STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of WAUSAU FIREFIGHTERS ASSOCIATION LOCAL NO. 415 Requesting a Declaratory Ruling Pursuant to Secs. 111.70(4)(b), and 227.41, Stats. Involving a Dispute Between Said Petitioner and CITY OF WAUSAU	Case 48 No. 39585 DR(M)-435 Decision No. 25720

Appearances:

Lawton and Cates, S.C., Attorneys at Law, by Mr. Richard V. Graylow and Law Clerk Tracey L. Schwalbe, 214 West Mifflin Street, Madison, Wisconsin 53703-2594, and Mulholland and Hickey, Attorneys at Law, by Messrs. Thomas A. Woodley and Gregory K. McGillivary, 1125 15th Street, N.W., Washington, D.C. 20005, for the Union.

Mulcahy and Wherry, S.C., Attorneys at Law, by Messrs. Ronald J. Rutlin amd Jeffrey T. Jones, P.O. Box 1004, 401 Fifth Street, Wausau, Wisconsin 54402-1004, for the City.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECLARATORY RULING

Wausau Firefighters Association Local No. 415 having on October 26, 1987 filed a petition with the Wisconsin Employment Relations Commission pursuant to Secs. 111.70(4)(b) and 227.41, Stats. seeking a declaratory ruling as to whether Local No. 415 has a duty to bargain with the City of Wausau over a proposal contained in the City's final offer submitted pursuant to the interest arbitration provisions of Sec. 111.77, Stats.; and the parties having waived hearing and submitted written statements of position, the last of which was received by the Commission on September 21, 1988; and the Commission having reviewed the matter and being fully advised in the premises, 1/ makes and issues the following

FINDINGS OF FACT

1. That the City of Wausau, herein the City, is a municipal employer having its principal offices at City Hall, Wausau, Wisconsin 54401.

2. That the Wausau Firefighters Association, Local No. 415, herein the Union, is a labor organization having its principal offices at Wausau, Wisconsin 54401.

3. That during collective bargaining between the City and the Union over a successor collective bargaining agreement to their 1985-1986 contract, the City made the following proposal to the Union:

> Effective January 1, 1987, or immediately following ratification by the parties of this Agreement, or the

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1/ Having given notice to the parties of its intent to take notice of a U.S. Department of Labor opinion letter dated October 28, 1987, the Commission hereby takes notice of same.

implementation of an Arbitrator's Award, whichever comes later, the work day (duty day) for all employees who perform firefighting duties shall consist of a twenty-four hour and ten minute period. Each work day shall include a paid ten (10) minute roll call payable at straight time. Sleep and meal time may be deducted from hours worked for purposes of determining overtime under the Fair Labor Standards Act pursuant to 29 CFR Part 785.22 and 29 CFR Part 553.15. Consistent with these provisions, sleep time will be deducted from hours worked if the employee receives at least five (5) uninterrupted hours of sleep up to a maximum of eight (8) hours of uninterrupted sleep. If sleep time is interrupted by a call to duty, the interruption shall be counted as hours worked, and if the period is interrupted to such an extent that the employee cannot get a reasonable nights sleep (i.e. at least five (5) hours) the entire time shall be counted as hours worked. The City shall schedule in accordance with a 27-day work cycle. In the event that the Fair Labor Standards Act regulations are changed, the City agrees to abide by the new regulations during the term of this Agreement."

4. That the parties were unable to reach a voluntary agreement on a successor to their 1985-1986 contract; that the Commission, on June 18, 1987, ordered that the parties proceed to compulsory final and binding interest arbitration pursuant to Sec. 111.77, Stats.; that the parties thereafter selected an interest arbitrator and proceeded to schedule an interest arbitration hearing; that prior to the conduct of said hearing the Union filed the instant petition for declaratory ruling; that the parties have not proceeded to interest arbitration during the pendency of this declaratory ruling, and that there is no evidence in this record that the individual employes represented by the Union have advised the Union and/or the City that said employes are willing to agree to relinquish their FLSA overtime rights impacted by the City proposal set forth in Finding of Fact 3.

