STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of

CITY OF MILWAUKEE

Requesting a Declaratory Ruling Pursuant to Section 111.70(4)(b),
Wis. Stats., Involving a Dispute Between Said Petitioner and

MILWAUKEE POLICE ASSOCIATION

Case 505
No. 63352
DR(M)-647

Decision No. 32115

Appearances:

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.

Laurie A. Eggert, Cermele & Associates, Attorneys at Law, 6310 West Bluemound Road, Suite 200, Milwaukee, Wisconsin 53213, appearing on behalf of the Milwaukee Police Association.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECLARATORY RULING

On March 18, 2004, the City of Milwaukee filed a petition with the Wisconsin Employment Relations Commission seeking a declaratory ruling pursuant to Sec. 111.70(4)(b), Stats. as to the City's duty to bargain with the Milwaukee Police Association over certain Association proposals regarding a successor collective bargaining agreement between the parties. A hearing was held in this matter on July 6, 2004, before Commission General Counsel Peter Davis and briefs and reply briefs were submitted by December 1, 2004.

Subsequent to hearing and briefing, the parties agreed that a decision as to the matters in dispute should be held in abeyance pending additional bargaining. Thereafter, the parties advised the Commission that a decision was needed as to one of the proposals originally in

dispute. In March, 2007, the Commission sought clarification from the parties regarding the scope and meaning of the proposal at issue and the parties completed submission of responses and further argument by March 17, 2007.

Having considered the matter and being fully advised in the premises, the Commission makes and issues the following

FINDINGS OF FACT

1. The City of Milwaukee, herein the City, is a municipal employer. The City has a Police Department that provides law enforcement services.

2. The Milwaukee Police Association, herein the MPA, is a labor organization that serves as the collective bargaining representative for certain City employees who provide law enforcement services.

3. The MPA has made the following proposal to the City:

> If the City chooses to adopt a so-called early intervention or tracking system, or other similar program designed to identify an individual or group performance problems, beyond that which is currently in effect, the parties will engage in collective bargaining as to those aspects of the modifications or creation which are primarily related to wages, hours and conditions of employment. In the event that the parties are unable to arrive at an agreement, those matters still in dispute will be submitted to a final and binding interest arbitration before an arbitrator selected by the parties from a list provided by the Wisconsin Employment Relations Commission.

4. The proposal in Finding of Fact 3 is primarily related to wages, hours and conditions of employment (in part) and primarily related to management and public policy (in part).

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

CONCLUSIONS OF LAW

1. Insofar as the proposal in Finding of Fact 3 requires the City to negotiate mid-term over issues related to an "early intervention or tracking system" that are primarily related to wages, hours, and conditions of employment and submit any remaining disputes as to such issues to interest arbitration, the proposal is a mandatory subject of bargaining.

2. Insofar as the proposal in Finding of Fact 3 would preclude the City categorically from implementing aspects of an "early intervention or tracking system" that primarily relate to management and public policy, if any, before bargaining and/or interest arbitration is concluded on the mandatory subject of bargaining aspects or impacts of the "system", the proposal is a permissive subject of bargaining.

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

DECLARATORY RULING

The City of Milwaukee has a duty to bargain with the Milwaukee Police Association within the meaning of Sec. 111.70 (1) (a), Stats. as to the portion of the proposal in Finding of Fact 3 that is described in Conclusion of Law 1, above.

The City of Milwaukee has no duty to bargain with the Milwaukee Police Association within the meaning of Sec. 111.70 (1) (a), Stats. as to the portion of the proposal in Finding of Fact 3 that is described in Conclusion of Law 2, above.

Given under our hands and seal at the City of Madison, Wisconsin, this 31st day of May, 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

CITY OF MILWAUKEE

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

The MPA proposal at issue in this case requires, on its face, that the City bargain and, if necessary, proceed to interest arbitration over mandatory subjects of bargaining that arise if the City wishes to adopt an "early intervention or tracking system" during the term of the contract, whether those mandatory issues are related to the decision itself or to the impacts of the decision on wages, hours, and conditions of employment. In its initial briefs, the City challenged the proposal, in part, as a permissive rather than mandatory subject of bargaining because the City could not lawfully be required to submit any matters to mid-term interest arbitration except voluntarily. The City also argued that the proposal would delay the City from implementing its "final impact proposals" until interest arbitration had concluded. On these issues, Commission precedent plainly establishes that the City is incorrect.

