STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

| | |
|---|---|
| In the Matter of the Petition of<br><br>THE CITY OF WAUKESHA (FIRE DEPARTMENT)<br><br>Requesting a Declaratory Ruling Pursuant to Section 111.70(4)(b), Stats., Involving a Dispute Between Said Petitioner and<br><br>THE INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, AFL-CIO, LOCAL 407 | Case XLII<br>No. 25239 DR(M)-134<br>Decision No. 17830 |

Appearances:

Michael, Best & Friedrich, Attorneys at Law; 250 East Wisconsin Avenue; Milwaukee, Wisconsin 53202, by Mr. Marshall R. Berkoff, appearing on behalf of the Petitioner.

Brendel, Flanagan, Sendik & Fahl, S.C., Attorneys at Law; 118 North Avenue; Hartland, Wisconsin 53029, by Mr. John K. Brendel, appearing on behalf of Local 407, International Association of Firefighters.

## DECLARATORY RULING

The City of Waukesha having, on October 25, 1979, filed a petition with the Wisconsin Employment Relations Commission seeking a declaratory ruling, pursuant to Section 111.70(4)(b) of the Municipal Employment Relations Act, with respect to whether four proposals contained in a tentative final offer, submitted by Local 407, International Association of Firefighters in municipal interest arbitration, related to mandatory subjects of collective bargaining; and the parties having waived hearing in the matter, and thereafter having filed statements of positions and briefs in support thereof by January 22, 1980; and the Commission being fully advised in the premises makes and issues the following

## FINDINGS OF FACT

1. That City of Waukesha, hereinafter referred to as the City, is a municipal employer within the meaning of Section 111.70(1)(a), Stats., and has its principal offices at 201 Delafield, Waukesha, Wisconsin.

2. That Local 407, International Association of Firefighters, hereinafter Association, is a labor organization within the meaning of Section 111.70(3)(j), Stats., and has its offices at Waukesha, Wisconsin.

3. That at all times material herein the Association has been the certified collective bargaining representative for a unit of employes of the City consisting of all firefighters, lieutenants, captains and inspection personnel in the employ of the City.

4. That on August 27, 1979, in a mediation-arbitration proceeding, the parties exchanged final offers for a successor agreement to the 1977-78 collective bargaining agreement, covering the wages, hours and working conditions of the employes in the above unit; that included within the Association's final offer were seven proposals, which the City, by letter to the Commission dated August 31, 1979, objected to as relating to alleged non-mandatory subjects of bargaining; that thereafter the parties participated in another informal investigation session with a Commission investigator present, during which the parties resolved their dispute with respect

to three proposals; and that on October 24, 1979, the City filed the subject petition challenging the following proposals contained in the Association's final offer:

ARTICLE 6 - HOURS/DUTIES

. . .

Section 2. . . . The City will not unilaterally change any benefit or condition of employment which is mandatorily bargainable and heretofore enjoyed by the majority of unit employees during the life of this Agreement. . .

Off duty time shall be free of City control except that callback requests will be honored whenever reasonably possible.

. . .

ARTICLE 19 - PROMOTIONAL PROCEDURE

When an authorized vacancy exists in a classification up to and including the rank of Captain, [sic] it shall be filled by promotion in the following manner:

1. A notice of vacancy shall be posted on the department bulletin board 30 days prior to the last day on which applications are acceptable. The notice shall state the date, time and place of written examination.

2. Only employees with more than 3 years of employment on the Waukesha Fire Department can be applicants for MPO positions and 5 or more years for all other officers positions.

3. Application forms shall be provided by the Chief.

4. There shall be a written examination and an oral interview and the written examination given first. The examination and interview shall include an orderly series of tests and evaluations to be applied equally and equitably to all applicants. Any eligible applicant who has made timely application can take the examination.

5. Applicants who have received a grade of 70% or better on the written examination will have an oral interview. The interview will be given by a board of not less than 3 composed of the Chief and such staff officers as he may select.

