

STATE OF WISCONSIN  
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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**GREEN BAY POLICE BARGAINING UNIT**, Complainant,

vs.

**CITY OF GREEN BAY and JAMES M. LEWIS, CHIEF OF POLICE,**  
Respondents.

Case 281  
No. 56529  
MP-3430

**Decision No. 29469-A**

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Appearances:

Parins Law Firm, S.C., by **Attorney Thomas J. Parins**, 125 South Jefferson Street, Suite 201, P.O. Box 1626, Green Bay, WI 54305, appearing on behalf of the Bargaining Unit.

**Mr. Daniel M. Olson**, Assistant City Attorney, City of Green Bay, 100 North Jefferson Street, Room 200, Green Bay, WI 54301-5026 appearing on behalf of the City of Green Bay.

**FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER**

Daniel J. Nielsen, Examiner: On May 28, 1998, the Green Bay Police Bargaining Unit (hereinafter referred to as either the Union or the Complainant) filed a complaint with the Wisconsin Employment Relations Commission asserting that the City of Green Bay and Police Chief James M. Lewis (hereinafter referred to as either the City or the Respondent) had committed a prohibited practice within the meaning of Secs. 111.70(3)(a)4 and 5 of the Municipal Employment Relations Act (MERA), by unilaterally removing the position of Communication/Communications Officer-Specialist (Computer Officer) from the bargaining unit and replacing it with the non-unit position of PC Network Technician. The complaint was held in abeyance for a period of time. On September 2, 1998, it was placed on active status and the Commission appointed Daniel J. Nielsen, an examiner on its staff, to conduct a hearing on the matter and to make and issue appropriate Findings of Fact, Conclusions of Law and Orders.

No. 29469-A

A hearing was scheduled for December 8, 1998, but was postponed after the Complainant submitted an amended complaint, alleging other violations connected with overtime allocation and denial of requested information. An Answer to the amended complaint was filed on December 30th. A hearing was held on January 25, 1999, in Green Bay. In mediation prior to the hearing, the parties came to an agreement on the overtime and information issues, and these elements were dismissed on the record. The original dispute over the Computer Officer remained, and the parties were afforded full opportunity to present such testimony, exhibits, other evidence and arguments as were relevant to that dispute. A transcript of the hearing was prepared, and was received by the Examiner on February 21, 1999. The parties submitted post-hearing briefs which were exchanged through the Examiner on April 14, 1999, whereupon the record was closed.

Now having considered the evidence, the arguments of the parties, the statutes and the record as a whole, the Examiner makes and issues the following Findings of Fact, Conclusions of Law and Order.

**To maximize the ability of the parties we serve to utilize the Internet and computer software to research decisions and arbitration awards issued by the Commission and its staff, footnote text is found in the body of this decision.**

### **FINDINGS OF FACT**

1. The City of Green Bay, hereinafter referred to as the City or the Respondent, is a municipal employer providing general governmental services to the people of Green Bay in northeastern Wisconsin.

2. Among the services provided by the City, is the operation of a police department. James M. Lewis is the Chief of Police for the City. James Kalny is the City's Director of Human Resources.

3. The Green Bay Police Bargaining Unit, hereinafter referred to as the Union or the Complainant, is a labor organization, representing the City's sworn law enforcement officers. Attorney Thomas J. Parins is the principal representative for the Union.

4. The Union and the City are parties to a labor agreement which provides, inter alia:

. . .

## ARTICLE 1 RECOGNITION/MANAGEMENT RIGHTS

. . .

1.01 UNIT. The City agrees to recognize the Bargaining Unit as the bargaining agent for all full-time personnel of the Police Department having powers of arrest employed by the City, excluding the rank of Chief, Assistant Chief, Captain and Lieutenant in the matter of wages, hours and working conditions. Prior to any negotiation, the City shall be furnished with a list of the membership of the Bargaining Unit.

. . .

1.03 MANAGEMENT RIGHTS. The Union recognizes the prerogative of the City, subject to its duty to collectively bargain, to operate and manage its affairs in all respects in accordance with its responsibilities, and the powers and authority which the City has not abridged, delegated or modified by this Agreement, are retained by the City, including the power of establishing policy to hire all employees, to determine qualifications and conditions of continued employment, to dismiss, demote, and discipline for just cause, to determine reasonable schedules of work, to establish the methods and processes by which such work is performed. The City further has the right to establish reasonable work rules, to delete positions from the Table of Organization due to lack of work, lack of funds, or any other legitimate reasons, to determine the kinds and amounts of services to be performed as pertains to City government and the number and kinds of classifications to perform such services, to change existing methods or facilities, and to determine the methods, means and personnel by which City operations are to be conducted. The City agrees that it may not exercise the above rights, prerogatives, powers or authority in any manner which alters, changes or modifies any aspect of the wages, hours or conditions of employment of the Bargaining Unit, or the terms of this agreement, as administered, without first collectively bargaining the same or the effects thereof.

