STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of BROOKFIELD PROFESSIONAL FIREFIGHTERS ASSOCIATION, LOCAL 2051, IAFF, AFL-CIO To Initiate Final and Binding Arbitration Between Said Petitioner and CITY OF BROOKFIELD	Case 64 No. 38183 MIA-1185 Decision No. 25843

Appearances:

Mr. Roger E. Walsh, Lindner and Marsack, S.C., 411 East Wisconsin Avenue, Milwaukee, Wisconsin 53202, appearing on behalf of the City.

Mr. John Keith Brendel, Attorney at Law, 17800 W. Bluemound Road, Brookfield, Wisconsin 53005, appearing on behalf of the Union.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On January 26, 1987, the above-named Petitioner filed with the Commission a petition alleging that the Petitioner and the City had reached an impasse in their fire fighter unit collective bargaining on wages, hours and conditions of employment to be incorporated in a collective bargaining agreement, and requesting the Commission to proceed under its authority under Sec. 111.77, Stats., to conduct an investigation and to certify the results thereof and to determine whether final and binding arbitration under Sec. 111.77(4)(b), Stats. should be initiated.

During the course of the Commission's investigation, the parties resolved all but one issue as to which the City submitted a timely objection that the subject--City contributions toward health insurance benefits for employes who retire during a portion of the term of the agreement--was not a mandatory subject of bargaining. No further processing of the interest arbitration petition was undertaken during the pendency of the declaratory ruling proceeding before the Commission.

On June 10, 1988, the Commission issued a declaratory ruling (Dec. No. 25517) holding that the Union's proposal was a mandatory subject of bargaining. The City appealed that declaratory ruling to Waukesha County Circuit Court. On December 21, 1988, Circuit Judge Zick affirmed the Commission's decision.

In its written response to the Commission investigator's efforts to resume the investigation following the Commission's issuance of the above-noted declaratory ruling, the City requested that the interest arbitration proceeding be stayed pending the final resolution of the City's appeal of the Commission's declaratory ruling. The City's letter to that effect, which was received on August 8, 1988, set forth the City's arguments in support of that position. The Union opposed the City's request and submitted its position in writing initially on August 22, 1988 and in a letter brief received on November 28, 1988. Neither party has requested that a hearing be conducted in the matter and there appear to be no factual issues in dispute such as would require a hearing.

The Commission has reviewed the file correspondence in this matter and has considered the arguments presented by the parties. On those bases, the Commission makes and issues the following

ORDER

1. The City's request to hold the investigation in the above-matter in abeyance pending exhaustion of all appeals of the Commission's declaratory ruling in Dec. No. 25517 shall be, and hereby is, denied.

2. The investigation in the matter shall be resumed without delay.

3. Within 21 days of the date of this decision, or such later deadline as the Commission investigator may establish, the City shall submit its contemplated final offer in the matter in response to that submitted by the Union by cover letter dated August 18, 1988.

Given under our hands and seal at the City of Madison, Wisconsin this 10th day of January, 1989.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
S. H. Schoenfeld, Chairman

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Herman Torosian, Commissioner

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A. Henry Hempe, Commissioner

CITY OF BROOKFIELD

MEMORANDUM ACCOMPANYING
FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

BACKGROUND

This case involves the parties' bargaining about a calendar 1987-88 agreement. The parties reached agreement on all but the issue of retiree health insurance, and they have implemented all of the undisputed aspects of that agreement. On the single disputed issue, the City timely objected that the Union's contemplated final offer was a prohibited (i.e., illegal) subject of bargaining. The Commission ruled on June 10, 1988 that the Union's proposal was a mandatory subject. Decision No. 25517. The City appealed, and the Waukesha County Circuit Court (Case No. 88-CV-2090) affirmed the Commission on December 21, 1988.

SELECTED PORTIONS OF WISCONSIN STATUTES

111.70(4)(cm) Methods for peaceful settlement of dispute

. . .

6. Interest arbitration. . . .

e. Arbitration proceedings shall not be interrupted or terminated by reason of any prohibited practice complaint filed by either party at any time.

. . .

g. If a question arises as to whether any proposal made in negotiations by either party is a mandatory, permissive or prohibited subject of bargaining, the commission shall determine the issue pursuant to par. (b). If either party to the dispute petitions the commission for a declaratory ruling under par. (b), the proceedings under subd. 6.c and d shall be delayed until the commission renders a decision in the matter, but not during any appeal of the commission order. The arbitrator's award shall be made in accordance with the commission's ruling, subject to automatic amendment by any subsequent court reversal thereof.

9. Application. . . .

b. This paragraph does not apply to labor disputes involving law enforcement and fire fighting personnel.

. . .

111.70(6) DECLARATION OF POLICY. The public policy of our state as to labor disputes arising in municipal employment is to encourage voluntary settlement through the procedures of collective bargaining. Accordingly, it is in the public interest that municipal employes so desiring be given an opportunity to bargain collectively with the municipal employer through a labor organization or other representative of the employes' own choice. If such procedures fail, the parties should have available to them a fair, speedy, effective and, above all, peaceful procedure for settlement as provided in this subchapter.