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

CONCLUSIONS OF LAW

1. That although a collective bargaining agreement can constitute an "agreement" between employes and their employer under 29 CFR 553.222(c) and 29 CFR 785.22 to exclude sleep and meal time for the purposes of overtime computation, the Fair Labor Standards Act and its implementing regulations cited above do not permit an employer, absent agreement by the individual employes, to seek such an agreement as a mandatory subject of bargaining.

2. That, contrary to the provisions of the Fair Labor Standards Act and the implementing regulations cited in Conclusion of Law 1, the City's proposal as set forth in Finding of Fact 3 herein seeks to compel bargaining over the exclusion of sleep and meal time for the purposes of overtime computation.

3. That the disputed City proposal set forth in Finding of Fact 3 is a prohibited subject of bargaining within the meaning of Sec. 111.70(1)(a), Stats., where, as here, the individual employes have not voluntarily agreed to relinquish the FLSA overtime rights impacted by the City proposal.

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

DECLARATORY RULING 2/

That the Union has no duty to bargain within the meaning of Sec. 111.70(1)(a) and 3(a)(4), Stats. with the City over the disputed proposal set forth in Finding of Fact 3.

Given under our hands and seal at the City of Madison, Wisconsin this 11th day of October, 1988.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Stephen Schoenfeld, Chairman

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Herman Torosian, Commissioner

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A. Henry Hempe, 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

(Footnote 2 Continued on Page 4)

(Footnote 2 Continued)

2/ 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 Union

The Union asserts that it cannot bargain with the City over the proposal in question where, as here, the individual employes in the bargaining unit have advised the City that they will not waive their FLSA rights to have overtime pay computed in a manner which includes sleep and meal time. The Union argues that the FLSA rights in question cannot by subjected to the collective bargaining process absent individual employe consent thereto because, as the United States Supreme Court held in Barrentine v. Arkansas-Best Freight System, 450 U.S. 728, 740 (1981), an individual's FLSA rights "...cannot be abridged by contract or otherwise waived because this would nullify the purposes of the statute and thwart the legislative policies it was designed to effectuate."

While conceding that issues regarding hours and overtime pay are normally mandatory subjects of bargaining, the Union rejects the City's argument that the obligation to "harmonize" conflicting statutory provisions should produce a finding that the City's proposal is mandatory herein. The Union contends that FLSA overtime pay provisions "preempt" MERA collective bargaining statutes and that no "harmonization" is possible. The Union argues that FLSA rights are minimum standards which cannot be altered by collective bargaining, citing U.S.E.E.O.C. v. County of Calumet 686 F.2d 1249 (7th Cir. 1982). The Union asserts that the City proposal is illegal and unenforceable, citing Glendale Professional Policemen's Association v. City of Glendale, 83 Wis. 2d 90 (1978).

The Union also alleges that City proposal runs afoul of 29 U.S.C. Sec. 218(a) which provides that no employe can be placed in a worse position vis-a-vis FLSA rights than he/she was before Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985). In this regard, the Union argues that firefighters would improperly receive less overtime for working more hours under the City proposal than was the case prior to the application of the FLSA to them under Garcia.

Lastly, the Union cites International Association of Firefighters, Local 349, et.al. v. City of Rome, Georgia, 682 F.Supp. 522 (N.D. Ga., 3/88) and Brewer, et.al. v. City of Waukesha, No. 87-C-0606 (F.D. Wis. 8/88) as being supportive of its position herein.

Given the foregoing, the Union requests that the Commission find it has no duty over the City proposal.

The City

The City asserts that under a conventional duty to bargain analysis, its proposal is clearly a mandatory wage and hours proposal. To the extent that the Union herein urges to the contrary based on the FLSA, the City asserts that it is possible to harmonize the pertinent provisions of 29 CFR 553 with the duty to bargain under the Municipal Employment Relations Act. In this regard, the City contends that it is clear that a collective bargaining agreement which resulted from an arbitration award under Sec. 111.77, Stats., would be an "agreement" within the meaning of 29 CFR 553 and thus would not in any way contradict the FLSA's provisions. The City urges that because the FLSA does not specify the manner in which "agreements" may be reached between employers and employes, the Commission should conclude that the collective bargaining process is an available means. The City asserts that as it is prohibited by law from negotiating individually with employes, the only method by which it can seek such "agreements" is through negotiations with the Union. The City argues that if the Commission concludes to the contrary, it is in effect nullifying the collective bargaining process as a means to resolve labor disputes and is not honoring its obligation to harmonize potentially conflicting statutes. Moreover, the City asserts that it is self-evident that most municipal employes will not voluntarily accept a proposal resulting in a reduction in overtime pay and, therefore, a conclusion that the City cannot compel bargaining over such an agreement would effectively foreclose

