STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of RICHLAND COUNTY Requesting a Declaratory Ruling Pursuant to Section 111.70(4)(b), Wis. Stats., Involving a Dispute Between Said Petitioner and RICHLAND COUNTY (SHERIFF'S DEPARTMENT) EMPLOYEES LOCAL 2085, WCCME, AFSCME, AFL-CIO	Case 49 No. 35266 DR(M)-376 Decision No. 23103

Appearances:

Melli, Walker, Pease and Ruhly, S.C., Attorneys at Law, Suite 600, Insurance Building, 119 Monona Avenue, P. O. Box 1664, Madison, Wisconsin 53701-1664, by Mr. Jack D. Walker, and Ms. JoAnn M. Hart, for the County.

Lawton & Cates, Attorneys at Law, 110 East Main Street, Madison, Wisconsin 53703-3354, by Mr. Bruce F. Ehlke, for the Union.

ORDER DENYING MOTION TO DISMISS, DENYING MOTION IN LIMINE, AND GRANTING MOTION TO QUASH SUBPOENA

Richland County having on June 27, 1985, filed a petition with the Wisconsin Employment Relations Commission seeking a declaratory ruling pursuant to Sec. 111.70(4)(b), Stats., as to whether the County was obligated to bargain with Local 2085, Wisconsin Council of County and Municipal Employees, AFSCME, AFL-CIO over certain matters; and Local 2085 having on July 18, 1985, filed a Statement in response to said petition asserting inter alia that the petition should be dismissed as to three of the four proposals at issue because there was no "dispute" between the parties within the meaning of Sec. 111.70(4)(b), Stats., and the parties thereafter having engaged in unsuccessful efforts to resolve the matter; and hearing having then been conducted on September 9, 1985, in Richland Center, Wisconsin, before Peter G. Davis, a member of the Commission's staff; and during said hearing the County having made a Motion in Limine seeking to preclude Local 2085 from raising additional arguments as to the mandatory nature of one of the proposals at issue; and during said hearing Local 2085 having made a Motion to Quash a subpoena through which the County sought to acquire certain records from Local 2085 which the County believed relevant to its position that Local 2085's fair share proposal was an illegal subject of bargaining; and the parties having agreed that their respective Motions should be ruled upon by the Commission prior to further hearing and the parties having submitted written argument in support of their respective Motions the last of which was received on October 18, 1985; and the Commission having considered the record and the parties' Motions and supporting argument and having concluded that Local 2085's Motion to Dismiss should be denied, that the County's Motion in Limine should be denied, and that Local 2085's Motion to Quash should be granted;

NOW, THEREFORE, it is

ORDERED

1. That the Motion to Dismiss is hereby denied.

2. That the Motion in Limine is hereby denied.

3. That the Motion to Quash is hereby granted.

Given under our hands and seal at the City of Madison, Wisconsin this 9th day of December, 1985.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Herman Torosian, Chairman

_____
Marshall L. Gratz, Commissioner

_____
Danae Davis Gordon, Commissioner

RICHLAND COUNTY

MEMORANDUM ACCOMPANYING ORDER DENYING MOTION TO DISMISS, DENYING MOTION IN LIMINE, AND GRANTING MOTION TO QUASH SUBPOENA

BACKGROUND

Local 2085, Wisconsin Council of County, Municipal Employees of the American Federation of State, County and Municipal Employees, AFL-CIO, is the exclusive collective bargaining representative of certain Richland County employes in the County's Sheriff Department. In February, 1985, Local 2085 filed with the Wisconsin Employment Relations Commission a petition for final and binding arbitration pursuant to Sec. 111.77, Stats., asserting that Local 2085 and the County had been unsuccessful in their efforts to bargain a successor to their 1984 collective bargaining agreement. During the investigation of the arbitration petition by a member of the Commission's staff, the parties exchanged final offers on May 17, 1985 and May 31, 1985. In their final offers, both parties proposed that the following portions of the parties' 1984 contract be included in the successor agreement:

. . .

3.02 The Employer hereby recognizes the "Fair Share" principle as set forth in Wisconsin Statute 111.70 as amended. A deduction from each employee shall be made from the paycheck each month in the amount as certified by Local 2085 Treasurer as the uniform dues of the Union. Dues deduction for each employee covered by this Agreement shall commence upon completion of sixty (60) calendar days of employment.