. . .

111.77 Settlement of disputes in collective bargaining units composed of law enforcement personnel and fire fighters. . . .

(3) Where the parties have no procedures for disposition of a dispute and an impasse has been reached, either party may petition the commission to initiate compulsory, final and binding arbitration of the dispute. If in determining whether an impasse has been reached the commission finds that any of the procedures set forth in sub.(1) have not been complied with and that compliance would tend to result in a settlement, it may require such compliance as a prerequisite for ordering arbitration. If after such procedures have been complied with or the commission has determined that compliance would not be productive of a settlement and the commission determines that an impasse has been reached, it shall issue an order requiring arbitration. The commission shall in connection with the order for arbitration submit a panel of 5 arbitrators from which the parties may alternatively strike names until a single name is left, who shall be appointed by the commission as arbitrator, whose expenses shall be shared equally between the parties. Arbitration proceedings under this section shall not be interrupted or terminated by reason of any prohibited practice charge filed by either party at any time.

. . .

(9) Section 111.70(4)(c)3 and (cm) shall not apply to employments covered by this section.

POSITION OF THE CITY

Legally, until the City's appeals are exhausted, there would be no statutory authority similar to that expressly set forth in Sec. 111.70(4)(cm)6.g. Stats., upon which to declare that the instant parties have reached the "impasse" required as a condition precedent to initiation of interest arbitration under that statute. The Legislature expressly stated in Secs. 111.70(4)(cm)9.b. and 111.77(9), Stats., that the (4)(cm) provisions do not apply to labor disputes involving fire fighting personnel. In 1976, the Legislature added Sec. 111.77(3), Stats. providing that MIA proceedings shall not be interrupted or terminated by reason of prohibited practice proceedings, and it included a nearly identical provision in the separate Sec. 111.70(4)(cm)6.e. Stats., enacted in 1978. Had the Legislature wanted MIA proceedings to be governed by a provision paralleling Sec. 111.70(4)(cm)6.g. Stats., it would have added such a provision in 1976 or 1978. Since it did not, it follows that the Legislature did not intend the 6.g. provisions to apply to MIA proceedings. Because an impasse can only exist if the parties are deadlocked on a mandatory subject of bargaining, until there are no further appeals available or pending on that question, the WERC cannot make a final determination that an impasse exists.

Practically, if MIA were resumed before all appeals are exhausted, employes could retire at age 55 in reliance upon an arbitrator's award selecting the Union's final offer, only to have it later determined to be a nonmandatory subject, thereby relieving the City of the obligation to pay health insurance premiums for retired employes. The employe would probably be unable to go back to work and would be without City contributions toward health insurance and hence irreparably harmed. If the Union were to argue that no one would retire until after the declaratory ruling petition is finally resolved, then there would be no reason to resume MIA proceedings until that time.

For those reasons, the Commission must stay the MIA proceedings until all appeal rights are exhausted in the declaratory ruling matter.

POSITION OF THE UNION

The City's request for a stay of the MIA proceedings should be denied. Exhaustion of the appeal process could be years away. Chances of reversal are slim, and the City's concern about irreparable harm is not convincing.

The statutes governing police-fire dispute resolution are silent on the question of whether and how long a declaratory ruling proceeding stays the processing of an interest arbitration dispute. It would be unfair, irrational, and possibly a denial of equal protection to deny police and fire fighter employes the right to resume interest arbitration proceedings expressly provided to most other employes under Sec. 111.70(4)(cm)6.g. Stats.

In addition, Sec. 111.77, Stats., gives the Commission the authority and responsibility to declare an impasse. In doing so, the Commission should be guided by the legislative purpose of avoiding unnecessary interruption of the process reflected both in the Sec. 111.77(3), Stats. provision that prohibited practice complaints do not interrupt MIA proceedings and in the Sec. 111.70(6) Stats., policy of providing a fair, speedy and effective procedure for achieving settlement in the absence of voluntary agreement between the parties.

Since the irreparable harm to employes cited by the City is highly unlikely to occur and since the City is highly unlikely to prevail on its appeal given the great deference given the Commission's scope of bargaining decisions, the potentially great harm to retiring firemen of delaying the process for years outweighs the possible harm arising from imposition of a stay. (In its earlier August 18 and October 14, 1988 correspondence on the subject, the Union asserted that "a man who is concerned with the issue would simply not retire until the issue is resolved. In the interim, as long as he is waiting, some progress could still be made" and "the men are all aware of the situation and will govern their elections to retire accordingly.")

Since the City has failed to show any compelling reason to grant such a stay, if such a stay is legally permissible at all in the instant circumstances, the Commission should deny the City's request and resume the MIA proceeding as soon as possible.

DISCUSSION

This appears to us to be a matter of first impression under Sec. 111.77, Stats.