all municipal employers in Wisconsin from attempting to implement the provisions of 29 CFR 553. Citing State of Wisconsin, Dec. No. 23161-B, (Roberts, 1/87), the City argues that the Commission has generally concluded that matters related to compliance with the FLSA are mandatory subjects of bargaining. Thus, the City concludes that the Union is incorrect when it asserts that the City's proposal is a prohibited subject of bargaining.

The City asserts that the provisions of the FLSA itself demonstrate that Congress recognized that the collective bargaining process can produce binding "agreements" which are mandatory subjects of bargaining. The City notes that the 1985 amendments to the FLSA included a provision which explicitly referenced the collective bargaining process as a means by which municipal employers could seek to lessen the impact of the Garcia decision. Indeed, the City asserts that whenever Congress has, as a matter of policy, concluded that the provisions of a collective bargaining agreement should not modify the terms of the FLSA, Congress has explicitly so stated. Citing Arien v. Olin Mathieson Chemical Corp. 382 F.2d 192 (6th Cir., 1967) the City asserts that federal courts have consistently ruled that "agreement" under 29 CFR 553 may be found based upon an agreement between the Union representing employes and their employer. The City also asserts that as a general matter, federal labor law is supportive of the proposition that the rights of individual employes may be subordinated for the collective benefit of all employes in the bargaining unit.

As to the Union's reliance upon Barrentine, the City asserts that Barrentine is factually distinguishable because the applicble provisions of the Fair Labor Standard Act explicitly recognize the possibility of an agreement which would allow exclusion of sleep and meal time for the purposes of overtime compensation computation.

Lastly, the City responds to the Union's citation of the Rome, Georgia case by arguing that said decision does not address the issue herein, i.e., how can an express agreement under 29 CFR 553 be pursued. As to the Union's citation of City of Waukesha, the City asserts that said decision was wrongly decided as it undermines the basic principles underlying collective bargaining.

Given the foregoing, the City requests the Commission find the City's proposal to be a mandatory subject of bargaining.

DISCUSSION

Section 7(k) of the Fair Labor Standards Act creates a partial overtime exemption for public employers who employ employes engaged in fire protection. If an employer elects to utilize the 7(k) partial exemption and the employes have a shift or "tour of duty" in excess of 24 hours, then sleep and meal time can be excluded for the purposes of overtime calculation if there is an agreement between the employer and employe(s) allowing such an exclusion. The City's proposal herein seeks a shift in excess of 24 hours and seeks an agreement allowing exclusion of sleep and meal time hours for the purpose of calculating overtime compensation. 3/

But for the existence of the Fair Labor Standards Act (FLSA), it would be clear that the hours of work and overtime proposal at issue herein would be a mandatory subject of bargaining. The issue for us to determine is whether, as argued by the Union, the FLSA overtime benefits presently enjoyed by employes cannot be relinquished through collective bargaining unless the individual employes voluntarily consent thereto or whether, as argued by the City, the Union can be compelled to bargain over relinquishment of the FLSA rights of unit members, even where, as here, the employes have not consented thereto.

As a general matter, we are persuaded that the Union has correctly cited Barrentine for the proposition that the FLSA exists to give individual workers specific protections and that these individual rights are not subject to waiver through the collective bargaining process or otherwise. However, as the

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3/ The City asserts and we agree, contrary to the Union, that the proposal does not impact upon the continuing employe right to receive straight time compensation for all hours working including sleep and meal time.

