STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of WAUPACA COUNTY Requesting a Declaratory Ruling Pursuant to Section 111.70(4)(b), Wis. Stats., Involving a Dispute Between Said Petitioner and WAUPACA COUNTY HIGHWAY DEPARTMENT LOCAL 1756, AFSCME, AFL-CIO	Case 66 No. 44127 DR-477 Decision No. 26880

Appearances:
Godfrey and Kahn, S.C., Attorneys at Law, by Mr. James R. Macy, 219 Washingt
Mr. Michael J. Wilson, Representative, Wisconsin Council 40, 5 Odana Court,
Madison, WI 53719, appearing on behalf of Waupaca County Highway
Department Local 1756, AFSCME, AFL-CIO.

FINDINGS OF FACT, CONCLUSION OF LAW
AND DECLARATORY RULING

On June 8, 1990, Waupaca County 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 County had a duty to bargain over certain matters with Waupaca County Highway Department Local 1756, AFSCME, AFL-CIO. Pursuant to a request from the Commission, the County filed a statement in support of the petition on June 22, 1990. Thereafter, by letters dated June 23, 1990 and July 3, 1990, AFSCME and the County respectively advised the Commission that they did not believe a hearing was required. On July 30, 1990, AFSCME filed its statement in response to the County's petition for declaratory ruling.

The parties then asked that the petition be held in abeyance pending settlement efforts. By letter dated December 13, 1990, AFSCME advised the Commission that settlement efforts had been unsuccessful. The parties then filed additional written argument, the last of which was received on January 28, 1991. Having reviewed the parties' positions, and being fully advised in the premises, the Commission makes and issues the following

FINDINGS OF FACT

1. Waupaca County, herein the County, is a municipal employer having its principal offices at 811 Harding Street, Waupaca, Wisconsin 54981-2077.

2. Waupaca County Highway Department Employees Union, Local 1756, AFSCME, AFL-CIO, herein AFSCME, is a labor organization with its principal offices at 1973 Strongs Avenue, Stevens Point, Wisconsin 54481.

3. AFSCME is the collective bargaining representative of certain employes of the County's Highway Department. During collective bargaining over a successor to the parties' 1988-1989 contract, a dispute arose as to whether the underlined portion of the following proposals are mandatory subjects of bargaining:

1. 4.01. The Employer and the Union agree that they will cooperate in every way possible to promote harmony and efficiency among all employees. (The Employer agrees to maintain certain conditions of work, primarily related to wages, hours and conditions of employment not specifically referred

to in this Agreement in accord with previous practice.)

2. 7.06. A temporary employee is a person hired for a specified period of time not to exceed ninety (90) calendar days, and who will be separated from the payroll at the end of such pay period. If, however, a temporary employee is retained, his service shall be connected and the first ninety (90) calendar days of his employment shall be considered to have been his probationary period. When a temporary employee

is separated from the payroll, said employee shall not be rehired until a period of at least ninety (90) days has elapsed. In the event the employee is rehired within said ninety (90) day period, the employee shall be considered as serving his probationary period and the probationary period and the employee's seniority shall date from the original date of hire.

3. 8.03. All vacancies shall be posted on the bulletin board. Such notice shall be posted for at least ten (10) calendar days, and shall state the prerequisites, (Equipment number) and wage rate for the job. Such prerequisites shall be consistent with the requirements of the job classification. It is understood by the parties that the employee who has signed the posting with an equipment number shall be considered the primary operator; however, the County may reassign such equipment to other worksites to meet specific workload needs.

4. 13.04. Probationary employees, temporary employees and seasonal employees shall be paid at the rates as now listed in the attached schedule. The employees' weekly pay shall be the product of his job classification rate, multiplied by the number of hours worked.

4. Disputed proposal 4.01 primarily relates to wages, hours, and conditions of employment.

5. The Commission does not have sufficient information to determine whether disputed proposals 7.06, 8.03 and 13.04 primarily relate 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

The disputed proposal referenced in Finding of Fact 4 is a mandatory subject of bargaining.

