STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of WAUKESHA COUNTY Requesting a Declaratory Ruling Pursuant to Section 111.70(4)(b), Wis. Stats., Involving a Dispute Between Said Petitioner and WISCONSIN PROFESSIONAL POLICE ASSOCIATION/LEER DIVISION	Case 92 No. 36754 DR(M)-395 Decision No. 24141

Appearances:

Michael, Best & Friedrich, Attorneys at Law, by Mr. Marshall R. Berkoff and Mr. Jose A. Olivieri, 250 East Washington Avenue, Milwaukee, Wisconsin 53202, appearing on behalf of the County.

Cullen, Weston, Pines & Bach, Attorneys at Law, by Mr. Lee Cullen, 20 North Carroll Street, Madison, Wisconsin 53703, appearing on behalf of the Association.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECLARATORY RULING

Waukesha County having on March 31, 1986, filed a petition with the Wisconsin Employment Relations Commission seeking a declaratory ruling pursuant to Sec. 111.70(4)(b), Stats., as to the County's duty to bargain with Wisconsin Professional Police Association/LEER Division over a proposal made by the Association during collective bargaining; and hearing having been held on June 3 and June 23, 1986, in Waukesha, Wisconsin before Peter G. Davis, a member of the Commission's staff; and the parties having submitted written argument, the last of which was received on September 8, 1986; and the Commission, having considered the record and argument, makes and issues the following

FINDINGS OF FACT

1. That Waukesha County, herein the County, is a municipal employer providing law enforcement service within its boundaries and having its principal offices at 515 West Moreland Boulevard, Waukesha, Wisconsin 53186.

2. That Wisconsin Professional Police Association/LEER Division, herein the Association, is a labor organization functioning as the collective bargaining representative of certain individuals employed by the County to provide law enforcement services and having its principal offices at 7 North Pinckney Street, Madison, Wisconsin 53703.

3. That during bargaining over a successor to the parties' 1984-1985 contract, a dispute arose as to the County's duty to bargain over the following proposal:

> A. All wages rates, economic benefits and other conditions of employment set forth in this contract, county ordinances, and county rules and regulations shall not be affected in any manner by the provisions of this section.
>
> B. Except as modified by this contract, the County retains the sole and exclusive right to establish all qualifications, standards and requirements for movement from the Deputy I to Deputy II classifications.
>
> C. The County retains the sole and exclusive right to establish all qualifications, standards and requirements for the hiring of Deputy I classification applicants.
>
> D. The County retains the sole and exclusive right to

determine the number of employees working in the Deputy I and Deputy II classifications.

E. The County reserves the sole and exclusive right to assign deputies on any shift to any bargaining unit work.

F. Shift selection pursuant to section 6.03 shall be accomplished as follows:

a. Deputy II classification shall have the first choice of shift selection according to seniority.

b. Deputy I classification shall have the second choice of shift selection according to seniority.

G. The union, on its own behalf, or on behalf of individual deputies, shall not raise an equal pay for equal work issue in the administration of this section.

H. The union shall indemnify and save the County harmless against any and all claims, demands, suits, orders, judgments or other forms of liability against the County that arise out of the County's compliance with this section.

I. This section shall only apply to the seniority rights and shift selections of Deputy I and Deputy II classifications.

that during the declaratory ruling hearing, the Association amended its proposal to the following:

A. All wages rates, economic benefits and other conditions of employment set forth in this contract, county ordinances, and county rules and regulations shall not be affected in any manner by the provisions of this section.

B. The County retains the sole and exclusive right to establish all qualifications, standards and requirements for movement from Bailiff/Process Server Work Assignments to Patrol/Traffic Work Assignments.

C. The County retains the sole and exclusvie right to establish all qualifications, standards and requirements for Bailiff/Process Server Work Assignments.

D. The County retains the sole and exclusive right to determine the number of employees working in bailiff/process server work assignment and patrol/traffic work assignment.

E. The County retains the sole and exclusive right to assign deputies on any shift to any bargaining unit work.

. . .

F. Shift selection pursuant to section 6.03 shall be accomplished as follows:

a. Deputy II classification shall have the first choice of shift selection according to seniority.

b. Deputy I classification shall have the second choice of shift selection according to seniority.

G. The union, on its own behalf, or on behalf of individual deputies, shall not raise an equal pay for equal work issue in the administration of this section.

