STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

GREEN BAY POLICE BARGAINING UNIT, Complainant,

and

CITY OF GREEN BAY (POLICE DEPARTMENT)
and JAMES M. LEWIS, Respondents.

Case 278
No. 55984
MP-3381

Decision No. 30130-A

Appearances:

Parins Law Firm, S.C., by **Attorney Thomas J. Parins**, 422 Doty Street, P.O. Box 817, Green Bay, WI 54305-0817, on behalf of Green Bay Police Bargaining Unit.

Mr. Jerry H. Hanson, Assistant City Attorney, City of Green Bay, City Hall, Room 200, 100 North Jefferson Street, Green Bay, WI 54301, on behalf of the City.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Green Bay Police Bargaining Unit (Union) filed a complaint with the Wisconsin Employment Relations Commission on January 2, 1998, alleging inter alia that the City of Green Bay (Police Department) and Police Chief James M. Lewis had committed a per se refusal to bargain and unilateral change in violation of Secs. 111.70(3)(a)1, 4 and 5, Stats., by discontinuing approval of officers' shift trading on overlapping consecutive partial and double shifts since October 14, 1997 and November 25, 1997, respectively, which had formerly been granted pursuant to Article 5.02 of the labor agreement. The complaint also alleged that the unilateral changes made by the City were "intentional" and the "result of an antiunion bias," in violation of Sec. 111.70(3)(a)1, Stats. The original complaint also alleged that the City had violated the labor agreement and thereby Sec. 111.70(3)(a)5 and 1, Stats., by unilaterally

prohibiting shift trades effective October 14, 1997, and by unilaterally discontinuing employee work group selections among certain officers. The complaint sought an order that the City rescind its unilateral changes and return to the status quo ante as well as an order prohibiting the City from making such changes in the future without first bargaining with the Union. The complaint did not seek any monetary remedy except attorneys' fees.

On October 22, 1998, Complainant filed an Amended Complaint herein in which it withdrew allegations of the original complaint relating to the City's alleged unilateral discontinuation of employee selection of working groups among certain night shift officers effective November 10, 1997. Thereafter, the case was held in abeyance until it was assigned to Examiner Sharon A. Gallagher on April 18, 2001.

On May 10, 2001, the Commission appointed Sharon A. Gallagher, a member of its staff, to act as Examiner to make and issue Findings of Fact, Conclusions of Law and Order as provided in Sec. 111.07(5), Stats. Hearing on the complaint was scheduled and held on June 12 and July 16, 2001, in Green Bay, Wisconsin. The parties filed post-hearing briefs and reply briefs, the last of which was received and exchanged by the undersigned by October 1, 2001. By letter dated November 30, 2001, the Examiner requested that the parties submit information regarding the status of an oral reprimand (referred to in the TRO transcript) which was issued and placed in Officer Robert Pigeon's personnel file on November 25, 1997. By December 10, 2001, the parties responded to the Examiner's request and the record herein was then closed. The Examiner, having considered the evidence and argument of counsel, 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. Green Bay Police Bargaining Unit (hereafter Union) is an unincorporated independent labor organization within the meaning of Sec. 111.70(1)(h), Stats., and has its principal office c/o Thomas J. Parins, Jr., Parins Law Firm, S.C., 422 Doty Street, P.O. Box 817, Green Bay, Wisconsin 54305.

2. The City of Green Bay (hereafter City) is a municipal employer within the meaning of Sec. 111.70(1)(j), Stats., and its principal office is located at 100 North Jefferson Street, Room 200, Green Bay, Wisconsin 54301-5026. The City operates a Police Department for the protection and security of its citizens. At all times relevant and material hereto, James M. Lewis has been the Chief of Police and has acted on behalf of the Police Department (hereafter Department); at all times relevant hereto, Captain Parins has also acted on behalf of the Department.

3. At all times relevant and material to this proceeding, the Union has been the certified exclusive bargaining representative of:

> all full-time personnel of the Police Department having powers of arrest employed by the City, excluding the rank of Chief, Assistant Chief, Deputy Chief, Captain and Lieutenant in the matter of wages, hours, and working conditions.

4. The Union and the City have been parties to a series of collective bargaining agreements. The 1994-95 labor agreement contained the following language relevant hereto:

> ARTICLE 5
>
> SHIFT ASSIGNMENTS
>
> 5.01 ASSIGNMENTS IN GENERAL. Assignments to shift positions shall be by seniority among those persons possessing the qualifications for the position to be filled. Assignments shall be made and persons with appropriate qualifications and seniority may bid for shift positions only when a vacancy exists in such position. In the case of Sergeants and Detective Sergeants, seniority shall mean seniority in rank.
>
> 5.02 SHIFT TRADING. Officers shall be allowed, upon request, to have another officer substitute for the requesting officer on any given tour of duty under the following conditions:
>
> (1) The substitute office shall be of the same rank and have the same general job description as the requesting officer (i.e., patrol officer and patrol officer; detective and detective, etc.).
>
> (2) The request shall be in writing and approved by the shift commander or supervisor of both the requester and substitute, which said approval shall not be unreasonably withheld.
>
> (3) The consideration to the substituting officer, such as the requesting officer substituting for the substituting officer in the future, shall be strictly between said officers, without the City having any obligation whatsoever to be involved in enforcing any such agreement.
>
> . . .

ARTICLE 6

OVERTIME

6.01 OVERTIME PAYABLE. Employees will be compensated at the rate of time and one-half (1 ½) based upon their normal rate of pay for all hours worked in excess of the scheduled work day or work week. Overtime shall commence after 8 1/2 hours on a regular work day or for hours worked outside the normally scheduled work week. Overtime will not be paid for time spent correcting usual and required reports or information within the maximum work day of 8-3/4 hours. Overtime shall include a maximum of fifteen (15) minutes after the overtime work is completed to allow the employee to submit all usual and required reports and information and to ascertain that they have been properly and correctly submitted. In the event that such are not proper and correct, the employee may be held an additional fifteen (15) minutes without pay as part of the maximum work day to correct the same. For purposes of calculating overtime, compensation for the hourly rate shall be based on a bi-weekly schedule of 75.6 hours and an annual schedule of 1964.5 hours. No change in the amount of overtime claimed by an employee shall be made unless the employee is notified of such proposed change within seven (7) days of the employee turning in an overtime card.

6.02 OVERTIME/COMPENSATORY TIME. Compensatory time shall be limited to an accumulation of one hundred (100) hours [or the present accumulation of more than one hundred (100)] derived from holiday work or overtime.

