STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of

STATE ENGINEERING ASSOCIATION

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

STATE OF WISCONSIN

Case 627
No. 63046
DR(S)-7

Decision No. 31264

Appearances:

William Haus, Haus, Roman and Banks, LLP, Attorneys at Law, 148 East Wilson Street, Madison, Wisconsin 53703-3423, on behalf of the State Engineering Association.

David J. Vergeront, Chief Legal Counsel, Office of State Employment Relations, 101 East Wilson Street, 4th Floor, P.O. Box 7855, Madison, Wisconsin 53707-7855, on behalf of the State of Wisconsin.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECLARATORY RULING

On December 2, 2003, the State Engineering Association filed a petition with the Wisconsin Employment Relations Commission seeking a declaratory ruling pursuant to Sec. 227.41, Stats., as to whether certain bargaining proposals made to the Association by the State of Wisconsin are mandatory subjects of bargaining.

The parties waived hearing and filed written argument until August 24, 2004.

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

FINDINGS OF FACT

1. The State of Wisconsin, herein the State, is an employer.

2. The State Engineering Association, herein the Association, is a labor organization serving as the collective bargaining representative of certain State employees.

3. During bargaining between the State and the Association, the State proposed that the following provisions from prior expired collective bargaining agreements with the Association be included in a successor agreement:

> **3/1/1** It is understood and agreed by the parties that management possesses the sole right to operate its agencies so as to carry out the statutory mandate and goals assigned to the agencies and that all management rights repose in management, however, such rights must be exercised consistently with the other provisions of this Agreement.
>
> **3/1/2** Management rights include:
>
> A. To utilize personnel, methods, and means in the most appropriate and efficient manner possible as determined by management.
>
> B. To manage and direct the employees of the various agencies.
>
> C. To transfer, assign or retain employees inn positions within the agency.
>
> D. To suspend, demote, discharge or take other appropriate disciplinary action against employees for just cause.
>
> E. To determine the size and composition of the work force and to lay off employees in the event of lack of work or funds or under conditions where management believes that continuation of such work would be inefficient or nonproductive.
>
> F. To determine the mission of the agency and the methods and means necessary to fulfill that mission including the contracting out for or the transfer, alteration, curtailment or discontinuance of any goods or services. However, the provisions of this Article shall not be used for the purpose of undermining the Association or discriminating against any of its members.

3/1/3 It is agreed by the parties that none of the management rights noted above or any other managements rights shall be subjects of bargaining during the term of this Agreement. Additionally, it is recognized by the parties that the Employer is prohibited from bargaining on the policies, practices and procedures of the civil service merit system relating to:

. . .

12/7/1 In the event the Employer uses Hiring Above the Minimum (HAM) or Raised Minimum Rate (RMR) for recruitment, the Employer will notify the Association before implementation.

. . .

15/1/1 The parties acknowledge that during the negotiations which resulted in this Agreement each had the unlimited right and opportunity to make demands and proposals with respect to any subject or matter not removed by law from the area of collective bargaining, and that all of the understandings and agreements arrived at by the parties after the exercise of that right and opportunity are set forth in this Agreement. Therefore, the Employer and the Association, for the life of this Agreement, and any extension, each voluntarily and unqualifiedly waives the right, and each agrees that the other shall not be obligated to bargain collectively with respect to any subject or matter not specifically referred to or covered in this Agreement, even though such subject or matter may not have been within the knowledge or contemplation of either or both of the parties at the time they negotiated or signed this Agreement.

4. There is a dispute between the State and the Association over whether underlined portions of the proposals in Finding of Fact 3 are mandatory or permissive subjects of bargaining.

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

CONCLUSIONS OF LAW

1. By agreeing to include the proposals set forth in Finding of Fact 3 in prior collective bargaining agreements with the State, the Association has not waived the right to obtain a ruling as to whether it must bargain over the inclusion of said proposals in a future collective bargaining agreement.

