STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of COUNTY OF MILWAUKEE Requesting a Declaratory Ruling Pursuant to Section 227.41, Stats., Involving a Dispute Between Said Petitioner and MILWAUKEE DISTRICT COUNCIL 48, AFSCME, AFL-CIO	Case 228 No. 37619 DR(M)-412 Decision No. 26247
In the Matter of the Petition of MILWAUKEE DISTRICT COUNCIL 48, AFSCME, AFL-CIO Requesting a Declaratory Ruling Pursuant to Sec. 111.70(4)(b), Stats. Involving a Dispute Between Said Petitioner and MILWAUKEE COUNTY	Case 275 No. 42296 DR(M)-463 Decision No. 26248

Appearances:
Ms. Mary Ann Grimes, Principal Assistant Corporation Counsel, Room 303, Milwau
Podell, Ugent & Cross, S.C., Attorneys at Law, by Ms. Nola J. Hitchcock Cross, 207 East Michigan Street, Milwaukee, Wisconsin 53202,

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECLARATORY RULING

Milwaukee County having on September 24, 1986 filed a petition with the Wisconsin Employment Relations Commission pursuant to Sec. 227.41, Stats., seeking a declaratory ruling that Section 2.25(4) of the County's 1985-1986 collective bargaining agreement with Milwaukee District Council 48, AFSCME, AFL-CIO was an illegal subject of bargaining and, therefore, unenforceable; and the petition thereafter having been held in abeyance at the request of the parties until hearing was ultimately Noticed on May 3, 1989; and Milwaukee District Council 48, AFSCME, AFL-CIO, having on May 30, 1989 filed a petition with the Commission pursuant to Sec. 111.70(4)(b), Stats., seeking a declaratory ruling that a settlement agreement reached by the parties regarding Section 2.25(4) of the 1985-1986 agreement was a mandatory subject of bargaining; and hearing on said petitions having been held in Milwaukee, Wisconsin on May 31, 1989 before Examiner Peter G. Davis; and the parties thereafter having filed written argument; and the record having been closed on August 14, 1989; and the Commission, being fully advised in the premises, makes and issues the following

FINDINGS OF FACT

1. That Milwaukee County, herein the County, is a municipal employer having its principal offices at 901 North 9th Street, Milwaukee, Wisconsin 53233.

2. That Milwaukee District Council 48, AFSCME, AFL-CIO, herein AFSCME, is a labor organization having its principal offices at 3427 West St. Paul Avenue, Milwaukee, Wisconsin 53208 which serves as the collective bargaining representative of certain County employes.

3. That the 1985-1986 collective bargaining agreement between the County and AFSCME contained the following provision:

> 2.25 SENIORITY DEFINED
>
> . . .
>
> (4) Vacancies authorized to be filled in the bargaining unit shall be filled by bargaining unit employes before said vacancies are filled by any non-bargaining unit employe. Seniority shall begin from the date of the appointment of the bargaining unit position.

that during bargaining over a successor to the 1985-1986 agreement, the County filed a declaratory ruling petition with the Wisconsin Employment Relations Commission alleging that Section 2.25(4) was illegal and unenforceable because the contract language conflicted with Sec. 63.05(2), Stats., which provides:

> (2) From the names certified under sub.(1)(b), the appointing authority shall make a selection to fill a vacant position based solely on merit and fitness.

that thereafter the parties entered into the following Settlement Agreement regarding the manner in which Section 2.25(4) would be interpreted:

> 1. The first sentence of par. 2.25(4) of the 1985-86 Memorandum of Agreement which is found on lines 31-33 on p. 27 shall be interpreted to mean that the County would treat examinations, for bargaining unit positions agreed to by the parties to be promotional or promotional/original, pursuant to Sec. 2.32 - Promotional Language.
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> 2. Original examinations for bargaining unit positions per agreement shall not be subject to Sec. 2.32 Promotional Language or 2.25(4) of the 1985-86 Memorandum of Agreement.
>
> 3. The Union has no objection to the County holding a promotional/original examination if a promotional examination does not yield the required number of certified eligibles pursuant to the Civil Service Rules in effect on August 1, 1985.
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> 4. This Agreement does not bar the Union from arguing "merit and fitness" under Sec. 2.32 on any pending grievances.
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> The interpretation of Sec. 2.25(4) is prospective.
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> 5. Based on Section 2.25(4) of the 1985-86 Memorandum of Agreement, the County agrees to call exams for bargaining unit positions in accordance with the attached list. On the attached list, "O" refers to original examination; "P" refers to promotional examination; and "O/P" refers to original/promotional examination.

that the parties' 1987-1988 collective bargaining agreement contained Section 2.25(4) as well as Section 2.32 which provides:

> 2.32 **PROMOTION**
>
> (1) Merit and fitness affecting the ability of an employe to perform the duties of the office or position being equal, the most senior employe shall be appointed. Whenever the most senior employe certified from the promotional eligible register is denied the appointment, the reason for denial shall be made known to him or her in writing by the appointing authority.
>
> (2) Employes who do not successfully complete their probationary period in the promotional position or who desire to return to their former classification shall be permitted to return to the position from which they were promoted in the event such position remains vacant; and if such position has been filled, the County will make every reasonable effort to place such employe in another position with the classification from which he/she was promoted, or, if no such vacancy exists, to a position in a title and pay range lower than that from which he/she was promoted. Employes not returned to their former classification because no vacancy exists shall be placed on the appropriate reinstatement list.
>
> (3) When an employe does not successfully complete his/her promotional probation and is returned to his/her former classification, he/she shall do so with full seniority and, whenever practicable, shall be returned in classification to the same shift and department.

and that the parties' dispute over Section 2.25(4) emerged again during bargaining over a successor to the 1987-1988 contract.

4. That, as applied by the parties pursuant to their practice and Settlement Agreement, Section 2.25(4) 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

CONCLUSIONS OF LAW

1. That there is no irreconcilable conflict between Chapter 63 of the Wisconsin Statutes and Section 2.25(4) of the parties' 1987-1988 labor agreement.

2. That Section 2.25(4) is a mandatory subject of bargaining within the meaning of Sec. 111.70(1)(a), Stats.

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

DECLARATORY RULING 1/

That Milwaukee County and Milwaukee District Council 48, AFSCME, AFL-CIO, have a duty to bargain within the meaning of Sec. 111.70(3)(a)4, Stats., over Section 2.25(4).

Given under our hands and seal at the City of Madison, Wisconsin this 28th day of November, 1989.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
A. Henry Hempe, Chairman

_____
Herman Torosian, Commissioner

_____
William K. Strycker, Commissioner

(Footnote 1/ on page 4)

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.

(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 County

The County argues that there is an irreconcilable conflict between Section 2.25(4) and Sec. 63.05(2), Stats., and thus that Section 2.25(4) is a prohibited subject of bargaining. The County alleges that Chapter 63 of the Wisconsin Statutes sets forth the exclusive means by which the appointing authority is to select among applicants for a vacant position. The County contends that Section 2.25(4) substitutes bargaining unit status for the "merit and fitness" standard mandated by Sec. 63.05(2), Stats. The County asserts that if a bargaining unit employe wishes to fill a unit vacancy, the contract language precludes both individuals who are not County employes and County employes who are not in the AFSCME bargaining unit from successfully competing for said position.

The County alleges that, unlike the situation which confronted the Wisconsin Supreme Court in Glendale Professional Policeman's Association v. City of Glendale, 83 Wis.2d 90 (1978), it is not possible to harmonize the disputed contract language and provisions of the civil service statute. The County argues that, unlike the contract language at issue in Glendale which required the appointment of the most senior qualified candidate, Section 2.25(4) precludes consideration by the appointing authority of applicant qualifications. The County further argues that Section 2.25(4) can compel the appointing authority to appoint an unqualified candidate. Unlike Glendale, the County alleges that the appointing authority's discretion has been eliminated, not simply restricted.