. . .

## ARTICLE 5 SHIFT ASSIGNMENTS

. . .

5.10 ASSIGNMENT OF POSITIONS. (1) Assignments to job or duty positions shall be made only when a vacancy exists, and there shall be no bumping. Job or duty position vacancies shall be posted and assigned on the basis of seniority amongst those bidding as follows:

(a) The positions of Detective Sergeant, Communications Sergeant, Photo-Ident Technician, Range master, Bailiff, and Communications officer shall be first assigned to the most senior Specialist II, and if none bid, then to the most senior Specialist I, and if none bid, then to the most senior Advanced Patrol Officer.

(b) Positions within the uniform Operations Department shall be assigned to the most senior police officer bidding.

5. Prior to April of 1998, the Police Department's computer operations were primarily managed by an employee in the classification of Specialist in the police bargaining unit. This position was variously referred to as a Specialist, the Communications Officer, or the Communications/Computer Officer. For the purposes of this decision, the position is referred to as the Computer Officer. The position was responsible for computer operations and some aspects of the communications systems. Ron Shaha was the incumbent Computer Officer until his retirement in March of 1998. Shaha had originally secured the Computer Officer job through a posting process among qualified officers.

6. At the time of his retirement, Shaha estimated that his primary work responsibilities were divided as follows: Rebuilding and maintaining PC equipment - 30%; Responding to end user questions and concerns - 50%; Loading and upgrading software - 10%; Dealing with the Department's radios - 10%.

7. On learning of Shaha's plan to retire, the City's Human Resource Department investigated the duties of the job and the anticipated needs of the Department, with an eye to determining whether changes needed to be made in the position. Two of the primary questions were whether the position required a sworn police officer and whether it should remain assigned to the Police Department, or should instead be part of the City's Information Services Department. Assistant Human Resources Director Kathy Koehler took the lead on this issue.

8. On April 22nd, Koehler prepared a memo for the City's Personnel Committee. Based on her discussions with Shaha and the Police Department's supervisors, she defined the essential duties that would be expected of Shaha's successor:

. . .

In summary, the essential functions of the position would be: installation and setup of new personal computers, peripherals, phone system equipment and network equipment; responding to and resolving problem calls including help desk requests; training City employees in software and equipment use;

performing routine and preventative maintenance on PC's and printers and as an overall job summary, is responsible for providing technical support for the City's data communication network including computers, radios, telephones, etc.

Based on these duties, Koehler concluded that there was no need for a sworn police officer in this job, and that the position most closely fit the existing classification of PC/Network Technician, which is represented in the AFSCME bargaining unit.

9. The Job Description for PC/Network Technician describes the essential functions and the knowledge, skills and abilities required for the job as:

CITY OF GREEN BAY  
Job Description

I. IDENTIFICATION

Position Title: PC/NETWORK TECHNICIAN  
Dept/Division: Information Services  
Reports To: Information Services Director  
Supervises: None  
Job Summary: Under general supervision, provides technical support for the City's data communications network.

II. ESSENTIAL FUNCTIONS

Responsible for installation and setup of new personal computers, peripherals (printers, plotters, speakers, etc.), phone system equipment and network equipment (hubs, routers, wiring, etc.). Repair and upgrade existing equipment including personal computers, peripherals, network equipment, phones and related wiring, board and disk upgrades, and memory changes. Respond to and resolve problem calls, including Help Desk requests. Perform problem determination, coordination of service calls with vendors and transportation of equipment. Install and configure operating systems and application software. Complete documentation necessary for administrative functions of the department, including time reporting, problem logs, etc. Train City employees in software and equipment use. Perform routine/preventive maintenance on PC's and printers (scan disk, defrag, etc.) on a regularly scheduled basis. Perform fixed asset tracking. Related functions as assigned.

### III. KNOWLEDGE, SKILLS AND ABILITIES

Considerable knowledge of PC and network technology. Knowledge of computer-based telephone systems. Ability to work well with department personnel and customers. Ability to work independently and as a team member. Ability to identify and resolve PC and network support problems. Ability to effectively communicate, both verbally and in writing.

May be required to demonstrate minimum competency by successfully passing approved tests.

### IV. MINIMUM EDUCATION AND EXPERIENCE REQUIRED

1. Associate degree in Microcomputers, Network Support, Computer Science or related field.
2. One to three years technical support-related experience.
3. A good driving record.

A combination of equivalent experience and/or education may be considered.

### V. PHYSICAL REQUIREMENTS

Ability to perform the following activities:

Lifting up to 70 pounds.  
Carrying up to 50 pounds.  
Frequent standing, sitting and crawling.  
Ability to use fine hand tools.

The above is not to be construed as an exhaustive statement of duties, responsibilities or requirements. The above percentages are estimates of actual time spent on identified functions.