6. The following weights shall be given to the examination interview and the prior department record of applicants

| | |
|---|---|
| Written Examination | 50% |
| Oral Interview | 25% |
| Department Record | 25% |

to determine final grades. The passing grade shall be 70% and applicants with a grade of 70% or better shall compose a list of qualified applicants and shall continue and remain in effect for a period of 2 years thereafter. In addition to the final grades as determined above, each applicant shall be given one additional point for each full year of service on the Waukesha Fire Department providing he has made a minimum score of at least 70% on the foregoing.

7. The applicants shall be selected by highest score achieved from the qualified list. The appointee shall be notified by letter or by word from the Chief and the names of those qualified and the final grade scores shall be posted on the bulletin board.

8. If a qualified list of applicants is in existence within the time heretofore prescribed, the vacancy shall be filled from such list within 10 days of the existence of the vacancy.

. . .

ARTICLE 21 - PRIORITY

The terms and conditions of this Agreement shall supercede and take precedence over any prior rules, regulations, orders and/or directives in conflict with or in contravention of any of the terms and conditions of this Agreement.

5. That the proposals of the Association with respect to off-duty time, and also with respect to promotional procedures, relate primarily to the formulation or management of public policy, while the proposals of the Association with respect to unilateral changes of benefits or conditions of employment which are mandatorily bargainable, as well as to the supremacy of the collective bargaining agreement over conflicting rules, regulations, orders and directions, primarily relate to wages, hours and conditions of employment.

Upon the basis of the above and foregoing Findings of Fact, the Commission makes and issues the following

CONCLUSIONS OF LAW

1. That the proposal of the Association requiring that off-duty time be free of City control, as well as its proposal relating to promotional procedure, relate to non-mandatory subjects of bargaining within the meaning of Sec. 111.70(1)(d) of the Municipal Employment Relations Act.

2. That the proposal of the Association prohibiting the City from unilaterally changing any benefit or condition of employment which is mandatorily bargainable, during the term of the agreement, as well as its proposal stating that the terms and conditions of the collective bargaining agreement supercede conflicting rules, regulations, orders and directives, relate to mandatory subjects of bargaining within the meaning of Sec. 111.70(1)(d) of the Municipal Employment Relations Act.

Upon the basis of the above and foregoing Findings of Fact and Conclusions of Law, the Commission makes and issues the following

## DECLARATORY RULING

1. That the City has no duty to bargain with the Association with respect to the latter's proposals relating to off-duty time, and to promotional procedures, and therefore such proposals cannot be submitted to mediation-arbitration.

2. That the City has a duty to bargain with the Association with respect to the latter's proposals relating to unilateral changes of benefits or conditions of employment, which is mandatorily bargainable, during the term of the agreement, and with respect to the Association's proposal relating to the supremacy of the collective bargaining agreement over conflicting rules, regulations, orders and directives, and if no agreement is reached on said proposals, said proposals may be properly submitted by the Association to mediation-arbitration.

Given under our hands and seal at the City of Madison, Wisconsin this 23rd day of May, 1980.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Morris Slavney, Chairman

_____
Herman Torosian, Commissioner

_____
Gary L. Covelli, Commissioner

MEMORANDUM ACCOMPANYING DECLARATORY RULING

The instant petition presents the question of the bargainability status of four proposals contained in the Association's initial final offer of August 17, 1979. The City contends that the disputed proposals relate to non-mandatory subjects of bargaining.

The test or standard to be used in determining whether a proposal relates to a mandatory subject of bargaining is whether the subject is "primarily" or "fundamentally" related to wages, hours, or conditions of employment. Subjects which are "primarily related to the formulation or management of public policy" are non-mandatory subjects. 1/ A municipal employer cannot be compelled to bargain or submit to mediation-arbitration any matter that is not primarily related to wages, hours, or conditions of employment.

Continuation of Benefits and Conditions

The City insists that the following sentence of the Association's proposal on Hours/Duties relates to a non-mandatory subject of bargaining:

> . . . The City will not unilaterally change any benefit or condition of employment which is mandatorily bargainable and heretofore enjoyed by the majority of unit employees during the life of this Agreement.