Barrentine Court notes, 4/ the FLSA does contain provisions which explicitly allow the collective bargaining process to define FLSA rights. As the instant case demonstrates, there are also FLSA rights which can be relinquished by "agreement" between the employer and employe(s). Thus, our reading of the FLSA and Barrentine persuades us that the Barrentine holding is dispositive only as to those FLSA rights as to which the statutes and administrative regulations make no reference to collective bargaining or employer-employe agreement. Clearly, the statutes and regulations establishing the FLSA rights affected by the City's proposal herein explicitly contemplate the possibility of employes giving up their right to have sleep and meal time hours be compensable for the purposes of overtime calculation. Thus, Barrentine is not dispositive of the issues before us.

29 CFR 553. 222 provides the following as to inclusion of sleep time for firefighters as compensable hours for the purposes of overtime computation:

> ss. 553.222 Sleep time.
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> . . .
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> (b) Where the employer has elected to use the Section 7(k) exemption, sleep time cannot be excluded from the compensable hours of work where (1) the employee is on a tour of duty of less than 24 hours, which is the general rule applicable to all employees under 29 CFR 785.21, and (2) where the employee is on a tour of duty of exactly 24 hours, which is a departure from the general rules in Part 785.
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> (c) Sleep time can be excluded from compensable hours of work, however, in the case of police officers

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4/ In footnote 19, the Court stated:

> It is true that the FLSA, as amended, includes a number of references to collective-bargaining agreements. See Tennessee Coal, Iron & R. Co. v. Muscoda Local No. 123, 321 U.S. 590, 602, n. 18. 4 WH Cases 293 (1944) Sections 7(b)(1) and (2) of the FLSA, 29 U.S.C. ss207(b)(1), (2), state that an employer need not pay overtime under the Act for an employee's performance of work in excess of the statutory maximum, if the employee is employed "in pursuance of an agreement (containing alternative maximum hours provisions) made as a result of collective-bargaining by representatives of employees certified as bona fide by the National Labor Relations Board." Section 3(o) of the Portal-to-Portal Act amendments, 29 U.S.C. ss.203(o), excludes from the definition of "hours worked" under ss.6 and 7 of the FLSA, "any time spent in changing clothes or washing at the beginning or end of each workday" if that time was noncompensable "under a bona fide collective-bargaining agreement." And ss.4 of that Act, 29 U.S.C. ss254, which excludes from compensable time "preliminary" or "postliminary" working activities requires compensation under the minimum wage provisions if a collective-bargaining agreement in effect between the employer and the employee's union makes that time compensable. See also 29 U.S.C. ss207(e)(7). Where plaintiff's claim depends upon application of one of these exceptions, we assume without deciding that a court should defer to a prior arbitral decision construing the relevant provisions of the collective-bargaining agreement. In this case, however, petitioners' threshold claim does not depend upon application of any of those exceptions. The contention that petitioners were engaged in compensable "principal" activity when conducting the pre-trip safety inspections is a claim that arises wholly independently of the collective-bargaining agreement. Accordingly, deference to the prior arbitral decision in this case would be inappropriate. See supra n. 13.

or firefighters who are on a tour of duty of more than 24 hours, but only if there is an expressed or implied agreement between the employer and the employees to exclude such time. In the absence of such an agreement, the sleep time is compensable. In no event shall the time excluded as sleep time exceed 8 hours in a 24-hour period. If the sleep time is interrupted by a call to duty, the interruption must be counted as hours worked. If the sleep period is interrupted to such an extent that the employee cannot get a reasonable night's sleep (which, for enforcement purposes means at least 5 hours), the entire time must be counted as hours of work.

29 CFR 553.223, 785.19 and 785.22 provide the following as to inclusion of meal time for firefighters as compensable hours for the purposes of overtime computation:

ss.553.223 Meal time.

. . .

(c) With respect to firefighters employed under Section 7(k), who are confined to a duty station, the legislative history of the Act indicates congressional intent to mandate a departure from the usual FLSA "hours of work" rules and adoption of an overtime standard keyed to the unique concept of "tour of duty" under which firefighters are employed. Where the public agency elects to use the Section 7(k) exemption for firefighters, meal time cannot be excluded from the compensable hours of work where (1) the firefighter is on a tour of duty of less than 24 hours, and (2) where the firefighter is on a tour of duty of exactly 24 hours, which is a departure from the general rules in 29 CFR 785.22.

