STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of

**MILWAUKEE POLICE ASSOCIATION,
IUPA, AFL-CIO, LOCAL 21**

Involving Certain Employees of

THE CITY OF MILWAUKEE

Case 473
No. 59268
MIA-2339

Decision No. 30296

In the Matter of the Petition of

**MILWAUKEE POLICE ASSOCIATION,
IUPA, AFL-CIO, LOCAL 21**

Involving Certain Employees of

THE CITY OF MILWAUKEE

Case 484
No. 60362
MIA-2409

Decision No. 30297

Appearances:

Attorney Thomas J. Beamish, Assistant City Attorney, 800 City Hall, 200 East Wells Street, Milwaukee, Wisconsin 53202-3551, appearing on behalf of the City of Milwaukee.

Attorney Laurie A. Eggert, Eggert Law Offices, S.C., 1840 North Farwell Avenue, Suite 303, Milwaukee, Wisconsin 53202, appearing on behalf of the Milwaukee Police Association, IUPA, AFL-CIO, Local 21.

ORDER

On October 12, 2000, the Milwaukee Police Association filed a petition with the Wisconsin Employment Relations Commission seeking interest arbitration pursuant to Sec. 111.70(4)(jm), Stats. of a collective bargaining agreement with the City of Milwaukee covering certain Association-represented law enforcement officers employed by the City.

The City and the Association subsequently met with Commission Investigator Marshall L. Gratz in an unsuccessful effort to reach a voluntary agreement. The parties thereafter began to exchange final offers.

On July 21, 2001, the City filed a petition with the Wisconsin Employment Relations Commission pursuant to Sec. 111.70(4)(b), Stats. seeking a declaratory ruling that certain portions of the Association's final offer could not proceed to interest arbitration because they were permissive or prohibited subjects of bargaining. One of the portions of the Association's final offer placed at issue by the declaratory ruling was a proposal to add the following provision to the parties' next collective bargaining agreement:

> **ARTICLE 74**
>
> **INTERNAL INVESTIGATIONS**
>
> If an employee is required to submit to interrogation by the employer concerning an allegation of misconduct under Rules and Regulations/Procedures, Order(s), Directives or Memo(s), and such interrogation could lead to discipline, demotion or discharge, the interrogation shall be conducted on working days as defined in 227.01(14) between the hours of 7:00 A M and 5:00 P M This paragraph shall apply only to statements which are compelled by a PI-21.

On September 1, 2001, Section 2610 of 2001 Wisconsin Act 16 became effective and created Sec. 111.70(4)(jm)4.k., Stats. which provides that one of the matters subject to interest arbitration under Sec. 111.70(4)(jm), Stats. is:

> Establish a system for conducting interrogations of members of the Police department that is limited to the hours between 7 a.m. and 5 p.m. on working days, as defined in s. 227.01(14), if the interrogations could lead to disciplinary action, demotion, or dismissal, but one that does not apply if the interrogation is part of a criminal investigation.

Section 9317 of Act 16 provides that:

> The treatment of section 111.70(4)(jm)4.k. of the statutes first applies to petitions for arbitration submitted under section 111.70(4)(jm)1. of the statutes on the effective date of this subsection.

On September 13, 2001, the Association filed a petition for arbitration pursuant to Sec. 111.70(4)(jm), Stats. along with a letter which stated:

> The Milwaukee Police Association hereby withdraws its petition for final and binding arbitration pursuant to 111.70(4)(jm). Wis. Stats., which was filed on October 9, 2000.

On October 23, 2001, the City filed a motion with the Wisconsin Employment Relations Commission asking the Commission to refuse to allow the Association to withdraw and refile a petition for arbitration. On October 25, 2001, the Association filed a response to the City's motion.

Hearing on the motion and the petition for declaratory ruling was held in Milwaukee, Wisconsin on October 26, 2001 before Commission Examiner Peter G. Davis.

By letter received December 3, 2001, the parties advised the Commission that they wished to receive a ruling on the City's motion before proceeding to brief the issues in the declaratory ruling.

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.

