STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, LOCAL UNION NO. 583, AFL-CIO, Complainant, vs. CITY OF BELOIT, Respondent.	Case 128 No. 51730 MP-2953 Decision No. 28270-B

Appearances:

Lawton & Cates, S.C., 214 West Mifflin Street, P.O. Box 2965, Madison, Wisconsin 53701-2965, by Mr. Richard V. Graylow and Mr. John C. Talis, for the Complainant.

Mr. Bruce K. Patterson, Employee Relations Consultant, P.O. Box 51048, New Berlin, Wisconsin 53151-0048, for the Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

International Association of Fire Fighters, Local Union No. 583, AFL-CIO, on October 27, 1994 filed a complaint of prohibited practices with the Wisconsin Employment Relations Commission in which it alleged the City of Beloit had committed prohibited practices within the meaning of Chapter 111, Stats. On January 4, 1995, the Commission appointed Marshall L. Gratz, a member of its staff, to act as Examiner, to make and issue Findings of Fact, Conclusions of Law and Order pursuant to Sec. 111.07(5), Stats. On March 22, 1995, in order to accommodate the parties' joint request that the complaint case be adjudicated by the same WERC staff member assigned to the related grievance arbitration case, Arbitrator Jane B. Buffett, was substituted as Examiner. Hearing was held on March 29, 1995, in Beloit, Wisconsin. A transcript was taken and received April 23, 1995. Briefs and reply briefs were filed, the last of which was received July 12, 1995. The Examiner, having considered the evidence and arguments of the parties, and being fully advised in the premises, makes and issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. International Association of Fire Fighters, Local Union No. 583, AFL-CIO, (the Union), is a labor organization. Its President is Terry Hurm, 524 Pleasant Street, Beloit, Wisconsin 53511.

2. The City of Beloit (the City), is a municipal employer with offices at 100 State Street, Beloit, Wisconsin 53511.

3. The parties are signatories to a series of collective bargaining agreements. At the the opening of bargaining for the 1992-1994 contract, the Union submitted to the City its proposals including the following notation:

> ADD TO CONTRACT - A definition of "Light Duty". Also add that only 40 hr/week employees who are not in the bargaining unit can only replace 53 hr/week employees while an emergency condition is occuring [sic].

On November 15, 1991, the contract for the 1992-1994 term was signed. It did not contain any new provision addressing light duty.

4. The Union usually presented duplicate copies of its bargaining proposals to Fire Chief Gerald Buckley and Personnel Director Alan Tollefson. The Chief is part of the City's negotiating team.

5. On July 29, 1993, Union Vice President Gary Schenck, Union Treasurer Bill Hoefer, Chief Buckley and Assistant Chief James Reseberg met to discuss light duty policy. No resolution was reached at that meeting.

6. On August 3, 1993, Union President Terry Hurm wrote to Chief Buckley that the Union Executive Board had met in response to the July 29, 1993 meeting and decided it would like to meet again with the City after researching the issue. The memo also asserted it would consider any implementation of light duty a grievable offense.

7. On November 3, 1993 Union President Terry Hurm sent the following memo to Chief Buckley:

> Chief Buckley,
> Local #583 has put together this light duty policy. Plese [sic]

review it with your staff and let me know what you think.

Feel free to contact me if you have any questions.

. . .

Proposed Light Duty Policy

A. At the option of an employee who is on sick leave, non-duty injury leave, duty injury, or duty sick leave, and who is released by a physician, to work on light duty, shall be offered light duty assignments within the fire department, and with no loss of pay or benefits. Employees who are released for light duty work by a physician will not be required to report for duty during the twenty-four (24) hour period following the day such release is signed by the physician. Any employee who is on non-duty sick leave, or non-duty injury leave shall have the option to work light duty or use his/her sick leave.

B. If a member has a vacation scheduled while on light duty, they shall be entitled to their regular vacation selection as if they normally would have had it on a duty shift.

Chief Buckley told Union President Hurm he doubted the City would be willing to reopen the contract to rebargain light duty. The City did not respond further to the proposal.

8. On June 2, 1994, Chief Buckley wrote Shift Commander Brian Brown, an employe on workers' compensation leave whose doctor had released him for work with medical restrictions, that he should report June 6, 1994 for light duty on a forty-hour week basis in the Inspection Bureau.

9. On June 2, 1994, Union President Hurm and Shift Commander Brown met with Chief Buckley to challenge the light duty assignment.

10. Since April, 1987, six employes who had suffered duty-incurred injuries or illness have been assigned light duty on a forty-hour week for periods of time varying from two to eleven weeks. With one exception, employes on worker's compensation leave who have not been assigned light duty were employes who were either not given a medical release for light duty or employes for whom the nature of the injury or illness was in dispute with the workers' compensation carrier. The one exception involved fire fighter Kenneth Sands, whose injury and potential to perform light duty occurred over a weekend.

11. By failing to respond to the Union's November 3, 1993 proposal, the City did not fail to bargain over a proposal for which it had an obligation to bargain.