First, it argues that while there may be a duty to bargain with respect to the impact or effects of the exercise of a fundamental management right, this proposal prevents the City from taking any action that affects or modifies a condition of employment even though the law permits the City to make the change and bargain about the effects later. The City also contends that the proposal is so broad as to include "work rules," which are exclusively managerial prerogatives and thus themselves permissive subjects. Consequently, the effect of the language is to implicitly reserve the right to negotiate during the contract term about non-mandatory subjects. The City also notes that the test of "mandatorily bargainable" included in this proposal, would necessarily have to be interpreted by an arbitrator but involve judgments and standards established by this Commission. This it claims would not be in furtherance of a viable contract grievance procedure, and would result in multiple proceedings. Last, it avers that the test as to whether a "condition of employment" was "enjoyed by the majority of unit employes" is improper and in violation of Wisconsin law, in that if a duty to bargain exists, it exists regardless of whether a majority of employes "enjoyed" this benefit or condition of employment.

The Association, contrariwise, argues that merely because a dispute requiring arbitration may sometimes arise as a consequence of inclusion of said language in the agreement is not a basis for concluding that the proposal relates to a non-mandatory subject. Rather, the test is whether the proposal is properly worded "so as to be within the rules as provided in this State." The purpose of the clause is to "eliminate (employe) fears from threats of loss of privileges in the event that the Association's final offer should be acceptable to

---

1/ Unified School District No. 1 of Racine County v. WERC, 81 Wis. 2d 89.

the arbitrator." Furthermore, the clause was limited to avoid the probability of a request for a declaratory ruling and it is not an attempt to "ursurp any rights of management" with regard to policy decisions.

The Association's proposal on its face is limited to matters which are mandatory subjects of bargaining. The City's principal argument, however, is that the clause would preclude it from taking action on non-mandatory subjects, such as work rules, 2/ that impact on or affect "benefits" and "conditions of employment" and bargain about the effects thereafter.

We have previously held that an employer is not prohibited from implementing a matter relating to a permissive subject of bargaining even though it would result in a change in the impact thereof, which impact is a mandatory subject of bargaining if the latter is not covered by the agreement. 3/ Certainly the City cannot change any benefit or condition of employment established in the agreement, nor does the Association have any duty to bargain during the term of the agreement concerning changes in express contractual provisions. Notwithstanding the foregoing, we do not believe that the disputed proposal bars the City from taking action on permissive subjects. It does not, as the City suggests, reserve the right to negotiate during the term of the agreement with respect to permissive subjects of bargaining not included in the collective bargaining agreement.

The determination as to whether a particular matter relates to a mandatory subject of bargaining is generally subject to the jurisdiction of the Commission and such issues are not determined by arbitrators.

Furthermore, we consider the County's argument that the Union's proposal states a test contrary to law to be without merit. The purpose of the Union's language stating:

> The City will not unilaterally change any benefit or condition of employment which is mandatorily bargainable and heretofore enjoyed by a majority of unit employes . . .

is not to propose a test for determining what subjects are mandatory subjects of bargaining, but rather, states what mandatorily bargainable benefits or conditions of employment the County cannot unilaterally change during the term of the agreement. Stated differently, the language provides that where a majority of the employes enjoy a benefit or condition of employment which is mandatorily bargainable, said benefit or condition of employment cannot be unilaterally changed by the City. Conversely, if a mandatorily bargainable benefit or condition of employment is not enjoyed by a majority of employes, then the City can change same.

Thus we conclude that the Association's proposal relates to a mandatory subject of bargaining, and therefore it may be included in the Association's final offer for the purpose of mediation-arbitration.

---

2/ We have previously held that certain work rules are mandatory subjects of bargaining. City of Wauwatosa (15917) 11/77.

3/ Milwaukee Sewerage Commission (17302) 9/79.

Off Duty Time

The City insists that the following proposal of the Association is not mandatorily bargainable:

> . . . Off duty time shall be free of City control except that callback requests will be honored whenever reasonably possible.

It contends the proposal affects the City's staffing of its firefighting force and its firefighting mission. Furthermore, its inclusion in the agreement would eliminate the ability of the Chief to promulgate rules pursuant to Section 62.13 (10 m), Wis. Stats., and eliminate his ability to staff during an emergency. The City also argues that the proposal is contrary to an existing ordinance governing "outside employment," and thus contrary to law.