H. The union shall indemnify and save the County harmless against any and all claims, demands, suits, orders, judgments or other forms of liability against the County that arise out

of the County's compliance with this section.

I. This section shall only apply to the seniority rights and shift selections of Deputy I and Deputy II classifications.

and that the County contends the Examiner engaged in improper conduct during the hearing such that the Association's amended proposal and certain testimony ought to be stricken from this proceeding.

4. That the Association's proposals set forth in Finding of Fact 3, both before and after the amendments, are primarily related to the formulation and management of public policy.

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

CONCLUSIONS OF LAW

1. That the Examiner's conduct during the June 3 and June 23, 1986 hearings in this matter does not require or warrant striking any portions of the record and does not require that the Association's proposal amendment noted in Finding of Fact 3 be disregarded in this proceeding.

2. That the Association's proposals noted in Finding of Fact 3, both before and after the amendment, are permissive subjects of bargaining.

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

DECLARATORY RULING 1/

That the County and the Association do not have a duty to bargain under Sec. 111.70(1)(a), Stats., about either the proposal or the amended proposal set forth in Finding of Fact 3.

Given under our hands and seal at the City of Madison, Wisconsin this 11th day of December, 1986.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Herman Torosian, Chairman

_____
Marshall L. Gratz, Commissioner

_____
Danae Davis Gordon, Commissioner

1/ Pursuant to Sec. 227.11(2), Stats., the Commission hereby notifies the parties that a petition for rehearing may be filed with the Commission by following the procedures set forth in Sec. 227.12(1) and that a petition for judicial review naming the Commission as Respondent, may be filed by

1/ Continued

required to conduct more than one rehearing based on a petition for rehearing filed under this subsection in any contested case.

227.16 Parties and proceedings for review. (1) Except as otherwise specifically provided by law, any person aggrieved by a decision specified in s. 227.15 shall be entitled to judicial review thereof as provided in this chapter.

(a) Proceedings for review shall be instituted by serving a petition therefor personally or by certified mail upon the agency or one of its officials, and filing the petition in the office of the clerk of the circuit court for the county where the judicial review proceedings are to be held. Unless a rehearing is requested under s. 227.12, petitions for review under this paragraph shall be served and filed within 30 days after the service of the decision of the agency upon all parties under s. 227.11. If a rehearing is requested under s. 227.12, any party desiring judicial review shall serve and file a petition for review within 30 days after service of the order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. The 30-day period for serving and filing a petition under this paragraph commences on the day after personal service or mailing of the decision by the agency. If the petitioner is a resident, the proceedings shall be held in the circuit court for the county where the petitioner resides, except that if the petitioner is an agency, the proceedings shall be in the circuit court for the county where the respondent resides and except as provided in ss. 182.70(6) and 182.71(5)(g). The proceedings shall be in the circuit court for Dane county if the petitioner is a nonresident. If all parties stipulate and the court to which the parties desire to transfer the proceedings agrees, the proceedings may be held in the county designated by the parties. If 2 or more petitions for review of the same decision are filed in different counties, the circuit judge for the county in which a petition for review of the decision was first filed shall determine the venue for judicial review of the decision, and shall order transfer or consolidation where appropriate.

(b) The petition shall state the nature of the petitioner's interest, the facts showing that petitioner is a person aggrieved by the decision, and the grounds specified in s. 227.20 upon which petitioner contends that the decision should be reversed or modified.

. . .

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

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

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECLARATORY RULING

POSITIONS OF THE PARTIES

THE COUNTY

The County initally asserts that the Commission's Examiner inappropriately counseled the Association during the hearing. The County contends that the Examiner, over the County's objections, improperly led Association witnesses, asked counsel for the Association to provide testimony when said counsel was not under oath, and advised the Association on changes to make in its proposals. The County argues that the Examiner's conduct was so prejudicial that all questions and answers asked by and given to the Examiner and all proposal modifications and related testimony should be stricken from the record.

The County contends that the Examiner's conduct was contrary to the procedural protections provided by statute and administrative rule and represents a threat to the fundamental fairness and due process which must be part of the declaratory ruling proceeding. In this regard, the County urges the Commission to reject the Examiner's contention, as expressed during the hearing, that a declaratory ruling proceeding is a class 1 process analogous to a representation or unit determination hearing. The County asserts that election proceedings are nonadversial, fact finding proceedings not subject to judicial review whereas declaratory ruling proceedings are subject to judicial review and are adversial in nature resolving statutory "disputes" in a manner which is binding in related prohibited practice proceedings. Lastly the County notes that in Milwaukee Board of School Directors, Dec. No. 20093-A (WERC, 2/83) the Commission wisely refused to intervene by suggesting how a specific proposal should be framed to make it a mandatory subject of bargaining. The County argues that the parties herein are more than capable of developing mandatory proposals without assistance from the Examiner.

