

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of

CITY OF NEW LISBON

Requesting a Declaratory Ruling Pursuant to Sec. 111.70(4)(b), Stats.,
Regarding a Dispute Between Said Petitioners

and

NEW LISBON CITY EMPLOYEE'S UNION LOCAL 569-A, AFSCME, AFL-CIO

Case 10
No. 55235
DR(M)-584

Decision No. 29208

APPEARANCES

Curran, Hollenbeck & Orton, S.C., Law Offices, by **Mr. Fred D. Hollenbeck**, 111 Oak Street, PO Box 140, Mauston, Wisconsin, 53948-0140, for the City

Mr. David White, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 8033 Excelsior Drive, Suite B, Madison, Wisconsin, 53717-1903, for the Union.

ORDER GRANTING MOTION TO DISMISS

On May 20, 1997, the City of New Lisbon advised the Wisconsin Employment Relations Commission as follows:

The City and Union have at least tentatively scheduled an arbitration hearing before Justice Callow on June 4. Enclosed is a copy of the final offers

of each of the parties.

Section 111.70(4)(cm)(6)(g) provides that if a question arises as to whether any proposal made in negotiations by either party is a mandatory, permissive or prohibited subject of bargaining, the commission shall determine the issue pursuant to paragraph (b).

Section 111.70(4)(b) provides that such dispute shall be resolved by the commission on petition for a declaratory ruling.

Please consider this letter a petition for declaratory ruling on each of the issues set forth in both final proposals. Some of the issues are obvious but some are not.

It is important to get your ruling prior to the hearing because 111.70(4)(cm)(6)(g) prohibits the arbitrator from adopting anything other than mandatory subjects of bargaining.

On May 27, 1997, the Commission received the following written response from Local 569-A, AFSCME:

I have received a copy of Mr. Hollenbeck's letter to you, dated May 19, 1997, in which he petitions for a declaratory ruling on all issues set forth in both final offers of the parties. A copy of his letter is enclosed, for reference.

The Union requests that this petition be dismissed as untimely. ERB 32.11 of the Wisconsin Administrative Code sets for the procedure for raising objection that proposals relate to nonmandatory subjects of bargaining. The procedure requires that the objecting party can raise the objection at any time during negotiations, but prior to the close of the investigation. When such an objection is properly raised, the offers of the parties are not to be deemed final offers. ERB 32.12 provides that following the issuance of an objection, the objecting party has ten days to file a petition for declaratory ruling.

In the instant case, the City has failed to raise any objection that the Union's offer contained a non-mandatory subject prior to the close of the investigation. Even if it had so raised an objection, it did not follow up with a formal petition for a declaratory ruling within the ten day time limit set forth in ERB 32.12.

In such a case, ERB 32.12 (3) provides that failure to file a petition within ten days of the issuance of an objection (which must come **before** the investigation

is closed and the offers certified), constitutes a waiver of any objection, and the contents of the offers are treated as mandatory subjects.

I would note that the offers in this case have been certified since January 22, 1997. I would also note that it appears from Mr. Hollenbeck's letter that he wishes to call into question not only all of the Union's proposals, but all of the City's proposals as well. Given these two facts, the Union is of the opinion that the purpose of the petition is not so much to raise legitimate questions regarding whether there are non-mandatory issues in the final offers, but rather an attempt to delay the June 4 hearing.

Therefore, the Union asks that the City's petition for declaratory ruling be dismissed.

By letter dated May 30, 1997, the Commission advised the parties as follows:

At your earliest convenience, please file any response you wish to make to Mr. White's May 22, 1997, letter/motion seeking dismissal of your petition for declaratory ruling. In your response, please advise the Commission whether you believe it can proceed to rule on Mr. White's May 22, 1997, letter/motion after consideration of your response thereto (and after taking notice of the content of the INT/ARB file) or whether a hearing and/or opportunity for additional argument is required.

In any event, absent some resolution of this matter which you and Mr. White reach in the next day or two, it is highly unlikely that the Commission will be in a position to rule on the motion prior to June 4. I encourage you and Mr. White to satisfy yourselves that Arbitrator Callow is fully aware of the status of this matter so that he/you do not incur needless expense.

On June 3, 1997, the Commission received the following response from the City:

This is in response to your letter of May 30 which I received when I returned to the office this afternoon.

Contrary to Mr. White's conclusion, it was not my intention to even ask for a delay in the hearing of the issues. We are prepared and ready to proceed on June 4.