6.03 ALLOCATION OF OVERTIME. (1) Posting. All overtime of the department schedule, where practicable, shall be posted. If more persons qualified for such overtime work sign for such than are needed, allocation of the overtime shall be on a seniority basis among those qualified for the work. (It is contemplated that at times it will be necessary to determine the qualification of an employee to work overtime based upon the employee's knowledge of the subject of the overtime work or the training and expertise of the employee. However, in the event of a dispute as to the same, the City shall have the burden of establishing the necessity.) In allocating overtime the department shall ask for volunteers on the basis of seniority regardless of whether the officer is on a work or off day. In the event sufficient volunteers are not found, the balance of the overtime shall be assigned on the basis of inverse seniority among those on their work days and then by inverse seniority among those on off days. No overtime shall be allocated or assigned where it will result in an officer working more than two consecutive double shifts of such overtime. Management may refuse overtime where there is a legitimate safety concern. In the event that any

overtime will result in an overtime shift of more than eight (8) hours, the shift may be divided into two shifts except in emergency situations. Practicability of posting shall be determined in light of time available for posting and departmental or public security, or other relevant and sufficient factors. This paragraph shall not apply to overtime resulting from an extension of a person's normal work day duty, nor shall it apply to overtime not assigned by the City of Green Bay.

. . .

5. In early 1996, the parties opened negotiations for the 1996-98 labor agreement. Neither the Union nor the City proposed to change Section 5.02 and no discussions of that section were held. The City did propose changes in Sections 1.03 and 6.01 - 6.03. The 1996-98 labor agreement which was voluntarily agreed upon by the parties included the following changes in Articles 1 and 6:

ARTICLE 1

RECOGNITION/MANAGEMENT RIGHTS

. . .

1.03 MANAGEMENT RIGHTS. The Union recognizes the prerogative of the City, subject to its duties 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 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 6

OVERTIME

6.01 OVERTIME PAYABLE. Employees will be compensated at the rate of time and one-half (1 ½) based upon their normal rate of pay for all hours worked in excess of the scheduled work day or work week. Overtime shall commence after 8 1/2 hours on a regular work day or for hours worked outside the normally scheduled work week. For purposes of calculating overtime, compensation for the hourly rate shall be based on a bi-weekly schedule of 75.6 hours and an annual schedule of 1964.5 hours. No change in the amount of overtime claimed by an employee shall be made unless the employee is notified of such proposed change within seven (7) days of the employee turning in an overtime card.

6.02 OVERTIME/COMPENSATORY TIME. Compensatory time shall be limited to an accumulation of one hundred (100) hours [or the present accumulation of more than one hundred (100)] derived from holiday work or overtime. {still under discussion and not part of contract at date of signing — except that for those persons who already have time in excess of this amount, the limit shall be four hundred eighty (480) hours. Overtime shall be paid or taken as compensatory time, subject to the above limit, at the option of the officer.}

6.03 ALLOCATION OF OVERTIME. (1) Posting. All overtime of the department schedule, where practicable, shall be posted. If more persons qualified for such overtime work sign for such than are needed, allocation of the overtime shall be on a seniority basis among those qualified for the work. (It is contemplated that at times is will be necessary to determine the qualification of an employee to work overtime based upon the employee's knowledge of the subject of the overtime work or the training and expertise of the employee. However, in the event of a dispute as to the same, the City shall have the burden of establishing the necessity.) In allocating overtime the department shall ask for volunteers on the basis of seniority regardless of whether the officer is on a work or off day. In the event sufficient volunteers are not found, the balance of the overtime shall be assigned on the basis of inverse seniority among those on

their work days and then by inverse seniority among those on off days. No overtime shall be allocated or assigned where it will result in an officer working more than a shift and one-half in any 24-hour period. Practicability of posting shall be determined in light of time available for posting and departmental or public security, or other relevant and sufficient factors. This paragraph shall not apply to overtime resulting from an extension of a person's normal work day duty, nor shall it apply to overtime not assigned by the City of Green Bay.

. . .

6. On October 14, 1997, Captain Parins issued the following memo:

. . .

It is an approved practice of this Department for an employee of one shift to trade or substitute for an employee of another shift. However, that employee cannot substitute for another employee until their shift obligation is completed. This happens from time to time and I want it to stop. An officer working the afternoon shift cannot cover a night shift officer at 10:15 p.m. because the afternoon shift officer is not done with his own shift until 10:45 p.m. Obviously, we cannot count one person twice in our staffing schemes, particularly with minimum safety staffing obligations. An employee may cover for a second employee only after they have completed their obligations of 8 ½ hours to the City.

Asking the citizens of this city to bear the costs of these overlapping hours is not right. Please keep this in mind when approving substitutions and leave requests. I am certain that no union would allow the City to take 30 minutes pay from an employee when that employee is at work. Asking the City to pay an officer for 30 minutes when he is not working is equally unfair.

Please see me with any questions. We will discuss this at our next staff meeting, but I want this followed immediately.

7. In 1997-98 there were 120 non-supervisory police officers employed by the City. Less than 20 of these officers regularly traded consecutive shifts. Prior to October 14, 1997, officers arranged to trade shifts with each other. Sometimes officers would come in early or

stay after their regular shift, working a back-to-back shift and one-half, or they would work their shift plus the other officer's full shift, working a back-to-back double shift, or an officer might work for another officer on the former's scheduled day off. In these instances prior to October 14, 1997, management routinely approved these shift trades so long as the officers met the other requirements of Article 5. No overtime liability was created by or paid out due to these trades and the City did not become involved in how and when officers paid each other back for their trades. The above-described shift trading practice existed in the City for many years prior to October 14, 1997. No negotiations have occurred and no changes were made in Article 5.02 either before or after October 14, 1997.

8. After October 14, 1997, unit police officers were denied shift trades pursuant to Captain Parins' memo for all back-to-back, overlapping partial and double shift trades. On November 25, 1997, pursuant to Article 26.05, the City entered a disciplinary action into its administrative register concerning an oral reprimand given to Officer Robert Pigeon. Pigeon was denied Department approval to trade with another officer and work back-to-back double shifts (his own night shift followed by the other officer's day shift), and he was orally reprimanded therefor and a copy of the register entry was placed in Pigeon's personnel file, to be removed one year after its entry date, per the contract.