The County also contends that Section 2.25(4) conflicts with management rights granted by Sec. 111.70(1)(a), Stats., and Section 1.05 of the 1987-1988 agreement and as such should be removed from the realm of matters as to which AFSCME can demand that the County bargain.

As to the Settlement Agreement, the County initially asserts that said Agreement addresses the manner in which examination are to be"called" for bargaining unit vacancies and not the manner in which vacant positions are to be filled once a list of eligibles is established. The County argues that consistent with Glendale, the County can choose to bargain with AFSCME as to which vacancies will be considered "promotional" and limitations on the County's discretion to select the best qualified internal applicant for "promotional" vacancies. To that extent, the County alleges that the Settlement Agreement is a permissive subject of bargaining. However, as to non-promotional vacancies, the County contends that the Settlement Agreement is a prohibited subject of bargaining because it impermissibly infringes upon the appointing authority's discretion to select candidates solely on the basis of merit and fitness.

AFSCME

AFSCME asserts that the issue before the Commission is whether Sec. 63.05(2), Stats., prohibits the parties from agreeing to fill unit vacancies with only qualified County employes before qualified applicants from outside County service are considered. AFSCME contends that under the Section 2.25(4) and the Settlement Agreement, only the names of candidates who are deemed qualified as a result of civil service testing procedures are eligible for selection. AFSCME further alleges that Chapter 63 has always given the County discretion to call exams for a vacancy on a promotional basis, and thereby preclude individuals who are not currently County employes from even applying. In such circumstances, AFSCME asserts that, in effect, current County employes are deemed to have more "merit and fitness" than other applicants for the purposes of promotional vacancies. AFSCME argues Section 2.25(4) only requires that the County take the additional step of equating current employe status with "merit and fitness" in those cases in which individuals who are not currently County employes are allowed to apply for a unit position.

AFSCME alleges that the purpose of the civil service statutes is to provide for selection among applicants based on objective criteria rather than favoritism. Current employe status is an objective criterion which fosters this statutory purpose, as evidenced by Sec. 63.05(1), Stats., which allows promotional vacancies to be filled only by current qualified County employes. Thus, AFSCME argues that current employe status is a criterion that is related to and not in conflict with "merit and fitness." Therefore, AFSCME argues the contract language and Settlement Agreement are mandatory subjects of bargaining.

DISCUSSION

We have consistently held that a union representing municipal employes has a mandatory right to bargain over proposals which establish the criteria which a municipal employer must apply when determining which qualified unit applicant will fill a vacant position within a bargaining unit. 2/ We have historically reached this conclusion because, on balance, the relationship of such proposals to wages, hours and conditions of employment 3/ is stronger than the intrusion into management prerogatives caused by such proposals. 4/

Section 2.25(4) is contract language which on its face establishes the right of bargaining unit employes to fill vacant positions within the unit. While the County correctly argues that the language itself does not state that bargaining unit applicants must be qualified for the vacant position, it is clear from the reference to Section 2.32 in the Settlement Agreement and the testimony at hearing that the language applies only to those ten or more individuals who are certified by County civil service procedure to the appointing authority as being qualified to hold the position in question. 5/ Given the foregoing, application of the "primary relationship" test to the instant language yields a conclusion that Section 2.25(4) is a mandatory subject of bargaining 6/ unless, as the County argues, there is an irreconcilable conflict with Chapter 63. We turn to a consideration of that issue.

