STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

DANE COUNTY, WISCONSIN MUNICIPAL EMPLOYEES LOCAL 60, AFSCME, AFL-CIO, Complainant, vs. CITY OF MADISON (LIBRARY), Respondent.	Case 180 No. 51661 MP-2950 Decision No. 28256-B
DANE COUNTY, WISCONSIN MUNICIPAL EMPLOYEES LOCAL 60, AFSCME, AFL-CIO, Complainant, vs. CITY OF MADISON (LIBRARY), Respondent.	Case 181 No. 51662 MP-2951 Decision No. 28257-B

Appearances:

Mr. Jack Bernfeld, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO 8033 Excelsior Drive, Suite "B", Madison, Wisconsin 53717-1903, on behalf of the Complainants.

Mr. Larry W. O'Brien, Assistant City Attorney, Room 401, City-County Building, 210 Martin Luther King, Jr. Boulevard, Madison, Wisconsin 53710, on behalf of the Respondent.

FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

On October 7, 1994, Dane County, Wisconsin Municipal Employes Local 60, AFSCME, AFL-CIO filed two complaints of prohibited practice with the Wisconsin Employment Relations Commission alleging that the City of Madison had violated Secs. 111.70(3)(a) 1 and 4, Wis. Stats. On December 15, 1994, the Commission consolidated the two complaints for purpose of hearing, and appointed a member of its staff, Hearing Examiner David E. Shaw, to make and issue Findings of Fact, Conclusions of Law and Order in the matter, as provided for in Sec. 111.70(4)(1) and 111.07, Wis. Stats. Hearing in the matter was held in Madison, Wisconsin, on February 16, 1995; a stenographic transcript of the hearing was provided to the parties by March 8, 1995. The parties filed written arguments by April 27, 1995 and reply briefs by May 16, 1995.

FINDINGS OF FACT

1. Dane County, Wisconsin Municipal Employes Local 60, AFSCME, AFL-CIO, "the Union," is a labor organization with offices at 8033 Excelsior Drive, Madison, Wisconsin.

2. The City of Madison, "the City," is a municipal employer with offices at 210 Martin Luther King, Jr., Boulevard, Madison, Wisconsin.

3. Among its other entities, the City operates and maintains a public library system, whose workforce includes collective bargaining units of librarians and paraprofessionals represented by the Union, certified by the Wisconsin Employment Relations Commission on October 20, 1982 and September 28, 1981, respectively. The most recent collective bargaining agreement for each unit covered the period January 1, 1992 to December 31, 1993; neither unit had an agreement covering the period after December 31, 1993 in place prior to the close of the record in this proceeding.

4. Both expired agreements contain at Article I, Consideration of Agreement, Section 1.04, Conflicting Ordinances and Resolutions. Section 1.04 in the Agreement covering the paraprofessional unit provided:

> 1.04 CONFLICTING ORDINANCES AND RESOLUTIONS:
>
> The terms and conditions of this Agreement shall supersede Ordinances and Resolutions wherein there is a conflict with the terms of this Agreement. This Agreement shall be adopted by Resolution and City Ordinance.

Section 1.04 in the Agreement covering the professional unit provided:

> 1.04 Conflicting Ordinances and Resolutions: The terms and

conditions of this Agreement which shall be adopted by Ordinance and Resolution, shall supersede ordinances and resolutions wherein there is a conflict with the terms of this Agreement.

Section 16.02 of the paraprofessional unit Agreement, and Section 17.03 of the professional unit Agreement, provided the following:

Existing Benefits

The Employer intends to continue other authorized existing employee benefits not specifically referred to or modified in this Agreement. It is agreed by the Union that bad or unreasonable habits that may develop among employees do not constitute "past practice" rights or employee benefits. The existing employee benefits referred to in this section are those that are mandatory subjects of bargaining primarily related to wages, hours and other conditions of employment.

Section 17.03 of the professional unit Agreement also includes this final sentence:

. . .Disputes between the parties as to whether or not a benefit is a mandatory subject of bargaining primarily related to wages, hours and other conditions of employment shall be resolved by the WERC.

5. Each unit's expired bargaining agreement contained, at Article V, the following provisions relating to Management Rights:

ARTICLE V

MANAGEMENT RIGHTS

The rights and responsibilities of the Employer shall include but are not limited to the following subject to this Agreement:

. . .

E. To establish policies, rules, regulations and procedures. Any dispute with respect to policies, rules, regulations and procedures shall not in any way be subject to arbitration unless and until said matters

> are applied or an employee is disciplined pursuant to established policies, rules, regulations and procedures in which case the reasonableness of said matters may be subject to the grievance and arbitration procedure;
>
> . . .
>
> The rights and authority which the Employer has not officially abridged, delegated or modified by this Agreement are retained by the Employer.
>
> The enumeration of the rights and duties of the Employer in this Agreement shall not be deemed to exclude other inherent management rights and management functions not expressly reserved herein.

6. Each unit's expired collective bargaining agreement contained an Article entitled, "Grievance and Arbitration Procedure," identical in relevant parts, which provided for the processing of grievances from filing through final and binding arbitration.

