STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of

VILLAGE OF WILLIAMS BAY

Requesting a Declaratory Ruling Pursuant to Section 227.41, Wis. Stats.,
Involving a Dispute Between Said Petitioner and

**WISCONSIN PROFESSIONAL POLICE ASSOCIATION/
LAW ENFORCEMENT EMPLOYEE RELATIONS DIVISION**

Case 11
No. 60522
DR(M)-629

Decision No. 30385-A

Appearances:

Consigny, Andrews, Hemming & Grant, S.C., by **Attorney Richard R. Grant,** 303 East Court Street, Post Office Box 1449, Janesville, Wisconsin 53547-1449, appearing on behalf of the Village of Williams Bay.

Attorney Gordon E. McQuillen, Director of Legal Services, Wisconsin Professional Police Association/LEER Division, 340 Coyier Lane, Madison, Wisconsin 53713, appearing on behalf of the Wisconsin Professional Police Association/Law Enforcement Employment Relations Division.

FINDINGS OF FACT, CONCLUSION OF LAW AND DECLARATORY RULING

On November 5, 2001, the Village of Williams Bay filed a petition with the Wisconsin Employment Relations Commission seeking a declaratory ruling pursuant to Sec. 227.41, Stats., as to whether the contractual interest arbitration proposal of the Wisconsin Professional Police Association/Law Enforcement Relations Division (WPPA) is a mandatory subject of bargaining.

The parties waived hearing and agreed to a briefing schedule. Following a delay in the filing of the WPPA brief, the Village filed a motion for default judgment. By order dated June 30, 2002, the Commission denied the motion (DEC. NO. 30385). The briefing schedule was completed July 15, 2002.

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

FINDINGS OF FACT

1. The Village of Williams Bay, herein the Village, is a municipal employer having a population of less than 2500 with its principal offices in Williams Bay, Wisconsin. The Village provides law enforcement services to its citizens through its Police Department.

2. The Williams Bay Police Officers Association, affiliated with the Wisconsin Professional Police Association/Law Enforcement Employees Relations Division, herein WPPA, is a labor organization that serves as the collective bargaining representative of the law enforcement employees in the Village's Police Department.

3. The 1999 collective bargaining agreement between the Village and the WPPA contained the following provision:

. . .

ARTICLE XXI – COMPULSORY ARBITRATION

> The State Mediation/Arbitration Law (Wisconsin Statute Section 111.77) shall not apply to the EMPLOYER, the ASSOCIATION or the EMPLOYEES for the life of this Agreement. If the parties cannot reach agreement on a new contract to succeed this Agreement, and an impasse has been reached regarding the new succeeding contract, then the provisions of Wisconsin State Statute 111.77 shall apply to the disposition of the dispute regarding the terms of the new contract to succeed this contract.

. . .

4. During bargaining over a successor to the 1999 agreement, the Village filed a petition with the Wisconsin Employment Relations Commission pursuant to Sec. 227.41, Stats., seeking a declaratory ruling as to the statutory and contractual options available to the parties if they were unable to voluntarily reach an agreement on a successor agreement.

On June 21, 2001, the Commission issued its decision as to this declaratory ruling petition (DEC. NO. 30161) and concluded:

> 1. Because the Village of Williams Bay has a population of under 2500, neither the Village nor the Association has the statutory right to use the interest arbitration procedures contained in Sec. 111.77, Stats., to resolve any impasse as to the terms of a successor to their 1999 collective bargaining agreement.
>
> 2. Through the terms of their 1999 collective bargaining agreement, the Village and the Association have the contractual right to use the interest arbitration procedures contained in Sec. 111.77, Stats., to resolve any impasse as to the terms of a successor to their 1999 collective bargaining agreement.
>
> 3. Because the parties' 1999 collective bargaining agreement provides a procedure for final and binding resolution of the terms of a successor agreement, fact finding pursuant to Sec. 111.70(4)(c)3, Stats., is not an available method to resolve a dispute over the terms of a successor agreement.