As we are all aware, Section 111.70(4)(cm)(6)(d) provides that the arbitrator is to adopt, without further modification, the final offer of one of the parties on all disputed issues except those items that the commission

_____ determines not to be mandatory subjects of bargaining and those items which
_____ have not been treated as mandatory subjects by the party.

We feel it would be extremely helpful for Justice Callow as arbitrator to know which items the Commission determines not to be mandatory subjects of bargaining. It is not particularly significant that we have your ruling on those subjects prior to the hearing but, of course, it is significant that we have your ruling prior to the preparation of and issuance of the ultimate decision. Since we do not anticipate a decision on this matter on the day of the hearing, and since we anticipate that the decision will be issued after receipt of post-hearing briefs, it is probably immaterial that the issue be decided prior to the actual hearing.

It is, obviously, mandatory under the statute that the Commission make the determination provided for and we look forward to receipt of your decision on that subject at your convenience.

By letter dated June 9, 1997, the City confirmed that the letter received by the Commission on June 3, 1997, was the City's response to Local 569-A's Motion to dismiss the petition.

Having considered the matter and being fully advised in the premises, the Commission makes and issues the following

ORDER

The petition for declaratory ruling filed by the City of New Lisbon is dismissed as untimely.

Given under our hands and seal at the City of Madison, Wisconsin, this 8th day of October 1997.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Meier /s/
James R. Meier, Chairperson

A. Henry Hempe /s/
Henry Hempe, Commissioner

Paul A. Hahn /s/
Paul A. Hahn, Commissioner

City of New Lisbon

MEMORANDUM ACCOMPANYING ORDER GRANTING
MOTION TO DISMISS

As reflected in the preface to our Order and in the interest arbitration file (CITY OF NEW LISBON, CASE 8, NO. 52439, INT/ARB-7609), the petition for declaratory ruling was filed shortly before the parties' hearing with Interest Arbitrator Callow.

The City believes its petition is timely under Secs. 111.70(4) (b) and (c) 6.d. and g., Stats., Local 569-A cites ERC 32.11 and 32.12 in support of its position that the petition is untimely because it was not filed prior to the close of the investigation into the interest arbitration petition.

Section 111.70(4)(b), Stats., provides only that:

(b) *Failure to bargain.* Whenever a dispute arises between a municipal employer and a union of its employees concerning the duty to bargain on any subject, the dispute shall be resolved by the commission on petition for a declaratory ruling. The decision of the commission shall be issued within 15 days of submission and shall have the effect of an order issued under s. 111.07. The filing of a petition under this paragraph shall not prevent the inclusion of the same allegations in a complaint involving prohibited practices in which it is alleged that the failure to bargain on the subjects of the declaratory ruling is part of a series of acts or pattern of conduct prohibited by this subchapter.

Thus, the statute under which the City filed its petition does not place any limitation on the timing of a petition. Nor do the provisions of our administrative rules relative to Sec. 111.70(4)(b), Stats., (ERC 18) create any such limitation.

However, following the legislative creation of interest arbitration for municipal employees other than those engaged in law enforcement and fire fighting functions (Chapter 178 Laws of 1977), the Commission was confronted with the need to address the question of whether the timing of a petition for declaratory ruling should be restricted in the context of an interest arbitration proceeding. In CITY OF WAUWATOSA, DEC. NO. 16910-A (WERC, 5/79), the Commission explained how and why it addressed this question as follows:

DISCUSSION:

Section 111.70(4)(cm)6.a. of MERA reads in relevant (*sic*) part as follows:

- a. Upon receipt of a petition to initiate mediation-arbitration, the commission shall make an investigation, with or without a formal hearing, to determine whether mediation-arbitration should be commenced Prior to the close of the investigation each party shall submit in writing its single final offer containing its final proposals on all issues in dispute to the commission. Such final offers may include all mandatory subjects of bargaining. Permissive subjects of bargaining may be included by a party if the other party does not object and shall then be treated as a mandatory subject. No later than such time, the parties shall also submit to the commission a stipulation, in writing, with respect to all matters which are agreed upon for inclusion in the new or amended collective bargaining agreement. The commission, after receiving a report from its investigator and determining that mediation-arbitration should be commenced, shall issue an order requiring mediation-arbitration and immediately submit to the parties a list of 5 mediator-arbitrators (emphasis added)

Pursuant to the mandate of 111.70(4)(cm)8. of MERA that "the commission shall adopt rules for the conduct of mediation-arbitration proceedings under sub d.6...." the Commission adopted the following rules relevant (*sic*) herein.