9. After the Pigeon reprimand was issued and the instant complaint was filed, the Union filed a request for a Temporary Injunction (TRO) in Brown County Circuit Court, seeking an injunction, pending a WERC ruling on the instant prohibited practice complaint, against the City denying shift trades. On April 20 and 22, 1998, the Court heard testimony regarding the shift trade practice which existed prior to October 14, 1997, and the affect of the City's actions in this area thereafter. On May 5, 1998, the Circuit Court granted the Union a Temporary Injunction, as follows:

> . . . that pending the conclusion of litigation in this matter, and proceedings now pending before the Wisconsin Employment Relations Commission, the defendants . . . shall allow police officers to trade shifts under Section 5.02 of the labor contract where such shift trades involve overlapping or double shifts. . . .

10. During the hearing which culminated in the Temporary Injunction, seven officers testified without contradiction that prior to October 14, 1997, the Department managers had always approved their trade requests and allowed them to work consecutive double shifts and overlapping shifts. These officers stated that they had each traded shifts between 6 and 20 times per year; that after October 14, 1997, they were required to take 30 minutes of comp time, personal leave or vacation if they wanted to trade with an officer on an overlapping shift;

and that double shift trades were denied outright after October 14, 1997. Each of these officers stated that they were personally aware of other officers who, prior to October 14, 1997, had traded back–to-back overlapping partial or double shifts without having to take any comp time, vacation or personal leave and who had been allowed to work double shifts on a trade.

11. The Circuit Court, on May 5, 1998, granted the Union a Temporary Injunction (which remained in force at the time of the instant hearing, on the following grounds:

. . .

> I find from the testimony presented here that it has been a continued practice in the Green Bay Police Department to trade shifts even when those shifts are consecutive and even when there is a half hour overlap that there really is someone not covering for, and so an injunction would be necessary to preserve the status quo pending resolution before the Wisconsin Employment Relations Commission.
>
> I'm also satisfied that there is a reasonable probability of success on the merits. I have the most difficulty with the lack of adequate remedy of law and irreparable harm, and in the first place I was prepared to find that there was adequate remedy of law because any officer not giving the consecutive shift because he would lose the half hour could, in fact, get that half hour traded back, but even aside from Mr. Heil, members of the Bargaining Unit could, in fact, come down to zero even while litigation is pending and be in a position to be without that half hour credit necessary to pull that consecutive shift trade, and so I think there would be no adequate remedy of law for those individuals in the Bargaining Unit. There is no way to determine who they are in the future because they all could have banked time today. There may be a time before the litigation is depleted that they would be without banked time and unable to avail themselves of that shift trade.
>
> I'm satisfied that there could be irreparable injury. For instance, if one of the members of the Bargaining Unit was going to trade a shift to attend a friend's wedding or a sister's wedding and would be unable to do so, that passes the time the unit would go without his attendance and there would be no way to recover, and so I'm satisfied then the Court should enter a temporary injunction requiring the defendants to allow the police officers to continue to exercise their contract right to trade shifts that involve consecutive shifts and also that half hour.
>
> I find though for the request made regarding the group assignments, I find that no injunction is necessary to preserve the status quo, and I then deny relief as requested in the second paragraph. (Tr. 124-5).

12. On September 14, 1999, the City issued the following letter entitled "Repudiation of Alleged or Actual Past Practice Pertaining to Trading/Posting" during the hiatus following the expiration of the 1996-98 labor agreement.

. . .

As you are aware, the City's initial proposal originally included a proposal to discuss the incorporation section of the contract (Section 36.02). At the insistence of the union the first 4 sessions were spent discussing officer compensation for negotiations. It was not until our 5th negotiation session (on September 13) that we were able to discuss that matter and at that meeting you informed us that you did not believe that this article had anything to do with past practices but only applied to "agreements". While I am not sure what the rationale is for the distinction, we believe it is incumbent on the parties to discuss and reach understanding on many alleged and/or existing past practices.

We have recently processed in excess of thirty (30) grievances, in addition to several that we disposed of in a package settlement. In addition, there have been several disagreements in regard to the application of certain contractual provisions. It is our impression that many of these disputes have been based in the parties' differing views in regard to the existence of past practice concerning many items. In the hopes of clarifying the application of the contact and to minimize disputes based in past practice, the City hereby informs you that it is repudiating the following matters that the union has alleged to constitute past practice between the parties. It must be noted that by this repudiation, the City does not in any way admit to the existence of the past practices that the union has alleged. The City specifically reserves its right to argue that the following matters have not raised to the level of a binding past practice. The purpose of this document is to put you on notice that insofar as a past practice may be said to exist, the City, during this contractual hiatus, is repudiating any mutually agreed upon past practice, mutual procedure, or process, which the union alleges to exist in regard to the following:

1. The union has alleged that, pursuant to past practice, officers may overlap on a trade and thus one officer may cover the time slots of two people. Insofar as this is or may be said to be a past practice, that practice is hereby repudiated by the City.

2. The union has alleged that the contract permits trading for double shifts which results in officers working more than 12-3/4 hours per day. Insofar as this is or may be said to be a past practice, that practice is hereby repudiated by the City.

. . .

> Again, the City believes that these matters constitute expansions of the contract that it either never has, or currently does not accept. While reserving the right to argue that there never has been a practice related to these issues, by this letter the City has repudiated these matters informing you of its intent that upon execution of the contract the City will not honor the alleged practices unless specifically agreed otherwise.

. . .

13. The parties voluntarily settled their 1996-98 labor agreement which was executed on September 18, 1996, and which expired on December 31, 1998. The parties went to interest arbitration over the 1999-01 labor agreement. The parties' final offers regarding the 1999-01 agreement did not contain any proposed amendment of Section 5.02 and an interest arbitration award regarding the 1999-01 contract was later issued by Arbitrator Honeyman thereon.

14. Prior to October, 14, 1997, there existed a long-standing, mutually agreed upon contract-based past practice that essentially defined "any given tour of duty" such that shift trade requests would be granted even when they resulted in officers working consecutive full (double) or partial shifts and officers were never required to use any comp time, vacation or personal leave to cover the 30-minute overlap time between shifts. This practice was part of the status quo in existence when the 1994-95 contract expired and it remained unchanged by collective bargaining or interest arbitration during the 1996-98 contract and the 1999-01 agreement. The City never offered to bargain with the Union over this change prior to making it. The Union never requested to bargain regarding the change. Instead, the Union filed the instant complaint and sought and gained a TRO to maintain the shift trade practice pending the outcome of this case. That TRO is still in effect.

15. The City's September 14, 1999 attempted repudiation of the past practices surrounding Section 5.02 does not constitute a valid defense against the instant allegations and was not effective to repudiate the contract-based shift trade past practice.