2. Portions of Articles 3/1/3 and 15/1/1 are not mandatory subjects of bargaining within the meaning of Sec. 111.91(1)(a), Stats.

3. Article 12/7/1 is a mandatory subject of bargaining within the meaning of Sec. 111.91(1)(a), Stats.

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

DECLARATORY RULING

The Association does not have a duty to bargain with the State within the meaning of Secs. 111.81(1) and 111.84(1)(d), Stats. as to the proposals referenced in Conclusion of Law 2.

The Association does have a duty to bargain with the State within the meaning of Secs. 111.81(1) and 111.84(1)(d), Stats. as to the proposal referenced in Conclusion of Law 3.

Given under our hands and seal at the City of Madison, Wisconsin, this 3rd day of March, 2005.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/
Judith Neumann, Chair

Paul Gordon /s/
Paul Gordon, Commissioner

Susan J. M. Bauman /s/
Susan J. M. Bauman, Commissioner

STATE OF WISCONSIN

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

We first consider the State's argument that the inclusion of these proposals in prior collective bargaining agreements between the parties should preclude the Association from now contesting the proposals' status as mandatory subjects of bargaining. We do not find this State argument to be persuasive.

In GREENFIELD SCHOOLS, DEC. NO. 14026-B (WERC, 11/77), arising under the Municipal Employment Relations Act (MERA), the Commission rejected this same argument and stated:

> We agree with the Examiner's rejection of the Association's argument that the District, by having included permissive subjects in the expired collective bargaining agreement, must bargain over such subjects in the future as having become mandatory subjects of bargaining. Subsequent to the Examiner's decision herein, the Commission expressly rejected this argument in CITY OF WAUWATOSA.
>
> The Association argues that the *quid pro quo*, which it surrendered to induce the District's concession on the permissive subjects, requires that the permissive subject thereafter be treated as a mandatory subject of bargaining. Essentially this argument requests the Commission to determine the adequacy of the consideration and balance the mutual exchange of consideration, a function which belongs entirely to the parties at the bargaining table. Even the consideration extended to induce an employer's concession on mandatory items is subject to the employer's right, after expiration of the contract and upon discharge of its duty to bargain, to make unilateral changes in such mandatory subjects. Labor organizations, in extending consideration to induce employer concessions on permissive subjects, must assume responsibility for weighing the value of the consideration extended in light of the employer's right unilaterally to alter such permissive subjects on termination of the agreement.
>
> Because of the importance of the point in regard to implementing the overall legislative purpose to encourage successful bargaining, we repeat the Examiner's observation that the effect of the rule proposed by the Association would deter employers from bargaining over permissive subjects. Such deterrence, in the Commission's opinion, would be to the substantial detriment of achieving voluntary settlements in collective bargaining. (Footnote omitted).

We find the same rationale applicable to the State Employment Labor Relations Act (SELRA) and reject the State's argument on that basis.

We turn to a consideration of the mandatory or permissive status of the three disputed proposals.

LEGAL FRAMEWORK

Section 111.91, Stats. identifies mandatory and permissive subjects of bargaining as follows:

> **111.91 Subjects of bargaining. (1)** (a) Except as provided in pars. (b) to (e), matters subject to collective bargaining to the point of impasse are wage rates, consistent with sub. (2), the assignment and reassignment of classifications to pay ranges, determination of an incumbent's pay status resulting from position allocation or reclassification, and pay adjustments upon temporary assignment of classified employees to duties of a higher classification or downward reallocations of a classified employee's position; fringe benefits consistent with sub. (2); hours and conditions of employment.
>
> (am) In collective bargaining units specified in s. 111.825(1m), the right of the employer to transfer employees from one position to another position and the right of employees to be transferred from one position to another position is a subject of bargaining.
>
> (b) The employer shall not be required to bargain on management rights under s. 111.90, except the procedures for the adjustment or settlement of grievances or disputes arising out of any type of disciplinary action referred to in s. 111.90(3) shall be a subject of bargaining.
>
> (c) The employer is prohibited from bargaining on matters contained in sub. (2).
>
> (cm) Except as provided in sub. (2)(g) and (h) and ss. 40.02(22)(e) and 40.23(1)(f)4., all laws governing the Wisconsin retirement system under ch. 40 and all actions of the employer that are authorized under any such law which apply to nonrepresented individuals employed by the state shall apply to similarly situated employees, unless otherwise specifically provided in a collective bargaining agreement that applies to those employees.
>
> (d) Demands relating to retirement and group insurance shall be submitted to the employer at least one year prior to commencement of negotiations.
>
> (e) The employer shall not be required to bargain on matters related to employee occupancy of houses or other lodging provided by the state.