7. For at least the past 26 years, a practice existed under which Library employes were allowed to purchase books and other materials for their personal use from library suppliers, or "jobbers", at a discount the suppliers made available only to the Library employes. The discount varied from five percent to forty-three percent off the normal sale price. In making their purchases, the librarians and paraprofessionals submitted orders under an account maintained through the Staff Association, which consists of all employes, both represented and unrepresented, of the Madison Public Library, Dane County Library System and the South Central Library System. The number of orders placed were generally ten per month, but increased to twenty to thirty per month near Christmas. The books/materials ordered by employes were shipped separately from that ordered for the Library itself, but the invoices identified the Madison Public Library, Order Dept. - SCLS Acct. as the account to be billed. When material arrived from the supplier, employes were notified by library staff, and they retrieved the material from the Library's Administrative Office, at which time they paid the amount due to a library employe, who then sent the invoice and money to the Staff Association, which paid the supplier. Library employes who purchased books and other material in this way did not pay a sales tax on their purchases. Only library staff, and neither members of the general public nor other city employes, were able to participate in this program.

8. On July 26, 1993, Union Staff Representative Jack Bernfeld wrote to City Labor Relations Manager Gary Lebowich as follows:

> I understand that the City is contemplating revising its Code of

> Ethics. Please be advised that the Union objects to the unilateral implementation of revisions to the existing Code, to the extent that such rules relate to any employee represented by Local 60. Such matters are mandatory subjects of bargaining and we therefore request to bargain over the decision and impact of all such subjects, not otherwise covered under our collective bargaining agreement, if the City intends to pursue any changes affecting our membership.

The City did not respond to Bernfeld's letter.

9. Prior to August 14, 1994, Madison General Ordinance 3.47(5)(c), the City of Madison Code of Ethics, applicable to all City employes, provided that

> No official or employee shall accept any valuable gift, whether in the form of service, loan, thing, or promise, from any person, firm or corporation which to his knowledge is interested directly or indirectly in any manner whatsoever in business dealings with the City;....

10. On May 3, 1994, the Madison Common Council adopted an ordinance repealing and recreating its Code of Ethics for all City elected officials, all City employes, and all members of City boards, committees and commissions, to be effective August 14, 1994, including Sec. 3.47(5)(a)1., MGO which provided that:

> No incumbent may use or attempt to use her or his position or office to obtain financial gain or anything of value or any advantage, privilege or treatment for the private benefit of herself or himself ....

11. On June 15, 1994, City Attorney Eunice Gibson, responding to an inquiry from Library Director Peter Niemi, issued a memorandum to Niemi informing him that the Ethics Code both in its then present form, as well as the revised form that was to take effect August 14, 1994, prohibited library staff members' receipt of discounts on personal book purchases from the Library's suppliers.

12. On June 28, 1994, Niemi sent to all staff the following memorandum:

> Regrettably (sic), the library must discontinue the practice of providing for staff discounts on books and other purchases from library suppliers, such as Baker and Taylor. The City Attorney has ruled that these discounts are in violation of the City Ethics Code.

> There may be a possibility that staff could order and receive discounts through South Central Library System or the Dane County Library Service. Perhaps the Staff Association could pursue this.

Since Niemi's memorandum was issued, Library staff have no longer purchased books and materials at a discount from the jobbers through the Library.

13. The Summer 1994 edition of City News, the city employe newsletter, contained the following notice:

> * Summer Deals -- Human Resources Department
>
> There are a number of special deals and passes for many summer activities available through the Human Resources Department. Here is a sample:
>
> * Disney Magic Kingdom Club
> * Six Flags Great America
> * 20% off Wisconsin Dells discount
> * 20% off Noah's Ark
>
> All you need to do is stop by the Human Resources Department and pick up what you need and you're on your way to some fun, and now less expensive, activities! Have a great summer!

The record is silent on whether these promotional activities were available to non City-employes as well.

14. On July 14, 1994, Linda Wolfe, a member of the paraprofessional unit, and Mary Knapp, a librarian, filed grievances, alleging that Niemi's memo of June 28 violated Sections 16.02 and 17.03 of their respective collective bargaining agreements. The City did not offer a written response to either grievance.

15. On August 11, 1994, Bernfeld wrote to Lebowich as follows:

> Local 60 hereby gives notice of its intent to proceed to arbitration with the grievance referenced pursuant to the Article VI - Grievance and Arbitration Procedure of the parties (sic) collective bargaining agreement. I will request the Commission to submit a panel of arbitrators from which the parties can select an arbitrator to hear and decide this dispute. Since this grievance is identical to the one filed

> in the Librarian unit, we suggest that these matters be consolidated for hearing. Please advise.
>
> The Union remains willing to meet about this matter to attempt to resolve same prior to a hearing in the matter. If you are interested in meeting about same, please call.

16. On August 16, 1994, City Labor Relations Specialist Kenneth B. Wright wrote to Bernfeld as follows:

> Please be advised that the City of Madison intends to rely on the Wisconsin Employment Relations Commission decision in Greenfield, Decision No. 14026-B, as is announced at each of our bargaining tables, which states that absent a contract the arbitrator has no power to arbitrate. We therefore decline to participate in your quest for arbitration. We do not intend to utilize, absent a contract, Wisconsin Employment Relations Commission's panel or panels in this (these) matter(s).