(d) In the case of police officers or firefighters who are on a tour of duty of more than 24 hours, meal time may be excluded from compensable hours of work provided that the tests in 29 CFR 785.19 and 785.22 are met.

. . .

ss785.19 Meal.

(a) Bona fide meal periods. Bona fide meal periods are not worktime. Bona fide meal periods do not include coffee breaks or time for snacks. These are rest periods. The employee must be completely relieved from duty for the purposes of eating regular meals. Ordinarily 30 minutes or more is long enough for a bona fide meal period. A shorter period may be long enough under special conditions. The employee is not relieved if he is required to perform any duties, whether active or inactive, while eating. For example, an office employee who is required to eat at his desk or a factory worker who is required to be at his machine is working while eating.

. . .

ss785.22 Duty of 24 hours or more.

(a) General. Where an employee is required to be on duty for 24 hours or more, the employer and the employee may agree to exclude bona fide meal periods and a bona fide regularly scheduled sleeping period of not more than 8 hours from hours worked, provided adequate sleeping facilities are furnished by the employer and the employee can usually enjoy an uninterrupted night's

> sleep. If sleeping period is of more than 8 hours, only 8 hours will be credited. Where no expressed or implied agreement to the contrary is present, the 8 hours of sleeping time and lunch periods constitute hours worked.
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> . . .

As the foregoing clearly indicates, employes can agree to allow the employer to exclude sleep and meal time for overtime purposes. Our task is one of determining whether the City can seek such an agreement through the collective bargaining process as a mandatory subject of bargaining absent the agreement of the employes. On balance, we conclude that it cannot. As evidenced by the examples recited in footnotes herein, where Congress and the Department of Labor intended that the collective bargaining process be an available avenue by which FLSA rights could be defined, explicit references to the collective bargaining process, or collective bargaining agreements, or labor unions are utilized in the statute or the administrative regulations. Because FLSA rights involve the generally bargainable matters of wages and hours, we also equate such statutory and administrative references to the collective bargaining process as permitting mandatory bargaining over such FLSA rights. Here, the statute and administrative regulations specifically applicable herein make no reference to the collective bargaining process, to collective bargaining agreements or to union representation. While the critical phrases "an express or implied agreement between the employer and the employees" and "the employer and the employee may agree" from 29 CFR 553.222(c) and 785.22, respectively, could be interpreted in a manner which would allow mandatory collective bargaining to produce such an agreement, we are satisfied that the combination of the absences of references to collective bargaining and the general premise that FLSA rights are possessed by individual employes 5/ warrants a contrary conclusion where, as here, the

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5/ As the Barrentine Court noted at 739,

> The principal congressional purpose in enacting the Fair Labor Standards Act of 1938 was to protect all covered workers from substandard wages and oppressive working hours, "labor conditions (that are) detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers." 29 U.S.C. ss202(a). 14/ In contrast to the Labor-Management Relations Act, which was designed to minimize industrial strife and to improve working conditions by encouraging employees to promote their interests collectively, the FLSA was designed to give specific minimum protections to individual workers and to ensure that each employee covered by the Act would receive "'(a) fair day's pay for a fair day's work'" and would be protected from "the evil of 'overwork' as well as 'underpay.'" Overnight Motor Transportation Co. v. Missel, 316 U.S. 572, 578, 2 WH Cases 47 (1942), quoting 81 Cong. Rec. 4983, 75th Cong., 1st Sess. (1937)(message of Pres. Roosevelt). 15/

This reasoning was persuasive to the Court in Brewer et.al. v. City of Waukesha. Judge Reynolds held:

> The federal regulations which provide for an express or implied agreement between the City and firefighters to exclude sleep and meal time as compensable hours for calculating overtime do not define what is meant by an express or implied agreement. However, this court believes that the record must contain some evidence that the individual firefighters voluntarily agreed to the exclusion. No such evidence is found in this record.
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> In this case, the Wisconsin impasse procedure operated to exclude sleep and meal time hours over the individual firefighters' express objections. As such, the impasse procedure is preempted by Federal regulations requiring the

(Footnote 5 Continued on Page 10)

(Footnote 5 Continued)

5/ individual firefighters to expressly or impliedly agree to the exclusion.