Turning to the bargainable status of the Association's original and amended proposals herein, the County contends that either version is a permissive and prohibited subject of bargaining. The County advances the following three basic arguments in support of its position that the proposal is permissive:

(1) the proposal interferes with the County's right to develop and maintain separate and legitimate job classifications.

(2) the proposal interferes with the County's right to develop and maintain an organizational structure with managerial and supervisory systems and relationships which promotes its purpose of protecting the public with effective and efficient law enforcement service;

(3) the proposal would mandate training systems not in existence or contemplated by the Department to accommodate the massive work change proposed.

As to its first contention, the County argues that the effect of the Association's proposal would be the elimination of the long standing distinctions between duties performed by Deputy I's and Deputy II's and thus totally eradicate two separate and distinct job classification contrary to Brown County, Dec. No. 19042 (WERC, 11/81); Milwaukee Board of School Directors, Dec. No. 17504 (WERC, 12/79) and Milwaukee Board of School Directors, Dec. No. 20398-A (WERC, 12/83).

Turning to its second argument, the County asserts the Association's proposal will produce wholesale movement of Deputy II's out of the Patrol Division and a corresponding movement of Deputy I's into that Division. In the County's view, this movement will radically change existing supervisory and managerial relationships which the County relies upon for the proper development and training of employes as well as to maintain knowledge of and sensitivity to the employe's ability, experience and skills. The County argues that the disruption of the organizational structure and the resultant harm to the quality of service provided primarily relate to public policy.

Lastly, the County argues that the Association's proposal will impose massive new training obligations on the County and that this inteference with County resource allocation decisions primarily relates to public policy. Milwaukee Board of School Directors, Dec. No. 17504 (WERC, 12/79); Oak Creek-Franklin Joint City School District, Dec. No. 11827-D (WERC, 9/74) aff'd (CirCt Dane, 11/75). The County also asserts that the proposal impermissibly intrudes into the provision of quality public protection services because senior training personnel will move out of the Patrol Division and be unavailable to train the influx of bailiffs and process servers being forced out on night patrol.

The County concludes its argument on the permissive nature of the proposal by asserting:

> The Association's proposals do not merely provide mechanisms and opportunity for the movement of an employee from one job to another. The Association's proposals would accomplish the move between what are now separate classifications by making the classifications irrelevant. The Association proposals piously recite management rights but simultaneously emasculate them.

As to the contention that the proposal is a prohibited subject of bargaining, the County submits the proposal will have the effect of unequal wages and benefits being paid to male and female employes performing identical work creating a prima facie violation of the Equal Pay Act. The County argues that because none of the statutory exceptions present in the Act as affirmative defenses are applicable to the Association's proposal, the proposal would establish a system promoting unlawful activity and thus is a prohibited subject of bargaining. The County contends that the presence of the Association's hold harmless clause does not affect the prohibited nature of the proposal. The County further notes that the Commission has found proposals which even indirectly further unlawful conduct will be found to be prohibited subjects of bargaining. City of Wauwatosa, Dec. No. 15917 (WERC, 11/77).

The County summarizes its brief thusly:

> The Hearing Examiner in this matter acted imappropriately in providing assistance and counsel to the Association. The Commission should not consider the objectionable testimony or proposed modifications of the Association's final offer.
>
> All of the Association's proposals constitute prohibited and permissive subjects of bargaining. The proposals should be found to be prohibited inasmuch as they promulgate and promote unequal pay for equal work. The proposals are clearly permissive in that they effectively abolish job classifications and eliminate distinctions between jobs, redesign the organizational structure of the Department and change supervisory and reporting relationships on a broad scale in the Department. Further, whether immediate or over a period of time the proposals mandate massive retraining without any controls, limits or timing and require the attempted absorption of far greater numbers of personnel into new work than the Department has ever before faced and at the same time being denied qualified senior deputies to train the new patrol force.
>
> The desire of Deputy IIs to work on the first shift Monday through Friday is understandable. But the Association cannot be allowed to usurp County responsibility to create jobs. It cannot change the job classification system to avoid pay reductions when the Deputy IIs would be doing lower paid work and it should not be allowed to assume the responsibility for making training decisions and creating new supervisory relationships in the Department.