17. On October 7, 1994, the Union filed complaints with the WERC, alleging that the City, by discontinuing the practice of providing for staff discounts on books and other purchases from library suppliers, has altered the status quo and has refused to bargain and has thereby committed prohibited practices in violation of Sec. 111.70, Wisconsin Statutes, in particular, subsections 3(a)1 and 4. As a remedy, the Union seeks an order declaring the City's action to have been a prohibited practice, directing the City to cease and desist from violating MERA, ordering the City to bargain in good faith and restore the discount policy, directing the City to post notices regarding the order, and any other remedy the Commission believed appropriate.

18. Bernfeld's letter of July 26, 1993 to Lebowich, set forth above in Finding 8, as well as the grievances filed by the Complainants with regard to the City's decision to end the practice of permitting its Library employes to purchase books or materials for their personal use from the Library's suppliers at a discount only available to Library employes, constitutes demands by the Unions to bargain both the decision and the impact of the decision. The City has not responded to the Union's demands to bargain either the decision or the impact of the City's decision to end the practice.

19. The City's decision to interpret and apply its Code of Ethics so as to prohibit the continuance of the practice of permitting its Library employes to purchase books or materials for their personal use from Library suppliers at a discount only available to Library employes primarily relates to the management and direction of the City's government and the formulation of public policy, rather than wages, hours and conditions of employment. The impact of the City's decision

to end the aforesaid practice primarily relates to the wages of the affected employes.

Based on the foregoing Findings of Fact, the Examiner makes the following

CONCLUSIONS OF LAW

1. Sections 77.52 and 77.54, Stats., requires the payment of a sales tax upon the retail sale of tangible personal property or its consumption in this state. The purchase of books and materials from Library suppliers by employes for their personal use constitutes retail sales of tangible personal property or the consumption of tangible personal property. The practice of employes of Respondent City of Madison Library not being required to pay sales tax on their purchase of books or materials for their personal use from the Library's suppliers violated Wisconsin Statutes and is, therefore, an illegal subject of bargaining. Therefore, the Respondent City of Madison was not required to bargain the decision to end that practice.

2. The decision of the Respondent City of Madison to interpret and apply its Code of Ethics so as to prohibit, and thereby end, the practice of permitting Respondent's Library employes to purchase books and materials for their personal use from the Library's suppliers at a discount only available to Library employes, constituted a permissive subject of bargaining over which the Respondent City of Madison was not required to bargain. Therefore, the Respondent City of Madison, its officers and agents, did not refuse to bargain in violation of Secs. 111.70(3)(a)1 or 4, Stats., by implementing its decision and unilaterally ending the practice without bargaining with the Complainant, Dane County, Wisconsin Municipal Employees Local 60, AFSCME, AFL-CIO, representing the employes in the bargaining units in Case 180 and Case 181.

3. The impact of the decision of the Respondent City of Madison, as set forth in Conclusion of Law 2, is a mandatory subject of bargaining over which the Respondent City of Madison is required to bargain with the Complainant, Dane County, Wisconsin Municipal Employees Local 60, AFSCME, AFL-CIO, representing the employes in the bargaining units in Case 180 and Case 181. Therefore, by refusing to bargain the impact of said decision, the Respondent City of Madison, its officers and agents, have refused to bargain in violation of Secs. 111.70(3)(a)4, Stats., and derivatively, Sec. 111.70(3)(a)1, Stats.

On the bases of the foregoing Findings of Fact and Conclusions of Law, the Examiner makes the following

ORDER 1/

(Footnote 1/ appears on page 10.)

1. The allegations in Case 180 and Case 181 as to the violation of Secs. 111.70(3)(a)1 and 4, Stats. with regard to the Respondent City of Madison's unilateral decision to end the practice set forth in Conclusion of Law 2, and thereby alter the status quo, are dismissed.

2. The Respondent, City of Madison, its officers and agents shall immediately:

a. Cease and desist from refusing to bargain the impact of its decision to end the practice set forth in Conclusion of Law 2 with the Complainant Dane County, Wisconsin Municipal Employees Local 60, AFSCME, AFL-CIO, with regard to the employes it represents in the bargaining units in Case 180 and Case 181.

b. Take the following affirmative action which the Examiner finds will effectuate the purposes of the Municipal Employment Relations Act:

1. Notify Dane County, Wisconsin Municipal Employees Local 60, AFSCME, AFL-CIO, in writing, that it will bargain the impact of its decision to prohibit and end the practice of permitting City of Madison Library employes to purchase books or materials for their personal use from the Library's suppliers at a discount only available to Library employes, as it relates to those employes in the bargaining units in Case 180 and Case 181.

2. Notify all of the employes in the bargaining units represented by Dane County, Wisconsin Municipal Employees Local 60, AFSCME, AFL-CIO, in Case 180 and Case 181 by posting in conspicuous places at its library facilities where notices to such employes are usually posted, a copy of the Notice attached hereto as "Appendix 'A'". The notice shall be signed by an authorized representative of the City and shall remain posted for thirty (30) days thereafter. Reasonable steps shall be taken by the City to ensure that said notices are not altered, defaced or covered

by other material.

3. Notify the Wisconsin Employment Relations Commission within twenty (20) days of the date of this Order, as to what steps have been taken to comply herewith.

Dated at Madison, Wisconsin, this 30th day of January, 1996.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By David E. Shaw /s/
David E. Shaw, Examiner

1/ Any party may file a petition for review with the Commission by following the procedures set forth in Sec. 111.07(5), Stats.

