STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of

MILWAUKEE COUNTY

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

MILWAUKEE DISTRICT COUNCIL 48, AFSCME, AFL-CIO

Case 710
No. 69536
DR(M)-698

Decision No. 33265

Appearances:

Mark F. Vetter and **Mark L. Olson,** Buelow Vetter Buikema Olson & Vliet, LLC, Attorneys at Law, 20855 Watertown Road, Suite 200, Waukesha, Wisconsin 53186, appearing on behalf of Milwaukee County.

Mark A. Sweet, Sweet and Associates, Attorneys at Law, 2510 East Capitol Drive, Milwaukee, Wisconsin 53211-5231, appearing on behalf of Milwaukee District Council 48, AFSCME, AFL-CIO.

FINDINGS OF FACT, CONCLUSION OF LAW AND DECLARATORY RULING

On February 2, 2010, Milwaukee County filed a petition with the Wisconsin Employment Relations Commission seeking a declaratory ruling pursuant to Sec. 111.70(4)(b), Stats., as to the County's duty to bargain with Milwaukee District Council 48, AFSCME, AFL-CIO over two AFSCME proposals. AFSCME filed a statement in response to the petition on March 4, 2010 asserting that the County had a duty to bargain over the two disputed proposals.

On March 25, 2010, the parties met in Milwaukee, Wisconsin with Commission Examiner Peter G. Davis for the purpose of presenting evidence regarding the meaning of the two disputed proposals. Prior to the taking of any testimony, AFSCME indicated that it would be amending both disputed proposals in an effort to resolve the dispute between the parties.

On April 1, 2010, AFSCME presented amended proposals to the County. On April 12, 2010, the County advised AFSCME and the Examiner that it was withdrawing its petition as to one the disputed proposals but maintaining its petition as to the now amended remaining proposal. A hearing regarding this disputed proposal was held in Milwaukee, Wisconsin on June 8, 2010 before Examiner Davis. The parties thereafter filed written argument-the last of which was received August 4, 2010.

On November 19, 2010, Examiner Davis asked AFSCME for clarification as to the meaning of its proposal. AFSCME provided that clarification on November 30 and December 13, 2010. On December 17, 2010, the County filed a response to the AFSCME clarifications. On December 21, 2010, AFSCME submitted a December 21, 2010 decision of the Court of Appeals and on December 27, 2010 the County advised that it had no objection to inclusion of said decision in the record before the Commission.

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

FINDINGS OF FACT

1. Milwaukee County, herein the County, is a municipal employer providing a variety of services to its citizens and others.

2. Milwaukee District Council 48, AFSCME, AFL-CIO, herein AFSCME, is a labor organization serving as the collective bargaining representative of certain employees of the County.

3. AFSCME made the following proposal for inclusion in the successor to the 2007-2008 collective bargaining agreement between AFSCME and the County.

Section 1.05 Management Rights

. . .

For the period of July 1, 2009 through December 31, 2010, the County shall not privatize work currently being performed by those bargaining unit employees who are current incumbents in such positions. The County may unilaterally reduce a bargaining unit employee's pay by ordering the employee not to report to work in either full day increments or by reducing the employee's workweek to no less than thirty-five (35) hours per week. *The total reduction effectuated by such unilateral across-the-board reduction in employee pay* shall not exceed forty-five (45) hours in the calendar year (prorated for a part-time employee based on his or her total hours of work). *Such* unilateral *across-the-board* reduction in pay by the County may not apply to those employees who work in

24-hour/seven hour/seven day per week operations or to employees working for elected officers of the County other than the County Executive or the County Board of Supervisors. However, if unilateral *across-the-board* reductions of bargaining unit employees' pay is implemented for employees who work in a 24-hour/seven day per week operation or for an employee working for elected officers of the County other than the County Executive or the County Board of Supervisors, the unilateral *across-the-board* reduction in pay will be in compliance with the same conditions as set forth above. As used herein, the unilateral *across-the-board* reduction in pay of a bargaining unit employee means any County order or directive of whatever kind that requires a bargaining unit employee not to report for work on all or part of a regularly scheduled work day, or that suspends a bargaining unit employee from work without pay for reasons unrelated to discipline. *If it is necessary to reduce the workforce beyond the forty-five (45) hours set forth above, such reduction shall be made pursuant to Section 2.37 of this Memorandum of Agreement*.