10. The Job Description for Specialist, Technical Coordinator for the Communication Division describes the basic functions, duties and responsibilities, and the knowledge, skills and abilities required for the job as:

## Job Description

### GREEN BAY POLICE DEPARTMENT Communication Division

#### I. TITLE

Specialist, Technical Coordinator for the Communication Division

#### II. REPORTING RELATIONSHIP

The Communication Specialist will be directly responsible to the Director of the Communications Division and, through the chain of command, to the Deputy Chief of Administration.

#### III. BASIC FUNCTIONS

- A. To report to the Director of Communications in the matters of supervision and discipline of Communications' personnel as it relates to Department policies and procedures.
- B. To insure all communication and electronic systems are properly maintained so that they are operational for normal and emergency use at all times to include but not limited to radio, computer, telephones and all supporting equipment.
- C. To be the technical coordinator and act as the project manager on various requests that come to the division for automation.
- D. To act as liaison for the Division between street officers, the CCOs, and other Department personnel, to see their requests are coordinated to insure that the automated systems in place serve the needs and measure up to the expectations of all active users for functionality and easy use.
- E. To investigate and identify which automated systems can best meet the law enforcement function, but maintain the required standards and codes set forth to comply with open records, investigative and criminal procedures, making sure rules of evidence, arrest, search and seizure, and the rights of the individual are not violated.
- F. Acts as a liaison for the Green Bay Police Department's Communication Division to the Information Services Department. Works with the Information Services Department as appropriate in computer related matters.

### III. DUTIES AND RESPONSIBILITIES

- A. Performs preventive maintenance and minor routine or emergency repairs, or acts as the Department liaison between the city and its contractors for all equipment under his/her control. This equipment includes, but is not limited to, radios, computers, telephones, radar units, pagers, auto tape recorders, duplicating equipment, building public address system, and vehicle fleet maintenance, i.e. all radio and computer systems in the fleet.
- B. Assists all divisions in the Department with research, development and implementation of any automated systems.
- C. Assists with the preparation of the annual budget for all equipment under his/her control. Makes recommendations to the administration for new equipment and be able to work with other city departments in drawing up bid specifications.
- D. Recommends training for officers and civilian employees as it pertains to all facets of the Communications Division to cover law updates and police procedures for the Department's computer, radio and telephone systems.
- E. Monitors and assists in evaluating CCO job performance.
- F. Monitors and advises the Division Commander when CCOs need to be recertified in order to comply with existing standards, i.e. EMD, CPR, TTY.
- G. Assists in developing and updating all Division SOPs and guidelines for CCO's operation in the 911 Communication Center.
- H. Acts as instructor during department training programs for new employees, roll call and in-service training programs covering all areas of his/her responsibility.
- I. Perform all other duties that may be assigned by his/her supervisors.
- J. Assumes the duties and responsibilities of the Director of Communications in his absence.



IV. KNOWLEDGE, SKILLS AND ABILITIES

- A. To be acquainted with and recognize complaints of all violations of ordinances of the City of Green Bay, and misdemeanors and felonies against the persons and the State of Wisconsin and the United States.
- B. To be completely familiar with the Rules and Regulations relative to criminal procedures of arrest, search and seizure, and the rights of individuals under investigation for any matter.
- C. To be familiar with allied agencies of the city, state, or federal government, for proper referral of matters in all local jurisdictions of department responsibility.
- D. To be familiar with technical aids and general use of such aids in application to investigate activities.
- E. To be familiar with general investigative procedures, sources of information and proper method of reporting same and of following same through correct remedial steps, such as courts or commissions basically assigned to handle these matters.
- F. Knowledge of department main frame computer hardware and software operations (beyond the end-user level) sufficient to provide the ability to troubleshoot and resolve problems, system failures, etc. In depth knowledge of CAD system.
- G. Knowledge of Department radio and telephone systems (beyond end-user level) sufficient to provide the ability to troubleshoot, resolve and/or correct problems of moderate difficulty. Knowledge of the role of the trunk radio system in major emergency response including talk groups, etc. Knowledge of the theory and practice of radio transmission and reception; radio transmitting and receiving equipment; radio installation, maintenance, testing and operations; and Federal Communications Commission's rules and regulations governing transmitting and receiving equipment as it pertains to public safety usage.
- H. Knowledge of personal computers, printers, modems, mobile data terminals, and other police department electronics (beyond the end-use level) sufficient to provide the ability to troubleshoot, resolve and/or correct problems of moderate difficulty.

- I. Ability to work from blueprints, schematic diagrams, technical manuals, etc. Ability to work with parts, equipment, tools, etc. common to the electronic communication and computing fields. Ability to maintain accurate and complete files and records on personnel equipment.