ERB 31.09 Informal investigation or formal hearing.

(2) INFORMAL INVESTIGATION PROCEDURE. The commission or its agent shall set a date, time and place for the conduct of informal investigation and shall notify the parties thereof in writing. The informal investigation may be adjourned or continued as the commission or its agent deems necessary. During said investigation the commission or its agent may meet jointly or separately with the parties for the purposes described in subsection (1) above. Prior to the close of the investigation the investigator shall obtain in writing the final offers of the parties on the issues in dispute, as well as a stipulation in writing on all matters agreed upon to be included in the new or amended collective bargaining agreement. At the same time the parties shall exchange copies of their final offers, and shall retain copies of such stipulation, and if at said time, or during any additional time permitted by the investigator, no objection is raised that either final offer contains a proposal or proposals relating to non mandatory subjects of bargaining, the commission agent shall serve a notice in writing upon the parties indicating the investigation is closed...(emphasis added)

ERB 31.10 Final offers. Final offers shall contain proposals relating only to mandatory subjects of bargaining, except either final offer may contain proposals relating to permissive subjects of bargaining if there is no timely objection by the other party to the inclusion of such proposals in such final offer, and lacking such timely objection, such proposals shall be treated as mandatory subjects of bargaining. (emphasis added)

ERB 31.11 Procedure for raising objection that proposals relate to non-mandatory subjects of bargaining. (1) TIME FOR RAISING OBJECTION. Any objection that a proposal relates to a non-mandatory subject of bargaining may be raised at any time after the commencement of negotiation, but prior to the close of the informal investigation or formal hearing. (emphasis added)

(a) During negotiations, mediation or investigation. Should either party, during negotiations or during commission mediation or investigation raise an objection that a proposal or proposals by the other party relate to a non-mandatory subject of bargaining, either party may commence a declaratory ruling before the commission pursuant to s. 111.70(4)(b), Stats., and chapter ERB 18, Wis. Adm. Code seeking a determination as to whether the proposal or proposals involved relate to a non-mandatory subject or subjects of bargaining.

(b) At time of call for final offers. Should either party, at such time as the commission or its agent calls for and obtains and exchanges the proposed final offers of the parties, or within a reasonable time thereafter as determined by the commission or its investigator, raise an objection that a proposal or proposals by the other party relate to a non-mandatory subject of bargaining, such offers shall not be deemed to be final offers and the commission or its agent shall not close the investigation or hearing but shall direct the objecting party to reduce the objection to writing, identifying the proposal or proposals claimed to involve a non-mandatory subject of bargaining and the basis for such claim. Such objection shall be signed and dated by a duly authorized representative of the objecting party, and copies thereof shall, on the same date, be served on the other party, as well as the commission or its agent conducting the investigation or hearing, in the manner and within such reasonable time as determined by the commission or its investigator. (emphasis added)

(2) EFFECT OF BARGAINING ON PERMISSIVE SUBJECTS.
Bargaining with regard to permissive subjects of bargaining during negotiations and prior to the close of the investigation shall not constitute a waiver of the right to file an objection as set forth in par. (1)(b) above.

ERB 31.12 Petition or stipulation to initiate a declaratory ruling proceeding to determine whether a proposal or proposals relate to mandatory subjects of bargaining. (1) WHO MAY FILE. Either party may file a petition, or both of the parties may file a stipulation, to initiate such a declaratory ruling before the commission.

(3) WHEN TO FILE. Such a petition or stipulation may be filed with the commission during negotiations, mediation or investigation. If such a petition or stipulation is filed after the investigator calls for final offers, such a petition or stipulation for declaratory ruling must be filed within 10 days following the service on the commission or its investigator of the written objection that a proposal or proposals relate to nonmandatory subjects of bargaining. Failure to file such a petition or stipulation within this time period shall constitute a waiver of the objection and the proposal or proposals involved therein shall be treated as mandatory subjects of bargaining.

(4) PROCEDURE FOLLOWING ISSUANCE OF DECLARATORY RULING. Following the issuance and service of the declaratory ruling, the commission or its investigator shall conduct further investigation or hearing for the purpose of obtaining the final offer of each party before closing the investigation. Neither final offer may include any proposal which the commission has found to be a nonmandatory subject of bargaining unless consented to in writing by the other party. Should the commission's decision be appealed the parties may agree to the conditional inclusion of such proposals in their final offers.