The Association claims that the firefighters should be free to bargain for total freedom to do as they chose during off duty hours so long as the employes do nothing to jeopardize their ability to perform their duties or anything that reflects adversly upon the department. It argues that the City's claim that it will lose its callback ability in emergencies is unpersuasive in that the proposal provides for emergencies of that nature. Lastly, it concludes that to permit the City to circumvent the bargaining process by merely enacting an ordinance is destructive of the intent and purpose of MERA.

In its brief, the City outlined the longstanding and undisputed procedure it presently follows in regard to firefighter work schedules. That procedure calls for the platoon which has just completed its 24 hour tour of duty to be the "Alert Platoon." Firefighters on the "Alert Platoon" are required to remain "in the area" and within contact of the City, although not confined to their homes, to be available for an unforeseen emergency or staffing need. In addition to the aforesaid procedure, there is also a City Ordinance governing outside employment or moonlighting by firefighters.

Clearly, the matter of control or incursion into an employes' time away from the work place is generally a matter related to hours, as well as conditions of employment. 4/ However, as noted earlier herein, even though that is the case, unless the matter is "primarily" related thereto it will not be found to be a mandatory subject of bargaining. The decision to require firefighters, while off duty, to remain on alert for an additional 24 hour period, whether resulting from an ordinance implementing Section 64.13 (10 m), Wis. Stats., or not, we believe, is "primarily" or "fundamentally" related to consideration of public safety, level of firefighter service, and the mission of the department. To require the City to bargain on the instant proposal could interfere with the City's decision making authority on matters affecting public policy. 5/ Consequently, we find that the proposal calling for the elimination of City control over firefighters' off duty time relates to a non-mandatory subject of bargaining.

There is, however, a primary relationship between the impact of the City's decision to require firefighters to be on "alert" status for 24

---

4/ Good Hope Industries, Inc., 230 NLRB No. 170, 95 LRRM 1518 (1977).

5/ City of Wauwatosa (15917) 11/77.

hours after finishing a duty tour, and firefighters' wages, hours and conditions of employment. 6/ Thus, the City does have a duty to bargain with respect to the impact of a decision to require firefighters to be available during off duty hours.

In light of the foregoing, it is unnecessary to address the City's arguments relative to the bargainability of the proposal viz, the City ordinance governing outside employment.

Promotional Procedure

The City contends that the "Promotional Procedure" proposal advanced by the Association is not a mandatory subject of bargaining. It specifically takes exception to the aspect of the proposal requiring the highest scoring applicant be selected and, further, to the language contained in said proposal pertaining to establishing an eligibility standard of more than three years of employment for promotion to the nonexistant position of Motor Pump Operator. For promotions in all other officer positions only employes with five or more years of employment on the Waukesha Fire Department can be applicants under the Association's proposal. It reasons that the Association's proposal, if adopted, would eliminate the discretion granted to the City Police and Fire Commission, pursuant to the provisions of Section 62.13, Wis. Stats. Also, it insists that, because said proposal arbitrarily assigns service points and "effectively" removes the judgment of Chief and Commission, it cannot be harmonized with the statutes. The City further argues that the detailed procedures and limitations in the Association's proposal would remove the Police and Fire Commission's statutory right to "repeal and modify rules calculated to secure the best service in the department" and therefore cannot be harmonized with Section 62.13. Also, it contends that the City may have certain needs in the future to provide promotional opportunities for minority groups to further affirmative action plans, and adoption of said plans are primarily related to the formulation or management of public policy, whereas this proposal would interfere with the City's ability to act.

The Association asserts that, in the past, the Commission has found promotional procedures to be mandatorily bargainable subjects. In this case, its proposal is limited to employes within the bargaining unit, establishes fair and reasonable standards of competition among unit employes and allows the Chief considerable discretion in scoring applicants. Consequently, it concludes the proposal complies with previous standards established by the Commission and courts necessary to a finding that it is a mandatory subject of bargaining.

After reviewing the Association's proposal we believe there are several sections which result in it being a non-mandatory subject of bargaining. To begin with, the first and last paragraphs of said proposals appear to require the City to fill all vacancies. 7/ We have previously held that a proposal which would require a municipal employer to establish or maintain certain positions constitutes a non-mandatory subject of bargaining. 8/ Such proposals relate to the formulation or management of public policy.