Having reviewed the record and being fully advised in the premises, the Commission makes and issues the following

ORDER

The City's motion is denied.

Given under our hands and seal at the City of Madison, Wisconsin, this 21st day of March, 2002.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

A. Henry Hempe /s/
A. Henry Hempe, Commissioner

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

THE CITY OF MILWAUKEE

MEMORANDUM ACCOMPANYING ORDER

The issue before us is whether the Association can withdraw and refile a Sec. 111.70(4)(jm) interest arbitration petition so as to take advantage of the change in Sec. 111.70(4)(jm), Stats. which became effective September 1, 2001. Because the "Initial Applicability" language of 2001 Wisconsin Act 16 specifies that the change in Sec. 111.70(4)(jm), Stats. takes effect as to petitions filed on or after September 1, 2001, it is undisputed that if the Association can withdraw and refile a petition, the Association's September 13, 2001 petition gives it access to the change in Sec. 111.70(4)(jm), Stats.

The City asserts that the Association's actions are an abuse and manipulation of the Commission's processes and therefore ought not be allowed. The Association contends that its actions are an appropriate effort to use the new right the legislature enacted.

The statutes and administrative rules we administer do not deal directly with the right of a party to withdraw and refile a Sec. 111.70(4)(jm) interest arbitration petition. However, maintenance of the "rudiments of fair play" has long been recognized as part of our obligation when administering the law. GENERAL ELECTRIC CO. V. WISCONSIN EMPLOYMENT RELATIONS BOARD, 3 Wis. 2D 227 (1958). Thus, for instance, we have concluded that it is not appropriate to allow a party to withdraw without prejudice a petition for unit clarification (MILWAUKEE BOARD OF SCHOOL DIRECTORS, DEC. NO. 8974-C (WERC, 11/78)) or a petition for an all-union agreement (VERNON MEMORIAL HOSPITAL, DEC. NO. 12348-A (WERC, 2/74)) where hearing on the petition had already been conducted. Given the foregoing, we think it clear that our obligation to maintain the "rudiments of fair play" gives us authority to consider the merits of the City's motion.

We have not previously had occasion to consider whether the "rudiments of fair play" are offended when a party seeks to take advantage of a statutory change by withdrawal and refiling an action with the Commission. However, the Wisconsin courts have considered that question when interpreting Sec. 805.04(2), Stats. 1/ that authorizes courts to grant plaintiff's motion for dismissal of a civil action "upon such terms and conditions as the court deems proper."

1/ Section 805.04(2), Stats., provides:

> **(2)** BY ORDER OF COURT. Except as provided in sub.(1), an action shall not be dismissed at the plaintiff's instance save upon order of court and upon such terms and conditions as the court deems proper. Unless otherwise specified in the order, a dismissal under this subsection is not on the merits.

The courts have interpreted Sec. 805.04(2), Stats. as being a "rule of fairness designed to protect a defendant from prejudice when a plaintiff seeks to discontinue his suit without adjudication of the merits." ENGEBOSE V. MORAINE RIDGE LIMITED PARTNERSHIP, 228 WIS. 2D 860, 863 (Ct.App. 1999). In ENGEBOSE, at 866, the Court concluded that ". . .recourse to the benefit of an available statutory amendment is not an element of prejudice that precludes the trial court from granting the. . .motion to voluntarily dismiss the originally filed claim without prejudice." Rather, the Court focuses on the past investment of time and resources that might be lost if the case were dismissed. SEE ALSO CLARK V. MUDGE, 229 WIS. 2D 44 (Ct.App. 1999).

With this guidance, we conclude that the Association's desire to take advantage of the statutory change does not violate the "rudiments of fair play." We further conclude that the withdrawal and refiling does not prejudice the City's investment of time and resources to an extent that violates the "rudiments of fair play." We note in this regard that a bargaining proposal as to the issue affected by the statutory change had already been considered by the parties (and was one of the issues in the City's petition for declaratory ruling). Therefore, we have denied the City's motion.

Dated at Madison, Wisconsin, this 21st day of March, 2002.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

A. Henry Hempe /s/
A. Henry Hempe, Commissioner

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

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