Section 111.07(5), Stats.

(5) The commission may authorize a commissioner or examiner to make findings and orders. Any party in interest who is dissatisfied with the findings or order of a commissioner or examiner may file a written petition with the commission as a body to review the findings or order. If no petition is filed within 20 days from the date that a copy of the findings or order of the commissioner or examiner was mailed to the last known address of the parties in interest, such findings or order shall be considered the findings or order of the commission as a body unless set aside, reversed or modified by such commissioner or examiner within such time. If the findings or order are set aside by the commissioner or examiner the status shall be the same as prior to the findings or order set aside. If the findings or order are reversed or modified by the commissioner or examiner the time for filing petition with the commission shall run from the time that notice of such reversal or modification is mailed to the last known address of the parties in interest. Within 45 days after the filing

(Footnote 1/ continues on the next page.)

(Footnote 1/ continues from the last page.)

> of such petition with the commission, the commission shall either affirm, reverse, set aside or modify such findings or order, in whole or in part, or direct the taking of additional testimony. Such action shall be based on a review of the evidence submitted. If the commission is satisfied that a party in interest has been prejudiced because of exceptional delay in the receipt of a copy of any findings or order it may extend the time another 20 days for filing a petition with the commission.

This decision was placed in the mail on the date of issuance (i.e. the date

appearing immediately above the Examiner's signature).

Appendix "A"

NOTICE TO EMPLOYES

Pursuant to an order of the Wisconsin Employment Relations Commission, and in order to effectuate the policies of the Municipal Employment Relations Act, we hereby notify our employes that:

1. We will not refuse to bargain the impact of the City's decision to cease the practice of permitting its Library employes to purchase books and materials for their personal use from the Library's suppliers at a discount available only to Library employes.

2. We will notify Dane County, Wisconsin Municipal Employees Local 60, AFSCME, AFL-CIO, in writing, that we will bargain the impact of the City's decision referenced in paragraph 1, above.

Dated at Madison, Wisconsin, this 30th day of January, 1996.

CITY OF MADISON

By ________________________________

THIS NOTICE MUST BE POSTED FOR THIRTY (30) DAYS FROM THE DATE HEREOF, AND MUST NOT BE ALTERED, DEFACED OR COVERED BY ANY MATERIAL.

THE CITY OF MADISON

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

POSITIONS OF THE PARTIES

In support of its complaints, the Union asserts that the unilateral cessation of the discount book benefit constitutes a refusal to bargaining as it alters the status quo without negotiations. It is a violation of Secs. 3(a)4 and derivatively and independently 3(a)1, Stats. The status quo is preserved by the contract and the practices of the parties.

Given the language in each collective bargaining agreement preserving Existing Benefits, the threshold question is whether or not the book discount benefit constitutes a mandatory subject of bargaining. As the matter of book discounts is one that is primarily related to wages, hours and conditions of employment, and not a matter principally related to the formulation or management of public policy, this matter does relate to a mandatory subject of bargaining.

The City errs in asserting that the application of the Ethics Code is a matter of public policy, in that the Code has coexisted with the discount book benefit (and with other discounts made available to City employes) for decades; an opinion by the City Attorney does not change that fact. It is not for the Commission to interpret and apply the City's Ethics Code, but rather only to apply the appropriate statutes and labor agreements. Further, even if a conflict exists between the Code and the labor agreements, the labor agreements already establish that the agreement supersedes any conflicting ordinance. That the labor agreements do not specifically address the issue of book discounts does not preserve for the City the unfettered right to change this condition of employment.

The book discount program is a longstanding practice which has become binding due to a provision in the labor agreements requiring the continuation of existing practices. The unilateral discontinuation of the book discount practice was an improper change in the status quo. The Commission should order the City to cease and desist from such violations; order the City to restore the status quo and to bargain with the Union during negotiations if it wishes to pursue the matter; make employes whole; order the employer to post appropriate notices, and order any other remedy it believes appropriate.

In opposition to the complaints, the City asserts that the Union's assertion that the City has committed statutory violations is without merit, in that neither condition required to establish

something as an existing benefit -- that the benefit be authorized, and that it have been a mandatory subject of bargaining -- was met.

That the discounts were not authorized is apparent from the fact that the users of the discount did not pay sales tax on their purchases. Sec. 77.52, Stats., imposes the sales tax on sales of tangible personal property. The employes purchased the books and materials from the vendors, i.e., tangible personal property, for their private use. Thus, the purchases did not qualify for the exemption as purchases made for the City. Any attempt to use the City's exempt status is illegal; any attempt by any person to authorize such a practice is beyond their lawful authority. The discount and the lack of payment of the sales tax were not authorized because they were illegal.

Because the discount is not a mandatory subject of bargaining, it is further not subject to the narrowly drawn "existing benefits" clauses in the respective labor agreements. There never having been any previous discussion in bargaining relating to these discounts, and there never having been a claim that the discounts were a mandatory subject of bargaining, and the Union having made no such claim at hearing, it is clear that even the units do not believe the discount is a mandatory subject of bargaining. Because the discount is not a mandatory subject of bargaining, the discount is not subject to the labor agreements' "existing benefits" clauses by the parties' own clearly expressed provisions.

