STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

WASHINGTON COUNTY SOCIAL SERVICES DEPARTMENT EMPLOYEES UNION, LOCAL 1199, AFSCME, AFL-CIO, Complainant, vs. WASHINGTON COUNTY (DEPARTMENT OF SOCIAL SERVICES), Respondent.	Case 67 No. 36893 MP-1846 Decision No. 23770-D

Appearances:

Mr. Robert W. Lyons, Executive Director, and Mr. Richard W. Abelson, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 2216 Allen Lane, Waukesha, Wisconsin, 53186, appearing on behalf of the Complainant.

Lindner & Marsack, S.C., Attorneys at Law, by Mr. Roger E. Walsh, 700 North Water Street, Milwaukee, Wisconsin 53202, appearing on behalf of the Respondent.

ORDER AFFIRMING EXAMINER'S FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

Examiner Lionel L. Crowley having on March 26, 1987, issued Findings of Fact, Conclusion of Law and Order in the above entitled matter wherein he concluded that Respondent Washington County had not committed a prohibited practice within the meaning of Sec. 111.70(3)(a) 4, Stats., by refusing to bargain with Complainants AFSCME over the impact of a change in the hours of certain employes represented by AFSCME; and AFSCME having on April 9, 1987 timely filed a petition with the Commission seeking review of the Examiner's decision pursuant to Sec. 111.07(5) and 111.70(4)(a), Stats.; and the County thereafter having filed a Motion to Dismiss Complainants Petition For Review asserting that Complainant had failed to serve the County with a copy of the petition and had thereby failed to comply with ERB 12.09(1); and the Commission, following review of the parties' written argument with respect to said motion, having on July 20, 1987, issued an Order Denying Motion to Dismiss Petition for Review and establishing briefing schedule; and on or about August 27, 1987, AFSCME having advised the Commission that it would not be filing a brief in support of its petition for review; 1/ and the County having on September 3, 1987, advised the Commission that it would not be filing any written argument because AFSCME had given the County and the Commission no idea of what specific objections AFSCME had to the Examiner's decision; and the Commission having reviewed the record, the petition for review, and the Examiner's decision, and being satisfied that the Examiner's Findings of Fact, Conclusion of Law, and Order should be affirmed;

1/ AFSCME's petition for review consisted of the following:

> Pursuant to Chapter ERB 12.09(2), Wisconsin Administrative Code, Local 1199, AFSCME, AFL-CIO, is dissatisfied with the findings of fact, conclusions of law and order because the findings of fact are clearly erroneous and contrary to the preponderance of evidence; that they prejudicially effect the rights of the petitioning Union; and further, that substantial questions of law and administrative policy are involved.
>
> Appeal is taken herewith from all findings of fact and conclusions of law.

NOW, THEREFORE, it is

ORDERED 2/

That the Examiner's Findings of Fact, Conclusion of Law and Order are hereby affirmed.

Given under our hands and seal at the City of Madison, Wisconsin this 19th day of October, 1987.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Stephen Schoenfeld
Stephen Schoenfeld, Chairman

Herman Torosian, Commissioner

2/ Pursuant to Sec. 227.48(2), Stats., the Commission hereby notifies the parties that a petition for rehearing may be filed with the Commission by following the procedures set forth in Sec. 227.49 and that a petition for judicial review naming the Commission as Respondent, may be filed by following the procedures set forth in Sec. 227.53, Stats.

227.49 Petitions for rehearing in contested cases. (1) A petition for rehearing shall not be prerequisite for appeal or review. Any person aggrieved by a final order may, within 20 days after service of the order, file a written petition for rehearing which shall specify in detail the grounds for the relief sought and supporting authorities. An agency may order a rehearing on its own motion within 20 days after service of a final order. This subsection does not apply to s. 17.025(3)(e). No agency is required to conduct more than one rehearing based on a petition for rehearing filed under this subsection in any contested case.

227.53 Parties and proceedings for review. (1) Except as otherwise specifically provided by law, any person aggrieved by a decision specified in s. 227.52 shall be entitled to judicial review thereof as provided in this chapter.

(a) Proceedings for review shall be instituted by serving a petition therefore personally or by certified mail upon the agency or one of its officials, and filing the petition in the office of the clerk of the circuit court for the county where the judicial review proceedings are to be held. Unless a rehearing is requested under s. 227.49, petitions for review under this paragraph shall be served and filed within 30 days after the service of the decision of the agency upon all parties under s. 227.48. If a rehearing is requested under s. 227.49, any party desiring judicial review shall serve and file a petition for review within 30 days after service of the order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. The 30-day period for serving and filing a petition under this paragraph commences on the day after personal service or mailing of the decision by the agency. If the petitioner is a resident, the proceedings shall be held in the circuit court for the county where the petitioner resides, except that if the petitioner is an agency, the proceedings shall be in the circuit court for the county where the respondent resides and except as provided in ss. 77.59(6)(b), 182.70(6) and 182.71(5)(g). The proceedings shall be in the circuit court for Dane county if the petitioner is a nonresident. If all parties stipulate and the court to which the parties desire to transfer the proceedings agrees, the proceedings may be held in the county designated by the parties. If 2 or more petitions for review of the

(Footnote 2 continued on page 3.)

(Footnote 2 continued from page 2.)

2/ same decision are filed in different counties, the circuit judge for the county in which a petition for review of the decision was first filed shall determine the venue for judicial review of the decision, and shall order transfer or consolidation where appropriate. (b) The petition shall state the nature of the petitioner's interest, the facts showing that petitioner is a person aggrieved by the decision, and the grounds specified in s. 227.57 upon which petitioner contends that the decision should be reversed or modified.