5. Following receipt of the Commission's June 21, 2001 decision, the parties resumed bargaining and the WPPA proposed that the ARTICLE XXI – COMPULSORY ARBITRATION provision set forth in Finding of Fact 3 be included in the successor to the 1999 agreement. The Village asserts this WPPA proposal is not a mandatory subject of bargaining.

6. The ARTICLE XXI – COMPULSORY ARBITRATION proposal set forth in Finding of Fact 3 is not related to the employee wages, hours and conditions of employment for the agreement being bargained.

Based on the above and foregoing Findings of Fact, the Commission makes and issues the following

CONCLUSION OF LAW

The ARTICLE XXI – COMPULSORY ARBITRATION proposal set forth in Finding of Fact 3 is a permissive subject of bargaining.

Based on the above and foregoing Findings of Fact and Conclusion of Law, the Commission makes and issues the following

DECLARATORY RULING

The Village of Williams Bay and the Williams Bay Police Officers Association, affiliated with the Wisconsin Professional Police Association/Law Enforcement Employees Division, do not have a duty to bargain within the meaning of Secs. 111.70(1)(a) and (3)(a)4, Stats., as to the ARTICLE XXI – COMPULSORY ARBITRATION proposal set forth in Finding of Fact 3.

Given under our hands and seal at the City of Madison, Wisconsin, this 4th day of September, 2002.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Steven R. Sorenson /s/
Steven R. Sorenson, Chairperson

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

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

Village of Williams Bay

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSION OF LAW AND DECLARATORY RULING

As reflected in Finding of Fact 4, we have previously determined that the parties' 1999 contract contains an enforcable contractual interest arbitration procedure for resolving the terms of a successor contract should the parties be unable to do so. The dispute now before us is whether the WPPA can compel the Village to bargain (and proceed, if necessary, to contractual interest arbitration) over inclusion of that same contractual interest arbitration procedure in the successor contract.

The Village contends it cannot be compelled to bargain (or proceed to interest arbitration) over the disputed proposal because it is a permissive subject of bargaining. The Village urges the Commission to follow federal precedent which finds such proposals to be permissive subjects of bargaining under the National Labor Relations Act, citing PRINTING PRESSMAN LOCAL 252 219 NLRB NO. 54, 89 LRRM 1553 (1975) ENF'D NLRB V. COLUMBUS PRINTING PRESSMAN & ASSISTANTS' UNION NO. 252, 543 F.2D 1161 (CA 5 1976).

WPPA asserts that its proposal is a mandatory subject of bargaining because it is consistent with the general statutory purposes behind the Municipal Employment Relations Act and the specific authorization in Sec. 111.70(4)(c)3, Stats., for unions and municipal employers to develop their own procedures for settling disputes over the terms of a collective bargaining agreement.

WPPA argues that the Commission has already concluded that its proposal is enforceable and thus, to the extent the Village argues otherwise, urges rejection of the Village's position.

DISCUSSION

As evidenced by the parties' arguments, the Commission has not previously decided whether a proposal for interest arbitration of the terms of a successor agreement is a mandatory subject of bargaining under the Municipal Employment Relations Act for law enforcement employees where, as here, the parties have no statutory Sec. 111.77, Stats. right to interest arbitration. 1/

1/ We have addressed the issue of whether interest arbitration of disputes that arise during the term of a contract is a mandatory subject of bargaining for non-law enforcement employees. We concluded that such proposals are mandatory subjects of bargaining if the applicable interest arbitration statute

(Sec. 111.70(4)(cm), Stats.) authorizes interest arbitration of such mid-term disputes. CITY OF MILWAUKEE, DEC. NO. 19091 (WERC, 10/81); RACINE UNIFIED SCHOOL DISTRICT, DEC. NO. 20653-A (WERC, 1/84) AFF'D CT. APP. DIST. II, NO. 85-0158 (3/86). These decisions are of no particular analytical assistance here because it is clear that the terms of a successor agreement cannot be submitted to statutory interest arbitration (Sec. 111.77, Stats. here) due to the Village's population of less than 2500.