Further, absent anything in the agreements relating to materials discount or application or non-application of the Ethics Code, these units are subject to the Code. There being nothing in either labor agreement concerning these topics, and there being nothing in either agreement which conflicts with the Ethics Code, the City is authorized to apply the Code to members of these units through the respective management rights clauses.

Because the labor agreements clearly and unequivocally exclude from the existing benefits clauses those matters which are not mandatory subjects of bargaining, and the book discount is not a mandatory subject of bargaining, the Examiner should hold that elimination of the discount is required by the City Ethics Code and dismiss the complaints.

In reply, the Union responds that the City errs in asserting that the discounts were not authorized, when Library managers, who are city employes, authorized and participated in the program for decades. The City has produced no evidence that management lacked the authority to sanction the activity. The City further errs in raising the issue of sales tax, which is irrelevant to the determination of these complaints.

The City errs in asserting that the discount is not a mandatory subject of bargaining; it is not necessary for there to have been negotiations on this benefit to make it subject to the provisions on existing benefits, the purpose of which is to ensure the continuation of other rights and conditions of employment not addressed by the parties. A prior claim that the benefit was a mandatory subject

of bargaining was not required to establish it as such, especially when, as a practice that provides a clear benefit to employes without being primarily related to any public policy, it is by its very nature a mandatory subject of bargaining.

In reply, the City responds that in that it is the jobber, and not the City or Library, which grants the discount, and the Staff Association which administers it on behalf of represented and unrepresented employes, the units themselves are not involved in this dispute in any way; the Commission should not interject itself in a non-unit issue which does not involve collective bargaining agreements.

The Union has rather scrupulously avoided the issue of non-payment of state sales tax, expecting the Commission to authorize the continuation of tax evasion, something for which there is no legal authority. The Commission further lacks authority to permit continuation of the discount predicated on payment of the tax, as such action would be beyond the bounds of contract interpretation and enforcement. The Commission should further avoid the minefield of state revenue matters.

The fact that the Code was revised is irrelevant. The City Ethics Code and its prohibition of employes accepting such a private benefit as these discounts has existed for as long as this benefit has been taken and always was, and remains, a clear assertion of public policy. The practice was allowed only because no one outside the Library knew of it; once it was brought to the City's attention, it was stopped. The Commission may not interpret the Code and its application, but must accept the City Attorney's interpretation.

The Union's belated contention that this benefit, granted by the jobber, is a mandatory subject of bargaining is in error. The matter was never raised in any contract negotiation. The professional unit's agreement provides a process for resolution of disputes over what constitutes a mandatory subject of bargaining, which process was never invoked. The Union's attempt to raise this issue at this late date is inappropriate and should by ignored, especially since a benefit which involves the non-payment of sales tax is excluded from the area of mandatory subjects.

Contrary to the Union's assertion, the discount and evasion of sales tax using the City's tax exempt status is precisely both a gratuity and an unintended benefit and a bad and unreasonable habit, self-granted at some time in the past by persons unknown and continued by those who benefitted from it, and totally unrelated to any condition over which the City has any control. The granting of the benefit is not a condition of employment, and the Commission must dismiss the consolidated complaint.

DISCUSSION

It is initially noted that it was the City's decision to interpret and apply its Code of Ethics,

both in the form it existed at the time of Niemi's June 28, 1994 memorandum and in its revised form, to prohibit Library employes from utilizing discounts from the Library's supplier, which thereby resulted in ceasing the practice of permitting the utilizing of such discounts and this dispute.

The Union relies upon the "Existing Benefits" provisions in the expired agreements, along with the previously existing practice of allowing employes to purchase books and materials through the Library's suppliers for their personal use at a discount, as establishing that practice as the status quo to be maintained during the hiatus period after the expiration of the agreements. In its decision in School District of Wisconsin Rapids, Dec. No. 19084-C (WERC, 3/85), the Commission held:

> It is well settled that, absent a valid defense, a unilateral change in the status quo wages, hours or conditions of employment -- either during negotiations of a first agreement or during a hiatus after a previous agreement has expired -- is a per se violation of the MERA duty to bargain. Unilateral changes are tantamount to an outright refusal to bargain about a mandatory subject of bargaining because each of those actions undercuts the integrity of the collective bargaining process in a manner inherently inconsistent with the statutory mandate to bargain in good faith. In addition an employer unilateral change evidences a disregard for the role and status of the majority representative which disregard is inherently inconsistent with good faith bargaining.
> (Citations omitted)

In explaining how it would determine what constituted the status quo during a contract hiatus, the Commission has held that it will consider the contract language, practice and/or bargaining history. 2/

The duty to maintain the status quo, as a function of the duty to bargain in good faith as to wages, hours and conditions of employment, applies only to mandatory subjects of bargaining. School District of Wisconsin Rapids, supra. Also, the "Existing Benefits" clause in the expired Agreement specifically applies only to "authorized existing employe benefits" and defines "existing employe benefits" as "those that are mandatory subjects of bargaining primarily related to wages, hours and other conditions of employment".

In this case there is no real dispute as to the practice that existed until Library Director

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2/ Green County, Dec. No. 26798-B (WERC, 7/92) at footnote 4, citing, School District of Wisconsin Rapids, supra.