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

DECLARATORY RULING 1/

The County has a duty to bargain with AFSCME within the meaning of Secs. 111.70(1)(a) and (3)(a)4, Stats. as to the proposal referenced in Finding of Fact 4.

Given under our hands and seal at the City of Madison, Wisconsin this 3rd day of May, 1991.

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

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

(See Footnote 1/ Continued on Page 4)

(Footnote 1/ Continued)

> 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.
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> (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.
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> . . .
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> (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.

ARTICLE 4.01

The disputed language states:

> 4.01. The Employer and the Union agree that they will cooperate in every way possible to promote harmony and efficiency among all employees. (The Employer agrees to maintain certain conditions of work, primarily related to wages, hours and conditions of employment not specifically referred to in this Agreement in accord with previous practice.)

The County argues that the disputed language is not limited in its coverage to conditions which "primarily relate to wages, hours and conditions of employment" because the maintenance of said conditions must be in accordance with "previous practice". The County contends that this additional language extends the scope of the clause into areas impacting on permissive policy determinations.

The County also asserts that the clause places a grievance arbitrator in the position of determining whether a matter is a mandatory or permissive subject of bargaining and that the clause therefore "subverts the statutory right of the County to have these matters properly heard before the Wisconsin Employment Relations Commission as opposed to a grievance arbitrator." In this regard, the County cites various grievances filed by AFSCME which the County asserts demonstrate the need for Commission resolution of the scope of the proposal.

The Union alleges that its proposal is expressly qualified to maintain only those practices "primarily related to wages, hours and conditions of employment". AFSCME therefore contends that it is apparent that the clause does not apply to matters which, although related to wages, hours and conditions of employment, are not mandatory subjects of bargaining.

We think it clear that the challenged portion of Article 4.01 is a mandatory subject of bargaining. In essence, the clause obligates the County to maintain during the term of the new contract any existing "conditions of work" which are mandatory subjects of bargaining. Because the matters covered by the language are limited to mandatory subjects of bargaining, 2/ the reference in the clause itself to "previous practice" is of no analytical consequence.

As to the County's concern with the potential ambiguity of the clause, we have repeatedly held that the fact that the precise meaning of language is subject to arbitral interpretation is not relevant to a mandatory/permissive analysis. 3/ However, should this clause be included in a new contract and should an arbitrator interpret it to cover matters the County believes are not mandatory subjects of bargaining, then the County can seek a declaratory ruling to litigate that question.

2/ In Rusk County, Dec. No. 18593 (WERC, 5/81), we concluded that the following proposal was permissive because the proposal was not limited to maintenance of mandatory subjects of bargaining:

> MAINTENANCE OF STANDARDS
> Section 1. The employer agrees that all conditions of employment in his individual operation, relating to wages, hours of work, overtime differentials and general working conditions, shall be maintained at not less than the highest standards in effect at the time of the signing of this agreement, and the conditions of employment shall be improved whereever specific provisions for improvements are made elsewhere in this Agreement. Any disagreement between the local Union and the employer, with respect for this matter, shall be subject to the grievance procedure.
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> This provision does not give the employer the right to impose or continue wages, hours and working conditions less than those contained in this contract.

However, here, as in City of Waukesha, Dec. No. 17830 (WERC, 5/80) and Green County, Dec. No. 20056 (WERC, 11/82) only matters which are mandatory subjects of bargaining (i.e. those which are "primarily related to wages, hours and conditions of employment") are covered by the proposal.

3/ Janesville School District, Dec. No. 21466 (WERC, 3/84), Greenfield School District, Dec. No. 26427 (WERC, 4/90).