16. Although the parties' 1996-98 and 1999-01 collective bargaining agreements contain final and binding arbitration provisions, oral reprimands (like that received by Officer Pigeon in 1997) are expressly excluded from final and binding arbitration. Respondent never requested deferral of the Pigeon grievance (or of the allegations of this complaint) to final and binding arbitration, as Complainant alleged in its complaint that a remedy in contractual grievance arbitration would not be "viable" because officers who have been denied shift trades cannot be "made whole."

17. During the instant hearing, the City made an offer of proof that during negotiations for the 1996-98 labor agreement, extensive discussions were had regarding fatigue among officers working double shifts; that the parties then agreed to change Section 6.03 to allow officers to work only 1.5 shifts in a 24-hour period (with some limited exceptions); that, based upon these discussions and the change agreed to in Section 6.03, the City believed it was reasonable to deny shift trades where officers would have to work more than one shift and one-half in a 24-hour period under Section 5.02, although the parties admittedly never discussed 5.02 in this context and Section 5.02 was never changed during any of the parties' negotiations.

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

CONCLUSIONS OF LAW

1. The October 14, 1997 memo from Captain Parins, an agent of the City, and the City's actions thereafter implementing that memo by denying overlapping consecutive shift and one-half and double shift trades is primarily related to wages, hours and conditions of employment of municipal employees.

2. The decision to discontinue the past practice of granting overlapping partial and double shift trades without requiring officers to use comp time, vacation or personal days is a mandatory subject of bargaining over which the City had a duty to bargain with the Union.

3. The language of Section 5.02 is the status quo on shift trading which the City is required to maintain, along with the past practice surrounding it, during the term of the 1999-01 collective bargaining agreement, unless the City and the Union bargain otherwise.

4. When, on or about October 14, 1997, the City unilaterally decided to discontinue and then discontinued the past practice of allowing officers to work overlapping partial and double shift trades without using comp time, vacation or personal days to "pay" for the overlap, the City unilaterally implemented a change in a mandatory subject of bargaining during the term of the parties' 1996-98 collective bargaining agreement, without a valid defense, thereby violating Sec. 111.70(3)(a)4, Stats., and derivatively Sec. 111.70(3)(a)1, Stats.

5. The Union failed to prove any independent violation of Sec. 111.70(3)(a)1, Stats., as alleged in its complaint, that the City's actions in making the unilateral change (described in Conclusion of Law 1) were "intentional" or the "result of an antiunion bias." That allegation is dismissed. Complainant alleged that the Respondent's unilateral change in the shift trading past practice also violated Sec. 111.70(3)(a)5, Stats. Given the findings and conclusions herein

concerning the Sec. 111.70(3)(a)4, Stats., allegation, there is no need to determine the former allegation under Sec. 111.70(3)(a)5, Stats. Therefore, the Sec. 111.70(3)(a)5, Stats., allegation is dismissed.

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

ORDER

IT IS ORDERED that:

1. The alleged independent violation of Sec. 111.70(3)(a)1, Stats., is dismissed. The alleged violation of Sec. 111.70(3)(a)5, Stats., need not be addressed due to the Sec. 111.70(3)(a)4, Stats., findings and conclusions herein, and it is also dismissed.

2. City of Green Bay, its officers and agents, shall immediately:

(a) Cease and desist from violating its statutory duty to bargain with Green Bay Police Bargaining Unit by unilaterally revoking the past practice of allowing officers in the bargaining unit to work overlapping consecutive partial and double shift trades and of requiring them to use compensation time, personal leave or vacation when working overlapping consecutive partial and double shift trades.

(b) Take the following affirmative action which will effectuate the policies and purposes of the Municipal Employment Relations Act:

(1) Immediately reinstate the past practices surrounding Section 5.02 of the labor agreement by allowing officers to work overlapping consecutive partial and double shift trades without using comp time, vacation time or personal leave.

(2) Notify all bargaining unit employees, by posting in conspicuous places where employees work, copies of the Notice attached hereto and marked "Appendix A." The Notice shall be signed by a responsible representative of the City and shall be posted immediately upon receipt of a copy of the Order and shall remain posted for thirty (30) days thereafter. Reasonable steps shall be taken by the City to insure said Notice is not altered, defaced or covered by other material.

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

Dated at Oshkosh, Wisconsin, this 22nd day of January, 2002.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Sharon A. Gallagher /s/
Sharon A. Gallagher, Examiner

APPENDIX "A"

NOTICE TO EMPLOYEES

Pursuant to an Order of the Wisconsin Employment Relations Commission, and in order to effectuate the policies of the Municipal Employment Relations Act, the City of Green Bay Police Department notifies the employees that:

> WE WILL NOT violate our statutory duty to bargain with the Green Bay Police Bargaining Unit by unilaterally revoking the past practices regarding employees working overlapping consecutive partial and double shift trades without being required to use 30 minutes of comp time, vacation time or personal leave, until changed in negotiations or interest arbitration.

Dated this _____ day of _____, 2002.

_____
Chief of Police

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

CITY OF GREEN BAY (POLICE DEPARTMENT)

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

POSITIONS OF THE PARTIES

Union

The Union asserted that there is a long-established past practice associated with trading shifts within the Green Bay Police Department and that this practice was changed by the Department on October 14, 1997, by Captain Parins' memo to unit employees. The Union noted that the City presented no evidence to refute the shift trading past practice. The practice, which was demonstrated both in the prohibited practice hearing as well as before the Brown County Circuit Court on the Temporary Injunction, was that officers could trade shifts with other officers of equal rank even if those trades called for overlapping (consecutive) partial or double shifts.

As the shift trading past practice is contract-based, the Union asserted, the City could not repudiate such a practice unless and until the City gained favorable contract language essentially allowing it to discontinue the practice. The Union asserted that Section 5.02 of the labor agreement is essentially explicated by the past practice, requiring a conclusion that the practice is contract-based. In this regard, the Union noted that Section 5.02 of the labor agreement contains the term "on any tour of duty" which is clarified and fleshed out by the practice. On this point, the Union cited several grievance arbitration awards BARRON COUNTY (SHERIFF'S DEPARTMENT), MA-8382 (MCLAUGHLIN, 6/95); DOUGLAS COUNTY (MIDDLE RIVER HCC), MA-6453 (ENGMANN, 8/91); WOOD COUNTY (NURSES), MA-7555 (GRECO, 6/93); and BROWN COUNTY (SHERIFF'S DEPARTMENT), MA-8942 (BUFFETT, 2/95). In these arbitration cases, the Union noted that the arbitrators found that a past practice was contract-based and could not be repudiated or discontinued by the employer without specific negotiation allowing the discontinuation of the practice.