. . .

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

Note: For purposes of the above-noted statutory time-limits, the date of Commission service of this decision is the date it is placed in the mail (in this case the date appearing immediately above the signatures); the date of filing of a rehearing petition is the date of actual receipt by the Commission; and the service date of a judicial review petition is the date of actual receipt by the Court and placement in the mail to the Commission.

MEMORANDUM ACCOMPANYING ORDER AFFIRMING EXAMINER'S FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

The issue presented to the Examiner in this matter was whether the County was obligated to bargain with AFSCME over the impact of a change in the working hours of certain employes represented by AFSCME. The Examiner held as follows:

Discussion:

A municipal employer has a duty to bargain collectively with the representative of its employes with respect to mandatory subjects of bargaining during the term of an existing collective bargaining agreement, except as to those matters which are embodied in the provisions of said agreement, or bargaining on such matters had been clearly and unmistakenly (sic) waived. 2/ Section 9.04 of the parties' collective bargaining agreement provides that the County has the right to assign different workdays or workweeks to particular employes under certain enumerated circumstances. The Union concedes that the County's change in work schedules is embodied in the terms of the agreement and any failure to comply with this agreement is subject to the contractual grievance procedure. It argues that the impact of this change is not embodied in the agreement and the Union has not waived its right to bargain on the impact of the change.

A review of the collective bargaining agreement leads to the conclusion that the Union has waived its right to bargain not only the change in work schedules but also the impact of this change. Section 9.04 gives the County the right to assign different workdays or workweeks to "particular employes". The contractual management rights clause provides that the County has the right to assign jobs and to determine the personnel by which to conduct its operations. When these clauses are read together, it is implicit that the County has the right to change the schedules of particular employes as determined by it. Section 10.01 of the agreement provides for overtime compensation for professionals who work over forty hours a week or eight hours per day. Compensation for a change in schedule is therefore also embodied in the terms of the agreement. Although the contractual language does not specifically and expressly address all the impact concerns expressed by the Union, the parties could have negotiated and included such items as time and one-half pay for Saturday work, rotating schedules or permanent schedules, work schedules by seniority, etc. The agreement is not silent on schedule changes or overtime, it simply does not address all the ramifications of a change which the Union now seeks to negotiate. The fact that these additional items were not included in the agreement is not a basis for finding that these items were not waived. 3/ The language of the agreement encompasses these items and although the Union was unaware that the change of schedule under Section 9.04 had a greater impact than anticipated, renegotiation is not permitted. Thus, it is concluded that the collective bargaining agreement deals with the impact limitations now sought by the Union and it has waived bargaining on them during the term of the agreement.

The bargaining history supports this conclusion. Initially, the Union had sought a Monday through Friday schedule with changes only upon mutual agreement between the employe and his/her supervisor. The County's initial proposal allowed it to retain complete discretion to change an employe's hours of work. During the bargaining, the Union modified its position allowing changes in the Monday through Friday schedule under certain enumerated circumstances. In going from changes only upon mutual consent to changes under

certain conditions, the Union did not insist on further limitations of the County's discretion, such as changes based on seniority or on other factors. In short, it did not limit the County's discretion on changes where the enumerated conditions were met. Also, the Union initially proposed time and one-half for all Saturday work. It dropped this proposal as there is no mention of Saturday work in the overtime provision which provides for overtime after forty hours per week and eight hours per day. The Union by modification of its initial proposals dropped items it now claims are impact items over which the County must bargain such as compensation for Saturday work and limitations on the County's discretion to change certain employe's work schedules. Additionally, the Union could have sought more limitations on the County's discretion than those that were eventually agreed to but as it didn't, it has waived the right to raise them during the contract terms. 4/ Thus, the bargaining history supports the conclusion that the Union has waived bargaining on the impact of the County's changes in work schedules.

The County changed the work schedule after the contract and expired by its terms. The County correctly noted that it was obliged to maintain the status quo during the contractual hiatus period, which as discussed above, provided it the right to change workdays and workweeks and it was not obligated to bargain either the change or the impact. Thus, the County was not obligated to negotiate the impact of the change separate from negotiations for the successor to the agreement which expired on December 31, 1985, 5/ and therefore, it did not violate Sec. 111.70(3)(a)4, Stats. by its refusal to bargain the impact of the change in hours. Thus, the complaint has been dismissed in its entirety.

2/ Racine Unified School District, Dec. No. 18848-A (WERC, 6/82); Brown County, Dec. No. 20623 (WERC, 5/83); City of Richland Center, Dec. No. 22912-B (WERC, 8/86).

3/ Racine Unified School District, Dec. No. 18848-A (WERC, 6/82); City of Stevens Point, Dec. No. 21646-B (WERC, 8/85); Green Lake County, Dec. Nos. 23075-B (Roberts, 6/86) aff'd by operation of law, Dec. No. 23075-C, 23076-C (WERC, 7/86).

4/ Id.

5/ It is noted that the Union is not precluded from proposing any impact item of a change in hours as well as the change itself in bargaining for a successor agreement to the 1985 agreement as the waiver only applies to in-term bargaining and its continuance during the hiatus period by application of the status quo.

Our review of the record satisfies us that the Examiner correctly resolved the issues before him and as we are persuaded that his rationale quoted above aptly stated the basis for such disposition, we have affirmed his decision without further comment herein.

Dated at Madison, Wisconsin this 19th day of October, 1987.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Stephen Schoenfeld
Stephen Schoenfeld, Chairman

Herman Torosian, Commissioner