STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of OUTAGAMIE COUNTY Requesting a Declaratory Ruling Pursuant to Section 227.41, Wis. Stats., Involving a Dispute Between Said Petitioner and LOCAL 980, AFSCME, AFL-CIO	Case 159 No. 40516 DR(M)-451 Decision No. 25484

Appearances:

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

Lawton & Cates, S.C., Attorneys at Law, by Mr. Bruce F. Ehlke, 214 West Mifflin Street, Madison, Wisconsin 53703-2594, appearing on behalf of AFSCME.

FINDINGS OF FACT, CONCLUSION OF LAW AND DECLARATORY RULING

Outagamie County having, on September 4, 1986, filed a petition with the Wisconsin Employment Relations Commission seeking a declaratory ruling pursuant to Sec. 111.70(4)(b), Stats., as to whether a proposal submitted by Local 980, AFSCME, AFL-CIO, during collective bargaining with the County was a mandatory subject of bargaining; and the petition having been held in abeyance by agreement of the parties until AFSCME notified the Commission on February 16, 1987, that it wished to proceed to hearing and decision; and a statement in support of the petition having been filed by the County on March 26, 1987; and a statement in opposition to the petition having been filed by AFSCME on April 7, 1987; and hearing having been held in Appleton, Wisconsin on May 6, 1987, before Examiner Peter G. Davis; and the parties having filed briefs the last of which were received on July 17, 1987; and the parties thereafter having reached agreement on a successor collective bargaining agreement and the County having on March 29, 1988 advised the Commission that it wished to withdraw the petition based upon said settlement; and the Commission having on April 21, 1988 dismissed said petition because there was no longer a "dispute" within the meaning of Sec. 111.70(4)(b), Stats. between the parties as to the duty to bargain over the "successorship" proposal, Dec. No. 25379 (WERC, 4/88); and the Commission having further advised the parties that it would assert jurisdiction to decide the matter if either party filed a petition for declaratory ruling pursuant to Sec. 227.41, Stats., and AFSCME having on April 26, 1988 filed such a petition; and the Commission having on May 3, 1988 advised the parties that it would take notice of the record in DR(M)-409 and would proceed to issue its decision unless either party advised the Commission on or before May 16, 1988 that additional hearing was needed; and neither party having requested additional hearing; and the Commission, having reviewed the record and being fully advised in the premises, makes and issues the following

FINDINGS OF FACT

1. That Outagamie Count, herein the County, is a municipal employer having its principal offices at 410 South Walnut Street, Appleton, Wisconsin 54911.

2. That Local 980, AFSCME, AFL-CIO, herein AFSCME, is a labor organization having its principal offices at 1121 Winnebago Avenue, Oshkosh, Wisconsin 54901.

3. That AFSCME is the collective bargaining representative of certain County employes who work at the Outagamie Health Care Center and that during collective bargaining between the parties over a successor agreement, AFSCME made the following proposal which is the subject of the instant declaratory ruling.

The Employer agrees that it will not sell or otherwise transfer the operation of the Health Care Center to another employer unless the new employer agrees to assume the existing collective bargaining agreement as a part of the transfer agreement.

4. That the proposal recited in Finding of Fact 3 primarily relates to wages, hours and conditions of employment.

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

CONCLUSION OF LAW

That the proposal recited in Finding of Fact 3 is a mandatory subject of bargaining within the meaning of Sec. 111.70(1)(a), Stats.

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

DECLARATORY RULING 1/

That the County and AFSCME would have a duty to bargain over the proposal recited in Finding of Fact 3 pursuant to Secs. 111.70(1)(a) and (3)(a)4, Stats.

Given under our hands and seal at the City of Madison, Wisconsin this 31st day of May, 1988.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Stephen Schoenfeld
Stephen Schoenfeld, Chairman

Herman Torosian, Commissioner

A. Henry Hempe, Commissioner

1/ 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.

(Footnote one continued on page three)

(Footnote one continued from page two)

(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 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.

OUTAGAMIE COUNTY

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

POSITIONS OF THE PARTIES

The County

The County asserts that the proposal in question primarily relates to public policy considerations regarding the County's right to go out of the nursing home business by selling the Health Care Center. The County argues that the Commission in Chippewa County, Dec. No. 24521 (WERC, 5/87), concluded that the decision to sell a health care facility was a permissive subject of bargaining. The County contends herein that if it were obligated to bargain over the instant successorship clause, and if the clause became part of the collective bargaining agreement, the evidence demonstrates that there would be no purchasers interested in the health care facility in question. The County alleges that such a result would frustrate the political process and policy decisions which have been ongoing as to the question of whether to sell the County's Health Care Center. Citing Milwaukee Sewerage Commission, Dec. No. 17025 (WERC, 5/79), the County contends that the successorship provision is "so intertwined" with the County's right to go out of the health care business that it must be found to be a permissive subject of bargaining. In the County's view, any impact on the County's ability to go out of the health care business is sufficient to warrant a conclusion that the proposal is permissive. The County further argues that the proposal in question is not like the temporary restriction on the employer's right to lay off found to be mandatory by the Wisconsin Supreme Court in West Bend Education Association v. WERC, 121 Wis.2d 1 (1984), because the intrusion into the County's right is an ongoing one.