12. By ordering Shift Commander Brian Brown to light duty on June 6, 1994, the City was not making a unilateral change in wages, hours or working conditions.

CONCLUSIONS OF LAW

1. By failing to respond to the Union's November 3, 1993 proposal, the City did not refuse to bargain in violation of Sec. 111.70(3)(a)1 or 4, Stats.

2. By ordering Shift Commander Brian Brown to light duty on June 6, 1994, the City did not violate its duty to bargain, and therefore did not violate Sec. 111.70(3)(a)1 or 4, Stats.

ORDER 1/

The Complaint should be, and hereby is, dismissed.

Dated at Madison, Wisconsin, this 17th day of November, 1995.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Jane B. Buffett /s/
Jane B. Buffett, Examiner

(Footnote 1/ appears on the next page.)

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 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).

THE CITY OF BELOIT

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

BACKGROUND

During bargaining for the 1992-94 collective bargaining agreement, the Union raised the issue of light duty. Bargaining concluded, however, without the inclusion of any light duty provision and the contract was executed on November 15, 1991. During the term of that contract, on July 29, 1993, Union Vice President Gary Schenck and Union Treasurer Bill Hoefer met with Chief Gerald Buckley and Assistant Chief James Reseberg to discuss the Union's interest in creating a light duty policy. No resolution was reached at that meeting, but the Union subsequently informed the City that it wished to pursue the issue and on November 3, 1993, it sent a proposed contract provision to Chief Gerald Buckley. The City did not respond formally.

On June 2, 1994, the City ordered Brian Brown, an employe on worker's compensation leave who had been released by his doctor with medical restrictions, to report for light duty.

The Union filed the instant prohibited practice complaint, alleging that the City had violated its duty to bargain by failing to negotiate over the Union's November 3, 1993 proposal and by ordering Shift Commander Brown to report for light duty on June 6, 1994.

POSITIONS OF THE PARTIES

The Union

The Union contends that a light duty program is a mandatory subject of bargaining, and that the City therefore violated its duty to bargain when it did not respond to the Union's proposal made through its President, Terry Hurm. It asserts the City unilaterally developed and implemented a light duty policy. It rejects the City's argument that the right to bargain light duty had been waived by the 1992-94 contract. It argues that nothing in the contract demonstrated waiver and cites case law for the proposition that a waiver of the right to bargain must be clear and unmistakable and potential waivers are interpreted restrictively.

The City

The City asserts that the Union waived its right to bargain over light duty during the term of the 1992-1994 contract because it introduced proposals on the topic during the bargaining for that contract, but concluded bargaining without the inclusion of such a provision. Furthermore, the City was not obligated to bargain because the Union made its proposal to Chief Gerald Buckley who was not a bargaining agent for the City. As to ordering an employe with a duty-incurred injury to light duty, the City asserts it had a long-standing practice of such assignments.

DISCUSSION

City's Alleged Refusal to Bargain by its Failure to Respond to the November 3, 1993 Proposal

Section 111.70(3)(a) Stats., provides that it is a prohibited practice for a municipal employer to refuse to bargain with its employes' exclusive bargaining representative. This duty to bargain persists during the term of a collective bargaining agreement for all mandatory subjects except those which are covered by the contract or those for which the union has waived its bargaining rights either by bargaining history or specific contract language. 2/ In this case, the Union asserts and the City does not deny that light duty is a mandatory subject of bargaining. For purposes of analysis herein, the Examiner assumes, but does not reach, that conclusion.

The City argues that the Union did not properly present its demand to bargain because the proposal was presented to Chief Buckley rather than the City Manager or Personnel Director.

To the contrary, this Examiner concludes that the Union's actions were sufficient to be deemed a demand to bargain even though the Union discussed its concerns with Chief Buckley and presented its written proposal to him rather than to the Personnel Director or the City Manager. Chief Buckley had been a member of the City's bargaining team, and in the past the Union had given bargaining proposals to him at the same time that it submitted them to Personnel Director Alan Tollefson. Given that history, the Union could reasonably assume that Chief Buckley could either act as the City's bargaining representative or transmit the proposal to someone who could so act.

Even though the Union's actions established a demand to bargain, the question remains whether the City had a duty to bargain with the Union in response to the November 3, 1993 proposal or whether the Union had waived its right to bargain by raising the issue of light duty in negotiations but agreeing to a contract that lacked such a provision.

At the outset it must be noted that the Commission applies a rigorous standard to the question of determining whether the right to bargain has been waived, requiring that the waiver be clear and unmistakable. 3/ In State of Wisconsin 4/ the Commission set forth the principle that blanket waivers of bargaining rights found in contract provisions will not be expansively interpreted to waive the Union's right to bargain when the employer institutes a unilateral change in wages, hours, or conditions of employment. Furthermore, in City of Madison, 5/ the Commission did not

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2/ Cadott School District, Dec. No. 27775-C (WERC, 6/94).

3/ State of Wisconsin, Dec. No. 13017-D (WERC, 5/77).