Niemi issued his Memorandum of June 28, 1994. The dispute is whether permitting Library employes to purchase books and materials from the Library's suppliers at a discount for their personal use, 3/ and without paying the sales tax, was an "authorized" existing employe benefit and whether it is a mandatory subject of bargaining.

The City first argues that the practice was not authorized, since the employes did not pay sales tax on their purchases and it would be beyond anyone's lawful authority to authorize the employes to illegally utilize the City's tax exempt status. Further, since the practice is illegal, it is not a mandatory subject of bargaining.

As noted by the City, Sec. 77.52(1), Stats., imposes a sales tax on the gross receipts from the sale of tangible personal property. Sec. 77.52(3) and (4), Stats., provide:

> **(3)** The taxes imposed by this section may be collected from the consumer or user.
> **(4)** It is unlawful for any retailer to advertise or hold out or state to the public or to any customer, directly or indirectly, that the tax or any part thereof will be assumed or absorbed by the retailer or that it will not be added to the selling price of the property sold or that if added it, or any part thereof, will be refunded. Any person who violates this subsection is guilty of a misdemeanor.

Section 77.53, Stats., imposes a use tax on the use or consumption of tangible personal property consumed in this state, to be paid by the person who "consumes" it, providing, in relevant part:

> **77.53 Imposition of use tax. (1)** An excise tax is levied and imposed on the use or consumption in this state of taxable services under s. 77.52 purchased from any retailer, at the rate of 5% of the sales price of those services; on the storage, use or other consumption in this state of tangible personal property purchased from any retailer, at the rate of 5% of the sales price of that property. . .

. . .

3/ While it is the supplier that offers the discount, not the City, the practice has been that the City has permitted the Library employes to utilize those discounts. It is that permission which has been withdrawn by the City's decision to apply its Code of Ethics so as to prohibit employes from utilizing such discounts.

(2) Every person storing, using or otherwise consuming in this state tangible personal property or taxable services purchased from a retailer is liable for the tax imposed by this section.

. . .

(7) The tax required to be collected by the retailer from the purchaser shall be displayed separately from the list price, the price advertised in the premises, the marked price, or other price on the sales check, invoice or other proof of sale.

(8) Any person violating sub. (3) or (7) is guilty of a misdemeanor.

. . .

(10) For the purpose of the proper administration of this section and to prevent evasion of the use tax and the duty to collect the use tax, it is presumed that tangible personal property or taxable services sold by any person for delivery in this state is sold for storage, use or other consumption in this state until the contrary is established. The burden of proving the contrary is upon the person who makes the sale unless that person takes from the purchaser a certificate to the effect that the property or taxable service is purchased for resale, or otherwise exempt from the tax.

. . .

It is apparent that the purchase of books and other materials from the supplier without paying a sales or use tax is illegal, albeit it is not clear whether it is the supplier or the employes who are at fault as the record does not indicate why the employes had not been charged the tax on their purchases. There is no evidence that any of the employes have claimed or attempted to utilize the City's tax exempt status. 4/ Nevertheless, the circumstance of sales tax or use tax not being paid on the purchase of tangible, personal property meant for the employes' personal use violates state statutes. Thus, to the extent the nonpayment of sales tax was part of the practice that had been permitted, that aspect constitutes an illegal subject of bargaining over which the City had no obligation to bargain or to maintain as part of the status quo.

4/ The record indicates that the employe orders were made separately from Library orders, shipped separately, and paid for separately, however, the invoices also indicate the orders were for the Madison Public Library to the "SCLS Acct".

The City essentially asserts that the nonpayment of sales tax is part of the benefit the Union is claiming existed and that it is beyond the Commission's authority to permit continuation of the discounts conditioned upon payment of the sales tax. Whether the practice may be considered in its several aspects, with the aspects considered separately and independently, or whether the practice must be considered in all of its aspects as a whole, depends on how and if those aspects are interrelated. In this instance, the discount offered by the suppliers is easily separable from the supplier's failure to charge the employes sales or use tax on their purchases and one aspect is not dependent upon the other. It appears instead that the failure to charge the employes sales tax on their purchases was more an inadvertent than an intentional, albeit improper, "benefit" the supplier was providing. Further, the evidence indicates that it was the supplier's discount to the employes based upon their status as Library employes that has been the primary concern of both parties.

The City also asserts that the practice was not "authorized", since the City's Code of Ethics has prohibited the taking of such a private benefit for as long as the practice has existed, and in fact the Code was even more precise in that regard prior to its being revised. Assuming the City is properly interpreting its Code of Ethics, the problem with the City's argument lies in the parties' Agreements. Section 1.04, Conflicting Ordinances and Resolutions, provides that the terms and conditions of each Agreement shall be adopted by resolution and ordinance and shall supersede ordinances where there is a conflict with the terms of the Agreements. Section 1.04 assumes there may be conflicts between the terms of the Agreements and other City ordinances and provides that the former shall supersede the latter. The "Existing Benefits" provision in the Agreement is obviously a term of those Agreements. Thus, the fact that the Code of Ethics has now been interpreted to prohibit such a benefit as is the subject of these cases, does not of necessity result in a finding that the benefit/practice has not been "authorized" within the meaning of Secs. 16.02 and 17.03. It is clear from the record that the management personnel at the Library have been aware of the practice of permitting Library employes to utilize supplier discounts and utilized the discounts themselves. Thus, there was tacit approval of the practice to the degree the employes and the Union could reasonably assume it was "authorized".