The determination of whether a proposal is a mandatory or permissive subject of bargaining is typically made by balancing the relationship of the proposal to employee wages, hours and conditions of employment against the proposal's relationship to management and public policy interests. WEST BEND EDUCATION ASS'N V. WERC, 121 WIS.2D 1, (1984). However, on occasion, the Legislature specifically states whether a matter is a mandatory subject of bargaining. Thus, for non-law enforcement and non-firefighting personnel, the Legislature specified in Sec. 111.70 (4)(cm) 5, Stats. that any interest arbitration procedure other than that specified in Sec. 111.70(4)(cm), Stats. is a permissive subject of bargaining. 2/

2/ Section 111.70(4)(cm) 5. Stats. provides in pertinent part:

> ***5. 'Voluntary impasse resolution procedures.' In addition to other impasse resolution procedures provided in this paragraph, a municipal employer and labor organization may at any time , as a permissive subject of bargaining, agree in writing to a dispute settlement procedure, including authorization for a strike by municipal employees or binding interest arbitration, which is acceptable to the parties for resolving an impasse over the terms of any collective bargaining agreement under this subchapter. (emphasis added)***

However, for law enforcement and firefighting personnel covered by the dispute resolution processes of Secs. 111.70(4)(c) and 111.77, Stats., the Legislature has not specified whether proposals for interest arbitration are mandatory or permissive subjects of bargaining. Therefore, we turn to the traditional balancing analysis to resolve that issue.

We begin with the critical question of whether a contractual interest arbitration provision relates at all to employee wages, hours and conditions of employment. Absent such a relationship, the proposal cannot be a mandatory subject of bargaining. MTI V. WERC, 218 WIS.2D 75 (CT.APP. 1998).

Under the federal National Labor Relations Act COLUMBUS PRINTING precedent cited by the Village, the Fifth Circuit Court of Appeals concluded that the relationship to employee "terms and conditions of employment during the contract period is remote at best." The Court stated at 543 F.2d 1116, 1165-1166, that:

> . . . The Board contends that contract arbitration is a non-mandatory subject because it can have no impact upon the unit employees' working conditions during the term of the contract being negotiated. The union argues, however, that contract arbitration, as a procedure for determining "wages, hours, and other conditions of employment," is so intertwined with working conditions in the contract being negotiated as to render it a mandatory subject. Further, the union contends that employees derive a benefit from such a clause during the term of the contract: they are assured of continuing employment during any dispute that might arise over new contract provisions. Finally, the union insists that a contract arbitration clause is indistinguishable from a cost-of-living escalation clause.
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> The union's arguments are unpersuasive. First, the analogy to cost-of-living clauses is not apt. Such clauses are in the nature of aleatory contracts; they safeguard employees' interests against certain contingencies which will occur and affect wages, if at all, only during the existence of the contract. In contrast, contract arbitration clauses only affect wages and working conditions during the time periods covered by future contracts. Similarly, there is an "intertwining" between the arbitration clause and terms and conditions of employment only as to the term of a future contract.
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> The only benefit said to accrue to employees during the term of the contract being negotiated is the "peace of mind" they derive from knowing that disputes over new contract terms will not be resolved by the application of economic pressure. This asserted benefit, however, is too speculative to be considered a term or condition of employment in light of Allied Chemical & Alkali Workers, supra. The Board in that case held that the employer had refused to bargain by unilaterally offering retired employees an alternative to the method of payment of group health insurance premiums prescribed by the collective bargaining agreement. The Sixth Circuit refused enforcement of the Board's order, 427 F.2d 936, 74 LRRM 2425, and the Supreme Court affirmed. Inter alia, the Court held that benefits accorded retirees do not "vitally affect" the terms and conditions of employment of active employees, resulting in retirees' benefits being a nonmandatory subject. 404 U.S. at 182, 92 S.Ct. at 399, 30 L.Ed.2d at 359, 78 LRRM at 2983. The Board argued that active employees derived two benefits from representation of retirees' interests:

(1) inclusion of retirees in a group health insurance plan enlarged the pool of participants, possibly resulting in lower premiums for active employees; and (2) establishing a practice of representing retirees would insure the future retirement benefits of active employees, as active employees would be likely to continue protecting retirees' benefits in years to come. 404 U.S. at 177-78, 92 S.Ct. at 396-097, 30 L.Ed.2d at 356-67, 78 LRRM at 2981-82.