## VI. MINIMUM QUALIFICATIONS

- A. Post-secondary education in computer science, electronics, broadcast communications, or related field highly desirable.
- B. Be certified as a law enforcement officer by the Wisconsin Law Enforcement Training and Standard's Board.
- C. At least five years experience as a police officer and able to qualify through the Department promotional procedures.
- D. Valid driver's license and good driving record.
- E. Sufficient oral communication skills to represent the division at budget hearings, in public, and staff meetings, etc.
- F. Sufficient written communication skills to maintain department inventories, staff study research projects, management progress reports, preventive maintenance schedules, and issue memorandums as directed.
- G. Must process or be able to obtain any training and/or certifications to perform the duties in this area of specialization.

## VII. APPOINTMENT AND REMOVAL

- A. Subject to the regular rules and contractual agreements of the Green Bay Police Department as well as the laws of the State of Wisconsin.

11. In her memo to the Personnel Committee, Koehler also addressed the question of what department the position should be placed in. She noted that an argument could be made to place the job in the Information Services Department, since the whole City was linked by a single network and the position's work had potential impacts on the entire network. She concluded, however, that while the Department of Information Services would have to control the parameters for the position's authority over the network, the position would most appropriately be placed within the Police Department. She based this recommendation on the

fact that much of the specific systems work was peculiar to the Police Department and on the supervisory difficulties of having a job assigned full-time in one department while reporting to another.

12. Koehler estimated that, given the difference in the salaries for the two positions, the City would save approximately \$26,000 per year by deleting the Specialist II position from the Police Department's Table of Organization and replacing it with a PC/Network Technician.

13. Koehler presented her memo to Human Resources Director James Kalny prior to taking any action to transmit it to the Personnel Committee. On April 22nd, Kalny telephoned Thomas Parins, the Union's attorney and principal spokesperson. He advised Parins that the City was considering civilianizing the computer job held by Ron Shaha. The two men discussed the content of the job, and Parins told Kalny that it probably would not be a problem, but that he would have to speak with his client. Kalny told him that the recommendation was going to the Personnel Committee in a week and, if it was approved, to the Common Council a week later. Parins asked him to send Koehler's report and the relevant job descriptions so he could review them.

14. Kalny mailed Parins a copy of Koehler's memo and the job descriptions on April 23rd. On April 27th, Parins wrote back, acknowledging receipt of the memo. In his letter, Parins said that he would disseminate the information to his Bargaining Committee. He proposed that the Union and the City either discuss it at a previously scheduled May 13th grievance meeting or that it be placed on the overall labor-management agenda for discussion at some point in the future.

15. The City's Personnel Committee met on Tuesday, April 28th and approved Koehler's recommendation that the Computer Officer position be deleted from the Police Department's Table of Organization, and a new PC/Network Technician position be created within the Table of Organization.

16. Kalny received Parins' April 27th letter on Friday, May 1st. He replied to Parins in a letter that same day:

I am in receipt of your letter dated April 27, 1998, and want to make certain that there is no misunderstanding regarding the City of Green Bay's intent in this matter and our intended process at this point.

In our telephone conversation of April 23, 1998, we reviewed the content of the April 22, 1998 letter and I explained to you that the City was intent on beginning to fill this position and was looking for authorization from the Personnel Committee to do so. You informed me that while you could not commit the bargaining unit without conferring with them, that you did not anticipate that there would be a great deal of objection to removing this position

from the bargaining unit. You went on to explain that the bargaining unit recognizes that there is a need for computer expertise in performing the duties to be provided by the position described in the April 22, 1998 letter.

Accordingly, the City is proceeding to fill this position to meet this vital need as soon as possible. We do not feel, and I think you would agree, that this is the type of position that we should leave vacant for a considerable period of time, nor is it the type of position that should be filled with an individual that is not trained to perform all of the functions that will be required.

It is not the purpose of this letter to set forth the rationale for our recommendation to the Personnel Committee nor any arguments in support of it. It is only to let you know that we will be acting on the request, as presented, so that if you have any response to us, you can formulate it and get it to us in a manner that you deem timely.

If you have any questions concerning this correspondence, or the City's intent or procedure regarding this matter, please contact me . . .

17. On Tuesday, May 5th, the Common Council accepted the Personnel Committee's recommendation and adopted Koehler's recommendation with no changes.

18. On Thursday, May 7th, Kalny read a letter that had been received from Parins. The letter was dated May 5th. Parins' letter expressed surprise that the City was going to proceed to eliminate the Computer Officer job without bargaining first. Parins advised Kalny that any unilateral action to eliminate a bargaining unit position would be a violation of Section 1.03 of the labor contract and the statutory duty to bargain. Parins further stated that he was "personally taken aback" that Kalny would cite his offhand comments during their telephone conversation as agreement by the bargaining unit with the City's plan, or permission to proceed. He stated his impression that the telephone call was merely a prelude to collective bargaining. He also took issue with Kalny's claim that there was any urgency to the change, and asserted that there were ample resources in place to address the Department's computer needs pending collective bargaining.

