STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, LOCAL 400 Requesting a Declaratory Ruling Pursuant to Section 111.70(4)(b) Wis. Stats., Involving a Dispute Between Said Petitioner and CITY OF FOND DU LAC (FIRE DEPARTMENT)	Case 51 No. 32333 DR(M)-328 Decision No. 22373

Appearances:

Lawton and Cates, Attorneys at Law, Tenney Building, 110 East Main Street, Madison, Wisconsin 53703, by Mr. Richard V. Graylow, for the Union.

Davis and Kuelthau, S.C., Attorneys at Law, Suite 800, First Savings Plaza, 250 East Wisconsin Avenue, Milwaukee, Wisconsin 53202, by Mr. Mark F. Vetter, for the City.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECLARATORY RULING

On October 25, 1983, the International Association of Fire Fighters, Local 400, filed a petition with the Wisconsin Employment Relations Commission pursuant to Sec. 111.70(4)(b), Stats., seeking a declaratory ruling regarding the City of Fond du Lac's duty to bargain with Local 400 over certain matters. Hearing was ultimately held on May 2 and 3, 1984 in Fond du Lac, Wisconsin before Peter G. Davis, a member of the Commission's staff. The parties filed written argument the last of which was received September 27, 1984. Based upon the record, the Commission makes and issues the following

FINDINGS OF FACT

1. That International Association of Fire Fighters Local 400, herein the Union, is a labor organization which functions as the exclusive collective bargaining representative of certain firefighting employes of the City of Fond du Lac, Wisconsin and has its principal offices at 346 North Main Street, Fond du Lac, Wisconsin 54935.

2. That City of Fond du Lac, herein the City, is a municipal employer which employs certain individuals in a Fire Department which provides firefighting services to the City's residents and which has its principal offices at 160 South Macy Street, Fond du Lac, Wisconsin 54935.

3. That the Union and the City were parties to a 1981-1983 collective bargaining agreement with a stated expiration date of December 14, 1983 which established certain wages, hours, and conditions of employment applicable to the firefighting personnel employed by the City and represented for the purposes of collective bargaining by the Union; that during bargaining over a successor to the parties' 1981-1983 agreement, a dispute arose between the parties as to the City's duty to bargain with the Union over a Safety Clause proposal; that the parties were unable to resolve their dispute and the Union then filed the instant petition; and that the City contends that the underlined portions of the Union's current proposal set forth below are permissive.

SAFETY CLAUSE

> It is recognized by both parties that fire fighting by the very nature of the job is inherently dangerous. In an effort to provide a minimum amount of safety to employees of the Fond du Lac Fire Department, it is agreed that first responding companies from the Fond du Lac Fire Department will respond with a minimum of three firefighters on each engine and two firefighters with each aerial company. All ambulances shall be manned in accordance with State Statutes.

First responding companies are herein defined as those units initially dispatched to respond to the scene of an emergency on the first alarm.

It is understood by both parties that occasionally, in rare and unexpected emergency situations, for brief periods of time it may be necessary to run a unit with fewer than the stated minimums. Every effort will be made to keep these periods of undermanning to a minimum by filling vacancies as soon as possible.

It is further agreed that all Fond du Lac Fire Department aerials and pumpers shall be tested annually to assure compliance with N.F.P.A. standards. All other equipment shall be maintained in such a manner as to provide for the firefighters' safety.

4. That the minimum manning portion of the proposal applicable to engine and aerial companies primarily relates to the management and direction of the City.

5. That the manning portion of the proposal applicable to ambulances primarily relates to wages, hours, and conditions of employment.

6. That the N.F.P.A. standards are not present in this record; that therefore we cannot specify herein to what extent, if any, the portion of the proposal requiring annual testing of aerials and pumpers primarily relates to wages, hours and conditions of employment or to the management and direction of the City; but that, in general, those N.F.P.A. standards which primarily relate to service level choices are permissive and those which primarily relate to employe safety are mandatory.

7. That the portion of the proposal requiring maintenance of equipment primarily relates to wages, hours, and conditions of employment.

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

CONCLUSIONS OF LAW

1. That the portion of the proposal referenced in Finding of Fact 4 is a permissive subject of bargaining within the meaning of Sec. 111.70(1)(a), Stats.

2. That the portions of the proposal referenced in Findings of Fact 5 and 7 are mandatory subjects of bargaining within the meaning of Sec. 111.70(1)(a), Stats.