The County alleges that the proposal in question requires that it bargain over whether a successor employer should give job security to current employes even though the County itself has no duty to bargain over its right to lay off current employes. The County therefore argues that the proposal is contrary to City of Brookfield v. WERC, 87 Wis.2d 819 (1979). The County also argues in this regard that the New York PERB held in Monroe Woodbury Central School District, No. U-2393 (1977), that a proposal mandating retention of presently employed teachers in the event of a merger or consolidation was a permissive subject of bargaining because the union therein could not require that the current employer negotiate over such a guarantee of job security.

The County also contends that the proposal in question has the effect of requiring that the new employer grant recognition to AFSCME as the collective bargaining representative because of the recognition clause contained in the collective bargaining agreement. The County argues that such a result is contrary to the Commission's decision in Milwaukee Board of School Directors, Dec. No. 20398-A (12/83) that a recognition clause with respect to an existing employer is a nonmandatory subject of bargaining. The County argues that if a recognition clause between the County and AFSCME is permissive in nature, a demand by AFSCME that such a clause be imposed by contract upon an unknown successor employer clearly falls in the category of a nonmandatory subject of bargaining. The County again cites the New York PERB decision in Monroe Woodbury, supra, as being supportive of its argument in this regard.

The County additionally argues herein that Sec. 111.70(3)(a)4, Stats., allows an employer to demand that an election be held before it is obligated to bargain with a union. The County argues that if a successor employer would have no automatic duty to bargain with AFSCME, the successor employer should not be obligated to assume the collective bargaining agreement. The County further asserts that the proposal in question would impose an obligation upon a private sector employer and thus is beyond the scope of collective bargaining established by Sec. 111.70(1)(a), Stats.

Finally, the County argues that the proposal in question establishes wages, hours and conditions of employment for non-bargaining unit employes and thus is

contrary to the Commission's ruling in City of Sheboygan, Dec. No. 19421-A (WERC, 3/82).

Contrary to AFSCME's arguments herein, the County asserts that private sector precedent is inapplicable because the duty to bargain in the private sector is determined by the "vitally affects" test and does not require consideration of the statutory management's right's clause contained in Sec. 111.70(1)(a), Stats. The County asserts in this regard that the Wisconsin Supreme Court rejected the private sector analogy in Unified School District No. 1 of Racine County v. WERC 81 Wis.2d 89 (1977). The County also disputes AFSCME's assertion that a private sector employer's obligation to bargain with AFSCME if it hires a certain number of employes can be equated to an obligation to assume the existing contract. The County alleges that under private sector precedent, an employer has no such obligation.

Given the foregoing, the County asks that the Commission find the proposal in question to be a permissive subject of bargaining.

AFSCME

AFSCME asserts that its proposal is a mandatory subject of bargaining primarily related to preservation of existing wages, hours and conditions of employment. AFSCME strongly disputes the County's contention that if any public policy choices are implicated by a proposal, then the proposal is a permissive subject of bargaining. AFSCME asserts that the County's view of how to determine whether a proposal is a mandatory subject of bargaining flies in the face of the "primarily related" test established by the Wisconsin Supreme Court.

AFSCME contends that its proposal does not significantly implicate any public policy choices because the County remains free under this proposal to sell or lease the health care facility. AFSCME argues that the successorship clause in question would simply become one more subject for negotiations between the County and a potential purchaser. AFSCME asserts that a purchaser would not be forced to assume a union contract but rather would be free to choose of its own free will to enter into an agreement which includes assumption of the union contract as one of its conditions. Essentially, AFSCME would characterize its proposal as an "impact" proposal which leaves the County free to make any public policy decision and merely bargains over the impact of that decision on the employes represented by AFSCME.

AFSCME argues that successorship clauses have been found to be mandatory subjects of bargaining under the National Labor Relations Act, citing Lone Star Steel 231 NLRB 573 (1977), aff'd in pertinent part, 618 F.2d 698 (CA 10 1980). AFSCME asserts that although a successorship clause in the private sector clearly represents some hindrance to the absolute mobility of private sector capital, a limitation at the very core of private employer concerns, the clause was nonetheless found to be a mandatory subject of bargaining.