4/ Ibid.

5/ Dec. No. 15095 (WERC, 12/76).

find that the labor organization had waived its right to bargain by proposing, but not attaining, provisions on the topic in dispute.

At first blush, this case law might appear to support a conclusion that there was no waiver in this case. In its argument, however, the Union confuses the right to bargain in response to a unilateral change with the right to bargain during the term of a contract in the absence of such a change. In Menominee Indian School District 6/ cited by the Union, as in the many cases which have a similar fact pattern, the employer had implemented a unilateral change in wages, hours or conditions of employment, and when the union responded by seeking to bargain over the change, the employer had sought to demonstrate that the union had waived its right to bargain. These are the cases in which the Commission finds a blanket waiver clause in the contract insufficient to waive the right to bargain.

The instant case does not follow such a fact pattern. When, on November 3, 1993, the Union made a light duty proposal, the City had not implemented any unilateral change, even in the eyes of the Union. There was no such stimulus for the Union's proposals. Instead, the Union was simply trying to raise once more, during the term of the contract, an issue it had raised in negotiations. If the City were willing to reconsider the issue of light duty, it could. However, the Union does not have the right to compel bargaining on a previously negotiated item, for the City was entitled to rely on whatever bargain the parties had struck. 7/ This principle holds equally true for items considered, but not included in the collective bargaining agreement, as well as for those items included.

The right to revisit subjects already bargained in the absence of a unilateral change is clearly distinguishable from the rights vindicated in the Union's legal authorities.

This conclusion is not altered by a consideration of the holding of City of Milwaukee. 8/ In citing that case for the proposition that bargaining table conduct cannot waive statutory rights, the Union gives undue breadth to the case's holding. In City of Milwaukee, the employer had argued that by proposing and not attaining a contract provision regarding union representation of an employe during an investigatory hearing, the union had waived, not its right to bargain, but the employes' statutory right to representation. The Commission resoundingly refused to find such a waiver of a statutory right. While that case stands for the proposition that negotiating conduct does

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6/ Dec. No 24401-A (Houlihan, 11/87), aff'd by operation of law, Dec. No. 24401-B (WERC, 12/87). In Menominee the employer had installed a time clock which had wage implications, and refused to bargain on the grounds that a blanket waiver, or "zipper" clause in the contract had waived the union's bargaining rights.

7/ City of Madison (Fire Department), Dec. No. 27757-B (WERC, 10/94).

8/ Dec. Nos. 14873-B, 14875-B & 14899-B (WERC, 8/80).

not waive a related statutory right, it does not lead to a conclusion that waiver of the right to bargain can never result from bargaining table conduct.

The record shows that the Union raised the issue of light duty during negotiations for the 1992-94 contract and there is no showing that the City failed to respond in bargaining. The Union therefore, availed itself of the opportunity to bargain light duty during contract negotiations. Since there is no allegation that the City made a unilateral change prior to the Union's November 3, 1993 proposal, the City had no further obligation to bargain in response to that proposal.

City's Alleged Unilateral Change in Wages Hours and Conditions of Employment

A municipal employer's duty to bargain, created by Sec. 111.70(3)(a)4, Stats., includes a duty to refrain from making a unilateral change in wages, hours or conditions of employment without bargaining to impasse if requested by the union. 9/ The Union argues that ordering Shift Commander Brown to light duty after the Union contested the assignment was such an unlawful unilateral change of working conditions.

The record, however, does not support such an assertion. Other employes on worker's compensation leave who were medically released for restricted duty were ordered to perform light duty. Like Shift Commander Brown, they were required to change to a forty-hour a week schedule in order to perform light duty. The City's practice of making such assignments was demonstrated by the six employes who were assigned to light duty for periods ranging in length from two to eleven weeks during the seven-year period preceding the light duty assignment made to Shift Commander Brown. The one fire fighter who fit into this category but had not been assigned light duty had been medically released with restrictions for only one weekend when the Chief was not available to make the assignment. The only other apparent exceptions involved instances in which the worker's compensation claim was in dispute.

Given that record, the Examiner concludes that the assignment of light duty under circumstances similar to those of Shift Commander Brown's was an ongoing practice of the City. As an ongoing practice, it cannot be characterized as a unilateral change in working conditions. Consequently, the assignment did not impose upon the City a duty to bargain with the Union.

9/ City of Madison, cited at footnote 5 herein, at p. 18.

Summary

When the Union sought to bargain light duty during negotiations for the 1992-1994 contract, it waived its right to again demand bargaining over the subject on November 3, 1993, during the term of the contract, when the City had not taken any action regarding light duty. When the City assigned Shift Commander Brown to light duty on a forty-hour schedule, on June 2, 1994, it was following its standard practice and was not making a unilateral change in wages, hours and conditions of employment. Accordingly, in neither case did the City commit a prohibited practice and the complaint is dismissed.

Dated at Madison, Wisconsin this 17th day of November, 1995.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Jane B. Buffett /s/
Jane B. Buffett, Examiner