The Union, as the exclusive representative of all the employees in the bargaining unit, will represent all such employees fairly and equally, and all employees in the unit will be required to pay, as provided for in this Article, their proportionate share of the costs of representation by the Union. No employee shall be required to join the Union, but membership in the Union shall be made available to all employees who apply consistent with the Union Constitution and Bylaws. No employee shall be denied Union membership because of race, creed, color, or sex.

. . .

5.01 For the purpose of this Agreement, the term grievance means any dispute between the Employer and an employee within the Unit, or the Employer and the Union relating to the interpretation, application, breach or violation of the terms of this Agreement and any matters related to safety and work rules. No grievance shall be discussed during working hours without prior notice to the Richland County Sheriff.

. . .

10.01 For the term of this Agreement, the Health and Accident Insurance policy presently provided by the Employer shall be continued. The policy now in effect may be modified or a new plan incorporated during the term of the Agreement by mutual agreement of the Employer and Union. The Employer agrees to contribute ninety-two percent (92%) of the premium cost for the family and single plan.

That in its final offers, Local 2085 proposed an inclusion in this successor agreement of the following portion of the parties' 1984 agreement:

. . .

14.11 Employees designated as casual or temporary who are to assume the duties of regular employees shall receive sufficient training to carry out the necessary duties of the positions they are to assume. Utilization of casual or temporary employees applies to all positions in the Department.

Casual or temporary employees shall receive the minimum classification rate for the job classification they assume pursuant to Schedule A. Temporary employees and regular part-time employees who average twenty (20) hours per week or more on a quarterly basis shall be eligible for fringe benefits.

. . .

In its May 17 final offer, the County proposed deletion of Section 14.11 from the successor agreement while in its May 31 final offer, the County proposed deletion of the first paragraph of Section 14.11. The exchange of final offers did not produce a settlement between the parties on an entire successor contract or on any portion thereof relevant to the above-quoted proposals.

On June 27, 1985, the County timely filed the instant petition for declaratory ruling asserting that the portions of Local 2085's May 31 final offer set forth above are non-mandatory subjects of bargaining.

Local 2085 filed a Statement in response to the petition for declaratory ruling on July 18, 1985, seeking dismissal of the petition as to the three proposals which both parties' May 31 final offers had in common. On August 1, 1985, Local 2085 supplemented its July 18, 1985 Statement to respond to the County's contention that Section 14.11 of the Local 2085's proposal is non-mandatory because it covers non-bargaining unit employes. Local 2085 raised certain arguments as to the proposal's mandatory status but did not argue that the proposal was mandatory because the "casual or temporary" employes referenced therein were in fact bargaining unit employes.

On September 4, 1985, the County submitted to the Commission's investigator an amendment to its May 31 final offer which proposed to delete its Section 3.02 proposal and to modify its Section 5.01 and 10.01 proposals as follows:

. . .

5.01 For the purpose of this Agreement, the term grievance means any dispute between the employer and an employee within the unit, or the employer and the union relating to the interpretation, breach or violation of the terms of this Agreement.

. . .

10.01 For the term of this Agreement, the health and accident benefits presently provided by the employer to this unit shall be continued. The employer may change carriers or other methods of providing the benefit in its discretion. The employer agrees to contribute ninety-two percent (92%) of the cost for the family and single health and accident coverage.

. . .

On or about September 5, 1985 the County served a subpoena upon the Executive Director of District Council 40, WCCME, AFSCME, asking that he bring the following information to the September 9 hearing on the petition for declaratory ruling:

1. All records of every expenditure or transfer of funds of any type by AFSCME, Local 2085 or Wisconsin Council 40 since January 1, 1984.

2. All records or documents showing the amounts of funds transferred by Local 2085 or Wisconsin Council 40 to AFSCME, AFL-CIO, or any other labor organization and any documents which show what those funds have been used for since January 1, 1984.

3. Any documents relating to procedures for establishing the proper amount for fair share payments by nonmembers, including any documents relating to calculating amounts of percentages spent for activities for which amounts are not properly collectible under a fair share agreement.

4. Any documents relating to procedures for nonmember employees to challenge the fair share amounts and receive refunds and/or reductions of the fair share amount.

5. Any documents relating to procedures for employer involvement in determining the proper amount for fair share payments.

6. Any document which contains the names of Richland County Sheriff's Department employees who are members of AFSCME, Local 2085, or any affiliated labor organizations.

At the outset of the September 9 hearing, Local 2085 formally asserted for the first time that its Section 14.11 proposal was mandatory because the "casual or temporary" employes referenced therein are part of the bargaining unit represented by Local 2085. Said assertion prompted the County to make a Motion in Limine seeking exclusion of such an argument from the Commission's deliberations. Local 2085 also made a Motion to Quash the County's subpoena during the September 9 hearing.