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

DECLARATORY RULING 1/

1. That the City of Fond du Lac and International Association of Fire Fighters, Local 400 have no duty to bargain within the meaning of Sec. 111.70(3)(a)4, Stats. over the portion of the proposal referenced in Finding of Fact 4.

1/ Pursuant to Sec. 227.11(2), Stats., the Commission hereby notifies the parties that a petition for rehearing may be filed with the Commission by following the procedures set forth in Sec. 227.12(1) and that a petition for judicial review naming the Commission as Respondent, may be filed by following the procedures set forth in Sec. 227.16(1)(a), Stats. 227.12 Petitions for rehearing in contested cases. (1) A petition for rehearing shall not be prerequisite for appeal or review. Any person aggrieved by a final order may, within 20 days after service of the order, file a written petition for rehearing which shall specify in detail the grounds for the relief sought and supporting authorities. An agency may order a rehearing on its own motion within 20 days after service of a final order. This subsection does not apply to s. 17.025 (3)(e). No agency is required to conduct more than one rehearing based on a petition for rehearing filed under this subsection in any contested case.
Footnote 1 continued on Page 3)

2. That the City of Fond du Lac and International Association of Fire Fighters Local 400 have a duty to bargain within the meaning of Sec. 111.70(3)(a)4, Stats. over the portions of the proposal referenced in Findings of Fact 5 and 7.

Given under our hands and seal at the City of Madison, Wisconsin this 21st day of February, 1985.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Herman Torosian, Chairman

_____
Marshall L. Gratz, Commissioner

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Danae Davis Gordon, Commissioner

1/ (Continued)

227.16 Parties and proceedings for review. (1) Except as otherwise specifically provided by law, any person aggrieved by a decision specified in s. 227.15 shall be entitled to judicial review thereof as provided in this chapter.

(a) Proceedings for review shall be instituted by serving a petition therefor personally or by certified mail upon the agency or one of its officials, and filing the petition in the office of the clerk of the circuit court for the county where the judicial review proceedings are to be held. Unless a rehearing is requested under s. 227.12, petitions for review under this paragraph shall be served and filed within 30 days after the service of the decision of the agency upon all parties under s. 227.11. If a rehearing is requested under s. 227.12, any party desiring judicial review shall serve and file a petition for review within 30 days after service of the order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. The 30-day period for serving and filing a petition under this paragraph commences on the day after personal service or mailing of the decision by the agency. If the petitioner is a resident, the proceedings shall be held in the circuit court for the county where the petitioner resides, except that if the petitioner is an agency, the proceedings shall be in the circuit court for the county where the respondent resides and except as provided in ss. 182.70(6) and 182.71(5)(g). The proceedings shall be in the circuit court for Dane county if the petitioner is a nonresident. If all parties stipulate and the court to which the parties desire to transfer the proceedings agrees, the proceedings may be held in the county designated by the parties. If 2 or more petitions for review of the same decision are filed in different counties, the circuit judge for the county in which a petition for review of the decision was first filed shall determine the venue for judicial review of the decision, and shall order transfer or consolidation where appropriate.

(b) The petition shall state the nature of the petitioner's interest, the facts showing that petitioner is a person aggrieved by the decision, and the grounds specified in s. 227.20 upon which petitioner contends that the decision should be reversed or modified.

. . .

(c) Copies of the petition shall be served, personally or by certified mail, or, when service is timely admitted in writing, by first class mail, not later than 30 days after the institution of the proceeding, upon all parties who appeared before the agency in the proceeding in which the order sought to be reviewed was made.

Note: For purposes of the above-noted statutory time-limits, the date of Commission service of this decision is the date it is placed in the mail (in this case the date appearing immediately above the signatures); the date of filing of a rehearing petition is the date of actual receipt by the Commission; and the service date of a judicial review petition is the date of actual receipt by the Court and placement in the mail to the Commission.

CITY OF FOND DU LAC

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

At issue herein is the City of Fond du Lac's duty to bargain with the Union over four portions of the latter's Safety Clause proposal.

BACKGROUND

The record herein establishes that the City of Fond du Lac's Fire Department operates from four stations. The Central Station has a vehicle complement of one pumper, one ladder truck and one ambulance. Station 1 has a vehicle complement of one pumper and one ambulance while Stations 2 and 3 house one pumper each. Three firefighters normally man each pumper with two firefighters manning the ladder truck and each ambulance. The number of vehicles initially responding to a request for emergency service varies with the type of fire. A car fire or brush fire generates an initial response of one pumper from the closest station while a fire in a residence has the Central Station pumper, ladder truck, and ambulance (if it is not already on another call) responding along with a pumper from the closest outlying station. Firefighters are cross-trained so they can serve on either a pumper or ladder or, in the case of some firefighters, in an ambulance. The firefighters are trained to avoid situations in which they are working alone (the so-called "buddy system").