It is therefore necessary to determine whether the decision to end the practice of permitting Library employes to purchase books/materials from suppliers at a discount available only to Library employes constitutes a mandatory subject of bargaining. 5/ Section 111.70(1)(a), Stats., is the

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5/ The Examiner finds no merit to the City's contention that the Union should be precluded from now asserting that the practice involving the suppliers' discount is a mandatory subject of bargaining, since the Union had never made that claim previously in negotiations and had not previously sought a determination of the practice's status from the Commission as provided in Sec. 17.03 of the professionals unit Agreement. As the Union notes, there was not a dispute regarding the practice until Niemi's memorandum of June 28, 1994 was issued discontinuing the practice. The status of the practice not having been previously

starting point for such a determination and provides as follows:

> **111.70 Municipal Employment. (1)** DEFINITIONS. As used in this subchapter:
>
> (a) "Collective bargaining" means the performance of the mutual obligation of a municipal employer, through its officers and agents, and the representatives of its municipal employes in a collective bargaining unit, to meet and confer at reasonable times, in good faith, with the intent of reaching an agreement, or to resolve questions arising under such an agreement, with respect to wages, hours and conditions of employment, and with respect to a requirement of the municipal employer for a municipal employe to perform law enforcement and fire fighting services under s. 61.66, except as provided in sub. (4)(m) and s. 40.81(3) and except that a municipal employer shall not meet and confer with respect to any proposal to diminish or abridge the rights guaranteed to municipal employes under ch. 164. The duty to bargain, however, does not compel either party to agree to a proposal or require the making of a concession. Collective bargaining includes the reduction of any agreement reached to a written and signed document. The municipal employer shall not be required to bargain on the subjects reserved to management and direction of the governmental unit except insofar as the manner of exercise of such functions affects the wages, hours and conditions of employment of the municipal employes in a collective bargaining unit. In creating this subchapter the legislature recognizes that the municipal employer must exercise its powers and responsibilities to act for the government and good order of the jurisdiction which it serves, its commercial benefit and the health, safety and welfare of the public to assure orderly operations and functions within its jurisdiction, subject to those rights secured to municipal employes by the constitutions of this state and of the United States and by this subchapter.

In its decision in West Bend Education Association v. WERC, 121 Wis. 2d 1 (1984), the Wisconsin Supreme Court held that Sec. 111.70(1)(a), Stats., (then Sec. 111.70(1)(d)) is to be interpreted and applied as follows in determining whether a subject of bargaining is mandatory or permissive:

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questioned, there was no reason for the Union to have made such a claim or to have sought a determination prior to Niemi's memorandum.

Sec. 111.70(1)(d) sets forth the legislative delineation between mandatory and nonmandatory subjects of bargaining. It requires municipal employers, a term defined as including school districts, sec. 111.70(1)(a), to bargain "with respect to wages, hours and conditions of employment." At the same time it provides that a municipal employer "shall not be required to bargain on subjects reserved to management and direction of the governmental unit except insofar as the manner of exercise of such functions affects the wages, hours and conditions of employment of the employees." Furthermore, sec. 111.70(1)(d) recognizes the municipal employer's duty to act for the government, good order and commercial benefit of the municipality and for the health, safety and welfare of the public, subject to the constitutional and statutory rights of the public employees.

Sec. 111.70(1)(d) thus recognizes that the municipal employer has a dual role. It is both an employer in charge of personnel and operations and a governmental unit, which is a political entity responsible for determining public policy and implementing the will of the people. Since the integrity of managerial decision making and of the political process requires that certain issues not be mandatory subjects of collective bargaining, *Unified School District No. 1 of Racine County v. WERC,* 81 Wis. 2d 89, 259 N.W.2d 724 (1977), sec. 111.70(1)(d) provides an accommodation between the bargaining rights of public employees and the rights of the public through its elected representatives.

In recognizing the interests of the employees and the interests of the municipal employer as manager and political entity, the statute necessarily presents certain tensions and difficulties in its application. Such tensions arise principally when a proposal touches simultaneously upon wages, hours, and conditions of employment and upon managerial decision making or public policy. To resolve these conflict situations, this court has interpreted sec. 111.70(1)(d) as setting forth a "primarily related" standard. Applied to the case at bar, the standard requires WERC in the first instance (and a court on review thereafter) to determine whether the proposals are "primarily related" to "wages, hours and conditions of employment," to "educational policy and school management and operation," to "'management and direction' of the school system" or to "formulation

> or management of public policy." *Unified School District No. 1 of Racine County v. WERC,* 81 Wis. 2d 89, 95-96, 102, 259 N.W.2d 724 (1977). This court has construed "primarily" to mean "fundamentally," "basically," or "essentially," *Beloit Education Assn. v. WERC,* 73 Wis. 2d 43, 54, 242 N.W.2d 231 (1976).
>
> As applied on a case-by-case basis, this primarily related standard is a balancing test which recognizes that the municipal employer, the employees, and the public have significant interests at stake and that their competing interests should be weighed to determine whether a proposed subject for bargaining should be characterized as mandatory. If the employees' legitimate interest in wages, hours, and conditions of employment outweighs the employer's concerns about the restriction on managerial prerogatives or public policy, the proposal is a mandatory subject of bargaining. In contrast, where the management and direction of the school system or the formulation of public policy predominates, the matter is not a mandatory subject of bargaining. In such cases, the professional association may be heard at the bargaining table if the parties agree to bargain or may be heard along with other concerned groups and individuals in the public forum. *Unified School District No. 1 of Racine County v. WERC,* supra, 81 Wis. 2d at 102; *Beloit Education Asso.,* supra, 73 Wis. 2d at 50-51. Stating the balancing test, as we have just done, is easier than isolating the applicable competing interests in a specific situation and evaluating them.
> (Footnotes omitted)

At pages 7-9.