MOTION TO DISMISS

Positions of the Parties

Since both parties' May 31 final offers proposed inclusion in a successor agreement of Article III, 3.02 (Fair Share), Article V, 5.01 (Grievance Definition), and Article X, 10.01 (Health Insurance) as set forth in the parties' 1984 contract, Local 2085 contends that the County's declaratory ruling as to these provisions should be dismissed because there is no "dispute" between the parties within the meaning of Sec. 111.70(4)(b), Stats. Local 2085 asserts that the County is essentially seeking a declaratory ruling on the County's own proposals and cites the Commission's decisions in Milwaukee Board of School Directors, Dec. No. 17504 (WERC, 12/79) and West Bend Joint School District No. 1, Dec. No. 22694 (WERC, 5/85) for the proposition that there is no "dispute" under Sec. 111.70(4)(b), Stats., in such circumstances.

Local 2085 also submits that the County's petition is tantamount to seeking a declaratory ruling over the bargainable status of tentative agreements, a practice which, if allowed, would be totally antithetical to and disruptive of the bargaining process. Local 2085 also asserts that the County's inclusion of the three provisions in its own final offer gave Local 2085 every reason to believe that said provisions would be included in the successor contract. Local 2085 therefore contends that the doctrines of waiver and estoppel warrant dismissal of the petition as to these provisions.

Local 2085 characterizes the County's September 4 amendment as an untimely attempt to create a "dispute" which must be found unsuccessful. While not disputing the County's right to amend, citing City of Sheboygan v. WERC, 125 Wis.2d 1 (Ct.App. 1985), Local 2085 submits that the County's action does not remedy the lack of a "dispute" at the time the County's petition was filed.

The County contends that the three proposals subject to Local 2085's Motion are properly before the Commission because there is a "dispute" within the meaning of Sec. 111.70(4)(b), Stats., as to the County's duty to bargain over Local 2085's proposals. The County denies that the content of its May 31 offer created a tentative agreement between the parties as to these proposals and contends that its September 4 amendment removed any doubt as to the inaccuracy of Local 2085's

contention in that regard. The County submits that the nature of collective bargaining is such that proposals are offered and removed from the bargaining table in an ongoing process until settlement is reached. As no settlement had been reached through the May 31 exchange of offers, the County submits that it then exercised its statutory option to challenge certain portions of Local 2085's offer as being non-mandatory. The County asserts that Milwaukee Board of School Directors, supra, and West Bend Joint School District No. 1, supra, are inapposite because the County is not seeking a ruling on its own proposal and has never expressly waived its right to challenge Local 2085's proposals.

The County further contends that the doctrines of waiver and estoppel are inapplicable herein because Local 2085 had no reasonable expectation within the give and take context of collective bargaining that the County's proposals would remain constant when settlement was not reached.

Discussion

In our view, the County correctly asserts that the parties had no agreement on the proposals in question. All that had occurred was that the parties' offers had certain components which were identical and certain components which were different. Obviously, the parties could have chosen to unconditionally agree that the identical components would be tentatively agreed upon and future offers would only contain disputed items. However, there is no evidence of such an agreement here. Instead the parties were in a posture wherein unless agreement was reached, they retained the flexibility to change any part of their offer 1/ or to challenge any portion of the other parties' offer as being a non-mandatory subject of bargaining. 2/ Therefore we reject any contention by Local 2085 that the parties had a binding agreement on the proposals as to which their offers were parallel when the petition for declaratory ruling was filed.

The County's September 4 amendment whereby the County exercised its statutory right under Sec. 111.77, Stats., to modify its offer until overall settlement is reached or the investigation is closed 3/ removed any factual basis for Local 2985's contention that the County is impermissably seeking a ruling on its own proposals and that therefore there is no "dispute" to be resolved. Accordingly we do not address the merits of Local 2085's argument and have denied the Motion to Dismiss.

MOTION IN LIMINE

Positions of the Parties

The County argues that because Local 2085 failed to provide the County with timely notice of the claim that casual and temporary employes are unit employes, Local 2085 should be prohibited from litigating that claim before the Commission in this proceeding. It asserts that the purpose of ERB 18.03(3) is to give the petitioning party notice as to which defenses the party whose proposal is being challenged intends to rely upon so that the litigation may be processed and finished in a timely manner without the delay caused by "surprise". The County therefore asks that its Motion be granted.

