STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of	:	
CITY OF BROOKFIELD	:	
Requesting a Declaratory Ruling Pursuant to Sec. 111.70(4)(b), Stats., Involving a Dispute Between said Petitioner and	:	Case 66 No. 38870 DR(M)-429 Decision No. 25517
BROOKFIELD PROFESSIONAL FIREFIGHTERS ASSOCIATION	:	

Appearances:

Mr. Tom E. Hayes, Attorney at Law, 5429 North 118th Court, Milwaukee, Wisconsin 53225, appearing on behalf of the City.

Mr. John K. Brendel, Counselor of Law, 118 North Avenue, Hartland, Wisconsin 53029, appearing on behalf of the Union.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECLARATORY RULING

The City of Brookfield having on June 1, 1987 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 City had a duty to bargain with the Brookfield Professional Firefighters Association over an insurance proposal made by the Association during collective bargaining over a successor agreement; and the parties, having subsequently reached agreement on a 1987-88 contract but remaining desirous of a decision from the Commission, waived hearing and submitted written argument, the last of which was received September 30, 1987; and the Commission having considered the matter and being fully advised in the premises, makes and issues the following

FINDINGS OF FACT

1. That the City of Brookfield, herein the City, is a municipal employer having its principal offices at 2000 North Calhoun Road, Brookfield, Wisconsin 53005; and that among its functions the City operates a Fire Department.

2. That the Brookfield Professional Firefighters Association, herein the Union, is a labor organization which functions as the collective bargaining representative of certain individuals employed by the City in the Fire Department and has its principal offices at 118 North Avenue, Hartland, Wisconsin 53029.

3. That during collective bargaining over a successor to the 1985-86 contract between the City and the Union, the Union made the following proposal which the City contends is a prohibited or permissive subject of bargaining.

> Commencing 1/1/87, upon an employee's 'normal' retirement (as defined per Wis. Stat. Sec. 40.23) or upon an employee's termination due to disability (as defined in Sec. 40.65(4) Wis. Stats.), the City shall, at City expense, provide the employee with a single or family plan, as applicable, of group health insurance equal to the coverage or plan that the employee participated in at the time of retirement or termination. Such City payments shall continue monthly thereafter until any of the following events become applicable to the employee:
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> (a) The death of the employee;
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> (b) The employee and his/her spouse attain age 65;

(c) The employee and his/her spouse is qualified for Medicare;

(d) The employee and his/her spouse is a participant in a substantially similar group health insurance plan provided by a subsequent employer during the period of such participation.

4. That the proposal set forth in Finding of Fact 3 is primarily related to wages, hours and conditions of employment.

Upon the basis of the above and foregoing Findings of Fact, the Commission makes the following

CONCULSIONS OF LAW

1. That the proposal set forth in Finding of Fact 3 is not violative of that portion of Sec. 111.70(3)(a)4, Stats. which limits the maximum length of collective bargaining agreements reached under the Municipal Employment Relations Act to 3 years. 1/

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

Upon the basis of the above and foregoing Findings of Fact and Conculsions of Law, the Commission makes the following

DECLARATORY RULING 2/

1. That the City has a duty to bargain within the meaning of Secs. 111.70(3)(a)4 and (1)(a), Stats., with the Union over the proposal set forth in Finding of Fact 3, should the Union propose inclusion of said proposal in a successor collective bargaining agreement.

Given under our hands and seal at the City of Madison, Wisconsin this 10th day of June, 1988.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Stephen Schoenfeld, Chairman

_____
Herman Torosian, Commissioner

I concur

_____
A. Henry Hempe, Commissioner

1/ Sec. 111.70(3)(a)4, Stats. provides in pertinent part:

> "The term of any collective bargaining agreement shall not exceed 3 years."

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

(Footnote two continued on page three)

(Footnote two continued from page two)

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 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 FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECLARATORY RULING

POSITIONS OF THE PARTIES:

The City

The City asserts that the Union's proposal is a prohibited subject of bargaining because it seeks to impose obligations upon the City for a period of time which may be in excess of the 3 year limitation established by Sec. 111.70(3)(a)4, Stats. To the extent that the proposal provides benefits to retirees who are thus no longer "municipal employes" represented by the Union, the City contends that the proposal is permissive, citing Chemical Workers v. Pittsburg Plate Glass 404 U.S. 157 (1971) and City of Milwaukee, Dec. No. 19091 (WERC, 10/81). The City acknowledges that in Green County, Dec. No. 21144 (WERC, 11/83), the Commission found a similar health insurance proposal to be mandatory but asserts the 3 year term limitation issue was not specifically litigated in that case.