THE ASSOCIATION

The Association argues that the proposal is primarily related to "hours" because the basic objective is to give senior deputy sheriffs the right to select

their shift. The Association also analogizes this proposal to those proposals at issue in City of Green Bay, Dec. No. 12402-B (WERC, 1/75) and City of Madison, Dec. No. 16590 (WERC, 10/78) where the Commission found the application of seniority to choice of work assignments, promotions, or lateral transfers among qualified employes to be mandatory subjects.

Citing clauses 6.04(a) through (e) of its proposal, the Association contends that its proposal interferes neither with the County's right to establish job duties and job classifications nor with the County's right to determine and maintain qualifications. While the Association admits that its proposal will link deputy salaries directly to seniority and not to job classification, it argues that such a method of determining compensation is not unusual and notes that a proposal need not outline the most rational compensation system to be mandatorily bargainable. In the Association's view, a finding that the proposal is permissive would be akin to concluding that the County has a right to permanently retain the existing classification-based compensation system. As to the issue of qualifications, the Association points not only to 6.04(b) and (c) of the proposal but also asserts that nearly all deputies have been trained to perform the duties of road patrol, bailiff and process server.

Responding to the County's argument that the proposal would interfere with the training and supervision of deputies, the Association asserts that such contentions go to the merits of the proposal in interest arbitration and are irrelevant to the proposal's mandatory bargainability. Finally, the Association denies that the proposal creates conditions which would violate the Equal Pay Act because it fits within the statutory seniority system exception.

The Association therefore requests that the proposal be found to be mandatory.

DISCUSSION

A threshold issue in this matter is whether the Commission should consider those portions of the testimony and those modifications of the Association's position that resulted from certain of the Examiner's questioning of witnesses, questioning of Counsel for the Association, and comments/suggestions regarding possible modifications of the Association's proposals.

The Commission is committed to providing impartiality in fact and appearance on the part of those conducting hearings in Commission proceedings.

The Commission also recognizes that the underlying purposes of MERA of encouraging voluntary agreements and of minimizing interruptions of the statutory impasse resolution processes make it desirable and important for a declaratory ruling case examiner: to provide the Commission with a record reflecting clearly the nature and operational implications of the proposal(s) involved; to obviate objections as early in the declaratory ruling process as possible; and to avoid wherever possible situations in which the Commission determines the status of a proposal that does not in fact reflect the proponent's intentions only to have a proposal conforming to the proponent's intentions ultimately resubmitted in bargaining, objected to, and then heard and decided in a subsequent declaratory ruling proceeding.

In each declaratory ruling case the Commission's examiner must exercise discretion with respect to the degree of his or her participation in attempting to achieve the latter set of objectives without in fact or appearance losing impartiality. In order that impartiality in fact and appearance is not jeopardized in pursuit of the latter set of objectives, it is important that the

receptiveness or nonreceptiveness of the respective parties to the examiner's pursuit of the objectives noted above.

In the instant case, the nature and extent of the Examiner's pursuit of the abovenoted objectives has clearly caused the County to have serious concerns about lack of impartiality. We share the Examiner's view, expressed at the conclusion of the hearing, that that is regrettable and to be avoided in future cases if possible by close adherence to the advance notifications and safeguards noted above. In the Examiner's defense, however, we note that the meaning and operational implications of the instant proposal were not clear on the face of the language, were not mutually understood by the parties, and were not even clearly understood in several respects by some hearing participants (including the Examiner) well into the hearing. For those reasons, special efforts aimed at clarifying and conforming proposal to its proponent's intentions seem particularly understandable and warranted. It can also be noted that the Examiner sustained numerous objections by the County to proposed exhibits and lines of questioning which the Association sought to pursue; allowed County Counsel, over Association objection, to pursue a line of questioning about how the proposal would actually be implemented; and offered the County an opportunity for reconvening the hearing at a later date if the County concluded after reviewing the hearing developments that it needed an additional opportunity to be heard in the matter.

Our bottom line conclusion is that, in all of the circumstances, the Examiner's conduct in the instant circumstances does not warrant our striking or disregarding any portions of the record and does not warrant our disregarding the modifications of the Association's proposal that were made herein.