The record does verify the proposal's assertion that firefighting is inherently dangerous and consistently ranks at or near the top of any list of the most dangerous professions in the United States. A number of factors play a role in determining the extent of the danger faced by firefighters including the number, experience, training, skill and physical condition of firefighters present at the scene, the type and location of fire, how long the fire has been burning, the type, quantity and quality of equipment available to firefighters, firefighting procedures, local building codes, water supply, weather, and the time of day. Some of these factors can be controlled in a manner which serves to maximize safety at all times (i.e., building codes, equipment, training, procedures, and water supply). The record establishes that these predictable controllable factors are maintained in Fond du Lac in a manner which definitely enhances firefighter safety.

The record also demonstrates that effective suppression of the vast majority of building fires in Fond du Lac and elsewhere requires use of no more than the standard first response suppression technique of two firefighters advancing a single hose into the structure.

Lastly the record establishes the existence of what might be called the "heroic factor" applicable to firefighters in Fond du Lac and elsewhere which translates into a firefighter's willingness to protect human life by taking extraordinary risks to his or her personal safety, including entering a burning building alone, in violation of universal safety procedures.

POSITIONS OF THE PARTIES

The Union

The Union submits that all four disputed portions of the Safety Clause are mandatory subjects of bargaining. It bases this contention upon an assertion that the Safety Clause proposal in its entirety primarily relates to the health, safety and welfare of firefighters and thus primarily relates to conditions of employment within the meaning of Sec. 111.70(1)(a), Stats.

As to the minimum manning portions of the proposal, the Union argues the record demonstrates that a significantly greater danger to firefighters will exist if the first response engines and aerials are manned at levels below those specified in the proposal. The Union asserts that adequate safety levels can be maintained only if (1) manning levels are sufficient to allow for utilization of the "buddy system" at the fire scene and (2) adequate manpower arrives at the fire scene as a unit. The Union submits that any means of transporting personnel to the fire scene which would present the possibility of staggered arrival times

will hamper the efficiency and effectiveness of the fire suppression effort and generate unacceptable danger levels. It further contends that the manning levels specified in the proposal are well below nationally recognized standards and are those under which the City currently operates.

The Union agrees that factors such as safety equipment, firefighter's training level and experience, building codes and safety procedures also have an effect on firefighter safety. However, the Union rejects the City's contention that (1) such factors are more directly related to safety concerns than manning and (2) that manning is therefore a permissive subject of bargaining.

The Union asserts that the City's position regarding first response minimum rig manning is at odds with both the record evidence and the decisions of courts in other states. The Union cites City of Alpena v. Alpena Firefighters Association, 56 Mich. App. 568 (Mich. Ct. of Appeals, 1974); Town of Narragansett v. Int'l Assn. of Firefighters, AFL-CIO, Local 1589, 380 A.2d 521 (Rhode Island Sup. Ct. 1977); City of Erie v. Int'l Assn. of Firefighers, (Ct. of Common Pleas, Erie Co. Pa. 1980) aff'd 459 A.2d 1320 (Commonwealth Ct. of Pa. 1983); Int'l Assn. of Firefighters, Local 669 v. City of Scranton, 429 A.2d 779 (1981) and City of St. Paul v. Uniformed Firefighters, Local 21, et al., (Ramsey County District Court, File No. 432526, 1979) as being supportive of its position as to minimim manning.

As to the manning levels specified in the proposal which are applicable to ambulances, the Union reiterates its assertion that the manning requirements substantially enhance firefighter safety and thus are mandatory subjects of bargaining.

Turning to the remaining two disputed components of the Safety Clause, the Union submits that requiring the testing and maintenance of equipment clearly affects firefighter safety as it will minimize the potential for equipment failures which could lead to injury.

The Union contends that the foregoing arguments warrant a conclusion by the Commission that the entire Safety Clause is a mandatory subject of bargaining.

The City

The City asserts that as a municipal corporation, it has a statutory right under Chap. 62, Stats. to manage its affairs and to provide for the health, safety, and welfare of the public. It contends that these statutory powers are among those which are permissive subjects of bargaining under Sec. 111.70(1)(a), Stats., because they are matters "reserved to management and direction of the governmental unit." Although not specifically identified by statute, the City submits that it possesses the implied statutory right to determine manning levels in the Fire Department.