The Union noted that the language of Section 5.02 has not changed in any of the contracts that were put into evidence or referred to in this case. Therefore, the language of Section 5.02 in the effective labor agreement incorporates "by operation of labor law" the overlapping consecutive partial and double shift trading past practices. Because the City failed to negotiate any modification to the language of Section 5.02, that contract section continues in full force and effect and must include the overlapping consecutive partial and double shift trading practices which have been made a part of the meaning and interpretation of Section 5.02 over the years.

The Union urged that the doctrine of issue preclusion must be applied in this matter as the Brown County Circuit Court has already found that there was a past practice to allow shift trading where overlapping consecutive shifts and double shifts resulted, and that the Court found that the past practice was contract-based and that it therefore could not be unilaterally repudiated by the City. On this point, the Union cited NORTHERN STATES POWER CO. V. BUGHER, 189 WIS.3D 541, 525, N.W.2D 723 (1995). In that case, in order for issue preclusion to be effective, three factors had to be met: (1) There must be an identity between the parties or their privies in the prior and present suits; (2) There must be an identity between the causes of action in the two suits; and (3) A final judgment on the merits in a court of competent jurisdiction must be rendered.

The Union asserted that all three factors are present in the instant case. First, the parties in both actions are identical. Second, there was, in the Union's view, an identity between the causes of action. The Union asserted that the issues cited herein are identical to those before the Brown County Circuit Court on the TRO. Finally, the Brown County Circuit Court's Judgment was final and it was a court of competent jurisdiction for the TRO matter. Therefore, the Union urged that the Commission adopt the Brown County Circuit Court's findings that the past practice of allowing shift trading where there were overlapping consecutive partial and double shifts should be recognized as binding and that the Court's finding that shift trading is a contract-based past practice should also be binding upon the Commission.

The Union therefore sought that the Commission find that the City had committed a prohibited practice when, on October 14, 1997, it unlawfully prohibited officers from trading shifts in situations where the shifts were overlapping consecutive partial or double shifts; that the Commission order the City to continue and maintain the past practice relating to allowing officers to trade shifts in situations where the shifts are overlapping consecutive partial or double shifts without first negotiating that change. Finally, the Union sought an order that the City pay actual attorney fees in this matter, as the City's failure to bring forward any evidence to refute any of the Union's assertions demonstrated that the City's case was frivolous.

City

The City argued that significant language changes were made to Section 6.03 of the 1996-98 collective bargaining agreement between the parties, which effectively discontinued the ability of officers to work double shifts in an overtime situation, specifically mandating that an officer may not work more than one shift and one-half in a 24-hour period for overtime purposes. The City noted that there were extensive discussions regarding fatigue and safety issues when officers work too many hours in a row, which caused the City to seek the change in Section 6.03 of the 1996-98 collective bargaining agreement.

The City noted that Section 5.02 of both the 1994-95 and 1996-98 collective bargaining agreements states that requests for shift trading shall be approved by the shift commander or another supervisor and approval of such requests shall not be "unreasonably withheld." As the City was very concerned regarding safety and fatigue issues during the negotiations for the 1996-98 contract, it negotiated changes in Section 6.03 for that reason. The City noted that a prior arbitration case, CITY OF GREEN BAY (POLICE), MA-10726 (MCLAUGHLIN, 5/00), must be read to apply the prohibition against double shifts contained in Section 6.03 to other portions of the contract, including Section 5.02. Thus, the Commission should find that the parties agreed that working more than one shift and one-half, subject to some exceptions such as Packer games and emergencies, was generally unreasonable. As Section 5.02 gives management the specific authority to deny a request for a shift trade when management believes the request is unreasonable, the mutually agreed-upon change in Section 6.03 in the 1996-98 agreement should require a finding that working double shifts 1/ on a shift trade is also unreasonable.

1/ The City made no arguments in its briefs regarding overlapping consecutive partial shifts.

The City also argued that a recent decision by Arbitrator Morrison in CITY OF GREEN BAY (POLICE), MA-11303 (8/01), indicates that the phrase "legitimate safety concern" in Section 6.03 privileged the City to refuse an officer overtime work. Although the phrase "legitimate safety concern" refers to management's ability to refuse overtime, the City urged that the contract should be interpreted as a whole, to apply this phrase to Section 5.02 as well. The City urged that it looked at Section 6.03 to help it determine what was "unreasonable" in denying shift trades under Section 5.02. The City noted that management may use its discretion under Section 1.03 of the collective bargaining agreement to "determine reasonable schedules of work" and to "establish the methods and processes by which such work is performed." As the Chief of Police has expertise in the area of fatigue, and as the parties have determined that working double shifts on overtime is fatiguing, management's actions in denying double shift trades were authorized by the contract and were not arbitrary or unreasonable, in the City's view.

The City argued that the specific language of Section 6.03 regarding officers working "a shift and one-half" limits the general language of Section 5.02 of the agreement concerning the meaning of the phrase "on any given tour of duty." In all the circumstances, the City sought that the complaint be dismissed in its entirety.

REPLY BRIEFS

Union

The Union asserted that the arguments made in the City's brief were irrelevant and should not be considered herein. The true issue in this case, in the Union's view, is whether the City unilaterally changed the past practice regarding shift trades in 1997. As the evidence is clear that there was a past practice of allowing officers to trade shifts and as it is also clear that the City unilaterally changed that practice in October of 1997, the Union urged that the Commission must conclude that the City violated the statute. This is particularly so, where the City presented no evidence to refute the above facts. Indeed, the Union noted that it was 13 months after the 1996-98 contract was signed (in September, 1996), that the City unilaterally changed the past practice of allowing overlapping consecutive partial or double shifts on shift trading. Although the parties discussed Section 5.02 in their negotiations over the 1996-98 agreement, those negotiations did not lead to any changes in Section 5.02. Thus, the City is trying, through its unilateral actions, to eliminate a practice that it could not eliminate through bargaining with the Union. As the practice regarding shift trading in Section 5.02 is contract-based, any change must be made through negotiations.

The Union noted that the City did not address the overlapping partial shift issue in its brief and did not present any evidence at the hearing to refute this portion of the past practice. Rather, the City only addressed the double shift issue in its initial brief. Nonetheless, the Union asserted that the City is aware that the overlapping consecutive partial shift practice is also contract-based and that the Commission should not allow the City to change a practice thereon to require officers to use vacation, comp time or personal leave to pay back time in order to continue that long-standing contract-based practice. The Union reasserted its request for relief herein should be granted.