AFSCME denies the County's assertion that a decision from the New York PERB is supportive of the County's position herein. AFSCME asserts that the case involved in New York involved statutorily mandated consolidation of school districts which lacked the essential element of free choice available to the purchaser herein. AFSCME further disputes the persuasiveness of the County's argument that the clause impermissibly requires the successor employer to recognize AFSCME as the collective bargaining representative of employes. AFSCME notes that under federal law, successorship clauses are enforceable and further contends that a successor employer will be bound to recognize AFSCME as the collective bargaining representative even without a successorship clause if it hires a substantial number of the current employes. AFSCME argues that the successorship clause would in essence result in no more than voluntary recognition of AFSCME as the collective bargaining representative. Lastly, AFSCME characterizes as "bordering on the absurd" the County argument that the clause is not mandatory because it would establish the wages, hours and conditions of employment for employes not in the bargaining unit. AFSCME asserts in this regard that if a successor agrees to assume the AFSCME contract, then the employes of the new employer will be in the bargaining unit. AFSCME argues that the City of Sheboygan case cited by the County is inapposite herein because it involved a

proposal which would affect supervisory positions, not individuals who would fill unit positions under a successor employer. AFSCME further notes that if a sufficient number of the successor's employes were not current County employes, the employes would be free to file a decertification petition if they did not wish to be represented by the union.

In conclusion, AFSCME argues that the County would eliminate AFSCME's right to bargain regarding a successorship clause simply because the clause may have an effect on the implementation of a decision that has yet to be made, and may never be made. AFSCME contends that such a tangential and speculative County interest cannot offset the core of employe intersts represented by this successorship clause: the continuation of the wages, hours and conditions of employment secured for the Riverview/Health Center workers over years of bargaining with the County. AFSCME asserts that these wages, hours and conditions of employment are the primary aspect of the successorship clause, and the clause should be declared a mandatory subject of bargaining.

DISCUSSION:

It is useful to set forth the general legal framework within which the issue herein must be resolved. In Beloit Education Association v. WERC, 73 Wis.2d 43 (1976), Unified School District No. 1 of Racine County v. WERC, 81 Wis.2d 898 (1977) and City of Brookfield v. WERC, 87 Wis.2d 819 (1979), the Court set forth the definition of mandatory and permissive subjects of bargaining under Sec. 111.70(1)(d), Stats., as matters which primarily relate to "wages, hours, and conditions of employment" or to the "formulation or management of public policy," respectively. The Court also concluded that the impact of the formulation or management of public policy upon wages, hours and conditions of employment is a mandatory subject of bargaining.

Before we can proceed to apply the above-noted legal framework to the proposal at hand, we must address the County's various arguments that the proposal is permissive solely because it (1) obligates the new employer to assume a contract which contains a nonmandatory clause granting recognition to AFSCME as the employes' collective bargaining representative; (2) imposes obligations on a private employer contrary to Sec. 111.70(1)(a), Stats.; (3) obligates the new employer to bargain with AFSCME prior to a representation election contrary to Sec. 111.70(3)(a)4, Stats.; or (4) establishes wages, hours and conditions of employment for employes not currently in the bargaining unit.

As to the County's recognition clause argument, a close reading of the Milwaukee Board of School Directors case cited by the County demonstrates that said decision does not warrant finding the successorship clause to be a permissive subject of bargaining. In Milwaukee, we concluded that an employer was statutorily obligated to place a standard recognition clause 2/ in the parties' contract at the union's request and that this obligation was not subject to the collective bargaining process. Thus, although the County is correct that a standard clause is nonmandatory, a standard recognition clause is a matter which the employer is nonetheless obligated to place in the agreement. The recognition clause in the parties' 1984-85 contract meets the County's statutory obligation. 3/ Assumption of a contract containing a standard recognition clause by the new employer would obligate the new employer to recognize AFSCME as the employes' representative. We do not find the new employer's voluntary assumption of such a clause to be a basis for finding the successorship clause to be permissive.

2/ The Commission identified the elements of a standard recognition clause as (1) identification of the representative, (2) a description of the unit and (3) a statement that the employer recognizes the representative's exclusive status for the purposes of collective bargaining over unit employes.

3/ The clause also contains a sentence "this provision shall not be interpreted for purposes other than the identification of the bargaining representative," which language is a mandatory subject of bargaining under Milwaukee.