ARTICLES 7.06 AND 13.04

The disputed proposals state:

> 7.06. A temporary employee is a person hired for a specified period of time not to exceed ninety (90) calendar days, and who will be separated from the payroll at the end of such pay period. If, however, a temporary employee is retained, his service shall be connected and the first ninety (90) calendar days of his employment shall be considered to have been his probationary period. When a temporary employee is separated from the payroll, said employee shall not be rehired until a period of at least ninety (90) days has elapsed. In the event the employee is rehired within said ninety (90) day period, the employee shall be considered as serving his probationary period and the probationary period and the employee's seniority shall date from the original date of hire.
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> . . .
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> 13.04. Probationary employees, temporary employees and seasonal employees shall be paid at the rates as now listed in the attached schedule. The employees' weekly pay shall be the product of his job classification rate, multiplied by the number of hours worked.

The County asserts that the proposal is a permissive subject of bargaining because it relates to temporary and seasonal employes who are not in the bargaining unit represented by AFSCME. AFSCME contends that temporary and seasonal employes are included in the unit and that its proposal is therefore a mandatory subject of bargaining.

Resolution of the parties' dispute over portions of Article 7.06 and 13.04 turns in large part on the question of whether temporary and seasonal employes are included in the unit. Absent hearing, we cannot resolve that question. Thus, we are unable to determine the status of these proposals. If there continues to be a need for issuance of a declaratory ruling as to these proposals, hearing will be conducted within 15 days of our receipt of any parties' request for same, unless the parties agree otherwise.

ARTICLE 8.03

The disputed portion of Article 8.03 provides:

> 8.03. All vacancies shall be posted on the bulletin board. Such notice shall be posted for at least ten (10) calendar days, and shall state the prerequisites, (Equipment number) and wage rate for the job. Such prerequisites shall be consistent with the requirements of the job classification. It is understood by the parties that the employee who has signed the posting with an equipment number shall be considered the primary operator; however, the County may reassign such equipment to other worksites to meet specific workload needs.

The County contends that the contract language imposes "tremendous" constraints on its discretion when determining the composition of a work crew, the equipment to be used by the crew, and the work site and thus is a permissive subject of bargaining. Citing City of Brookfield, Dec. No. 19944 (WERC, 9/82) the County argues the language directly impacts on its ability to provide efficient service.

Further, the County alleges that to the extent the proposal requires that the primary operator also be given primary maintenance responsibilities, the proposal is also permissive because it intrudes into the County's managerial right to determine who will perform maintenance work. The County asserts that it should have the ability to assign all maintenance work to a separate mechanics crew, a determination which would not adversely affect employe safety.

In addition, the County argues that the flexibility granted by the last sentence of the proposal is not sufficient to meet the County's service needs and improperly places grievance arbitrators in a position to evaluate the County's policy decisions.

Given the foregoing, the County asks that this proposal be found to be a permissive subject of bargaining.

AFSCME contends the contract language is primarily related to conditions of employment. AFSCME argues employes have a compelling interest in the piece of equipment they operate because the equipment's condition, licensing requirements and amenities directly impact on an employe's ability to safely and properly perform their work. AFSCME also notes the clause has disciplinary

implications to the extent that employes are accountable for the condition of their equipment.

AFSCME asserts that this contract language is distinguishable from the City of Brookfield proposal because of the flexibility the County has to assign equipment. AFSCME denies that the language unduly burdens the County's work assignment decisions, arguing that the County is entitled under the contract to qualified operators and determines when, where and if a particular piece of equipment should be used.

As to the County's concern about the language being improperly grieved by employes, AFSCME asserts the filing of a grievance indicates only that a dispute exists at a given time. A grievance may or may not have merit. More importantly, AFSCME notes that there is nothing in the record to indicate that grievances have been resolved in some manner which improperly restricts County action.

Given the foregoing, AFSCME asks that the language be found to be a mandatory subject of bargaining.

As with Articles 7.06 and 13.04, hearing is needed before we can resolve the status of this proposal. Absent settlement by the parties, hearing will be conducted at the same time as hearing on Articles 7.06 and 13.04.

Dated at Madison, Wisconsin this 3rd day of May, 1991.

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