City

The City argued that since September, 1996, there has been no established past practice of trading double shifts within the Green Bay Police Department, as demonstrated by the record before the Brown County Circuit Court on the TRO. Therefore, the City urged that there can be no unequivocal past practice of double shift trading since that time and the Union has not proved its case on this point.

Whether the past practice associated with trading shifts may or may not be changed without negotiation, is irrelevant, in the City's view. The main issue in this case, in the City's view, is whether changes in Section 6.03 of the labor agreement redefine what is reasonable under Section 5.02 and whether the specific language of Section 6.03 regarding officers working one "shift and one-half" limits the general language of "on any given tour of duty" contained in Section 5.02 of the agreement.

As these issues took a long time to make their way to the WERC, the City, in the interim, attempted to repudiate the alleged past practices and have the TRO removed. However, the Court found that the past practice was contract-related and that the City could not unilaterally repudiate such a past practice. The City noted, however, that the Court's opinion was silent in regard to any interpretation of the contract as a whole, and any interpretation of Sections 6.03 and 1.03 of the labor agreement as they relate to Section 5.02. As the case in Brown County Circuit Court concerned the TRO, the City argued that the issue "whether the past practice associated with trading shifts may or may not be changed without negotiations," as that relates to the merits of this case is irrelevant.

The City argued that reading the 1996-98 labor agreement as a whole, the City did not unilaterally change any past practice associated with shift trading. The City noted that only one witness before the Circuit Court (Officer VanErem) stated that he knew of specific dates when officers traded for two consecutive shifts in a row between the months of September, 1996 and October, 1997. In the City's view, this is hardly a binding and well-established past practice. As the Union failed to show a past practice existed between September, 1996 and October, 1997, the instant case should be dismissed.

As the Circuit Court Judge merely determined to maintain the status quo pending a hearing before WERC and a decision by the Commission, issue preclusion should not apply to this case. The City found it ironic that the Union argued before the Circuit Court Judge that the WERC was the proper party to decide the merits of this case, yet the Union has now urged issue preclusion in this matter. The only reason the Circuit Court Judge issued the TRO was because he felt that irreparable harm could occur pending a decision by WERC in the instant case. Furthermore, the issues presented to the Commission in the City's original brief were never decided by the Circuit Court Judge. Therefore, the City urged that issue preclusion is not appropriate where, as here, there has been no interpretation of the specific clauses in the contract as they relate to overlapping consecutive double shift trades. For all of the foregoing reasons, the City urged that the complaint be dismissed.

DISCUSSION

The record evidence establishes that there has been a long-standing past practice at the City of allowing officers of equal rank to trade shifts with each other whereby officers could work consecutive overlapping partial or double shifts. This past practice did not require officers to use comp time, vacation or personal days to cover the 30-minute overlap of shifts when the officer working a trade would continue on patrol, not returning to the office for the last 15 minutes of his shift to do paperwork (as is normally the case) and later not attending roll call for 15 minutes at the beginning of the following shift.

On October 14, 1997, the City, by Captain Parins' memo, discontinued this shift trading practice. This was so despite the fact that the parties had reached and executed the 1996-98 agreement on September 18, 1996. The City notified all officers of the discontinuation of the practice but it never directly notified the Union nor did the City offer to bargain with the Union regarding the decision to revoke the practice or regarding the impact on the unit of the revocation. It is significant that there is no contention herein that the decision to discontinue the shift trade past practice is not a mandatory subject of bargaining.

The Union has charged herein that unilaterally changing the shift trading past practice constituted a per se refusal to bargain in violation of Sec. 111.70(3)(a)(4) Stats. 2/ Section 111.70(3)(a)4, Stats., provides that it is a prohibited practice for a municipal employer to "refuse to bargain collectively with a representative of a majority of its employees in an appropriate collective bargaining unit." A violation of Sec. 111.70(3)(a)4, Stats., also constitutes a derivative violation of Sec. 111.70(3)(a)1, Stats. The latter section provides that it is a prohibited practice for a municipal employer to "interfere with, restrain or coerce municipal employees in the exercise of their rights" guaranteed under Sec. 111.70(2), Stats. The rights guaranteed in Sec. 111.70(2), Stats., include:

> . . . the right of self organization, the right to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in lawful concerted activities for the purpose of collective bargaining or other mutual aid or protection, . . .

2/ At the hearing, the Union withdrew its allegation that the City had violated MERA by unilaterally discontinuing employee work group selections.

As a general rule, a municipal employer has a duty to bargain with the exclusive bargaining representative of its employees with respect to mandatory subjects of bargaining. Such mandatory subjects are those which "primarily relate" to wages, hours and conditions of employment, as opposed to subjects of bargaining which "primarily relate" to the formulation and choice of public policy. CITY OF BROOKFIELD V. WERC, 87 WIS.2D 819 (1979); UNIFIED SCHOOL DISTRICT NO. 1 OF RACINE COUNTY V. WERC, 81 WIS.2D 89 (1979); and BELOIT EDUCATION ASSOCIATION V. WERC, 73 WIS.2D 43 (1976). Thus, a municipal employer may not normally make a unilateral change during the term of a contract to existing wages, hours or conditions of employment without first bargaining on the proposed change with the collective bargaining representative. CITY OF MADISON, DEC. NO. 15095 (WERC, 12/76) AT 18, CITING MADISON JT. SCHOOL DISTRICT NO. 8, DEC. NO. 12610 (WERC, 4/74), CITY OF OAK CREEK, DEC. NO. 12105-A, B (WERC, 7/74) and CITY OF MENOMINEE, DEC. NO. 12564-A, B (WERC, 10/74).