The legislative intent expressed in Section 111.70(4)(cm)6.a. is that final offers may contain permissive subjects of bargaining if the other party does not object, in which case the permissive subject(s) shall be treated as mandatory for purposes of a petition for mediation-arbitration. Clearly, by said provision, the legislature intended that the failure of one party to object to the inclusion of a permissive subject of bargaining would result in a waiver of the right to object. It left open the question of when or how such objection should be made.

In implementing said legislative intent, the Commission had several options available to it. First of all, it could have adopted a rule establishing a requirement that any objection to an allegedly permissive proposal must be made when the proposal is first made or shortly thereafter. This would insure that the proponent was aware of the objection and provide the parties with a sufficient amount of time to secure a declaratory ruling under Section 111.70(4)(b) of MERA as contemplated by Section 11.70(4)(cm)6.g. 1/ On the other hand, such an approach would often have held up negotiations pending resolution of the issue even though the Commission's experience has shown that the parties are frequently able to "bargain around" disputes over the bargainability of a particular proposal. For this reason Section ERB 31.11(1)(a) and (2), Wis. Adm. Code provides that either party may raise an objection to a proposal during the negotiation, mediation or investigation stages of the statutory procedure by filing a petition for a declaratory ruling but that it does not waive its right to later object at the time of the call for final offers if it declines to do so and instead attempts to "bargain around" the problem.

Secondly, the Commission could have adopted a rule which allowed a party to object to a proposal sometime after the close of the investigation but before an arbitration award including such an item is issued. This approach would have afforded the parties the maximum amount of time possible to "bargain around" the problem but would have resulted in a situation where one party could cause a delay at a very critical stage of the proceedings, i.e., after an impasse had been reached and perhaps at a time when the parties were considering whether to withdraw their final offers. Furthermore, such a rule would permit one party to wait until the investigation is closed before advising the other party of its objection and thereby eliminate the other party's opportunity to change its final offer by modifying or eliminating the allegedly offending proposal, since final offers may not be changed after the close of the investigation without the consent of the other party. 2/ For this reason the Commission adopted a rule which permits either party to withhold the filing of an objection to a proposal alleged to be a permissive subject of bargaining until after the call for final offers but before the investigation is closed. If need be, the investigator has the power under ERB 31.09(2) and ERB 31.11(1)(b), Wis. Adm. Code, to hold the investigation open to allow a party a reasonable amount of time to file such an objection which must be reduced to writing and served on the other party. Once an objection is filed ERB 31.12(3), Wis. Adm. Code, gives the objecting party ten days in which petition or stipulation for a declaratory ruling.

1/ Section 111.70(4)(cm)6.g. reads in pertinent part as follows: If a question arises as to whether any proposal made in negotiations by either party is a mandatory, permissive or prohibited subject of bargaining, the commission shall determine the issue pursuant to par. (b), the proceedings under subd. 6.c and d shall be delayed until the commission renders a decision in the matter, but not during any appeal of the commission order. The mediator-arbitrator's award shall be made in accordance with the commission's ruling, subject to automatic amendment by any subsequent court reversal thereof.

2/ See Section 111.70(4) (cm)6.d. of MERA and Section ERB 31.16(5), Wis. Adm. Code.

As is apparent from the foregoing, the Commission concluded that the language of Secs. 111.70(4)(b) and (cm)6.a.c.d. and g., Stats., could support a conclusion that petitions for declaratory ruling could be filed anytime prior to the issuance of an arbitration award. However, as is also apparent from the foregoing, the Commission concluded that there were sound policy reasons for taking a different approach and adopting administrative rules requiring that a petition be filed prior to the close of the investigation. Consistent with our administrative rules (the applicable successors to ERB 31.09-31.12 are ERC 32.09-32.12), we have consistently dismissed petitions for declaratory ruling which are not so filed. See CITY OF WAUWATOSA, SUPRA.; CITY OF BROOKFIELD, DEC. NO. 19735 (WERC, 7/82); DOOR COUNTY, DEC. NO. 27158 (WERC, 2/92).

Given all of the foregoing, we hereby dismiss the City's petition as untimely because it was filed after the close of the interest arbitration investigation.

Given under our hands and seal at the City of Madison, Wisconsin, this 8th day of October 1997.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Meier /s/
James R. Meier, Chairperson

A. Henry Hempe /s/
Henry Hempe, Commissioner

Paul A. Hahn /s/
Paul A. Hahn, Commissioner

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