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-B

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.

ORDER SETTING ASIDE AND REMANDING EXAMINER'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Examiner Christopher Honeyman having on January 30, 1986, issued his Findings of Fact, Conclusions of Law and Order with Accompanying Memorandum in the above matter wherein he concluded inter alia that Respondent did not have a duty to bargain with Complainants over the instant decision to cross-train police department employes to perform fire fighting duties but that Respondent did violate its duty to bargain by implementing the last offer it made in bargaining about the impact of the cross-training decision on wages, hours and conditions of employment; and Complainants having on February 19, 1986, timely filed a petition with the Commission pursuant to Sec. 111.07(5), Stats., seeking review of certain aspects of the Examiner's decision; and the Commission having preliminarily reviewed the Examiner's decision and being satisfied that the case should be remanded to the Examiner for further findings and conclusions relative to the issue of Respondent's implementation of its last offer.

NOW, THEREFORE, it is

ORDERED

1. That pursuant to Secs 111.07(5) and 111.70(4)(a), Stats., the Examiner's Findings of Fact, Conclusions of Law and Order in the above matter shall be and hereby are set aside and remanded to the Examiner for issuance of Findings, Conclusions and Order in the matter that are consistent with the rationale set forth in the Memorandum accompanying this Order.

2. That in view of the foregoing, the Petition for Review filed by Complainants in the above matter is dismissed, without prejudice to the rights of any party to petition for review of the decision issued by the Examiner following this remand.

Given under our hands and seal at the City of Madison, Wisconsin this 7th day of March, 1986.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Herman Torosian, Chairman

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Marshall L. Gratz, Commissioner

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Danae Davis Gordon, Commissioner

MEMORANDUM ACCOMPANYING ORDER SETTING ASIDE AND REMANDING EXAMINER'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

In his analysis of issues relating to the Respondent's implementation of certain changes in wages, hours and conditions of employment, the Examiner found it unnecessary to determine whether the parties were at impasse in the bargaining over these matters or whether interest arbitration under Sec 111.77, Stats., was available to the union in question to resolve any impasse.

The Examiner found a determination of impasse unnecessary on the theory that implementation without mutual agreement was permissible during the term of a collective bargaining agreement only where a defense of waiver, estoppel or necessity is proven. He stated:

> While Brookfield (Dec. No. 19822-C (WERC, 11/84)), 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 in found, and no necessity to move immediately either, there is no persuasive reason why the Brookfield retionale 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.

Given foregoing the Examiner found the availability of interest arbitration to be irrelevant reasoning:

> 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 proceeed 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. (Footnote omitted.)

Because in our view the Examiner has misconstrued the impasse-based defense case law he applied to the matter before him, and because the Examiner is the most appropriate person to initially make factual determinations based upon the record he developed at the hearing, we have remanded this matter for factual findings, and legal conclusions (and consequent changes in the balance of his decision, if appropriate) as to the question of whether the parties were at impasse when the City implemented its offer.

In that regard, we direct the Examiner's attention to the Commission's decision in Green County, Dec. No. 20308-B (WERC, 11/84) wherein we held

> . . . that the binding interest provisions of Sec. 111.77 make inappropriate an application of the private sector impasse defense principles to disputes subject to that final and binding impasse resolution procedure. In our view, the underlying purposes of MERA and Sec. 111.77 warrant and require the conclusion that there is no available impasse-based defense in disputes subject to compulsory final and binding interest arbitration under Sec. 111.77.

Green County, supra, at 13. In our Memorandum in that case we reaffirmed the continuing availability of an impasse defense in disputes not subject to interest arbitration. Thus, at pp. 12-13 we noted that "A right to implement at impasse (as defined in the private sector cases) has been recognized in cases arising under MERA . . . but this appears to be the first in which the Commission is squarely presented in a petition for complaint review with the question of whether such a right exists as regards a dispute subject to final and binding Sec. 111.77, Stats., interest arbitration." Notably, in Note 9 of our Green County decision, we specifically distinguished one of those impasse-defense cases, Racine Schools, 14722-A (WERC, 8/78), on the ground that it involved a dispute which "arose during the term of an existing agreement so that med-arb was not available. See, Dane County (Handicapped Children's Education Board, Dec. No. 17400 (WERC, 11/79), aff'd Dec. No. 80-CV-0097 (CirCt Dane, 6/80) (mediation-arbitration is available only as regards negotiation disputes concerning new agreements or arising out of formal reopener provisions in existing agreements)." Then, we responded as follows to essentially the same argument on which the instant Examiner incorrectly premised his abovenoted analysis:

> Contrary to the County's contention, we find nothing anomalous about an interpretation of the legislative scheme wherein an impasse defense is available as regards in-term unilateral changes in subjects not covered by the existing agreement but not available in post-expiration disputes. The critical difference is the non-availability of a statutory method for resolving such in-term disputes as compared with the availability of such a procedure for resolving negotiations disputes concerning new agreements and arising out of formal reopener provisions contained in existing agreements.

Since the Examiner misconstrued the City of Brookfield and Green County

decisions, a finding as to whether the parties were at an impasse in the private sector sense 1/ is both appropriate and necessary.

In light of the foregoing it is also potentially material to the disposition of the case before the Examiner whether the particular dispute about which the parties were bargaining was within or outside of the range of disputes subject to statutory interest arbitration. Accordingly we are instructing the Examiner to reach and analyze that question on remand as well. We recognize that it is possible that the Examiner's findings and conclusions as to the impasse issue could make reaching this additional question unnecessary, we want the issue addressed because it has been argued herein, it is pending in an MIA petition proceeding between the instant parties which they have held in abeyance pending resolution of the instant complaint case, and to guide the conduct of the parties in the future.

We direct the Examiner's attention to the Commission's Dane County decision, supra, as the lead case on the question of the reach and availability of statutory interest arbitration procedures. In addition, without determining its applicability, if any, the Commission alerts all concerned of developments that followed the issuance of the Commission decision in one of the cases cited by the City. Specifically, the City cited Greendale School District, Dec. No. 20184 (WERC, 12/82) aff'd, Case No. 603-055 (CirCt Milw, 10/83) wherein a majority of the Commission as it was then constituted held that statutory interest arbitration was not available to resolve an impasse concerning wages, hours and conditions of employment of employes newly accreted to a bargaining unit during the term of an existing collective bargaining agreement covering the balance of the bargaining unit. Commissioner Torosian dissented on the grounds that since the existing agreement did not automatically extend to the newly accreted employes, the petition related to a dispute involving a new initial agreement for those employes and hence a dispute subject to interest arbitration under the Dane County case standards. During judicial review of the Commission's decision, the composition of the Commission changed and the Commission informed the Court of Appeals as follows:

> This letter will serve to inform you that the Wisconsin Employment Relations Commission will not file a brief in the above-entitled case. The Commission's decision being appealed does not represent the view of a majority of the present Commission, either as regards the proper statutory interpretation or the proper outcome. Accordingly, the commission does not seek affirmance of the judgment of the circuit court.

The Court of Appeals' dismissal of the appeal as moot was, however, on other grounds than the Commission's letter, above. Case No. 83-2007 (CtApp I, 3/84).

We think it appropriate that the Examiner and parties be apprised that Commissioner Torosian's dissent in Greendale Schools represents the view of at least a majority of the present Commission.

1/ Whether an impasse exists must be determined in the contest of the facts in a particular case, as they existed at a particular point in time. See, e.g., Taft Broadcasting Co., 163 NLRB 475, 64 LRRM 1386 (1967) ("Whether a bargaining impasse exists is a matter of judgment. The bargaining history, the good faith or the parties in negotiations, the length of the negotiations, the importance of the issue or issues as to which there is disagreement, the contemporaneous understanding of the parties as to the state of the negotiations, are all relevant factors to be considered in deciding whether an impasse in bargaining existed.

Upon issuance of the Examiner's decision as to the matters on remand, the parties will have the period established by Sec. 111.07(5) within which to seek Commission review. For that reason, we have dismissed the petition for review filed by Complainants herein since it may or may not reflect Complainants' views with respect to the decision of the Examiner following this remand.

Dated at Madison, Wisconsin this 7th day of March, 1986.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Herman Torosian, Chairman

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Marshall L. Gratz, Commissioner

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Danae Davis Gordon, Commissioner