In addition, a municipal employer's statutory duty under Sec. 111.70(3)(a)4, Stats., to bargain with a Union during the term of a collective bargaining agreement extends to all mandatory subjects of bargaining except those that are covered by the agreement or those regarding which the Union has clearly and unmistakably waived its right to bargain. SCHOOL DISTRICT OF CADOTT, DEC. NO. 27775-C (WERC, 6/94); CITY OF RICHLAND CENTER, DEC. NO. 22912-B (WERC, 8/86); BROWN COUNTY, DEC. NO. 20623 (WERC, 5/83); and RACINE UNIFIED SCHOOL DISTRICT, DEC. NO. 18848-A (WERC, 6/82). As Examiner Raleigh Jones aptly stated in ROCK COUNTY, DEC. NO. 29970-A (1/01):

> . . . an employer may not normally make a unilateral change during the term of a contract to a mandatory subject of bargaining without first bargaining on the proposed change with the collective bargaining representative. Absent a valid defense, a unilateral change to a mandatory subject of bargaining 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. The duty to bargain incorporates a duty to maintain the status quo with regard to most mandatory subjects of bargaining even after the collective bargaining agreement has expired, unless the duty to bargain has been discharged by negotiating to the point of impasse. (footnotes omitted)

Finally, a waiver by inaction has been recognized by the Commission as a valid defense to an alleged refusal to bargain, including alleged unilateral changes in mandatory subjects of bargaining, except where the unilateral change amounts to a fait accompli or the circumstances otherwise indicate that the request to bargain would have been a futile gesture. CITY OF GREEN BAY, DEC. NO. 29469-A (NIELSEN, 7/99); ST. CROIX FALLS SCHOOL DISTRICT, DEC. NO. 27215-B (BURNS, 1/93); CITY OF APPLETON, DEC. NO. 17034-C (MCCRARY, 1/80); WALWORTH COUNTY, DEC. NOS. 15429-A, 15430-A (GRATZ, 12/78); JT. SCHOOL DISTRICT NO. 5 OF FENNIMORE, DEC. NO. 11865-A (FLEISCHLI, 6/74).

In the instant case, the shift trade benefit was certainly "primarily related" to wages, hours and conditions of employment as this term is used in the case law. Indeed, the City did not argue otherwise in this case. The record showed employees often used shift trades to get time off where they would not otherwise have been able to do so given the status of their leave banks. 3/ In fact, less senior employees often used trades to enhance their paid time off, according to this record. In addition, officers frequently used trades in order to gain time off

for recreational and other activities which covered only partial shifts. Thus, in the Examiner's view, the subject of shift trading is "primarily related" to wages, hours and conditions of employment and is, therefore, a mandatory subject of bargaining.

3/ This evidence was presented in detail at the TRO proceedings.

Under a Sec. 111.70(3)(a)4, Stats., analysis, once it is determined that the unilateral change affected a subject which constituted a mandatory subject of bargaining, the inquiry then concerns whether the municipal employer had a valid defense to making the unilateral change mid-term of the contract. SCHOOL DISTRICT OF WISCONSIN RAPIDS, DEC. NO. 19084-C (WERC, 3/85). In this regard, it is axiomatic that bargaining history, specific contract language and conduct or inaction can provide a municipal employer with a valid defense against a Sec. 111.70(3)(a)4, Stats., allegation. RANDOM LAKE SCHOOL DISTRICT, DEC. NO. 29998-B (BURNS, 9/01); SCHOOL DISTRICT OF CADOTT, SUPRA.

In the instant case, it is clear that the Union and the City did not discuss Section 5.02 in negotiations for the 1996-98 labor agreement, and they never proposed or negotiated any changes in the terms of Section 5.02. In the Examiner's view, the Union clearly stood on the existing clause and past practice and it did not waive its right to pursue a Sec. 111.70(3)(a)4, Stats., complaint by either bargaining history or specific contract language regarding Section 5.02.

The question then arises whether the Union waived the right to pursue its claim of a unilateral change by its other actions or its failure to act. In the instant case, it is clear that the Union never received any advance notice that the City intended to revoke the contract-based shift trading past practice mid-term of the 1996-98 agreement. Under well-settled Commission law, a municipal employer that fails to notify its employees' labor representative of a unilateral change in a mandatory subject of bargaining prior to its implementation, essentially robs the representative of the opportunity to object to and to make a timely demand to retain the practice or bargain thereon, so that the Employer's action amounts to a fait accompli about which the Union can do nothing. CITY OF GREEN BAY, DEC. NO. 29469-A (NIELSEN, 7/99), AFF'D BY OPERATION OF LAW, DEC. NO. 29469-B (WERC, 8/99); ST. CROIX FALLS SCHOOL DISTRICT, DEC. NO. 27215-B (BURNS, 1/93) AFF'D DEC. NO. 27215-D (WERC, 7/93); and WALWORTH COUNTY, DEC. NOS. 15429-A, 15430-A, (GRATZ, 12/78), PAGES 10-11.

In this case, the Union's main objective was to retain the shift trading past practice or have it reinstated, rather than to engage in bargaining thereon which might have eroded bargaining unit members' rights in that area. See, CITY OF APPLETON, SUPRA; ST. CROIX FALLS SCHOOL DISTRICT, DEC. NO. 27215-B, SUPRA. Therefore, it was completely appropriate for the Union to file a prohibited practice complaint with the WERC and then to

seek to obtain a TRO in the Brown County Circuit Court pending the outcome of the instant complaint case to ensure that the past practice remained in full effect. The Examiner concludes that the Union did not waive any of its rights by action or inaction in this case. 4/

4/ Agreed-upon excerpts of the transcript of the Temporary Injunction in Brown County Circuit Court, as well as the transcript herein, have been considered in reaching the above conclusions.

The City has argued that by agreeing to changes in Section 6.03 during negotiations for the 1996-98 contract, the Union essentially waived its right to protest the City's announced change in Section 5.02 on October 14, 1997. I disagree. Section 6.03, by its terms, applies only to overtime situations. 5/ The record evidence was undisputed that overtime liability is never created when a shift trade is worked. Chief Lewis indicated that labor negotiations over the 1996-98 contract did not include any discussion of or agreement to change the language of Section 5.02.

5/ The McLaughlin and Morrison Awards cited and submitted by the City demonstrate that those Awards concerned overtime issues and dealt with the proper interpretation and application of Section 6.03, and that Section 5.02 was not before those arbitrators.

In addition, the City asserted that because the parties discussed officer fatigue in regard to overtime and then the parties agreed to change the language of Section 6.03, one could reasonably conclude that all other sections of the contract which might be impacted by officer fatigue were thereby changed either by implication or imputation. In the Examiner's view, this argument is unpersuasive.

Chief Lewis stated that it was his belief that because the parties agreed to change Section 6.03 of the labor agreement based upon discussions regarding officer fatigue, because Section 6.03 refers to "legitimate safety concerns," Lewis could then apply those concepts to Section 5.02 as that section includes a provision which states that approval of shift trades shall not be "unreasonably withheld." Chief Lewis stated that, in his opinion, it would be unreasonable, given the City's position regarding officer fatigue, to grant shift trades where an officer is going to work more than one shift and one-half in a 24-hour period, given the parties' negotiated change in Section 6.03.