19. Upon receiving this letter, Kalny called Parins. They had a brief conversation during which Kalny told Parins he was confused by his letter. He told Parins that the City would not be taking any further action on the staffing change until the parties had met.

20. On May 13th, the Union and the City met to discuss pending grievances. They did not discuss the substance of the Computer Officer issue at that meeting, but Parins did discuss it privately with the members of the Union's Bargaining Committee.

21. On May 28th, the Union filed the instant complaint, alleging that the City had violated Sections 111.70(3)(a)1, 4 and 5, MERA by unilaterally deleting the position of Computer Officer and removing the Computer work from the bargaining unit.

22. In the late Spring of 1998, the parties had approximately 30 grievances pending. They set up a regular series of meetings to discuss the pending grievances and other topics. Two sessions were held in May, including the May 13th session. The topic of the Computer Officer was not discussed at those sessions. Another session was held on June 16th, and the City had the Computer Officer placed on the agenda for that meeting. At that session, Kalny reiterated his belief that, at the time the matter was brought to the Personnel Committee and the City Council, the Union had raised no objection. He also said that the City had not taken any further action since that time and was open to discussing the matter. He took the position that, if there was any duty to bargain, it would be over the effects of the decision and not over the decision itself. Parins said that the decision itself had to be bargained and that the Union would not discuss the matter unless the City Council first rescinded its action. He also proposed that the City post the Computer Officer position, award it to the most senior applicant and, if necessary, provide training to that individual so that he could perform the job. The City rejected the demand to bargain the decision, as well as the rest of the proposal, and Kalny said that the question might be appropriate for a unit clarification petition to determine the appropriate unit placement.

23. On August 20, 1998, the City filed a petition with the Wisconsin Employment Relations Commission seeking a unit clarification decision on the appropriate placement of the newly created PC/Network Technician.

24. The provisions of Article 1 of the collective bargaining agreement clearly and unambiguously grant the City the right to delete positions for the Table of Organization.

25. The decision to delete the position of Computer Officer from the Table of Organization was expressly authorized by the collective bargaining agreement.

26. Article 1 of the collective bargaining agreement requires that the City bargain the effects of the decision to delete the Computer Officer position from the Table of Organization before the bargaining unit has realized any impact on its wages, hours and working conditions.

27. In June of 1998, the City offered to bargain the effects of the decision to delete the Computer Officer position from the Table of Organization.

28. During the pendency of this proceeding, the City has taken no action to implement the decision to have computer and communications work transferred to the newly authorized PC/Network Technician position.

29. As of the close of the record in this proceeding, the City of Green Bay has not refused to bargain on demand over the effects of the decision to delete the Computer Officer position from the Table of Organization.

On the basis of the above and foregoing Findings of Fact, the Examiner makes the following

### **CONCLUSIONS OF LAW**

1. The Respondent, City of Green Bay, is a municipal employer, within the meaning of Sec. 111.70(1)(j), MERA.

2. The Complainant, Green Bay Police Bargaining Unit, is a labor organization within the meaning of Sec. 111.70(1)(h), MERA.

3. By the terms of Article 1 of their collective bargaining agreement, the parties have waived bargaining over the decision to delete the position of Computer Officer from the Table of Organization.

4. The Respondent, City of Green Bay, had no duty to bargain collectively with the Respondent over the decision to delete the position of Computer Officer 1 from the Table of Organization.

5. By the terms of Article 1 of their collective bargaining agreement, the City is obligated to bargain on demand over the effects of the decision to delete the position of Computer Officer from the Table of Organization. Such bargaining must take place prior to the point at which the bargaining unit realizes any actual change in wages, hours or working conditions as a result of the decision.

6. The Respondent, City of Green Bay, has a duty to bargain collectively with the Respondent over the effects of the decision to delete the position of Computer Officer from the Table of Organization.

7. The Respondent, City of Green Bay, did not, during the pendency of this proceeding, refuse to bargain with the Complainant over the effects of the decision to delete the position of Computer Officer from the Table of Organization.

On the basis of the above and foregoing Findings of Fact and Conclusions of Law, the Examiner makes and issues the following

**ORDER**

The instant complaint be, and the same hereby is, dismissed in its entirety.

Dated at Racine, Wisconsin, this 30<sup>th</sup> day of July, 1999.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Daniel Nielsen /s/

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Daniel Nielsen, Examiner

CITY OF GREEN BAY (POLICE)

**MEMORANDUM ACCOMPANYING**  
**FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER**

**BACKGROUND**

The underlying facts are set forth in the Findings, and there is very little dispute over these. To briefly summarize, the Police Department has had a position of Specialist, colloquially known as the Communications/Computer Officer. That position has been responsible for advising on the acquisition and upgrading of communications and computer equipment, maintaining the equipment, and training others in the use of the equipment. It has been filled by a sworn law officer, and included in the Union's bargaining unit.

