STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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| In the Matter of the Petition of | : | |
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| WAUPACA CITY LAW ENFORCEMENT ASSOCIATION | : | Case 16<br>No. 42124 DR(M)-461 |
| | : | Decision No. 26121 |
| Requesting a Declaratory Ruling Pursuant to Sec. 227.41, Stats., Involving a Dispute Between Said Petitioner and | : | |
| | : | |
| CITY OF WAUPACA | : | |
| | : | |

Appearances:

Herrling & Swain, S.C., Attorneys at Law, by Mr. John S. Williamson, 103 East Washington Street, Appleton, Wisconsin 54911-5494, on behalf of the Association.

Melli, Walker, Pease & Ruhly, S.C., Attorneys at Law, by Ms. JoAnn M. Hart, Suite 600, Insurance Building, 119 Martin Luther King, Jr. Boulevard, P.O. Box 1664, Madison, Wisconsin 53701-1664, on behalf of the City.

## FINDINGS OF FACT, CONCLUSION OF LAW AND DECLARATORY RULING

Waupaca City Law Enforcement Association having on April 27, 1989 filed a petition with the Wisconsin Employment Relations Commission seeking a declaratory ruling pursuant to Sec. 227.41, Stats. 1/ as to whether a proposal made by the City of Waupaca during collective bargaining with the Association was a mandatory subject of bargaining; and the parties thereafter having filed written argument in support of and in opposition to the petition; and the Association having advised the Commission on July 21, 1989 that the briefing schedule had been completed; 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 Waupaca, herein the City, is a municipal employer having its principal offices at 124 South Washington Street, Waupaca, Wisconsin.

2. That the Waupaca City Law Enforcement Association, herein the Association, is a labor organization having its principal offices at 124 South Washington Street, Waupaca, Wisconsin and functioning as the collective bargaining representative of certain police officers in the employ of the City.

3. That during collective bargaining between the parties, a dispute arose as to whether the following City proposal is a mandatory subject of bargaining:

> "Article 25 - Duration, first paragraph. Amend the paragraph to read: Term: This Agreement shall become effective on the date signed or January 1, 1989,

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1/ While declaratory ruling petitions seeking resolution of disputes concerning the duty to bargain are typically filed under Sec. 111.70(4)(b), Stats., we have exercised our discretionary jurisdiction under Sec. 227.41, Stats. to resolve the instant dispute.

whichever is later, and shall remain in full force and effect through December 31, 1990, except that the parties agree to reopen this Agreement on September 1, 1989 to bargain wage rates (Appendix A) and health insurance (Article 11) to be effective in 1990. The Agreement shall renew itself for additional one-year periods thereafter, unless either party, pursuant to this Article, shall give notice to the other party in writing that it desires to alter, amend, or cancel this Agreement at the end of the contract period, provided that notice of intent to reopen shall be served on the other party in accordance with the Bargaining Procedures specified below."

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

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

CONCLUSION OF LAW

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.

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

DECLARATORY RULING 2/

That the Association and the City have a duty to bargain within the meaning of Sec. 111.70(3)(a)(4), Stats. over the proposal set forth in Finding of Fact 3.

Given under our hands and seal at the City of Madison, Wisconsin this 17th day of August, 1989.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By A. Henry Hempe /s/
A. Henry Hempe, Chairman

Herman Torosian /s/
Herman Torosian, Commissioner

William K. Strycker /s/
William K. Strycker, 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.

Continued

2/ Continued

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 192.71(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,
CONCLUSION OF LAW AND DECLARATORY RULING

## POSITIONS OF THE PARTIES

### The Association

The Association contends that the City's duration clause proposal is not a mandatory subject of bargaining because the proposal does not provide for the 180 day written notice which the Association asserts is mandated by Sec. 111.77(1)(a), Stats. as to mid-term contract reopeners. Analogizing Sec. 111.77(1)(a), Stats. notice requirements to those of Sec. 8(d) of the National Labor Relations Act and citing NLRB v. Lion Oil Co., 352 U.S. 282 (1977) and Hydrologics, Inc., 239 NLRB No. 129 (1989), the Association argues that Sec. 111.77(1)(a), Stats. applies to collective bargaining relative to reopeners as much as it does to bargaining over successor agreements. While acknowledging that the disputed proposal could be interpreted in a manner that does not prohibit either party from serving the Sec. 111.77(1)(a) notice, the Association urges the Commission to avoid such a potentially misleading interpretation. The Association contends that the disputed clause strongly but erroneously suggests that there is no obligation to file the Sec. 111.77(1)(a) notice as to the reopener and thus the clause is a "trap for the unwary."