The Supreme Court thought neither alleged benefit sufficiently concrete to affect vitally the terms and conditions of employment. As to the first alleged benefit, the Court said:

> The benefits that active workers may reap by including retired employees under the same health insurance contract are speculative and insubstantial at best. As the Board itself acknowledges in its brief, the relationship between the inclusion of retirees and the overall insurance rate is uncertain. Adding individuals increases the group experience and thereby generally tends to lower the rate, but including pensioners, who are likely to have higher medical expenses, may more than offset that effect. 404 U.S. at 180, 92 S.Ct. at 398, 30 L.Ed.2d at 358, 78 LRRM at 2982.

Similarly, the Court thought the second asserted benefit too speculative to support an obligation to bargain:

> The mitigation of future uncertainty and the facilitation of agreement on active employees' retirement plans, that the Board said would follow from the union's representation of pensioners, are equally problematical. . . . Under the Board's theory, active employees undertake to represent pensioners in order to protect their own retirement benefits, just as if they were bargaining for, say, a cost-of-living escalation clause. . . . By advancing pensioners' interests now, active employees, [however], have no assurance that they will be the beneficiaries of similar representation when they retire. The insurance against future contingencies that they may buy in negotiating benefits for retirees is thus a hazardous and, therefore, improbable investment. 404 U.S. at 180-82, 92 S.Ct. at 399, 30 L.Ed.2d at 358-59, 78 LRRM at 2983.

The Court's observations in Allied Chemical & Alkali Workers are equally applicable to the union's "peace of mind" argument here. Numerous new labor contract disputes are resolved prior to the use of economic pressure.

Thus, fear of wage losses during a strike is a rather remote fear. In addition, the contingency of a strike is one within the employees' power to prevent, unlike the contingencies, such as inflation and changes in the law, which can affect retirees' benefits. Furthermore, giving up the right to strike may cause anxiety, not peace of mind. As the court noted in Aikens v. Abel, 373 F.Supp 425, 437, 85 LRRM 2786, 2794 (W.D.Pa. 1974),

> The emption-laden term, right to strike, inevitably recalls the bloody and bitter historical struggle for parity that was waged by union members against the steel companies. No one . . . belittles the importance of the right to strike; brave men died to win it. No one discounts their sacrifice.

Indeed, employees may await the expiration of the current contract with anticipation rather than trepidation, as they perceive an opportunity to secure additional benefits through the application of enhanced economic leverage. Further, there is no assurance that employees will be better off economically, even accounting for wage losses due to a strike, under an arbitrated contract than under one reflecting the economic power of each party. Thus, the "peace of mind" benefit supposedly derived during the term of a current contract is too uncertain and "speculative a foundation on which to base an obligation to bargain." 404 U.S. at 182, 92 S.Ct. at 399, 30 L.Ed.2d at 359, 78 LRRM at 2983.

Reading section 8(d) in such a restrictive fashion serves the important purpose of fostering fruitful negotiations by excluding from the mandatory bargaining sphere proposals which have only an indirect or remove impact upon the unit employees. As Mr. Justice Stewart observed in Fibreboard Paper Products Corp., supra, 379 U.S. at 220, 85 S.Ct. at 408, 13 L.Ed.2d at 244.57 LRRM at 2616 (concurring opinion);

> It is important to note that the words of the statute are words of limitation. The National Labor Relations Act does not say that the employer and employees are bound to confer upon any subject which interests either of them; the specification of wages, hours, and other terms and conditions of employment defines a limited category of issues subject to compulsory bargaining.

We do not hold that parties to negotiations cannot waive their right to apply economic pressure by adopting a contract arbitration clause. We only

> hold that such a clause is not a mandatory subject of bargaining since its effect on terms and conditions of employment during the contract period is at best remote. Therefore the Board correctly determined that a union's insistence to impasse on such a clause constitutes a refusal to bargain under section 8(b)(3) of the Act.