1/ Green County, Dec. No. 20308-B (WERC, 11/84).

2/ It should be noted that as this dispute involves a law enforcement unit, it is the provisions of Sec. 111.77 Stats. and ERB 30 which are applicable.

3/ As noted by the Court in City of Sheboygan, supra, at 5-6, "Amendent of a final offer is prohibited only after the close of the WERC's investigation." and "Under the present statutory framework, it appears that the collective bargaining process continues after the petition for arbitration is filed and until WERC's investigation closes. Allowing new issues to be injected at this time encourages voluntary settlements through the process of collective bargaining." It should also be noted that because the investigation has not been closed both parties will have the opportunity to further modify their positions after this declaratory ruling proceeding is concluded.

Local 2085 contends that evidence as to the unit status of casual and temporary employes is obviously relevant to the Commission's determination regarding the parties' duty to bargain over this proposal and that, given the pendency of the motions which necessitate additional hearing, it is clear that no undue delay will be caused and both parties will be able to fairly litigate the matter. Local 2085 also notes that ERB 18.03(3) does not state that all arguments which have not raised in the Statement are waived. Local 2085 therefore asks the Commission to deny the Motion.

Discussion

The County is correct when it asserts that the purpose of the Statement in response to a declaratory ruling petition is to put the petitioning party and the Commission on notice as to arguments which will be raised in support of a proposal's status. 4/ Such notice, like that which is provided by the Statement which ERB 18.02(4) mandates must accompany the declaratory ruling petition itself, serves to make any evidentiary hearing as efficient and fruitful as possible because all parties know what will be litigated. Local 2085's tardy addition of other argument obviously frustrated that purpose vis-a-vis the September 9 hearing.

Nonetheless, in processing a declaratory ruling/petition, the Commission's primary interest is in receiving all relevant argument and evidence so that its decision can be as complete, correct and enduring as possible. Thus, while we look with disfavor on parties who tardily raise arguments which present the potential for the delay and additional expense which additional hearing entails, we conclude that Local 2085's failure to include its unit status argument in its Statement does not prohibit it from litigating same before us. A similar conclusion would apply to any argument not contained in County's Statement in support of its petition herein. However, as we concluded in Madison Metropolitan School District, Dec. No. 16598-A (WERC, 1/79) once we rule on a proposal, a party cannot seek to acquire a different result through the presentation of new argument.

MOTION TO QUASH

Positions of the Parties

The County asserts that its Subpoena Duces Tecum seeks information which is relevant to the issue of whether Local 2085's fair share proposal is a non-mandatory subject of bargaining and therefore asks the Commission to deny Local 2085's Motion to Quash. It is the County's contention that under Ellis v. Railway Clerks, _____ U.S. _____, 104 S.Ct 1883, (1984) and Hudson v. C' icago Teachers Local No. 1, 743 F.2d 1187 (7th Cir. 1984), cert. granted, 86 L.Ed. 2d 117 (1985), Local 2085's fair share proposal is unconstitutional because it requires dissenting non-members to pay full dues. Given the holding in Hudson that a public employer, acting as an agent of the union, is liable under 42 U.S.C. 1983 for employe claims of constitutional violations and given the County's collective bargaining relationship with Local 2085, the County contends that the information it requests through the subpoena is relevant to the question of whether AFSCME's fair share procedure, as currently administered, meets the constitutional requirements of current law.

4/ ERB 18.03(3) provides:

> (3) CONTENTS. The statement in response shall include the following:
>
> (a) A clear and concise statement of the position taken by such party as to whether the parties are under a duty to bargain on the subject or subjects set forth in the petition.
>
> (b) A clear and concise statement of the facts and arguments relied upon by such party in support of its position with respect to the matter involved.
>
> (c) Corrections, as may be deemed necessary, to the names, addresses, telephone numbers, affiliations and representatives set forth in the petition, or to the description of the collective bargaining unit involved, or the number of employes in such unit.

Local 2085 responds by alleging that the subpoena should be quashed. It asserts that the constitutionality of Wisconsin's fair share statute was upheld in Browne v. Milwaukee Board of School Directors, 83 Wis.2d 316 (1977) and that the subpoena is therefore not germane to the current proceedings. Local 2085 further contends that the County lacks standing to raise the legality of the fair share proposal which the County itself proposed, through its May 31 offer, be included in a successor agreement. In Local 2085's view, the County is seeking to litigate in a piece-meal fashion issues currently before the Commisison in Browne v. Milwaukee Board of School Directors, Case XCIX, No. 23535, MP-892 and other cases. Local 2085 argues that it is contrary to sound labor relations policy and the need for efficiency and economy in the operation of administrative agencies to allow the County to disrupt the collective bargaining process with issues which are currently being tried in an exhaustive fashion in other proceedings.