As the Court noted in Glendale, supra, at 105 "The relationship between public sector bargaining agreements and other statutes governing terms and conditions of employment can be one of the most difficult issues in public sector labor law." The task is one of seeking to harmonize "whenever possible" Sec. 111.70 rights with other statutory provisions. Muskego-Norway Consolidated Jt. School District No. 9 v. WERC, 35 Wis.2d 540 (1967). Only where a contract provision is in irreconcilable conflict with a statutory command does the provision become a prohibited subject of bargaining. Glendale, supra. After analyzing the Court's opinion in Glendale, we think it clear that when given the meaning provided by the Settlement Agreement and by the parties' practice, Section 2.25(5) can be harmonized with Chapter 63 of the Wisconsin Statutes and thus that Section 2.25(5) is a mandatory subject of bargaining.

2/ Beloit Schools, Dec. No. 11631-C (WERC, 7/74) aff'd Beloit Education Association v. WERC, 73 Wis.2d 43 (1976); Oconto County, Dec. No. 12970 (WERC, 3/75); City of Madison, Dec. No. 16590 (WERC, 10/78); Milwaukee Board of School Directors, Dec. No. 17504 (WERC, 12/79); City of Brookfield, Dec. No. 19944 (WERC, 8/82); Milwaukee Board of School Directors, Dec. No. 20093-A (WERC, 2/83); Janesville Schools, Dec. No. 21466 (WERC, 3/84).

3/ Access to unit positions which afford an employe better wages, hours and/or conditions of employment is a fundamental employe interest recognized by our Court in Glendale, supra, as one of the principal purposes for entering into a collective bargaining agreement.

4/ The municipal employer is, of course, free to seek union agreement at the bargaining table that the employer retains the discretion to fill a position with the applicant it deems "most" qualified.

5/ By operation of the parties' Settlement Agreement and past practice, it is also clear that AFSCME has agreed to limit the application of Section 2.25(4) to unit positions designated as promotional or open/promotional by the parties and has further agreed that a County employe who is not represented by AFSCME can be selected to fill a promotional or open/promotional vacancy if the merit and fitness of that non-unit County employe is greater than any qualified unit applicant.

6/ In addition to its argument that the disputed language is a prohibited subject of bargaining, the County asserts that the Settlement Agreement is permissive because it specifies those positions as to which AFSCME representative employes will receive preference over applicants who are not currently County employes. The County argues that it should retain the prerogative to decide which positions can be pursued by individuals who are not County employes. On balance, we remain persuaded that the relationship to employe wages, hours and conditions of employment discussed earlier in footnote 3 predominates over the relationship to management prerogatives.

While the parties disagree over whether the existing agreements obligate the County to fill a position designated open/promotional with a qualified current County employe before a non-County employe applicant can be considered, we need not resolve this disagreement. Either interpretation would be mandatory because, under either interpretation, the employe interests predominate.

In Glendale, the Court was confronted with the issue of whether statutory language which stated "the chiefs shall appoint subordinates subject to the approval of the board" could be harmonized with contractual language which required the appointment of the most senior qualified bargaining unit applicant. The Court concluded that harmonization was possible because the contract language simply limited but did not eliminate the police chief's statutory power. Here, the appointing authority is statutorily obligated to consider "merit and fitness" when selecting among applicants who are qualified for the position. As in Glendale, the contract language at issue herein, as applied pursuant to the Settlement Agreement and past practice, limits but does not eliminate the consideration of "merit and fitness" because the appointing authority is always selecting from qualified candidates approved by the County Civil Service procedures. 7/ Moreover, current employe status is not necessarily inconsistent with considerations of "merit and fitness." Thus, in

7/ Section 2.32 makes clear that the applicant selected by the appointing authority must successfully complete a probationary period once they receive the position.

this case we can meet our obligation to harmonize "whenever possible" by giving effect to both the appointing authority's power under Sec. 63.05(2), Stats., and the County's duty to bargain under Sec. 111.70, Stats.

Given the foregoing, we find Section 2.25(4), as applied by the parties, to be a mandatory subject of bargaining.

Dated at Madison, Wisconsin this 28th day of November, 1989.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
A. Henry Hempe, Chairman

_____
Herman Torosian, Commissioner

_____
William K. Strycker, Commissioner