The Commission previously has concluded that it is a mandatory subject of bargaining to propose a specific contract reopener which requires bargaining and interest arbitration over specified mandatory subjects of bargaining that arise during the term of a contract. MILWAUKEE SEWERAGE COMMISSION, DEC. NO. 17025 (WERC, 5/79), CITY OF MILWAUKEE, DEC. NO. 19091 (WERC, 10/81); RACINE SCHOOLS, DEC. NO. 20652-A (WERC, 1/84) pp. 48-50, AFF'D CT. APP. DIST. II, 85-0158, unpublished, (3/86). The Commission has also long held that, where interest arbitration is available as a means of resolving a dispute,, no proposals as to that dispute which are mandatory subjects of bargaining can be unilaterally implemented. GREEN COUNTY, DEC. NO. 10208-B (WERC, 11/84); OZAUKEE COUNTY, DEC. NO. 30551-B (WERC, 2/04). We see no reason to depart from that principle simply because the negotiations and interest arbitration occur mid-contract rather than during a contract hiatus. Consistent with this precedent, therefore, we conclude that the MPA proposal is a mandatory subject of bargaining to the extent it requires negotiations and, if necessary, interest arbitration over decisions and/or impacts of decisions that primarily relate to wages, hours, and conditions of employment, and, concomitant with that obligation, precludes the City from implementing any proposals that are subject to the contractual interest arbitration procedure.

The City has also challenged the MPA proposal on the ground that it implies that the City could not implement any aspects of the "system" until bargaining and/or interest arbitration is completed, even as to those aspects that may relate primarily to management and public policy and hence may be permissive subjects of bargaining. The proposal on its face does not address this issue, but MPA has indicated, in response to the Commission's inquiry, that MPA views its demand as indeed prohibiting implementation of the program, including any permissive aspects of the program, before bargaining/interest arbitration is complete as to all mandatory subjects of bargaining. Given MPA's assertion as to the intended scope of the proposal, it is necessary to consider whether the proposal, as thus intended, is a permissive subject of bargaining.

We begin by reviewing existing Commission precedent on the extent to which a union can compel an employer to negotiate over a proposal that would delay implementation of a permissive subject of bargaining until bargaining over the impact of the permissive subject on wages, hours and conditions of employment is completed. In MILWAUKEE SEWERAGE COMMISSION, DEC. NO. 17025 (WERC, 5/79), the Commission was confronted with a proposal which was interpreted as prohibiting the introduction of "new operations, equipment or positions" until the parties had bargained and reached agreement on the impact of such "new" matters on wages, hours and conditions of employment. The Commission stated:

> The phrase thereby would prevent the Sewerage Commission from effectuating such changes not only for the length of the negotiations period (entailed by the portion of the provision not objected-to herein) but also until such time as the Union gives its consent by reaching agreement on impact. We hold that a proposal to the latter effect is a permissive subject of bargaining because it might well prevent the municipal employer from taking actions that are essential to the fulfillment of its basic governmental mission.

In CITY OF MADISON, DEC. NO. 17300-C (WERC, 7/83), the Commission concluded that employer did not breach its duty to bargain by implementing a permissive subject of bargaining prior to completion of impact bargaining between the parties. The Commission held:

> In our view, an employer's fulfillment of its bargaining obligation with regard to the impact of a permissive subject decision is not a condition precedent to implementation of that permissive subject decision. 9/ In some cases, however, the parties' rights and obligations to bargain impact matters "at reasonable times" may "require that bargaining over impact commence prior to implementation. 10/ Such questions are subject to a case by case analysis as to whether the employer's totality of conduct is consistent with the statutory requirement of good faith. 11/
>
> 9/ MILWAUKEE SEWERAGE COMMISSION, 17302 (9/79)
>
> 10/ MILWAUKEE SCHOOLS, 20093-A (2/83) at 37-40
>
> 11/ See, e.g., CITY OF GREEN BAY, 18731-B (6/83)

It is apparent from this precedent that, depending upon the circumstances, including but not necessarily limited to the extent to which good faith bargaining has or could have taken place prior to implementation and the urgency of the City's concerns, the City may be within its rights in implementing aspects of the "early intervention or tracking system" that are permissive subjects of bargaining prior to agreement on those aspects or impacts that are mandatory subjects of bargaining. As noted in footnotes 10 and 11 of the MADISON decision, SUPRA, the City's duty to bargain in good faith may obligate it to begin and conceivably

complete "impact" bargaining prior to implementing permissive aspects of the system. Indeed, depending on the nature of the "system", it may not be feasible to implement the permissive aspects of the "system" until the completion of bargaining/interest arbitration makes it lawful to implement the system as a whole. However, as the MPA has explained its proposal, the proposal would categorically preclude implementing any permissive aspects of the "system" until completion of bargaining/interest arbitration, regardless of circumstances. To the extent the proposal thus categorically precludes what, in some circumstances, could be within the City's rights, the proposal is a permissive subject of bargaining. See also, CITY OF BROOKFIELD, DEC. NO. 20691-A (WERC, 2/84).[1]

Dated at Madison, Wisconsin, this 31st day of May, 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

1 The MPA also contends that its proposal should be viewed as a mandatory subject of bargaining because it essentially mirrors a contractual process the parties followed as to a drug testing issue. The City persuasively counters by pointing out that the City it did not object to the prior procedure. A party may voluntarily agree to include a permissive subject of bargaining in a collective bargaining agreement and doing so does not transform the subject into a mandatory subject of bargaining. GREENFIELD SCHOOLS, DEC. NO. 14026-B (WERC, 11/77). Thus, the City's acquiescence to the drug testing reopener provision is not relevant to whether the proposal at issue in the instant case is a mandatory subject of bargaining.

gjc
32115