In March of 1998, the Communications/Computer Officer retired. The City took the opportunity to consider the position and what it needed in the area of computing expertise. The City's Human Resources Department recommended to the Personnel Committee that the existing job be deleted from the Table of Organization, and that an additional position be created in the existing classification of PC/Network Technician, which has historically been represented by AFSCME. That classification does not require the powers of arrest.

On April 22nd, Human Resources Director James Kalny told Union spokesperson Thomas Parins that the City was contemplating the change, and that he wanted to move it to the Personnel Committee during the following week, with City Council action expected a week after that. Parins asked Kalny to send him the information, and said he would check with his committee. Five days later, Parins wrote Kalny and suggested a May 13th meeting to discuss the proposed change. The next day, before receiving Parins' letter, Kalny took the proposal to the Personnel Committee, where it was approved.

Kalny received the letter on May 1st and wrote back to Parins, advising him that a May 13th meeting would not fit with the schedule for submitting the question to the City Council. The Council acted on the recommendation on May 5th, deleting the Computer Officer position and adding the PC/Network Technician position. That same day, Parins sent Kalny a letter demanding bargaining over the decision. When Kalny got Parins' letter he called him and said the City would not take any steps to implement the decision before bargaining over the effects, although the City did not agree that the underlying decision had to be bargained. The instant complaint was thereafter filed. The parties subsequently met, with the City offering to bargain the effects of the decision and the Union demanding that the Council's action be rescinded and that the City bargain over the decision itself.

Additional facts, as necessary, are set forth below.



## ARGUMENTS OF THE PARTIES

### The Arguments of the Union

The Union argues that the City has committed a per se violation of both the duty to bargain and the collective bargaining agreement. The decision to remove the Computer Officer from the bargaining unit and place it in another bargaining unit has no effect whatsoever on the formulation or implementation of public policy. The services are provided no matter which unit the position is placed in, and the City admits that members of the bargaining unit may still be qualified for the job. The removal from this unit merely denies the police officers the right to bid for and be awarded the job. It denies them the benefit of their negotiated bidding and selection procedure, and undermines their seniority rights. These are all matters primarily related to wages, hours and working conditions. Thus the disputed decision is one which must be bargained with the Union before any change can be made. By acting unilaterally, the City clearly violated the statutory duty to bargain.

The City also violated the collective bargaining agreement. Section 1.03 of the agreement specified the rights of management, but it contains the caveat that these rights may not be exercised "in any manner which alters, changes or modifies any aspect of the wages, hours or conditions of employment of the bargaining unit, or the terms of this agreement, as administered, without **first** collectively bargaining the same or the effects thereof." (Emphasis added). The removal of a job from the bargaining unit clearly alters the working conditions of those who remain, in that it reduces their job opportunities. Further, it amends Section 5.10 of the contract, since that provision specifically sets forth the method by which other officers may claim the job of Computer Officer. Removal of the job from the bargaining unit necessarily amends this provision. Indeed, it effectively deletes a portion of the contract.

The Union rejects the City's suggestion that there was any type of waiver of bargaining or necessity defense. Kalny allegedly contacted Parins and told him of the City's intentions, and Parins is alleged to have said "Yah, I don't think this is going to be a problem, but I'll have to talk with my guys." This is hardly a waiver. The statement is, by its terms, speculative. It was followed shortly by a letter demanding bargaining. Moreover, the City admits that it has, at all times including the time of this alleged conversation, taken the position that it had no duty to bargain over this decision. The City cannot have received a waiver of a duty it does not recognize. The Union also notes that even though the statutory duty to bargain may be waived by inaction, the contractual duty to bargain under the Management Rights clause puts the onus on the City to bargain before it acts. Thus the onus is on the City to bargain, or at least offer to bargain, before it takes action. As to necessity, it is clear that the bargaining unit had officers who were qualified to do the work. It is equally clear that the City has not filled the new position pending the resolution of this dispute.

As it is clear that the City has violated the contract and the statute, the Examiner must order the City to cease and desist from its violations, restore the status quo ante, post the vacant job for members of the police bargaining unit, and post a notice.

### **The Arguments of the City**

The City takes the position that it has not violated any provision of law or contract and that the complaint should be dismissed. The duty to bargain extends only to those matters which are mandatory topics of bargaining. The WERC has consistently held that position deletion and creation and the shape of the organizational structure are primarily related to the formulation and management of public policy and are therefore a permissive subject. Merely transferring a position from one bargaining unit to another is a mandatory subject, but this is not a mere transfer. The former police position was obsolete and has been eliminated. A new position was authorized and that position is already appropriately represented in the AFSCME bargaining unit. The new position has the potential to impact the entire City's computer network, and does not require a sworn police officer. There is a substantial change in the duties and qualifications for the job from those of the obsolete police bargaining unit job.