THE PROPOSALS

Article 15/1/1

Article 15/1/1 provides:

> **15/1/1** The parties acknowledge that during the negotiations which resulted in this Agreement each had the unlimited right and opportunity to make demands and proposals with respect to any subject or matter not removed by law from the area of collective bargaining, and that all of the understandings and agreements arrived at by the parties after the exercise of that right and opportunity are set forth in this Agreement. Therefore, the Employer and the Association, for the life of this Agreement, and any extension, each voluntarily and unqualifiedly waives the right, and each agrees that the other shall not be obligated to bargain collectively with respect to any subject or matter not specifically referred to or covered in this Agreement, even though such subject or matter may not have been within the knowledge or contemplation of either or both of the parties at the time they negotiated or signed this Agreement.

The Association contends that the underlined portion of Article 15/1/1 is a permissive subject of bargaining.

In STATE OF WISCONSIN, DEC. NO. 19341 (WERC, 1/82), the Commission concluded that a proposal identical to Article 15/1/1 was a permissive subject of bargaining to the extent it waived the union's statutory right to bargain over matters that arise during the term of the contract as to which the union had no knowledge. The Commission therein stated:

> In a case involving the DEERFIELD COMMUNITY SCHOOL DISTRICT, 2/ the Commission was called upon to determine whether a provision, almost identical to that involved herein, related to a mandatory subject of bargaining. Therein we referred to the above language cited in STATE OF WISCONSIN, and determined that the proposal involved related to a permissive, rather than a mandatory subject of bargaining, because it was contrary to the public policy of favoring collective bargaining over mandatory subjects of bargaining. This same public policy is also expressed in SELRA.
>
> Sec. 111.80 of SELRA sets forth the Legislature's statement as to "public policy of the state as to labor relations and collective bargaining in state employment." Said statement recognizes the interest of the public, the employe, and the employer in the utilization of the collective bargaining process to resolve "whatever controversies may arise". 3/ Sec. 111.81(2) of SELRA, as previously quoted herein, includes within its definition of collective bargaining the resolution of questions "arising under" collective bargaining agreements. The foregoing statutory provisions clearly demonstrate an intent to extend the

> availability of the collective bargaining process to disputes or questions regarding mandatory subjects of bargaining under Sec. 111.91(1) of SELRA, which would result from an action contemplated to be initiated, or actually initiated, by the State, which arise during the term of the bargaining agreement, which are not covered by the agreement, and which were unknown to the parties when the agreement was negotiated. The State's proposal herein seeks *inter alia* to compel the WSEU to relinquish its statutory right to invoke the collective bargaining process in such circumstances.
>
> The fact that SELRA contains provisions other than those contained in MERA, including, but not limited to those provisions relating to "management rights", "subjects of bargaining", "tentative agreements", "terms of agreements", and the roles of the Joint Committee on Employment Relations, as well as the Legislature, in collective bargaining between agents of the State and the labor organizations representing State employes in collective bargaining, does not lessen the public policy fostering collective bargaining. Given the strong public policy supporting the collective bargaining process as the means to resolve said disputes and the concomitant statutory right of the Union to bargain in such circumstances, the State cannot insist to the point of impasse that the proposal in question be included in a bargaining agreement and thereby seek to compel WSEU to waive its statutory right to bargain. Thus the proposal in question has been found to be a permissive subject of bargaining under SELRA.