We are, however, deciding the mandatory/permissive nature of both the initial and modified versions of the Association's proposals, in order to provide greater guidance to the parties.

In Beloit Education Association v. WERC, 73 Wis.2d 43 (1976), Unified School District No. 1 of Racine County v. WERC, 81 Wis.2d 89 (1977) and City of Brookfield v. WERC, 87 Wis.2d 819 (1979), the Wisconsin Supreme Court set forth the definition of mandatory and permissive subjects of bargaining under Sec. 111.70(1)(a), Stats., as matters which primarily relate to "wages, hours, and conditions of employment" or to the "formulation or management of public policy," respectively. Prohibited subjects of bargaining are those proposals or provisions which violate public policy or statutes and thus are void as a matter of law. Board of Education v. WERC, 52 Wis.2d 625 (1971); WERC v. Teamsters Local No. 563, 75 Wis.2d 602 (1977). We have applied those principles in reaching the conclusions set in Finding of Fact 4, Conclusion of Law 2, our Declaratory Ruling, and in our Discussion below.

With regard to the status of the Association's proposals, both before and after modification, it is our view that, as written, both are permissive subjects of bargaining about which the County is not obligated to bargain collectively. We so conclude because, as written, the Unions' attempt to secure certain superior shift preference/bumping rights for individuals holding the Deputy II classification without exposing the County to additional wage and benefit costs, results in (1) reorganizing the department in such a way that the County is effectively prevented from determining which supervisors shall supervise Deputies I and which shall supervise Deputies II 2/; and (2) materially altering

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2/ The County has organized the Department so that the supervision of Deputies I is by two particular supervisors and the supervision of Deputies II is almost exclusively performed by a different set of supervisors. Co. Ex. 10. The Association's proposal would prevent the County from maintaining that organizational arrangement, since the proposal would both entitle senior Deputies II--without giving up their Deputy II classification--to bump to available first shift work including the bailiff and process work now being assigned nearly exclusively to Deputies I, and since the proposal would force the County to assign bumped Deputies I--while retaining their Deputy I classifications--to perform road assignments on the second and third shifts which work is now assigned exclusively to Deputies II except for temporary road training assignments to Deputies I. "The shape of its organizational structure so directly influences the ability of a municipal employer to

the duty content definitions established by the County for the Deputy I and II classifications. 3/

Having found the proposals permissive on the above bases, we do not find it necessary to address the additional grounds on which the County claimed the proposal was nonmandatory.

Having said that, however, we nonetheless wish to emphasize that the Union has the right to mandatorily bargain about the compensation payable to employes in the bargaining unit and to mandatorily propose, if it chooses, that the pay and benefits for all bargaining unit classifications be identical or that compensation be based on bargaining unit longevity and unrelated to duties performed or classification held.

Similarly, it is our view that the Union has the right to mandatorily bargain for shift selection and bumping procedures that result in transfers between classifications, so long as the procedure protects the County against being left with an employe complement on any shift that is not minimally qualified to perform the work available on that shift. For example, a proposal that all employes in the bargaining unit, in order of seniority, are entitled to a transfer to the shift of their choice and to bump a less senior employe in the process would, in our view, be a mandatory subject of bargaining so long as the employes assume the classification associated with the work they perform and the transfer does not deprive the employer of an employe complement on each shift that is minimally qualified to perform the available work on that shift. It should be noted, however, that prior Commission decisions have held permissive proposals which required the employer to provide or even discuss providing various types of in-

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2/ (continued)

operate so as to carry out its governmental mission that decisions regarding that structure primarily relate to the formulation and management of public policy." Brown County, Dec. No. 19042 (WERC, 11/81) at 5, citing, Milwaukee Board of School Directors, Dec. No. 17504 (WERC, 12/79).