The City notes that the management rights clause of the contract specifically gives the City the right to "delete positions from the Table of Organization due to . . . legitimate reasons." The uncontroverted evidence at the hearing establishes that the change was made to meet the operational needs of the Department and the City. Thus there are legitimate reasons for the deletion, as required by the contract. The Union misreads the provision at the end of this contract section. That provision calls for bargaining over some, but not all, management decisions. A decision which "alters, changes or modifies any aspect of the wages, hours or conditions of employment of the Bargaining Unit, or the terms of the agreement" must be bargained. Perforce, those which do not affect aspects of the working conditions or contractual rights do not need to be bargained. The Union offered absolutely no evidence of such an impact, and no impact can be assumed. As a matter of law, the decision was primarily one of public policy. The deleted position was vacant. There is no basis for finding the required impact. Thus, the contractual bargaining obligation does not apply.

Even if there had been some obligation to negotiate with the Union, the City gave prompt and timely notice of its intentions, and the Union made no demand. On April 22nd, Kalny notified Parins of the plan to delete the Computer Officer's job, and asked him to respond. He told Parins the issue would go to committee the following week, and to the City Council the week after that. Despite this clear notice, Parins did not respond until two days after the City Council voted. Despite the fact that the Union sat on its rights, Kalny immediately advised Parins that the City would not fill the job until after the parties worked out the issue. The parties met on June 16th, but the Union simply demanded that the City Council reverse its action, and the Department train the senior person to fill the job. The City rejected these unreasonable demands, but agreed to submit the question of appropriate unit placement to the WERC, a petition which is still pending. The City clearly proceeded in good

faith and gave the Union every opportunity to have input, and address any impact of this decision. The Union failed to make a timely demand, and when given the chance to bargain, it refused to make a meaningful proposal. The City cannot be held liable for the Union's actions.

Inasmuch as the decision to delete the position of Computer Officer position and to create an additional PC/Network Technician position was not a mandatory topic of bargaining, there is no duty to bargain the decision. Inasmuch as there is no proof of impact on wages, hours, working conditions or the existing contract, there is no duty to bargain the impact. Since the City gave the Union reasonable notice of the decision, and received no objection, the Union has waived bargaining. Finally, since the City met with the Union and offered to bargain, and the Union made no constructive or realistic proposal, the City has satisfied its duty to bargain. For all of these reasons, the instant complaint should be dismissed in its entirety.

### **DISCUSSION**

This case presents two similar, but legally distinct questions. The first is whether the City's decision to delete the Computer Officer and have computer services provided by a civilian PC/Network Technician violated its statutory duty to bargain under Sec. 111.70(3)(a)4. The second is whether the decision violates the obligation to bargain before acting incorporated into Section 1.03 of the collective bargaining agreement, and thus violates Sec. 111.70(3)(a)5. Each is addressed in turn.

#### **Section 111.70(3)(a)4**

It is a prohibited practice for an employer to unilaterally change any aspect of the employment relationship which primarily affects wages, hours or conditions of employment. As to those matters, the employer must satisfy its duty to bargain with the exclusive bargaining representative prior to making and implementing a final decision. As to those matters which relate primarily to the formulation and management of public policy, but which also impact on wages, hours and conditions of employment, the employer is free to make its decision, but must offer to bargain with the exclusive representative over the impact of the change. This is the familiar distinction between mandatory and permissive topics of bargaining.

The Commission's caselaw on civilianization is mixed. In some circumstances, the decision has been found permissive and in others, mandatory. See, RACINE COUNTY, DEC. NO. 26288-A (SHAW, 1/29/92); CITY OF EAU CLAIRE, DEC. NO. 22795-A (HONEYMAN, 1/86); DANE COUNTY, DEC. NO. 22681-A (HONEYMAN, 11/85). For the reasons set forth below, I do not find it necessary to determine whether the decision to replace the sworn Computer Officer with an unsworn PC/Network Technician was predominantly a policy decision or predominantly an economic decision.