The Association argues that the clause is also nonmandatory because it is unenforceable. Literal compliance with the 180 day notice prior provision is not possible within the context of the current bargain and, under the circumstances of this case, only literal compliance should suffice. If the clause is unenforceable, the Association urges that the City could then refuse to reopen the contract to bargain 1990 wages and health insurance benefits.

Given the foregoing, the Association asserts that the clause is not a mandatory subject of bargaining.

### The City

The City contends that its duration/reopener proposal is a mandatory subject of bargaining because the proposal primarily relates to wages, hours and conditions of employment. It asserts that the 180 day notice provision in Sec. 111.77(1)(a), Stats. is inapplicable to a contractual reopener during the term of an existing contract, and thus that the Commission should reject the Association's assertions to the contrary. The City regards the Association's reliance on Lion Oil, supra as totally misplaced because said case involved Section 8(d) of the National Labor Relations Act, and in any event, does not deal with the bargainability of reopener clauses.

Should it be concluded that Sec. 111.77(1)(a), Stats. applies to reopeners, the City argues that because the parties currently do not have a contract, neither party has a duty to give the 180 day notice. Once a contract exists, the City contends that prompt notice by either party would suffice. Furthermore, if a 180 day notice obligation exists for reopeners, the City asserts that nothing in its proposal would preclude compliance with that obligation.

Lastly, the City asserts that it has given the Association notice of the City's desire to bargain for 1990 wages and health insurance. Thus, the City argues that the Association's fears regarding City use of the reopener clause to deny the Association an opportunity to bargain for 1990 have been eliminated.

Given the foregoing, the City asks that the proposal be found to be a mandatory subject of bargaining.

DISCUSSION

As a general matter, duration clauses are mandatory subjects of bargaining 3/ because they establish the length of time wages, hours and conditions of employment will be in effect. Here, the Association urges us to conclude that the City's duration clause proposal is not mandatory because the proposal does not mandate or allow for compliance with Sec. 111.77(1)(a), Stats. as to the 1990 reopener contained therein. We reject the Association's argument because we do not believe that the notice requirements of Sec. 111.70(1)(a), Stats. are applicable to formal contract reopeners during the term of an existing agreement.

Sec. 111.77(1)(a), Stats. provides:

> (1) If a contract is in effect, the duty to bargain collectively means that a party to such contract shall not terminate or modify such contract unless the party desiring such termination or modification:
>
> (a) Serves written notice upon the other party to the contract of the proposed termination or modification 180 days prior to the expiration date thereof or, if the contract contains no expiration date, 60 days prior to the time it is proposed to make such termination or modification. This paragraph shall not apply to negotiations initiated or concurring in 1971. (emphasis added)

Given the underlined portion of that statutory provision, we believe that Sec. 111.77(1)(a) notice requirements can most reasonably be interpreted as applying only to a collective bargaining for a successor agreement and not as to bargaining for reopeners which occur during a contract which has not "expired". 4/

Furthermore, even assuming arguendo that the 180 day notice provision were applicable to reopeners, the City's proposal would not prohibit either party from complying therewith. Thus, the absence of a reference in the proposal to any existent procedural requirements imposed by Sec. 111.77(1), Stats. would not be a basis upon which we could reasonably conclude that a duration clause was nonmandatory because it was inconsistent with the law.

Given the foregoing, we find the City's proposal to be a mandatory subject of bargaining because it primarily relates to wages, hours and conditions of employment and is not inconsistent with Sec. 111.77(1)(a),

3/ City of Sheboygan, Dec. No. 19421 (WERC, 3/82)

4/ As urged by the City, we find the Association's arguments and analogies based upon Lion Oil and Section 8(d) of the NLRA to be unpersuasive when determining the bargainable status of a proposal under the Municipal Employment Relations Act.

Stats.

Dated at Madison, Wisconsin 17th day of August, 1989.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By A. Henry Hempe /s/
A. Henry Hempe, Chairman

Herman Torosian /s/
Herman Torosian, Commissioner

William K. Strycker /s/
William K. Strycker, Commissioner