3/ The County has created Deputy I and Deputy II classifications and has established a different set of basic, regularly-assigned duties for each of those classifications. Disregarding the de minimis grandfathering of one Deputy II in the warrants area and the de minimis occasional overlaps in those sets of duties in emergency or other unusual situations, Deputy I duties essentially consist of bailiff and process work assignments and Deputy II duties essentially consist of traffic/patrol work assignments. Since there is no contention or showing herein that any of the duties respectively allocated to the two classifications are not fairly within the scope of the responsibilities applicable to the kind of work performed by each of the employe groups involved, the general and specific duties and responsibilities allocated by the County to each of the classifications in question is a permissive subject of bargaining. Accord, Sewerage Commission of the City of Milwaukee, Dec. No. 17025 at 7 (WERC, 5/79). The Association's proposal would entitle holders of the Deputy II classification to perform work allocated by the County to the Deputy I classification and would require Deputies I to perform work exclusively allocated by the County to the Deputy II classification. The proposal thereby renders ineffective the County's duties allocations to the respective classifications. While the Association offered testimony and arguments to the effect that the County's mode of operation in that regard is unwise and counterproductive, as the Examiner correctly pointed out at hearing, that is not an available line of argument since it is a matter primarily related to the formulation and management of public policy and hence reserved to management's discretion absent management's agreement to bargain on the subject. See, e.g., Milwaukee Board of School Directors, Dec. No. 20398-A (WERC, 12/83) at 30 ("the Commission has consistently found the subject of classification structure to be a mattter of management prerogative which need not be bargained."); and id. at 13.

service training. 4/ The implications of those precedents would need to be carefully considered in determining the status of such a proposal if it were intended (in the context of the balance of the agreement as historically administered) to require the employer to promptly train bargaining unit employes so as to render them minimally qualified to perform available work on the shift onto which they seek to bump or are being bumped. A contention that the required training is no more than the employer has historically provided would be unavailing since the fact that a party has had a permissive subject in effect during a previous contract term does not render that subject mandatory as regards future bargains. 5/

While such proposals may well make it more difficult for the County to train and deploy its law enforcement personnel in the manner the County considers optimally efficient and effective, it is our view that those considerations go to the merits of the proposals rather than to their mandatory/permissive nature. See, e.g., Milwaukee Board of School Directors, Dec. No. 20093-B (WERC, 8/83) at 11-12; Racine Unified School District, Dec. No. 20653-A (WERC, 1/84) at 59; aff'd Case No. 85-0158 (CtApp II, 1986).

The Equal Pay Act concerns expressed by the County would not be presented by the straight seniority example proposals of the sort posited above since differences in pay for men and women performing the same work would be based upon a bona fide seniority system.

We are hopeful that the guidance we have provided herein will both avoid the need for a subsequent declaratory ruling proceeding in this matter and ameliorate the concerns as to impartiality of declaratory ruling hearing conduct that arose in this case.

Dated at Madison, Wisconsin this 11th day of December, 1986.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Herman Torosian, Chairman

I concur in all respects, but I have added a separate opinion, below.

_____
Marshall L. Gratz, Commissioner

_____
Danae Davis Gordon, Commissioner

4/ E.g., Milwaukee Board of School Directors, Dec. No. 17504 (WERC, 12/79) at 7 (holding permissive a proposal requiring the employer to make a paid but voluntary 40-hour inservice training program available to bargaining unit employes so that those interested in transferring to multi-unit method schools could learn in detail about the program to enable them to make an informed decision regarding such a transfer) and Oak Creek Schools, Dec. No. 11827-D (WERC, 9/74) at 16, aff'd (CirCt Dane, 11/75) (concluding that "the portion of the Association's proposal which refers to the formation of a committee to investigate and sponsor in-service programs and the participants therein is a permissive subject.")

5/ E.g., City of Wauwatosa (Fire), Dec. No. 15917 (WERC, 11/77) at 7.

CONCURRING OPINION OF CHAIRMAN TOROSIAN

The Commission decision does not address an additional aspect of the Association's proposals, to wit, the right of the Association to bargain for retention of wages, benefits and shift preference rights of both the bumping and the bumped employes, which the County argues could result in an Equal Pay Act violation under certain circumstances.

Rate retention proposals are common and they surely are primarily related to wages. I see no reason why the same would not be true of retention of educational incentive by bumping employes. By analogy, retention of shift preference rights primarily relates to conditions of employment just as shift preference provisions do in the first instance.

In my view, if the Association can mandatorily propose retention of higher rates, benefits and rights for the bumping employes, they can also propose retention of lower rates, benefits and rights for the bumped employes. The Association's stated objective in that regard is to free its shift preference and bumping provisions from the burden of increasing the County's wage and benefit costs, and the Association envisions its proposal as permitting the lower paid group to progress into the higher paid group as vacancies occur.

Thus, while broad retention provisions of the sort I am referring to are not common, I would not find them to be nonmandatory subjects unless a case were clearly made that they violate the Equal Pay Act.

Dated at Madison, Wisconsin this 11th day of December, 1986.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Herman Torosian, Chairman