Id. at 4 (Footnotes omitted). We continue to find the above expressed rationale persuasive.

The State argues that the result of the 1982 decision ought to be reconsidered because the parties did not argue and thus the Commission did not consider the impact of the ratification provisions that are peculiar to SELRA. We disagree. It is generally apparent that in 1982 the State relied on the distinctions between SELRA and MERA when arguing that existing MERA precedent ought not to be persuasive in a SELRA case. More importantly, as evidenced by the definition of collective bargaining found in Sec. 111.81(1), Stats., it is apparent that the State has an ongoing collective bargaining obligation as to "questions arising" during the term of a bargaining agreement. Whatever the ratification obligations that arise as to agreements reached as a result of such "during the term" bargaining, it is this State statutory obligation (and concomitant Association statutory right) that Article 15/1/1 seeks to waive, and it is said waiver which renders the proposal a permissive subject of bargaining.

Article 3/1/3

Article 3/1/3 provides:

> **3/1/3** It is agreed by the parties that none of the management rights noted above or any other managements rights shall be subjects of bargaining during the term of this Agreement. . .

The Association contends that, like Article 15/1/1, Article 3/1/3 seeks waiver over certain matters as to which the Association has a right to bargain during the term of a contract. The State counters by arguing that the disputed language merely reiterates that the Association has no right to bargain over matters that are statutorily or contractually identified as management rights.

When interpreting contracts, it is generally held that a decision-maker should avoid interpretations that render a portion of the contract mere surplusage. On that basis we decline to adopt the State's proposed interpretation of Article 3/1/3 as merely referring to statutory and contractually defined management rights. For Article 3/1/3 to have substantive meaning, its scope must extend beyond the State's proffered interpretation to "management rights" as to which the State would otherwise be obligated to bargain during the term of the contract. To this limited extent, Article 3/1/3 is permissive based on the same rationale that applied to Article 15/1/1.

Article 12/7/1

Article 12/7/1 provides:

> **12/7/1** In the event the Employer uses Hiring Above the Minimum (HAM) or Raised Minimum Rate (RMR) for recruitment, the Employer will notify the Association before implementation.

Article 12/7/1 gives the State discretion as to the wage rate to be paid to new hires. The Association acknowledges that the topic of "wages" is a mandatory subject to bargaining under Sec. 111.91(1)(a), Stats., but contends that the level of discretion granted to the State in this proposal is tantamount to seeking an Association waiver of the right to bargain wages. We disagree.

While there are circumstances in which an employer's substantive position on a mandatory subject of bargaining can be indicative of bad faith bargaining, 1/ this record falls far short of establishing such circumstances. Further, even in such circumstances, we are unaware of any precedent indicating that mandatory subjects would thereby become permissive.

1/ For instance, if an employer proposed that it have total discretion to unilaterally determine employees wages and hours, it almost certainly would be engaging in bad faith bargaining.

In addition, unlike Articles 3/1/3 and 15/1/1, the subject of the State proposal (wage rates for new hires) is not a matter presently unknown to the parties but as to which the Association is nonetheless being asked to waive its right to bargain. Rather, the subject in

question is one known to the parties and therefore subject to negotiation during successor contract negotiations. The Association can and has proposed that the State not have discretion as to the wage rate to be paid new hires. Thus, the language of the State's proposal does not seek waiver of the Association's right to bargain about the wage rate applicable to new hires. Because the State's proposal does not seek waiver of a statutory right to bargain and addresses the mandatory subject of wages, we find it to be a mandatory subject of bargaining.

Dated at Madison, Wisconsin, this 3rd day of March, 2005.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/
Judith Neumann, Chair

Paul Gordon /s/
Paul Gordon, Commissioner

Susan J. M. Bauman /s/
Susan J. M. Bauman, Commissioner

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