Turning to the County's argument that the successorship clause imposes obligations on a private employer which is beyond the confines of collective bargaining under Sec. 111.70(1)(a), Stats., we believe the County's argument to contain a mischaracterization. Even assuming the validity of the County's apparent premise that the successor will inevitably be a private employer, any future purchaser of the health care facility will not have had the contract "imposed" on it but rather will have voluntarily agreed to accept the terms of the contract as part of the purchase agreement. The only obligation "imposed" by the clause is on the County who must obtain the agreement of purchaser to assume the contract if and when it wants to sell the facility. Thus, we reject this County argument.

As to the County argument that the successorship clause improperly obligates the purchaser to waive a statutory right to insist that a representation vote be conducted under Sec. 111.70(3)(a)4, Stats., we note Sec. 111.70(3)(a)4, Stats., is totally inapplicable to a private sector purchaser and, more fundamentally, that any new employer, whether public or private, would have voluntarily agreed to recognize AFSCME when it voluntarily assumes the existing contract.

Lastly, we turn to the County's argument that the clause is permissive because it establishes wages, hours and conditions of employment for nonunit employes. The County correctly asserts and we have held that an employer need not bargain over wages, hours and conditions of employment for employes who are outside the bargaining unit. However, it is apparent that this clause would establish the wages, hours and conditions of employment for only those County employes who were retained by a successor. 4/ Thus, being unpersuaded that the clause has the effect claimed by the County, we reject the argument based on those premises.

Given the foregoing, we turn to the balancing of the relationship of the proposal to management and public policy interests against the relationship of the proposal to wages, hours and conditions of employment. As the County correctly notes, we have concluded that in at least some circumstances a municipal employer need not bargain with the union over a decision to sell a health care facility to a private employer because the sale represents a policy choice by the municipal employer to cease providing health care services. 5/ However, contrary to the County's assertion, we do not find that this proposal prevents the County from making such a decision. 6/ The proposal only requires that if the County elects to sell or transfer the facility to a party who will continue to operate the facility to provide health care, the new employer will assume any existing contract. The County exhibit consisting of a letter from a potential purchaser indicating a disinterest in assuming the labor agreement reflects only the predictable views of a buyer in a potential transaction who seek to maximize their own flexibility upon purchase. 7/ On the other hand, the proposal has a strong relationship to employe wages, hour and conditions of employment in that it seeks to protect wages, hours, job security provisions, etc., which exist at the time of the sale or transfer. Given the foregoing, we conclude that the proposal

---

4/ The basis for our rejection of this argument is consistent with the rationale of the NLRB and the Tenth Circuit Court of Appeals in Lone Star, supra.

5/ We note that the instant proposal does not apply to a County decision to cease providing health care services by (1) simply closing the facility or (2) selling/leasing to a party who would use the facility for something other than provision of health care.

6/ Given this finding, we also must reject the County's arguments based upon the Supreme Court's holdings in West Bend and Brookfield.

7/ We note that the successor's obligation to honor the contract would end when the contract expired by its terms and thus that the length of time a successor would be a party to the contract would depend upon the timing of the purchase/lease. Upon expiration of the contract, the successor's obligation to maintain the status quo would obviously not include any duty to honor any portions of the contract which were permissive subjects of bargaining.

primarily relates to wages, hours and conditions of employment 8/ and is not "so intertwined" with any management or public policy interests that it should nonetheless be held permissive under Milwaukee Sewerage.

Our conclusion herein is analogous to our rejection in Racine Unified School District, Dec. No. 20653-A (WERC, 1/84) aff'd CtApp II (3/86) unpublished, and School District of Janesville, Dec. No. 21466 (WERC, 3/84) of employer arguments that a wage proposal is nonetheless permissive because it may serve to inhibit the employer from making educational policy choices as to class size or employe activities during the workday. As we noted in those decisions, virtually any wage or other mandatory proposal can impact on management and policy choices. Such impact arguments go to the merits and reasonableness of the proposal not its mandatory or permissive status. 9/ The statutory scheme leaves judgments as to the merits of a proposal to the bargaining table and, if necessary, to the interest arbitration process where factors such as the comparability and the impact which implementation of the proposal would have upon the welfare of the public come into play.

Dated at Madison, Wisconsin this 31st day of May, 1988.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Stephen Schoenfeld
Stephen Schoenfeld, Chairman

Herman Torosian, Commissioner

A. Henry Hempe, Commissioner

8/ This conclusion is consistent with the status of the law under the NLRA. See Lone Star, supra. We do not find the Monroe Woodbury decision of the New York PERB persuasive and note that it involves statutory consolidation processes not present herein. Thus, we are not deciding whether or how our holding herein applies to a school consolidation context.

9/ Our decision expresses no opinion on the likelihood of AFSCME being able to persuade the County or an interest arbitrator to place the disputed proposal in the parties' contract.