest arbitration over the subject or subjects of bargaining included in the reopener. 33/ It is apparent that the union regards the 1984 exchange of proposals discussed above (in the context of waiver) as such a reopener. But that issue arises properly in the interest arbitration proceeding and not, as noted, in this one. I have therefore approached the discussion above from both points of view, in order to address the issues in this case consistently with either result the Commission may reach in ruling on the interest arbitration petition. For the reasons already expressed, it is my conclusion that under the circumstances of this case the City did not have the right to implement its "final offer" unilaterally, whether or not the union has the right to compel interest arbitration immediately.

Solicitation of Volunteers

With respect to the amended complaint's allegation that the City violated MERA by soliciting volunteers to train for the PSO position, I note that there is no evidence that coercion or restraint of employes was involved. But the decision to request volunteers was part of the City's unilateral selection of the employes for the PSO test, and as noted above the standard for selection of employes for a promotional opportunity is a mandatory subject of bargaining. 34/ Unilateral solicitation of volunteers was therefore one aspect of the violation of the duty to bargain with the police patrol union.

Memorandum of Understanding

The remaining issue is whether the City interfered with, restrained or coerced employes in the exercise of their MERA rights, or refused to bargain, by requiring all prospective hires to sign the "memorandum of understanding" allegedly committing those employes to become PSOs if required.

On its face the memorandum is innocuous enough. It states:

> I am aware that the City of Eau Claire is currently exploring the establishment of the position "Public Safety

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32/ Supra.

33/ See f.i. Dane County, Dec. No. 17400, WERC, 11/79.

34/ Brown County, supra; Waukesha County, supra.

Officer." That position could require police officers to be cross-trained in fire fighting duties. I understand that if I am hired as a police officer, that I may, at some point in the future, be required to train for and perform the duties of Public Safety Officer."

The circumstances of signing of this document, however, classically imply coercion: To offer such a document for signature to a prospective employe, in the Police Chief's office, immediately prior to hire plainly implies that the employer does not have to hire a recalcitrant individual. As might be expected, all of those offered the document signed it. Yet the document on its face is ambiguous, since it does not state clearly whether it means that the employe has waived any right to object to an assignment as PSO, or whether it merely means that circumstances, including collective bargaining, could result in an order to become a PSO. The City's own position has mirrored this ambiguity; Police Chief McFarlane testified that it was an "informational memo", but Police Patrol Group President Brad Gough testified without contradiction that when the union asked initially about that memorandum, the City took the position that the document was a "legal and binding contract and that it would be enforced." Gough testified further that the City later changed its position as to the meaning of this document.

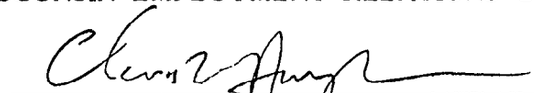
Had the City adhered to its original interpretation and intention of the memorandum, I would agree with Complainants that the purpose was to negotiate individually with employes and undercut the bargaining representative's ability to negotiate for them. But as the City itself has determined that it does not have this effect, it is unnecessary to issue a remedial order terminating the use of the memo; as correctly reinterpreted by the City, it does no more than warn a prospective employe that the PSO program is under consideration and may, under appropriate circumstances, involve him or her. It has no further binding effect, and is therefore unremarkable.

Remedy

Having found that the City improperly implemented a "final offer" to the police patrol union, the appropriate remedy is that matters be returned to the status quo. 35/ It is plainly not possible to undo the training which has proceeded; but the City is required to bargain concerning which employes should be selected for this duty, as well as other terms of employment, prior to implementing the PSO test.

Dated at Madison, Wisconsin this 30th day of January, 1986.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By 
Christopher Honeyman, Examiner

35/ NLRB v. Katz, supra; Racine; supra.