The City contends that manning levels are permissive subjects of bargaining because they directly relate to both (1) the financial health and management of the City and (2) the degree, level, and quality of fire protection deemed appropriate for the public's health, safety and welfare. The City asserts that the Union's manning proposal runs counter to the City's aforementioned statutory responsibilities and that the right to bargain under Sec. 111.70, Stats. cannot be harmonized with the intrusion of the Safety Clause proposal into the City's statutory powers. The City thus submits that the Union's proposal is not a mandatory subject of bargaining because it primarily relates to the management and direction of the City.

The City argues that application of the holdings in prior Commission decisions in City of Brookfield, Dec. No. 11489-B, 11500-B (WERC, 4/75) and City of Manitowoc, Dec. No. 18333 (WERC, 12/80) also generates a conclusion that the proposal's manning levels are permissive subjects of bargaining. Given the inherently dangerous nature of the firefighting profession, the City submits that to establish the proposal's mandatory nature, the Union must prove that the danger to firefighters would be substantially affected or that firefighters would experience unreasonably hazardous working conditions if manning levels were reduced below the specified levels. The City submits that under these decisions, factors such as types and quantities of safety equipment, safety practices and procedures, training, experience and building codes must be analyzed to determine whether they have a more direct and intimate affect on firefighter working

conditions and safety than do the manning levels on first response vehicles. The City contends that when the above factors are examined within the context of the instant record, it is clear that the City's commitment to firefighter safety warrants a finding by the Commisison that an alteration in manning levels of first response vehicles would not have a substantial effect on firefighter safety.

The City notes that the Union's proposal requires that the specified numbers of firefighters be on each first response vehicle while in transit to a fire. The City argues that the record does not support a conclusion that the number of firefighters riding a vehicle, whether in the vehicle's cab or elsewhere, has any significant impact on safety. The City alleges that the in transit manning requirement effectively precludes unilateral implementation of service alternatives such as a "public safety officer" who would be assigned to patrol a specific area and would respond to emergency scenes in a small truck or car instead of on a vehicle dispatched from a fire station. The City also contests the Union's assertion that rig manning levels below those specified in the proposal preclude use of the buddy system at the fire scene. The City contends that as long as adequate numbers of personnel are delivered in some manner to the fire scene, use of the buddy system is not impaired. The City also disputes the Union's contention that arrival of firefighters as a unit at the emergency scene is strongly related to safety. It asserts that the testimony in the record reveals that the reality that cross-training of personnel and shifting personnel complements due to trading of work schedules effectively remove any unit arrival impact.

The City further argues that a close review of the cases cited by the Union generate minimal support for the Union's position. The City directs the Commission's attention to City of New Rochelle v. Crowley, 403 N.Y.S. 2d 100 (Supreme Ct., Appellate Division, N.Y. 1978); The Troy Uniformed Firefighters Association, Local 2304, I.A.F.F. and City of Troy, 10 N.Y. PERB 3105 (1977); Int'l Assn. of Firefighters v. Helsby, 399 N.Y.S. 2d 334 (Supreme Ct., Appellate Division, N.Y. 1977); Local 1088, I.A.F.F., Berlin N.H. and City of Berlin, N.H., New Hampshire PERB, Dec. No. 81-42 (1981); and City of East Orange, N.J. and Local 23, East Orange Firemen's Mut. Benevolent Assoc., New Jersey PERC, Dec. No. 81-11 (1980) aff'd Supreme Ct. of N.J., Appellate Div. (1981) which the City contends are supportive of its position.

Based upon the foregoing, the City urges the Commission to find the Union's minimum manning clause permissive in recognition of the minimal safety impact of such a proposal and its true intent which is to provide job security and overtime opportunities for current unit members.

Turning to the testing and maintenance portions of the Union's proposal, the City urges that the proposal is amorphous given its failure to specify what equipment is to be maintained or which standards of the N.F.P.A. are applicable. The City submits that this lack of specificity in the proposal and the lack of supportive evidence in the record precludes a finding of any relationship between the proposal and safety. The City contends that such a relationship cannot be assumed and that the question of appropriate testing of equipment primarily relates to the City's management and control of its operation. Given the foregoing, the City requests that the Commission find that the City has no duty to bargain over this portion of the Union's Safety Clause.