Alternatively, Local 2085 asserts that the Commission could choose to make clear that none of the prerequisites for litigating fair share issues are present herein; that there must be dissenting employes, that the dissenters must pay now and complain later, and that the dissenters must make the union aware of their objections prior to commencing litigation. Given the lack of these prerequisites, Local 2085 asks that the supbonea be quashed.

Discussion

Initially we reject Local 2085's assertion that the County lacks standing to question the legality of Local 2085's fair share proposal in this proceeding. As a party to the collective bargaining relationship in question, the County clearly has standing to utilize Sec. 111.70(4)(b), Stats., to obtain resolution of a dispute as to the mandatory or prohibited subject status of the fair share proposal.

The issue before us is one of determining whether any of the information requested by the County is relevant or material to the mandatory nature of the fair share proposal. 5/ We conclude that based upon our prior holding in City of New Berlin, Dec. No. 17748-A (WERC, 5/81), 6/ the information is not relevant to the mandatory nature of the proposal and we have therefore granted the Motion to Quash.

Local 2085's fair share proposal is as follows:

> The Employer hereby recognizes the "Fair Share" principle as set forth in Wisconsin Statute 111.70 as amended. A deduction from each employee shall be made from the paycheck each month in the amount as certified by Local 2085 Treasurer as the

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5/ ERB 10.16(2) provides:

> (2) RULES OF EVIDENCE. Hearings, so far as is practical, shall be conducted in accordance with the rules of evidence and official notice as provided in s. 227.10, (227.08) Stats.

Section 227.08(1), Stats. provides:

> (1) Except as provided in s. 19.52 (3), an agency or hearing examiner shall not be bound by common law or statutory rules of evidence. The agency or hearing examiner shall admit all testimony having reasonable probative value, but shall exclude immaterial, irrelevant or unduly repetitious testimony. The agency or hearing examiner shall give effect to the rules of privilege recognized by law. Basic principles of relevancy, materiality and probative force shall govern the proof of all questions of fact. Objections to evidentiary offers and offers of proof or evidence not admitted may be made and shall be noted in the record.

6/ See also Winter Joint School District No. 1, Dec. No. 16951-D (WERC, 2/83).

uniform dues of the Union. Dues deduction for each employee covered by this Agreement shall commence upon completion of sixty (60) calendar days of employment.

The Union, as the exclusive representative of all the employees in the bargaining unit, will represent all such employees fairly and equally, and all employees in the unit will be required to pay, as provided for in this Article, their proportionate share of the costs of representation by the Union. No employee shall be required to join the Union, but membership in the Union shall be made available to all employees who apply consistent with the Union Constitution and Bylaws. No employee shall be denied Union membership because of race, creed, color, or sex.

In New Berlin, we concluded that so long as a fair share provision is couched in terms of the Sec. 111.70(1)(f), Stats., 7/ definition of the term "fair share" agreement, such a proposal or provision is legal and mandatory on its face and can properly be incorporated into a labor agreement. Because the proposal before us references the fair share provisions of Sec. 111.70, Stats., and contains portions of the statutory language contained therein, we conclude that it is a legal proposal as to which the County must bargain. 8/ Given this facial legality, the information sought by the County's subpoena is irrelevant and thus the Motion to Quash has been granted.

Dated at Madison, Wisconsin this 9th day of December, 1985.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Herman Torosian, Chairman

_____
Marshall L. Gratz, Commissioner

_____
Danae Davis Gordon, Commissioner

7/ Section 111.70(1)(f) Stats., provides:

> (f) "Fair-share agreement" means an agreement between a municipal employer and a labor organization under which all or any of the employes in the collective bargaining unit are required to pay their proportionate share of the cost of the collective bargaining process and contract administration measured by the amount of dues uniformly required of all members. Such an agreement shall contain a provision requiring the employer to deduct the amount of dues as certified by the labor organization from the earnings of the employes affected by said agreement and to pay the amount so deducted to the labor organization.

8/ There is no contention before us that the proposal is permissive even if legal and we have previously found legal fair share proposals to be mandatory subjects of bargaining. Town of Allouez, Dec. No. 15022-B (WERC, 1/77).