While the police-fire statutory dispute resolution scheme in Secs. 111.70(4)(c) and 111.77, Stats., contains no specific provision paralleling Sec. 111.70(4)(cm)6.g. Stats., it does expressly provide in Sec. 111.77(3), Stats., that the Commission is to determine "whether an impasse has been reached" such that interest arbitration is appropriately ordered. Thus, it is for the Commission to determine whether a dispute is ripe for interest arbitration. Subsequent judicial review proceedings may reverse a Commission determination and make it necessary to undo the results of an interim arbitration award issued pursuant to the Commission's determination. Such was the case in Milwaukee Deputy Sheriffs' Association v. Milwaukee County, 64 Wis.2d 651 (1974) (Supreme Court amends arbitrator's Sec. 111.77 award by deleting that portion determined to have been improperly allowed by Commission to be included in Union's final offer selected by arbitrator). Nevertheless, the statute appears to us to permit and require the Commission to proceed with the processing of a dispute once the Commission is satisfied that disputed subject matters are mandatory subjects of bargaining. The statute calls for determination of impasse by the Commission, when the Commission is satisfied that the conditions precedent have been met. While interruption of the processing of an interest arbitration petition for a determination of the mandatory-nonmandatory status of proposals is necessary to permit the Commission to determine whether, from its point of view, an impasse in collective bargaining has been reached, extending that interruption until all appeals have been exhausted is not.

We view Secs. 111.77(9) and 111.70(4)(cm)9.b. Stats., as intended to make it clear that the Legislature was not for example: creating an exception to the police-fire strike prohibition by extending the concept of the Sec. 111.70 (4)(cm), Stats. lawful right to strike upon mutual withdrawal of final offers to police and fire fighter bargaining units; or changing the Sec. 111.77(7), Stats. judicial award enforcement to the administrative agency function called for in Secs. 111.70(4)(cm)9, (3)(a)7 and (3)(b)6 Stats.; or changing the two forms of interest arbitration permitted in Sec. 111.77(4), Stats. to the broader range of alternative agreed-upon forms permitted in Sec. 111.70(4)(cm)5, Stats. While the Legislature thereby made it clear that Sec. 111.77, Stats. was to maintain its separate and distinct applicability to the specified law enforcement and fire fighting employments to which it applied, we do not read those provisions as prohibiting the Commission from concluding that Sec. 111.77, Stats., when interpreted in light of its purposes and the general purposes of MERA, is in some way or other parallel to a more specifically drawn aspect of the later-enacted (4)(cm) dispute resolution scheme.

The fact that the Legislature left the Sec. 111.77, Stats., police-fire statute without a provision parallelling Sec. 111.70(4)(cm)6.g. Stats. establishes no more than that the Legislature was content to leave Sec. 111.77, Stats. without a specific provision on the subject. In our view, the absence of a parallel specification leaves the matter for Commission interpretation consistent with the above-noted underlying statutory policies against interruption. See, Green County, Dec. No. 20308-B at 14-17 (WERC, 11/84) (absence of a Sec. 111.77, Stats., provision parallel to that in Sec. 111.70(4)(jm)13, Stats., expressly prohibiting unilateral changes in Milwaukee Police disputes once an interest arbitration petition has been filed means only that the Legislature left it to the Commission to determine--in light of the underlying purposes of the Act--whether parties were free to implement their final offers at impasse in disputes subject to Sec. 111.77, Stats). Our outcome herein draws further support from both the anti-interruption policy reflected in the express provisions against interruptions due to prohibited practice proceedings in Sec. 111.77(3), Stats., and from the general Sec. 111.70 (6), Stats. MERA policy declaration. Indeed, the Legislature's specification of just such an arrangement in 6.g. of the later-enacted and more-detailed Sec. 111.70(4)(cm), Stats., interest arbitration procedure confirms our conclusion that such an approach is more in keeping with the overall legislative purposes of providing a fair, speedy, effective and peaceful procedure for settlement if they are unable to resolve their collective bargaining disputes voluntarily. To permit one party to prevent the other from proceeding with the statutory dispute resolution process for what could turn out to be an unreasonably lengthy period of time (from a collective bargaining standpoint) merely by objecting to a proposal and then successively appealing any adverse Commission declaratory ruling thereon, would, in our view, be more apt to frustrate than obtain the overall purposes of the police-fire interest arbitration scheme and of MERA generally.

While we are not insensitive to the possibility of harm to an employe suggested in the hypothetical example drawn by the City should the Union's proposal be awarded by an arbitrator only to have the Commission's declaratory ruling subsequently reversed, we note that this is no different than the situation that would obtain under the procedure specifically designated by the Legislature for interest arbitration disputes subject to Sec. 111.70(4)(cm), Stats. In actuality, moreover, any such risk of harm would appear to be more acceptable if employes potentially affected are provided with advance notice of the impact an appellate reversal would have on their retirement decision. In any event, we believe it better practice to follow the statutory policy already developed for us by the Legislature.

For those reasons we have denied the City's request that the investigation be held in abeyance pending exhaustion of all appeals and have ordered that the investigation be resumed immediately. We have also ordered the City to submit its contemplated final offer in response to the modified final offer submitted by the Union via letter dated August 18, 1988.

Dated at Madison, Wisconsin this 10th day of January, 1989.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
S. H. Schoenfeld, Chairman

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Herman Torosian, Commissioner

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A. Henry Hempe, Commissioner