This court's interpretation of the federal regulations as requiring the individual firefighters to voluntarily consent to the exclusion is consistent with the purpose behind the FLSA. "(T)he FLSA was designed to give specific minimum protections to individual workers and to ensure that each employee covered by the Act would receive '(a) fair day's pay for a fair day's work' and would be protected from the evil of 'overwork as well as underpay.'" (Barrentine v. Arkansas-Best Freight System, Inc., 450 U.S. 728, 739 (1980) (quoting Overnight Motor Transportation Co. v. Missel, 316 U.S. 572, 578 (1942), and 81 Cong. Rec. 4983 (1937) (message of President Roosevelt)).

employes involved have not voluntarily consented to the relinquishment of their overtime rights. 6/

As the foregoing indicates, we have concluded that an individual employe has a statutory right under the FLSA to overtime benefits provided by that legislation and that the Congress did not intend that an individual employe could be compelled to relinquish that right. Bargaining proposals which seek to compel the relinquishment of a statutory right are prohibited subjects of bargaining. Racine Unified School District, Dec. No. 20652-A (WERC, 1/84). City of Glendale, 83 Wis. 2d 90 (1978). In our view it is not possible in the context of this proposal to "harmonize" the individual statutory rights with the collective bargaining process. To "harmonize" herein would ignore our view of the rights which Congress has established. Thus, we conclude that the City's proposal is not a mandatory but is a prohibited subject of bargaining. However, as we noted earlier, this is not a Barrentine situation in which no relinquishment of FLSA rights is contemplated under any circumstances. If all of the employes represented by the Union were willing to relinquish their FLSA rights, the City and the Union could mandatorily bargain over the quid pro quo for said relinquishment. Mandatory bargaining would also appear to be possible in the context of an employer proposal to the union which might provide a financial incentive to individual employes who voluntarily elect to give up the overtime at issue herein. Such a proposal would not, in our view, appear to run afoul of the statutory FLSA prohibition against unilateral wage changes made in retaliation for the assertion of FLSA rights after Garcia and would represent an appropriate manner in which to harmonize the provision of the Municipal Employment Relations Act with the FLSA. While the City could not compel any employe to relinquish their FLSA rights, it could propose incentives for any employes willing to do so. Bargaining in the context of such a proposal would seem to meet the City's concern expressed herein as to whether and how it can pursue an "agreement" without running afoul of the MERA prohibition against individual bargaining.

In light of our conclusion and the Union's objection to inclusion of the proposal in the City's final offer, 7/ the City cannot maintain the instant proposal in its final offer. However, the City shall have the opportunity to amend its final offer in light of our ruling and the Union will have the opportunity to respond to any such amendment. The interest arbitration process is therefore held in abeyance pending completion of the amendment process, if any.

6/ The City has correctly cited Arien v. Olin Matheson Corp., 382 F. 2d 192 (6th Cir., 1967) as a case in which a collective bargaining agreement was found to be the basis for an "implied agreement" to exclude sleep time under 29 CFR 785.22. However, the issue for us is whether the employer can compel bargaining over such an agreement, a matter as to which Arien provides no particular guidance. As the rest of our decision indicates, such agreements can be reached through collective bargaining where the individual employes voluntarily consent thereto. While the City also correctly notes that there are provisions of the FLSA which explicitly prohibit bargaining over certain FLSA rights, we are not persuaded that the City is correct when it argues that the absence of a prohibition should be equated with mandatory bargaining being appropriate in the face of individual employe opposition. Clearly, the Barrentine Court would also disagree with the City's argument in this regard.

7/ The City explicitly waived any objection to the timeliness of the Union's objection.

The parties are free to utilize the assistance of a Commission mediator to facilitate that process and interest arbitration will not proceed until both sides are satisfied that they do not wish to further amend their offers.

Dated at Madison, Wisconsin this 11th day of October, 1988.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Stephen Schoenfeld
Stephen Schoenfeld, Chairman

Herman Torosian, Commissioner

A. Henry Hempe, Commissioner