STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of

CLARK COUNTY EMPLOYEES, LOCAL 546-D(2)
(SOCIAL SERVICES SOCIAL WORKERS), AFSCME, AFL-CIO

To Initiate Arbitration Between Said Petitioner and

CLARK COUNTY

Case 132
No. 66385
INT/ARB-10809

Decision No. 32094-B

Appearances:

Houston Parrish, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 1457 Somerset Drive, Stevens Point, Wisconsin 54481, appearing on behalf of Clark County Employees, Local 546-D(2) (Social Services Social Workers), AFSCME, AFL-CIO.

Stephen L. Weld, Weld, Riley, Prenn & Ricci, S.C., Attorneys at Law, 3624 Oakwood Hills Parkway, P.O. Box 1030, Eau Claire, Wisconsin 54702-1030, appearing on behalf of Clark County.

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

By letter dated October 11, 2007, Interest Arbitrator Howard S. Bellman asked the Wisconsin Employment Relations Commission to determine whether he had authority under Sec. 111.70 (4)(cm) 6, Stats. to select Clark County's final offer.

The parties thereafter filed written argument as to the matter, the last of which was received November 26, 2007.

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

FINDINGS OF FACT

1. Clark County, herein the County, is a municipal employer.

2. Clark County Employees, Local 546-D(2) (Social Services Social Workers), AFSCME, AFL-CIO, herein the Union, is a labor organization that serves as the collective bargaining representative of certain County employees.

3. The County and the Union were unable to reach agreement on a 2007-2008 contract and on June 19, 2007, the Wisconsin Employment Relations Commission appointed Howard S. Bellman as interest arbitrator to establish the terms of said contract by issuing a final and biding award pursuant to Sec. 111.70 (4)(cm) 6 and 7, Stats. selecting the total final offer of the County of the Union.

The County's total final offer before Arbitrator Bellman provides in pertinent part:

> All items shall remain as in the 2004-2006 collective bargaining agreement except as follows:
>
> . . .
>
> 2. Implement attached drug and alcohol testing policy.

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

CONCLUSION OF LAW

Interest Arbitrator Bellman has the statutory authority under Sec. 111.70(4)(cm) 6 and 7, Stats. to select the County's final offer.

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

ORDER

Interest Arbitrator Bellman shall proceed to select either the County's or the Union's final offer.

Given under our hands and seal at the City of Madison, Wisconsin, this 19th day of December, 2007.

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

CLARK COUNTY

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

Arbitrator Bellman's request for guidance states in pertinent part:

> Dear Mr. Davis,
>
> As you suggested in our recent telephone conversation, I am submitting this written request for advice in the above matter in which I am the appointed Arbitrator. The hearing in this matter was held on August 14, 2007. Enclosed herewith are the parties' briefs.
>
> As I understand the final offer of the County, it includes a drug and alcohol policy that would be "separate and apart," from the collective bargaining agreement. (See the County's brief at p. 2) My concern is that the Municipal Employment Relations Act at Section 111.70(4)(cm)6 provides interest arbitration for "any (deadlocked) dispute. . .over wages, hours and conditions of employment to be included in a new collective bargaining agreement;" and that the final offer selected by an arbitrator, "shall be included into a written collective bargaining agreement." Thus, my question is whether my authority allows me to address a proposal for terms that are not to be so included.
>
> I would only add that there is another, separate, matter in dispute respecting a provision that would, if adopted, be included in the parties' collective bargaining agreement.
>
> I look forward to your advice.

Arbitrator Bellman asks if he has statutory jurisdiction to select a final offer that includes a drug and alcohol policy that will not be physically included in the 2007-2008 contract. We conclude that he does.

As the Arbitrator's inquiry notes, Sec. 111.70 (4)(cm) 6, Stats. speaks in terms of interest arbitration over "wages, hours and conditions of employment to be included in a new collective bargaining agreement" and provides that the arbitrator's decision "shall be incorporated into a written collective bargaining agreement." The question before us is whether this statutory language is broad enough to encompass the content of work rules or policies which a party specifically references as part of its final offer but the text of which rule or policy will not be physically included in the bargaining agreement if that parties' final offer is selected.

A literal interpretation of the above-quoted statutory language could answer this question in the negative, such that the content of final offers would be restricted to proposals that in all respects would be physically included within the four corners of the contract. Under that interpretation, the proposed location of some portion of the proposal would govern over the content and context. Such an interpretation would be easy to enforce and comply with: in this instance, the County would either propose that the text of the specific drug and alcohol policy be included the contract or drop the proposal and adopt the policy as a work rule. However, we conclude that such a result is not consistent with the dispute resolution policy [1] that underlies Sec. 111.70 (4)(cm) interest arbitration or with the above-quoted statutory language. In our view, the content and context of the proposal should govern the question of access to interest arbitration, so long as some portion of the final offer will be "included" or "incorporated" into the new bargaining agreement if that final offer is selected. Where, as here, the parties are bargaining a new collective bargaining agreement and, as a part of that bargaining process, have unsuccessfully engaged in an effort to reach agreement on a policy or work rule the text of which will exist outside the physical confines of the collective bargaining agreement, an impasse/deadlock over such a policy or work rule can proceed to be resolved through the statutory interest arbitration, provided that the final offer (and thus the contract, if that final offer is selected) contains some language incorporating by reference the specific proposed policy or rule.

Here, the content of the proposal regards employee wages, hours and conditions of employment [2], the context is the bargaining of a new collective bargaining agreement, and the

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[1] 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.

ERC 32.02 states:

> **ERC 32.02 Policy.** The policy of the state is to encourage voluntary settlement of labor disputes in municipal employment through the procedures of collective bargaining. If the procedures fail, the parties should have available to them a fair, speedy, effective and above all, peaceful procedure for settlement including, where a deadlock exists after negotiations and after mediation by the commission, a procedure for the resolution of the dispute by interest arbitration. Parties subject to s. 111.70(4)(cm), Stats., shall, upon request, provide the commission with the information the commission considers necessary to meet its statutory responsibilities to report on the operation of the interest arbitration law under s. 111.70(4)(cm), Stats., and on its effect on collective bargaining in the state.

[2] The Commission has not ruled on whether drug and alcohol policies are mandatory or permissive subjects of bargaining but ,even if the policy in question is in whole or in part a permissive subject of bargaining, permissive subjects of bargaining can proceed to interest arbitration where, as here, there has been no objection, and the policy clearly has a relationship to employee wages, hours and conditions of employment.

final offer itself contains at least some language that would be "incorporated" into the contract (the contract would "include" the language "Implement attached drug and alcohol testing policy"). Therefore, we conclude that the intent behind the statutory phrases "wages, hours and conditions of employment to be included in a new collective bargaining agreement" and "shall be incorporated into a written collective bargaining agreement" is honored and met.

Given all of the foregoing, we conclude that Arbitrator Bellman has the statutory authority to select the County's final offer and thus incorporate into the agreement the drug and alcohol policy referenced therein, even if the specific policy will exist outside the physical confines of the collective bargaining agreement, if Arbitrator Bellman concludes such is otherwise appropriate under the criteria in Sec. 111.70(4)(cm) 7,7g and 7r. Stats.

Dated at Madison, Wisconsin, this 19th day of December, 2007.

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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