However, there was no evidence to show that the Chief ever conveyed the above opinion to the Union in bargaining. The City failed to demonstrate that any discussion was had at bargaining or that any agreement was otherwise reached by the parties that the City's fatigue concerns and/or the "legitimate safety concerns" language of Section 6.03 (and its shift

and one-half limitation) were intended to be applied to Section 5.02 shift trades in determining when shift trades could be reasonably denied. Therefore, it appears that Chief Lewis reached the conclusion to apply the principles he believed underlay the amended Section 6.03 to Section 5.02 shift trades without any express or implied prior agreement with the Union.

The Union alleged in its complaint that the City violated the labor agreement and "Section 111.73(a)5," 6/ Stats., by unilaterally revoking the shift trading past practice, but that a remedy in grievance arbitration would not be "viable" because officers who have been denied shift trades cannot be "made whole" by a remedy at grievance arbitration. Section 111.70(3)(a)5, Stats., makes it a prohibited practice for a municipal employer to "violate any collective bargaining agreement previously agreed upon by the parties . . ." The Commission has had a long-standing policy of refusing to assert jurisdiction to determine the merits of breach of contract allegations where the parties' labor contract provides for final and binding arbitration of such disputes and where that arbitration procedure has not been exhausted. JT. SCHOOL DIST. NO. 1, CITY OF GREEN BAY, ET AL., DEC. NO. 16753-A, B (WERC, 12/79); BOARD OF SCHOOL DIRECTORS OF MILWAUKEE, DEC. NO. 18525-B, C (WERC, 6/79); OOSTBURG JT. SCHOOL DISTRICT, DEC. NO. 11196-A, B (WERC, 12/79).

6/ Although the Union used similar incorrect numbering in its complaint regarding the Sec. 111.70(3)(a)1 and 4, Stats., allegations, its descriptions thereof make it clear that the use of incorrect numbering of the MERA sections cited was an inadvertent error.

Here, the parties' labor agreement provides for final and binding arbitration of disputes at Article 3. However, Article 26 Discipline reads in relevant part as follows:

. . .

> 26.05 ADMINISTRATIVE REGISTER/DOCUMENTATION OR ORAL REPRIMANDS. Documentation of oral reprimands may be made only by way of an entry into an administrative register maintained by the department pursuant to the following, and such entries shall not be subject to grievance:
>
> . . .
>
> (5) Entries in the Administrative Register shall remain valid for purposes of progressive discipline or performance evaluation for a period of one year of their entry, and at the end of each year shall be void and considered expunged. Only one entry shall be made per page in the entry, and such page shall be removed and destroyed at the end of the above said one year period.

The facts herein show that on November 25, 1997, Officer Pigeon was given an oral reprimand for attempting to work overlapping double shifts which, when the trade was denied, created overtime liability for the City. The Union never filed a grievance regarding this oral reprimand. Based upon the findings and conclusions herein that the City violated Sec. 111.70(3)(a)4, and derivatively 1, Stats., it is unnecessary to determine the merits of this Sec. 111.70(3)(a)5, Stats., allegation.

The Union argued that the Commission should apply the doctrine of issue preclusion in this case and that the Brown County Circuit Court's conclusion that a contract-based shift trading past practice existed as alleged by the Union should stand in this case. The Union urged that all of the prerequisites for issue preclusion are present here, citing NORTHERN STATES POWER, SUPRA. I disagree. Although there is identity of the parties in this case with the TRO case, this case concerns a cause of action under Chapter 111 which is separate and distinct from that before the Circuit Court on the TRO. Also, no truly final judgment on the merits of this case was reached in the Circuit Court. Rather, the judge there merely acted to preserve the status quo pending the outcome of the instant case. Finally, the Examiner agrees with the City that it is somewhat ironic for the Union to argue in Circuit Court that the WERC was the only body with expertise to determine the past practice issue, while the Union has argued here that the Commission should simply rubber stamp the Circuit Court's findings regarding the shift trading past practice.

The Examiner took and considered all excerpts from the Circuit Court proceeding offered by the parties which contained testimony concerning the past practice issue. It is significant that the City agreed to this approach in this case. In sum, the Examiner does not believe this is a proper case for issue preclusion. Based on the evidence proffered, the Examiner has independently concluded that a contract-based shift trade past practice existed prior to October 14, 1997, as alleged by the Union.

Therefore, in the Examiner's view, the City's arguments fail to prove that the Union in fact waived its right to protest the City's unilateral action in revoking the shift trade past practice. I have found supra that no request for bargaining by the Union was necessary as the City's unilateral change amounted to a "fait accompli." See, CITY OF APPLETON, DEC. NO. 17034-C (MCCRARY, 1/80); FENNIMORE JT. SCHOOL DIST. NO. 5, DEC. NO. 11865-A (FLEISCHLI, 6/74). Thus, I have also found that the City did not have a valid defense for its conduct in unilaterally revoking the shift trade past practice, the City's actions are a per se violation of Sec. 111.70(3)(a)4, Stats., and derivatively, Sec. 111.70(3)(a)1, Stats., because the unilateral change interferes with and minimizes the influence and value of collective bargaining to unit employees.

In its complaint, the Union alleged that the City's actions were "intentional" and the "result of an anti-union bias," apparently in violation of Sec. 111.70(3)(a)1, Stats. The Union

failed to submit any evidence to show that its allegations were founded in fact. As a consequence, the Examiner has not found any independent violation of Sec. 111.70(3)(a)1, Stats., in this case.

In addition, the Union sought attorneys' fees in this case. The Commission has held that it will not award attorneys' fees and costs except in "exceptional cases where an extraordinary remedy is justified," specifically where the responding party's defense is "frivolous" or "debatable." MADISON METROPOLITAN SCHOOL DISTRICT, DEC. NO. 16471-D (WERC, 5/81) (TOROSIAN CONCURRENCE); ROCK COUNTY, DEC. NO. 23656 (WERC, 5/86); DER (UW HOSPITAL AND CLINICS), DEC. NO. 29093-B (WERC, 9/98). The facts of this case do not show that this is such an exceptional case or that the City's defenses were frivolous or debatable. Therefore, I have not ordered that the City pay any attorneys' fees herein. WISCONSIN STATE EMPLOYEES UNION, DEC. NO. 29177-C (WERC, 5/99).

Dated at Oshkosh, Wisconsin, this 22nd day of January, 2002.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Sharon A. Gallagher /s/
Sharon A. Gallagher, Examiner

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