The duty to bargain is not self-actuating. The duty to bargain arises upon a demand for such, and the failure to make a timely demand constitutes a waiver by inaction. WALWORTH COUNTY, DEC. NOS. 15429-A, 15430-A (GRATZ, 12/78) AT PAGE 9; CITY OF APPLETON, DEC. NO. 18451-A (DAVIS, 9/81) AT PAGE 5; CITY OF STEVENS POINT, DEC. NO. 21646-B (WERC, 8/85) AT PAGE 8. Waiver by inaction has been recognized as a valid defense to alleged refusals to bargain, including alleged unilateral changes in mandatory subject, except where the unilateral change amounts to a fait accompli or the circumstance otherwise indicate that the request to bargain would have been a futile gesture. WALWORTH COUNTY, SUPRA, AT PAGES 10-11; INTERSYSTEMS DESIGN & TECHNOLOGY CORP., 278 NLRB 759, 121 LRRM 1229 (1986). Here, contrary to the City's suggestion, there has been no waiver by inaction. Parins was advised of the City's intentions on April 22nd. He told Kalny he needed to discuss the matter with his bargaining committee. Five days later, he mailed a response, proposing that the issue be discussed at an already scheduled meeting on May 13th. Granting that Kalny wished to move more quickly on this proposal than Parins' suggested schedule would allow, in practical terms the only way in which Kalny's schedule could be met was if the Union acquiesced. Parins' response cannot be characterized as placing unreasonable restrictions on bargaining or displaying some other form of bad faith. He told Kalny he could not agree on his own authority, he consulted with his client and he promptly demanded to bargain. Nothing about Parins' response suggests a waiver of bargaining.

A more substantial argument in favor of a waiver of the statutory right to demand bargaining is presented by the language of Article 1 of the collective bargaining agreement. The duty to bargain attaches upon demand, and continues to the point of impasse or agreement. Bargaining is not required if there is a pre-existing agreement between the parties on the topic. At issue here is the City's decision to delete the position of Specialist - Communications/Computer Officer from the table of organization. Article 1.03 of the contract sets forth the rights of management, including, inter alia:

. . . The City further has the right to establish reasonable work rules, to delete positions from the Table of Organization due to lack of work, lack of funds, or any other legitimate reasons, to determine the kinds and amounts of services to be performed as pertains to City government and the number and kinds of classifications to perform such services, to change existing methods or facilities, and to determine the methods, means and personnel by which City operations are to be conducted . . .

The parties' collective bargaining agreement specifically gives the City the right "to delete positions from the Table of Organization due to . . . legitimate reasons" and the decision to delete the Computer Officer from the Table of Organization is the central question in this case. Rather clearly, that aspect of the case is disposed of by this language. The Union cannot insist on bargaining over this decision as a statutory right when it has already agreed that the City has the right to make precisely this decision. Based upon this language, I conclude that this case does not involve a violation of Sec. 111.70(3)(a)4.

**Section 111.70(3)(a)5**

It is a prohibited practice for an employer to violate a collective bargaining agreement. The Union has invoked the Commission's jurisdiction under Sec. 111.70(3)(a)5, and the City has not objected nor has it demanded deferral to arbitration. As recited above, the labor contract here contains an unusual provision in its Management Rights clause. After the listing of management's reserved rights, including the right to delete positions from the Table of Organization, the clause concludes with the following statement:

. . . The City agrees that it may not exercise the above rights, prerogatives, powers or authority in any manner which alters, changes or modifies any aspect of the wages, hours or conditions of employment of the Bargaining Unit, or the terms of this agreement, as administered, without first collectively bargaining the same or the effects thereof.

This provision gives rise to the Union's argument that the City cannot delete the Computer Officer's job without first bargaining over the decision. Plainly, the deletion of the position has a potential impact on the job opportunities of bargaining unit members. However, this does not mean that the decision itself must be bargained. The clear language of the same contract provision already allows the City to make this decision. The cited sentence specifies bargaining either the decision or the effects of the decision. Where the contract already allows for a specific action, rather than speaking to a general right, this language must be taken to mean that the City may make the specifically authorized decision, but must bargain the effects of that decision before implementing it.

Bargaining is required over the impact of the City's decision, and that bargaining must take place before the bargaining unit realizes any alteration, change or modification in any aspect of its wages, hours or conditions of employment. Here, the City has taken the position that it would not proceed with any implementation pending the outcome of litigation before the Commission in the unit clarification proceeding. As of the close of the record, no decision has been rendered in that proceeding. 1/ Moreover, the City did offer to bargain over the impact of this decision in May and June of 1998. The Union declined, unless the City first rescinded the decision. While the City may continue to have an obligation to bargain impact on demand, on these facts it cannot be said that the City has refused to bargain. The impact bargaining obligation under Article 1 may be satisfied at any point prior to implementation.

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*1/ The ultimate decision in the unit clarification does not bear on the duty to bargain. The duty to bargain here is a contractual obligation and a unit clarification ruling by the Commission is not an adjudication of the substantive provisions of the collective bargaining agreement. MILWAUKEE BOARD OF SCHOOL DIRECTORS, DEC. NO. 14614-B (WERC, 2/77)*

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For the reasons set forth above, I have concluded that the City did not violate either the duty to bargain under MERA, or its obligations under Article 1 of the collective bargaining agreement when the City Council voted to eliminate the Computer Officer position from the Table of Organization and create an additional PC/Network Technician position. Accordingly the instant complaint is dismissed.

Dated at Racine, Wisconsin, this 30<sup>th</sup> day of July, 1999.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Daniel Nielsen /s/

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Daniel Nielsen, Examiner