4. The proposal set forth in Finding of Fact 3 is primarily related to wages and hours.

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

CONCLUSION OF LAW

The proposal set forth in Finding of Fact 3 is a mandatory 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

Milwaukee County has a duty to bargain within the meaning of Secs. 111.70 (1)(a) and (3)(a) 4, Stats. over the proposal set forth in Finding of Fact 3.

Given under our hands and seal at the City of Madison, Wisconsin, this 11th day of March, 2011.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/
Judith Neumann, Chair

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

Milwaukee County

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

We begin our analysis with the following definition of collective bargaining found in Sec. 111.70(1)(a), Stats.:

> (a) "Collective bargaining" means the performance of the mutual obligation of a municipal employer, through its officers and agents, and the representative of its municipal employees in a collective bargaining unit, to meet and confer at reasonable times, in good faith, with the intention of reaching an agreement, or to resolve questions arising under such an agreement, with respect to wages, hours and conditions of employment, and with respect to a requirement of the municipal employer for a municipal employee to perform law enforcement and fire fighting services under s. 61.66, and for a school district with respect to any matter under sub. (4)(o), and for a school district with respect to any matter under sub. (4)(n), except as provided in subs. (3m), (3p), and (4)(m) and (mc) and s. 40.81(3) and except that a municipal employer shall not meet and confer with respect to any proposal to diminish or abridge the rights guaranteed to municipal employees under ch. 164. The duty to bargain, however, does not compel either party to agree to a proposal or require the making of a concession. Collective bargaining includes the reduction of any agreement reached to a written and signed document. The municipal employer shall not be required to bargain on subjects reserved to management and direction of the governmental unit except insofar as the manner of exercise of such functions affects the wages, hours and conditions of employment of the municipal employees in a collective bargaining unit. In creating this subchapter the legislature recognizes that the municipal employer must exercise its powers and responsibilities to act for the government and good order of the jurisdiction which it serves, its commercial benefit and the health, safety and welfare of the public to assure orderly operations and functions within its jurisdiction, subject to those rights secured to municipal employees by the constitutions of this state and of the United States and by this subchapter.

When applying Sec. 111.70(1)(a), Stats. to a specific dispute, the Wisconsin Supreme Court has concluded that collective bargaining is mandatory over matters primarily related to employee "wages, hours and conditions of employment" but permissive as to matter primarily related to "formulation of basic policy" and/or the "exercise of municipal powers and responsibilities in promoting the health, safety, and welfare of its citizens." CITY OF BROOKFIELD V. WERC, 87 Wis 2D 819, 829 (1979). Regarding the balancing of these respective relationships, our Supreme Court stated the following in WEST BEND EDUC. ASS'N V. WERC, 121 Wis. 2D 1, (1984), as to how Sec. 111.70(1)(a), Stats. (then Sec. 111.70(1)(d), Stats.) should be interpreted when determining whether a subject of bargaining is mandatory or permissive:

Sec. 111.70(l)(d) sets forth the legislative delineation between mandatory and nonmandatory subjects of bargaining. It requires municipal employers, a term defined as including school districts, Sec. 111.70(l)(a), to bargain "with respect to "wages, hours and conditions of employment." At the same time it provides that a municipal employer "shall not be required to bargain on subjects reserved to management and direction of the governmental unit except insofar as the manner of exercise of such functions affects the wages, hours and conditions of employment of the employees." Furthermore, Sec. 111.70(1)(d) recognizes the municipal employer's duty to act for the government, good order and commercial benefit of the municipality and for the health, safety and welfare of the public, subject to the constitutional statutory rights of the public employees.

Sec. 111.70(1)(d) thus recognizes that the municipal employer has a dual role. It is both an employer in charge of personnel and operations and a governmental unit, which is a political entity responsible for determining public policy and implementing the will of the people. Since the integrity of managerial decision making and of the political process requires that certain issues not be mandatory subjects of collective bargaining, Unified School District No. 1 of Racine County v. WERC, 81 Wis. 2d 89, 259 N.W.2d 724 (1977), Sec. 111.70(1)(d) provides an accommodation between the bargaining rights of public employees and the rights of the public through its elected representatives.

In recognizing the interests of the employees and the interests of the municipal employer as manager and political entity, the statute necessarily presents certain tensions and difficulties in its application. Such tensions arise principally when a proposal touches simultaneously upon wages, hours, and conditions of employment and upon managerial decision making or public policy. To resolve these conflict situations, this court has interpreted Sec. 111.70(l)(d) as setting forth a "primarily related" standard. Applied to the case at bar, the standard requires WERC in the first instance (and a court on review thereafter) to determine whether the proposals are "primarily related" to "wages, hours and conditions of employment," to "educational policy and school management and operation," to "management and direction' of the school system" or to "formulation or management of public policy." Unified School District No. 1 of Racine County v. WERC, 81 Wis. 2d 89, 95-96, 102, 259 N.W.2d 724 (1977). This court has construed "primarily" to mean "fundamentally," "basically," or "essentially," Beloit Education Asso. v. WERC, 73 Wis. 2d 43, 54, 242 N.W.2d 231 (1976).