In its decision in Unified School District No. 1 of Racine County v. WERC, supra, the Wisconsin Supreme Court held:

> "The question is whether a particular decision is primarily related to the wages, hours and conditions of employment of the employees, or whether it is primarily related to the formulation or management of public policy. Where the governmental or policy dimensions of a decision predominate, the matter is properly reserved to decision by the representatives of the people. This test can only be applied on a case-by-case basis, and is not susceptible to "broad and sweeping rules that are to apply across the board to all situations. . ."

At 81 Wis. 2d 102.

Therefore, in this case it must be determined whether the City's prohibition on the acceptance of such a discount, through its application of the Code of Ethics, primarily relates to wages, hours and conditions of employment or to the management and direction of the City or formulation or management of public policy. In doing so, the interests of the employes in maintaining the economic benefit of being able to utilize the discounts provided by the suppliers must be balanced against the City's interests in maintaining the public's trust in the City government and avoiding possible conflicts of interest among its employes. In this case, it is actually the Library's suppliers that provide the economic benefit and the involvement of the City has been to permit the employes to take advantage of the discounts and to place the orders and pick them up at the Library. The discounts vary in amount from five percent to forty-three percent and the value of the economic benefit to an employe varies based on if and how often the employe uses it, the price of the book/materials and the amount of the discount. With the exception of the Christmas season, the number of orders per month generally is at least ten. Thus, the degree of the economic impact of prohibiting the employes from utilizing the discount varies from employe to employe and from order to order. Conversely, the City has a substantial interest in protecting its integrity and maintaining the public's trust in City government. The City asserts that the discounts violate its Code of Ethics because they are only available to Library employes. The Union points out that the City apparently has no problem with its employes receiving other discounts, such as those for the Disney Magic Kingdom Club, Six Flags Great America, Wisconsin Dells and Noah's Ark, it made available to its employes through the City's Human Resources Department. The Union's point would be well taken if it were shown that those discounts were made available from those organizations only to City employes, as opposed to members of the general public. The record, however, is silent on whether such discounts are generally available to the public or restricted to City employes. There is also no evidence that those organizations were doing business with the City or interested in doing so. Therefore, the Examiner does not find the discounts from the Library's suppliers, restricted as it is to the Library's employes, analogous to those discounts or deals available from the Disney Club, Six Flags, etc., noted above.

In School District of Drummond, Dec. No. 17251-B (WERC, 6/82) aff'd, 121 Wis. 2d 126 (1984), the Commission held that an anti-nepotism policy was a mandatory subject of bargaining. The school board adopted and implemented an anti-nepotism policy prohibiting the employment of spouses of school board members for reasons that appear to be similar in some respects to those presumably underlying the City's application of its Code of Ethics to prohibit employes from utilizing discounts from its suppliers. Unlike the case in Drummond, however, the City's prohibiting its Library employes, represented and unrepresented alike, from utilizing the discounts from the Library's suppliers does not have the "heavy, direct and immediate primary relationship" to the employe's wages, such as the anti-nepotism policy had to employe terms and conditions of employment, i.e., termination of employment.

In this case, in weighing the employes' interest in being permitted to take advantage of an economic benefit offered by a third party -- the Library's suppliers -- against the City's interest in maintaining the public's trust and avoiding conflicts of interest, it is concluded that the prohibition imposed by the City through the application of its Code of Ethics is primarily related to the management and direction of the City government in furtherance of its responsibility "to act for the government and good order of the jurisdiction which it serves, its commercial benefit and the. . .welfare of the public to assure orderly operations and functions within its jurisdiction, . . ." That being the case, the City was not obligated to first bargain the decision to apply its Code of Ethics so as to prohibit the practice of permitting Library employes to take advantage of the discounts the Library's suppliers offered to only the Library employes, before implementing its decision. 6/ Thus, in that regard, the City did not refuse to bargain within the meaning of Sec. 111.70(3)(a)4, Stats. However, the impact of the City's decision to cease the practice of permitting the Library employes to utilize the supplier discounts primarily impacts on "wages", and is a mandatory subject of bargaining over which the City was, and is, required to bargain. The City's refusal to bargain the impact of its decision to end the practice has, therefore, been found to be in violation of Sec. 111.70(3)(a)4, Stats., and derivatively, Sec. 111.70(3)(a)1, Stats., and the City has been ordered to fulfill its obligation in that regard.

Dated at Madison, Wisconsin, this 30th day of January, 1996.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By David E. Shaw /s/
David E. Shaw, Examiner

6/ City of Brookfield, Dec. No. 19369-B (WERC, 12/83); City of Madison, Dec. No. 17300-C (WERC, 7/83).