---

6/ City of Brookfield, Wis. 2d (1978).

7/ The two paragraphs state: ". . . when an authorized vacancy exists . . . it shall be filled . . ." and ". . . if a qualified list of applicants is in existence . . . the vacancy shall be filled . . ."

8/ Oak Creek-Franklin School District No. 1 (11827-O) 11/74 (aff. Dane Co. Cir. Ct. (1975); and see discussion in Milwaukee Board of School Directors (17504) 12/79.

Another portion of the Association's proposal which we find to be a non-mandatory subject of bargaining is that which requires the City to give an oral interview, and also states that said "interview will be given by a board of not less than 3 composed of the Chief and such staff officers as he may select," because it goes to the management's right to determine if a written examination or an oral interview is necessary, and if one is desired, and which and how many management officials will conduct the interview. Such matters relate primarily to the City's management function, as noted in our decision in City of Beloit. 9/

Since a municipal employer has a right to determine necessary minimum qualifications for a position, 10/ the portion of the Association's proposal which relates to years of service necessary to apply, and which establishes the weights to be given to the measurements of the minimum qualifications, i.e., percentage weights attached to written examination, oral interview and department records, are non-mandatory subjects of bargaining. However, the selection criteria in promoting qualified candidates is a mandatorily bargainable subject, and therefore the weight to be given to seniority among the qualified applicants in determining who should be promoted, whether by a point system, as proposed here, or by other methods of crediting seniority, is a mandatory subject of bargaining.

The above is consistent with the Wisconsin Supreme Court's decision in Glendale Prof. Policemen's Asso. v. Glendale 11/ where the Court harmonized Section 62.13 with a seniority provision governing promotions since that provision did not "transfer from the Chief or the Board the authority to determine who is qualified." In Glendale, the seniority restriction provisions of the collective bargaining agreement operates only where there is more than one qualified candidate as determined by the procedures established by the City.

With regard to the City's argument that the Association's proposal may run afoul of state and federal law pertaining to affirmative action, there has been no showing what, if any, affirmative action policies are being interferred with, or that the proposal contravenes any state or federal legislation in this regard.

Finally, we do not consider the portion of the proposal wherein it makes reference to qualifications to be considered for promotion to a nonexistant position to be a non-mandatory subject of bargaining. While the Association does not dispute this point and offers no explanation for its inclusion, we do not read the proposal as being a demand to create such a position. Consequently, we do not view this as having any effect on the overall proposal's bargainability.

Priority of Agreement

The Association has also proposed that the following provision be included in the collective bargaining agreement:

---

9/ Dec. No. 11831-C, 7/74, aff. 73 Wis. 2d 43 (1976).

10/ City of Madison (16590) 10/78; Milwaukee Sewerage Commission (17302) 9/79.

11/ 83 Wis. 2d 90 (1978).

> The terms and conditions of this Agreement shall supercede and take precedence over any prior rules, regulations, orders and/or directives in conflict with or in contravention of any of the terms and conditions of this Agreement.

In support of its contention that the proposal relates to a mandatory subject of bargaining the Association insists that the proposal does not provide for the overruling of any statute or valid ordinance. Rather, it is intended to clarify the parties' intent that matters they have agreed upon and incorporated into the agreement are to be treated as resolved for the life of said agreement.

The City, however, believes the provision should be considered void in that it seeks to circumvent applicable ordinances and statutes. The effect of its inclusion in the collective bargaining agreement would nullify any existing rules, regulations and directives of the department whenever the Association could assert an "arguable" conflict, even though such rules carry out statutory mandates.

It is clear from the plain meaning of the Association's proposal that it does not pertain to City Ordinances or State Statutes. Rather its application is restricted to rules, regulations, orders and/or directives. Further, the Association agrees that its intent is not the overruling of valid ordinances or statutes. Consequently, we conclude that the proposal relates to a mandatory subject of bargaining.

In view of the aforesaid finding it is unnecessary to deal with the City's other arguments.

Dated at Madison, Wisconsin this 23rd day of May, 1980.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Morris Slavney, Chairman

_____
Herman Torosian, Commissioner

_____
Gary L. Covelli, Commissioner