As applied on a case-by-case basis, this primarily related standard is a balancing test which recognizes that the municipal employer, the employees, and the public have significant interests at stake and that their competing interests should be weighed to determine whether a proposed subject for bargaining should be characterized as mandatory. If the employees' legitimate interest in

> wages, hours, and conditions of employment outweighs the employer's concerns about the restriction on managerial prerogatives or public policy, the proposal is a mandatory subject of bargaining. In contrast, where the management and direction of the school system or the formulation of public policy predominates, the matter is not a mandatory subject of bargaining. In such cases, the professional association may be heard at the bargaining table if the parties agree to bargain or may be heard along with other concerned groups and individuals in the public forum. Unified School District No. 1 of Racine Co. v. WERC, supra, 81 Wis. 2D at 102; Beloit Education Asso., supra, 73 Wis. 2d at 50-51. Stating the balancing test, as we have just done, is easier than isolating the applicable competing interests in a specific situation and evaluating them. (footnotes omitted)

Consistent with the foregoing, when determining whether the AFSCME proposal is a mandatory or permissive subject of bargaining, we will balance the relationship of the proposal to AFSCME-represented employees' wages, hours and conditions of employment against the proposal's relationship to the County's interest in determining the level of service it wishes to provide through its AFSCME-represented employees.

Consistent with our Supreme Court's holding in CITY OF BROOKFIELD V. WERC, 87, WIS 2D 819 (1979), the AFSCME proposal acknowledges the County's right to reduce the level of service it wishes to provide by laying off employees.[1] If the County elects not to reduce services by layoffs, the proposal gives the County the option of reducing services by cutting employee wages and hours up to 45 hours per full-time employee in a given calendar year. The County argues that the limitations on how the non-layoff service reduction option could be implemented make the proposal a permissive subject of bargaining. We disagree and find the AFSCME proposal to be a mandatory subject of bargaining primarily related to employee wages and hours.

Critical to our finding is the fundamental freedom the AFSCME proposal gives the County to determine/reduce the level of service it wishes to provide. By exercising the right to lay off, the County can reduce services across-the-board or target only certain service areas for reduction or elimination while leaving other services intact. By exercising the additional non-layoff rights contained within the proposal, the County gains further flexibility. Within the context of that freedom and flexibility, the AFSCME proposal fundamentally addresses the impact of the County's service level choices on employee wages and hours. The proposal establishes how the loss of wages and hours necessitated by the County's service level choices will be distributed among employees if the County elects not to accomplish service level reductions by layoff. The duty to bargain over such "impact" proposals is specifically acknowledged in the definition of collective bargaining found in Sec. 111.70(1)(a), Stats.

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[1] The County asserts that the "If it is necessary" language found at the end of the AFSCME proposal is a permissive subject of bargaining because said language subjects the County's fiscal/service level choices to independent arbitral review. At hearing, the Union clarified the meaning of that "necessary" language (and is now bound thereby) so as to satisfy us that the County's fiscal/service level judgments as to whether to layoff are not subject to such review. Thus, we reject this County contention.

We acknowledge that by placing limitations on how the County may implement non-layoff service reductions, the AFSCME proposal does intrude into the ability of the County to fine tune its service reductions. However, as long as the fundamental freedom to layoff remains intact, the self-evident and substantial impacts on lost employee wages and hours created by non-layoff service level reduction options far outweigh this intrusion.[2]

Dated at Madison, Wisconsin, this 11th day of March, 2011.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/
Judith Neumann, Chair

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

[2] We note that our determination does not prevent the County from opposing the AFSCME proposal at the bargaining table and allows the County to propose its own manner of addressing the impact on employee wages and hours of non-layoff service reduction options. In contrast, if we were to hold that the AFSCME proposal is a permissive subject of bargaining, the County would be free to cut the wages and hours of any and all bargaining unit members to any level the County saw fit, rather than laying off employees. Given that the proposal completely protects the County's authority to reduce services through layoff, the Union/employee interest in limiting the County's authority to cut employee wages and hours so freely substantially outweighs the County's interest in fine tuning its service reductions.

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