STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of ASSOCIATION OF MENTAL HEALTH SPECIALISTS Requesting a Declaratory Ruling Pursuant to Sec. 111.70(4)(b), Stats. Involving a Dispute Between Said Petitioner and ROCK COUNTY	Case 275 No. 49542 DR(M)-524 Decision No. 27918

Appearances:
Mr. John S. Williamson, Jr., Attorney at Law, P.O. Box 845, 621 West Lawrence Street, Appleton, Wisconsin 54912-0845, for the Association.
Mr. Thomas A. Schroeder, Corporation Counsel, 51 South Main Street, Janesville, Wisconsin 53545, for the County.

FINDINGS OF FACT, CONCLUSION OF LAW AND DECLARATORY RULING

On July 8, 1993, the Association of Mental Health Specialists (Association) filed a petition with the Wisconsin Employment Relations Commission seeking a declaratory ruling pursuant to Sec. 111.70(4)(b), Stats. as to whether two collective bargaining proposals of Rock County (County) were mandatory subjects of bargaining.

On July 19, 1993 the County filed a motion to dismiss the petition asserting the petition was not properly signed and sworn to and had not been correctly served upon the County. On July 20, 1993 the Association refiled its petition and on July 29, 1993 the County withdrew the motion to dismiss.

On August 16, 1993, the County filed a statement in response to the petition. At the request of the Association, hearing was held on the petition in Janesville, Wisconsin on October 29, 1993 before Examiner Peter G. Davis.

The parties filed written post hearing argument, the last of which was received December 8, 1993.

Having reviewed the record and being fully advised in the premises, the Commission makes and issues the following

FINDINGS OF FACT

1. The Association of Mental Health Specialists, herein the Association, is a labor organization functioning as the collective bargaining representative of certain employes of Rock County and having its principal offices c/o Attorney John S. Williamson, Jr., Appleton, Wisconsin.

2. Rock County, herein the County, is a municipal employer having its principal offices at 51 South Main Street, Janesville, Wisconsin.

3. During collective bargaining for the successor to a 1990-1991 contract between the Association and the County, the County proposed to retain certain provisions of the 1990-1991 contract including the following

> Article XV Section 15.02 Meal and Rest Periods. A meal provided by the hospital and a period of thirty minutes, shall be made available to each full-time employee on each shift within the regular work day. Two fifteen minute rest periods or coffee breaks shall

be allowed each employee within each shift, each day.

. . .

Article XXIII, Section 23.01 Psycho-Social Workers.

> A. Whenever it becomes necessary to layoff employees represented by the bargaining unit due to lack of work, discontinuance of service, or other legitimate reasons, employees shall be laid off in an order determined by having a job performance ranking equal in consideration with the seniority ranking. Job performance ranking is the average ranking based on the employee's last two annual job performance evaluations. The seniority credit of all employees in the class shall be computed on the basis of continuous County service. Lowest ranked employees shall be laid off first, except that up to two employees or twenty percent (whichever is greater) of the number of employees within the class subject to layoff may be exempted at the discretion of the department head. Exemptions may be used to retain employees having special or superior skills for affirmative action purposes. Exercise of such exemption shall be declared by the appointing authority as part of the layoff plan.

A dispute then arose as to whether the Association was obligated to bargain with the County over said matters.

4. During hearing the parties resolved their dispute as to Article XV, Section 15.02 and the County amended its Article XXIII, Section 23.01 proposal to read:

> Whenever it becomes necessary to lay-off employees represented by the bargaining unit due to lack of work, discontinuance of service, or other legitimate reasons, employees shall be laid off in an order determined by having a job performance ranking equal in consideration with the seniority ranking. Job performance ranking is the average ranking based on the employee's last two annual job performance evaluations. The seniority credit of all employees in the class shall be computed on the basis of continuous County service. Lowest ranked employees shall be laid off first, except that up to two employees or twenty percent (whichever is greater) of the number of employees within the class subject to layoff may be exempted at the discretion of the department head. Exemptions may be used to retain employees having special or superior skills. Exercise of such exemption shall be declared by the appointing authority as part of the layoff plan. This provision shall not be applied in an arbitrary or capricious manner.

5. The Article XXIII, Section 23.01 proposal set forth in Finding of Fact 4 is primarily related to wages and conditions of employment.

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

CONCLUSION OF LAW

Article XXIII, Section 23.01 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 Association of Mental Health Specialists and Rock County have a duty to bargain within the meaning of Secs. 111.70(1)(a) and (3)(a)4, Stats. over Article XXIII, Section 23.01.