In the above-quoted portions of the Court's decision, the Court was indirectly responding to and rejecting the dissent of NLRB Chairman Murphy in COLUMBUS PRINTING wherein he stated at 89 LRRM 1553, 1564:

> . . . I would find that it is within the definition of a mandatory subject of bargaining, i.e., any issue which settles an aspect of the relationship between the employer and employees concerning wages, hours, working conditions, or other terms or conditions of employment. That an interest arbitration provision does so is beyond dispute. For by its very nature it provides a peaceful judicial-type procedure in place of economic warfare as a means of settling any such aspect of the employment relationship upon which there may be disagreement. Its provision for the continuing effectiveness of established contract terms throughout the negotiation period for renewal thereof and the assurance of continued employment to workers and uninterrupted production to the employer are the very essence of the bargaining relationship and the protection of employer-employee interests. The fact that, as the Administrative Law Judge concluded, this provision may have no immediately measurable impact upon the welfare of unit employees is irrelevant; this is not and never has been a measure of whether a subject is one upon which the parties are compelled to bargain. Thus, a cost-of-living escalator clause protects employees against future economic contingencies which may never arise. Similarly, a pension agreement may not always provide unit employees with tangible benefits which they will surely realize. Yet no one today would agree that either a cost-of-living escalator provision or a pension plan is not a mandatory subject. What both of them provide the unit employees is a sense of security concerning income, and this is certainly equally true of the interest arbitration provision. Nor does a management rights clause relate to immediate and known matters which will surely arise, but this, too, is a mandatory subject. Thus, it seems to me that interest arbitration is unambiguously a term or condition of employment, being, as it is, a protection against interruption of future continued job security and earnings capacity and furthering the peaceful resolutions of possible disputes over contract terms dealing specifically with wages, hours, and working conditions.

While we are not bound to follow federal law or rationale when deciding the question before us, EMPLOYMENT RELATIONS DEPARTMENT V. WERC, 122 WIS.2D 132 (1985), the two above-quoted perspectives articulately present the alternatives before us as to the absence or presence of the critical relationship to wages, hours and conditions of employment. After careful consideration, we find the Court's perspective to be the more persuasive. Thus, because the contractual interest arbitration process does not have the necessary relationship to employee wages, hours and conditions of employment **during the term of the contract being bargained,** the WPPA proposal is not a mandatory subject of bargaining.

In reaching this conclusion, we have considered the WPPA argument that the general policy language of Sec. 111.70(6), Stats. 3/ and the specific language of Sec. 111.70(4)(c)3, Stats. 4/ support and promote the existence of alternative procedures for dispute resolution when collective bargaining does not produce a voluntary agreement.

3/ Section 111.70(6), Stats., provides:

> ***(6) DECLARATION OF POLICY. The public policy of the state as to labor disputes arising in municipal employment is to encourage voluntary settlement through the procedures of collective bargaining. Accordingly, it is in the public interest that municipal employees so desiring be given an opportunity to bargain collectively with the municipal employer through a labor organization or other representative of the employees' own choice. If such procedures fail, the parties should have available to them a fair speedy, effective and, above all, peaceful procedure for settlement as provided in this subchapter. (emphasis added)***

4/ Section 111.70(4)(c)3, Stats., provides in part:

> ***3. 'Fact-finding.' If a dispute has not been settled after a reasonable period of negotiation and after the settlement procedures, if any, established by the parties have been exhausted. (emphasis added)***

We view these statutory provisions as supporting the general enforceability of a contractual interest arbitration procedure such as the one included in the parties' 1999 contract but not as providing significant support for the proposition that such procedures are mandatory subjects of bargaining. We note in this regard that although the general policy statement of

Sec. 111.70(6), Stats. is applicable to all employees covered by the Municipal Employment Relations Act, Sec. 111.70 (4)(cm) 5, Stats. specifically provides that contractual interest arbitration procedures are permissive subjects of bargaining for non-law enforcement and non-firefighting employees.

Given all of the foregoing, we find the WPPA proposal to be a permissive subject of bargaining.

Dated at Madison, Wisconsin, this 4th day of September, 2002.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Steven R. Sorenson /s/
Steven R. Sorenson, Chairperson

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

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

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