The City alleges that under this proposal it would be confronted with potentially very costly insurance obligations which would likely become vested rights enforcable by the retired employes. It asserts that the proposal thus seeks to impose unknown but substantial costs on future as yet unelected common councils who will be unable to seek relief through the collective bargaining process because the Union does not and cannot represent retirees. The City argues that the nature and extent of its obligation under this proposal render distinguishable the vacation and supplemental workers compensation analogies drawn by the Union herein.

Given the foregoing, the City asks that the Commission determine that the City has no duty to bargain with the Union over this proposal.

The Union

The Union argues that its proposal is a mandatory subject of bargaining applicable only to current employes who would retire during the term of the collective bargaining agreement. Citing Madison Metropolitan School District 133 Wis2d 462 (1986), the Union asserts that health insurance benefit proposals primarily relate to wages and argues that the receipt of benefits under the proposal during a period in excess of 3 years from the commencement of a contract is not violative of Sec. 111.70(3)(a)4, Stats. The Union contends that the legitimacy of receipt of benefits after expiration of the contract under which the benefits have been earned has been upheld in cases involving sick leave and vacation pay, citing General Drivers and Helpers Union, Local 662 v. WERB, 21 Wis.2d 242 (1963) and 59 Op. Atty. Gen. 209 (1970).

The Union alleges that the City's cost concerns are not relevant to the bargainable status of the proposal but instead go to merits of inclusion of the proposal in the contract. The Union notes that if the proposal were to become part of a contract, the City has the right to seek the exclusion of the proposal from any future contract and, if successful, would not be obligated to extend the benefit in question to employes who retired under the terms of the successor contract.

Given the foregoing the Union asks that the proposal be found mandatory.

DISCUSSION

In Green County, Dec. No. 21144 (WERC, 11/83) we decided that the following proposal was a mandatory subject of bargaining:

> "Upon retirement employees shall, at their option, be permitted to participate in the group health insurance program provided under this agreement until they qualify for Medicare."

We reasoned:

> The decisions of both the Commission and the United States Supreme Court have noted a distinction between a retirement benefit for those employes who have already retired and those who will retire in the future. As the Commission stated in City of Milwaukee, supra:
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> > Although, for existing employes, the Commission has held that the level and scope of health insurance benefits constitute a mandatory subject of bargaining and that retirement benefits for existing employes are mandatory subjects of bargaining, the Commission has never held that these same subjects are mandatory when they apply to non-unit members exclusively. In fact, consistent with the Supreme Court's decision in Pittsburgh, the Commission has concluded that proposals that have a primary impact on non-bargaining unit members and only indirect impact on unit members are permissive subjects of bargaining. Also, consistent with the decision in Pittsburgh, we conclude that an individual who is no longer employed due to retirement and without an expectation of further employment is not an "employe" within the meaning of MERA, nor is that person a member of the bargaining unit. (Footnotes omitted).
>
> Clearly, retirement benefits bargained as part of an overall compensation package need not be limited to the payment of a pension, but they may well include payments of health insurance premiums or, as here, the right to continue in a group health insurance program. Wages bargained in exchange for the performance of work as an active employe (prior to retirement) can take the form of payments and fringe benefit privileges paid to the employe contemporaneously with the active service or deferred so that payment to the employe occurs at a later date. Whether contemporaneous or deferred, the compensation involved is in exchange for the work performed by the employe during the term of the contract prior to retirement. Deferred compensation can be funded through an escrow or trust fund arrangement or on a pay-as-you-go basis, absent provisions of law to the contrary not present herein. Decisions as to what payments and fringe benefit privileges employes will receive for their work and when they will receive those payments and be entitled to those fringe benefit privileges are all matters primarily related to wages of bargaining unit employes for work performed during the contract term regardless of how much of the compensation package is payable contemporaneously with the work performed as opposed to at and during retirement or some portion thereof.
>
> Thus, in our view, if the instant clause applies only to current employes who retire during the term of the agreement, it would be a mandatory subject even though the County's obligations to such individuals would begin only at the time of the individuals' retirement.
>
> The proposal at issue herein states in pertinent part: "Upon retirement, employes shall, at their option be permitted to participate in the group health insurance program . . ." As written, we interpret the proposal as applying only to current members of the bargaining unit, who retire while the terms of the agreement at issue are in effect, as a future retirement benefit; because the proposal, by its terms, covers only "employes". Those who have retired prior to the effective date of the new agreement are no longer employes of the County.

We therefore conclude that the proposal is a mandatory subject of bargaining.