Given under our hands and seal at the City of Madison, Wisconsin this 13th day of January, 1994.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Herman Torosian /s/
Herman Torosian, Commissioner

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

Chairman A. Henry Hempe did not participate.

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.
(Continued on pages 4 and 5)

1/ (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 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.

. . .

(Continued)

1/ (Continued)

(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's brief summarizes its position as follows:

> The Association's claim that the County's proposal is non-mandatory rests on several interrelated grounds: (1) The proposal is deceptive in that (a) it creates the illusion that seniority will adequately protect employees from lay-off, when, in fact, seniority provides no such protection for less senior employees; (b) it fosters the illusion that the order of layoffs will be based on objective criteria when, in fact, it is based almost entirely on subjective, arbitrary, ad hoc standards; (c) it suggests seniority and job evaluations, in the absence of exemptions, play equal roles in determining the order of layoffs, when, in fact, job evaluations primarily determine that order; (d) it requires the Association to acknowledge that the method of determining lay-layoffs is not in itself arbitrary and capricious, and (e) it mixes, in a contradictory fashion, an objective criterion - seniority - with subjective criteria - supervisor's evaluations and department head exemptions - and then, permits the subjective criteria to override that objective criterion.

The Association argues that County's illusory, deceptive and self-contradictory proposal is non-mandatory because acceptance of such a proposal would be inconsistent with the duty of fair representation the Association owes affected employes. The Association further contends the County's proposal is nonsense and asserts it should not be required to bargain over nonsense.

The Association brief concludes as follows:

> Although the County's proposal, by simultaneously providing for an inherently arbitrary procedure and insisting on labeling that procedure as non-arbitrary, is nonsense, it is not innocent nonsense. It is not innocent nonsense because no union can knowingly agree to a proposal whose terms confer arbitrary power on an employer then agree this power is not arbitrary. To accept such a proposal would require a union to violate its duty of fair representation; to permit an employee to insist on such a proposal would serve no useful bargaining purpose. In short, the harm in permitting such insistence would be great; the benefit, non-existent.

The County

Citing West Bend Education Association v. WERC, 12 Wis.2d, (1984) and School District of Janesville, Dec. No. 21466 (WERC, 3/84) the County contends that its proposal which determines layoff procedures is primarily related to wages and conditions of employment and therefore a mandatory subject of

bargaining. The County asserts neither past interpretation or application of the layoff procedure nor speculation about future interpretations/applications are relevant to the proposal's mandatory status. The County argues grievance arbitration or prohibited practice forums are available to resolve any ambiguity or to correct alleged improper application based upon human error.

DISCUSSION:

In Beloit Education Association v. WERC, 73 Wis.2d 43 (1976), Unified School District No. 1 of Racine County v. WERC, 81 Wis.2d 89 (1977) and City of Brookfield v. WERC, 87 Wis.2d 819 (1979) the Wisconsin Supreme Court set forth the definition of mandatory and permissive subjects of bargaining under Sec. 111.70(1)(a), Stats., as matters which primarily relate to "wages, hours, and conditions of employment" or to the "formulation or management of public policy," respectively. Prohibited subjects of bargaining are those proposals or provisions which violate public policy or statutes or infringe on constitutional rights and thus are void as a matter of law. Board of Education v. WERC, 52 Wis.2d 625 (1971); WERC v. Teamsters Local No. 563, 75 Wis.2d 602 (1977).

The parties generally agree that proposals which establish the order in which employes will be laid off are mandatory subjects of bargaining. They disagree on whether this specific layoff proposal is "illogical," "illusory" or "deceptive" and, if it is, whether the proposal thereby becomes non-mandatory.

The Association's position rests on the proposition that: (1) job performance evaluations are inherently subjective, subject to abuse, and inevitably a basis upon which employes become inclined to curry the favor of their supervisors rather than support a union; (2) contract enforcement mechanisms such as grievance arbitration are inadequate to protect employe job security against the inherent arbitrariness of using job performance evaluations as a factor when determining who will be laid off; and thus (3) the Association should not be compelled to bargain over the disputed layoff proposal. In effect, the Association is contending that any proposal which allows an employer to use its evaluation of employes as even a partial basis for determining the order of layoff is non-mandatory. We reject this contention.

The Association's argument appears to be one of first impression. While the Association has cited labor law holdings for the general proposition that good faith bargaining requires the advancement of "honest" proposals which can be justified by "reason" (NLRB v. Trident Mfg. Co., 351 US 199 (1956); NLRB v. George P. Pillion & Son Co., 119 F.2d 32 (1941) it has not cited any case holding that a layoff proposal premised on job performance evaluations is "dishonest" "unreasonable" and thus non-mandatory. The closest the Association comes to a specific analogous holding is Aluminum Oil Co. v. NLRB, 131 F.2d 485 (1942) where unilateral employer establishment of employe wage increases was found violative of the duty to bargain. Such a holding is a far cry from the holding sought by the Association here.

In Rock County, Dec. No. 23656, (WEAC, 5/86), the Association made a somewhat analagous and equally unsuccessful effort to have a subcontracting proposal ruled a permissive or prohibited subject of bargaining because of the potentially negative impace the proposal could have upon unit employes. When rejecting the Association argument we commented in part as follows:

> The Association's second basic theory in essence asks that we change the bargainable status of an otherwise mandatory proposal simply because of the negative impact the subcontracting provision could have upon unit employes. The Association asks that we insulate it from the potential consequences to job

security which seeking certain levels of compensation may produce. The Association, at bottom, asks that we turn the give-and-take of the collective bargaining process into a no lose proposition for employes. We decline that invitation because it is not supported by any relevant precedent or by the basic premises of collective bargaining.

Perhaps the most salient proposition which the Association's argument fails to acknowledge is that the right to collectively bargain is the right to both municipal employers and employes' collective bargaining representative to seek a settlement, at least on mandatory subjects, which best serves their respective interests. Obviously, to the extent that one party or the other is successful, such a result may prove undesirable to the opposite party. However, success or potential success in pursuing an otherwise mandatory proposal is not a basis for determining that the proposal is no longer mandatory. For instance, a wage proposal does not become nonmandatory simply because it would be onerous upon the employer if placed in the contract. Indeed, we have noted that wage proposals which, if placed in a contract, might result in level of service reductions are not rendered nonmandatory because of this consequence. See Racine Schools, Dec. Nos. 20652-A, 20653-A, supra. School District of Janesville, Dec. No. 21466 (WERC, 3/84). Furthermore, nowhere in its Racine decision does the Wisconsin Supreme Court conclude or suggest that bargaining over economically motivated subcontracting is to be the one way street the Association contends herein it should be.

> The Court was not under any illusions and did not offer any guarantees that the result of the bargain would be painless for employes.
>
> It is also noteworthy that the collective bargaining process does not compel a party to voluntarily agree to a proposal which it deems undesirable, although the parties must comply with a lawfully issued interest arbitration award. The Association has the opportunity and the right to resist continued inclusion of the subcontracting provision in the next agreement between the parties through the statutory processes including, if necessary, binding interest arbitration. Lastly, it is clear that the collective bargaining process has the potential to produce a compromise by which parties reach a satisfactory resolution of competing interests.
>
> ---
>
> (footnote omitted)

As was true in 1986, the Association asks that we alter some basic realities of the collective bargaining process. As was true in 1986, we reject the Association position because we continue to find the existing reality provides the appropriate context for labor relations.

As we noted in our 1986 Rock County decision, a conclusion that a proposal is mandatory does not compel a party to voluntarily agree to the proposal nor preclude a party from proposing an alternative which it finds more acceptable. Thus, although collective bargaining can legitimately produce results a party finds undesirable, the bargaining process provides opportunities for a party to change contract providions it does not like. As was true in 1986, the Association seeks to avoid these realities and substitute a bargaining reality in which employes are insulated from potentially negative impacts.

In this proceeding, the Association also seeks to alter the human context in which collective bargaining exists. Because humans are capable of making arbitrary or illogical judgments, the Association argues that employes should be insulated from such potential arbitrariness (in a layoff context at least) when human employers make judgments about human employes' job performance. As indicated earlier, there are no such guarantees in collective bargaining. The County is free to continue to seek to have evaluation of job performance be a factor utilized when determining the order of layoff. The Association is free to seek to remove job performance as a layoff factor during collective bargaining or the interest arbitration process. It is free to argue to the County and/or an interest arbitrator that the County proposal is unresasonable. But Association dislike for the County position does not transform a proposal into a non-mandatory subject of bargaining.

Given the foregoing, we find the County proposal to be a mandatory subject of bargaining. 2/

Dated at Madison, Wisconsin this 13th day of January, 1994.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Herman Torosian /s/
Herman Torosian, Commissioner

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

Chairman A. Henry Hempe did not participate.

2/ Within the context of this proceeding and our rationale, we think it clear that if the collective bargaining process produces inclusion of the disputed language in the parties' next contract, the Association will not have breached its duty to fair representation.