In our view, the rationale quoted above is largely dispositive of the City's arguments herein. The instant proposal mandates the provision of certain health insurance benefits by the City to current employes who retire during the term of the contract. The City correctly notes that the City payments mandated by the proposal may well extend for a period of time in excess of the 3 year limitation on the term of a collective bargaining agreement established by Sec. 111.70(3)(a)4, Stats. However, as noted in Green County, proposals which seek deferral of compensation for work performed during a valid contract term are primarily related to wages. While the 3 year limitation on the term of a contract and the non-employe status acquired by individuals upon their retirement may impact upon the manner in which the right to deferred compensation would be enforced, 3/ the 3 year limitation relied upon by the City does not, in our view, also constitute a prohibition against the otherwise mandatorily bargainable nature of deferred compensation proposals. The statutory 3 year limit on contract length functions to assure the regular occurrence of the bargaining process by which it is determined whether proposals such as this become or remain part of a contract. 4/ The 3 year limitation does not function as a limitation upon the scope of deferred compensation proposals.

The City's argument as to the unknown costs which this proposal would impose upon the City in the future goes to the merits of whether the proposal should be included in a collective bargaining agreement not the bargainable status of the proposal.

Given the foregoing, we find the Union proposal to be a mandatorily bargainable wage proposal which seeks to defer compensation to current employes for current work into the future.

In response to our colleague's reference to "prior precedent" we would note that in the Outagamie case he cites, the petitioning party withdrew its petition. Here, both parties remain desirous of a decision.

Dated at Madison, Wisconsin this 10th day of June, 1988.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Stephen Schoenfeld
Stephen Schoenfeld, Chairman

Herman Torosian, Commissioner

3/ See Pittsburg Plate Glass, 404 US 157, footnote 20 and "Retiree Insurance Benefits: Enforcing Employer Obligations," Labor Law Journal, 8/87, pp. 496-508.

4/ As noted by the Union, if this proposal were included in a contract and then subsequently excluded in a successor contract, the City would not be obligated to extend the benefits to active employes who retire during that successor contract.

Concurrence of Commissioner Hempe:

Sec. 111.70(4)(b), Stats., provides in part:

> "Failure to Bargain." Whenever a dispute arises between a municipal employer and a union of its employees concerning a duty to bargain on any subject, the dispute shall be resolved by the Commission on petition for a declaratory ruling . . . " (Emphasis supplied)

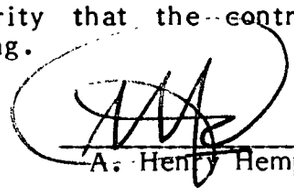
Where, as here, a dispute between the parties as to the status of proposed contract language becomes moot by virtue of a voluntary settlement, absent legally recognized exceptions, 5/ I am highly skeptical that Sec. 111.70(4)(b), Stats., confers continuing jurisdiction on the Commission to issue a declaratory ruling. Issuance under that circumstance, moreover, becomes an exercise in futility; the result can have no practical effect on the dispute, for the dispute, having been resolved, no longer exists.

Nor does the fact that following settlement both parties "remain desirous" of a declaratory ruling cure the jurisdictional defect I perceive. It is axiomatic that jurisdiction is conferred by statute, not by stipulation.

In the instant matter, consistent with recent Commission precedent, 6/ I believe the safer course would be to deny the petition for a declaratory ruling on the grounds that there is no longer a dispute. Either party, however, would be free to seek a declaratory ruling on the same question pursuant to the provisions of Sec. 227.41, Stats.

Besides providing the Commission with a path cleared of possible jurisdictional hubris, this latter route has the ancilliary advantage of transforming the issuance of a declaratory ruling into a discretionary act. While such discretion admittedly would be of no particular value in the instant case, I predict a future time and future cases when my colleagues in the majority may value it more highly than their present needs appear to require.

Although I harbor jurisdictional insecurities in this matter, I do concur with the view of the majority that the contract proposal in question is a mandatory subject of bargaining.



A. Henry Hempe, Commissioner

5/ Two such exceptions are where the issues are of great public importance, State v. Seymour, 24 Wis.2d 258, 261, 128 N.W.2d 680 (1964), or where the precise situation under consideration arises so frequently that a definitive decision is essential, Carlyle v. Karns, 9 Wis.2d 394, 101 N.W.2d 92 (1960). Both exceptions are restated with approval in Milwaukee Professional Firefighters, Local 215, IAFF, AFL-CIO v. City of Milwaukee, 78 Wis.2d 1, 15, 253 N.W.2d 481 (1977). Neither exception appears in the record of the instant case.

6/ Outagamie County (Health Care Center), Dec. No. 25379 (WERC, 4/88).