DISCUSSION

Before considering the specific proposal at issue herein, it is useful to set forth the general legal framework within which disputes over the duty to bargain must be determined.

Section 111.70(1)(a), Stats., defines collective bargaining as ". . . the performance of the mutual obligation of a municipal employer, through its officers and agents, and the representatives of its employes, to meet and confer at reasonable times, in good faith, with respect to wages, hours and conditions of employment with the intention of reaching an agreement, . . . the employer shall not be required to bargain on subjects reserved to management and direction of the govermental unit except insofar as the manner of exercise of such functions affects the wages, hours and conditions of employment of the employes . . ." (emphasis added).

When interpreting Sec. 111.70(1)(a), Stats., the Wisconsin Supreme Court has concluded that collective bargaining is required over matters primarily related to

wages, hours and conditions of employment but not over matters primarily related to "formulation of basic policy" or the "exercise of municipal powers and responsibilities in promoting the health, safety, and welfare for its citizens." City of Brookfield v. WERC, 87 Wis.2d 819, 829 (1979). See also Beloit Education Association v. WERC, 73 Wis.2d 43 (1976); Unified School District No. 1 of Racine County v. WERC, 81 Wis.2d 89 (1977). A municipality may choose to bargain over a matter which is not primarily related to wages, hours and conditions of employment if it is not expressly prohibited from doing so by legislative delegation. Brookfield, supra. It should be noted that a proposal's intrusion into statutorily established employer rights does not generate a finding that the proposal is permissive unless that intrusion outweighs the proposal's relationship to wages, hours and conditions of employment. Glendale Prof. Policeman's Association v. Glendale, 83 Wis. 2d 90 (1978); Beloit, supra.

Contrary to the City's argument herein, a conclusion that the Union's rig manning proposal is mandatory would not run afoul of the Court's teaching in Glendale, supra. If found mandatory and included in a contract, the proposal would simply limit existing managerial discretion. There would be no irreconcilable conflict between the City's authority under Ch. 62 and the manning proposal made under auspices of Sec. 111.70, Stats. Thus we proceed to determine the status of the proposal under the "primary relationship" test.

Issues regarding the right of public employes to bargain over safety related proposals are not new to this Commission. In City of Beloit, Dec. No. 11831-C (WERC, 9/74) the Commission found proposals regarding the student behavior which threatened teacher safety to primarily relate to conditions of employment and to be mandatory subjects of bargaining. The Wisconsin Supreme Court in Beloit, supra, upheld the Commission's determination. 2/

While the Commission has not squarely confronted the issue of firefighter rig manning, the Commission has previously addressed issues as to the status of minimum manning proposals relative to the number of firefighters on a 24 hour shift. In City of Brookfield, Dec. No. 11489-B, 11500-B (WERC, 4/75), the Commission, prior to the Wisconsin Supreme Court's Beloit decision, reasoned:

> Minimum Daily Manpower
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> The Complainant sought to show that Respondent's decisions as to the number of unit employes to be on duty daily affect the on-the-job safety and workload of the represented employes. Respondent argues that Complainant has not satisfactorily proven that relationship.
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> The record evidence establishes that the Respondent has reduced the number of unit employes on duty daily by two and that, therefore, each unit employe remaining will be subjected to an increased workload in order to perform the static or increasing total amount of fire extinguishing and non-fire extinguishing work expected to be performed by unit employes as a group. In addition, as noted in Complainant's brief, "(i)t is conceded by Respondents that approximately four major fires occur each year in Brookfield requiring all available fire fighters . . . In such instance, two additional men could provide a margin of safety by warning of actual or potential hazards or assist in the rescue of fellow fire fighters when so needed."
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> The record also shows that following said reduction in the number of unit employes on duty daily, the Chief of the Department instituted new fire call response assignments which caused the Department's aerial ladder truck (which carries

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2/ The Commission has reiterated the mandatory nature of teacher safety concerns in Sheboygan County Handicapped Children's Education Board, Dec. No. 16843 (WERC, 2/79); Blackhawk Vocational, Technical and Adult Education District, Dec. No. 16640-A (WERC, 9/80), aff'd Blackhawk Teachers' Federation v. WERC, 109 Wis.2d 415, (CtApp IV 1982); Milwaukee Board of School Directors, Dec. No. 20093-A (WERC, 2/83).

safety equipment in quantities and of types not carried on other apparatus) to respond less quickly and to fewer first calls than was the case prior to December 31, 1972. There is also evidence that one tank truck formerly available to fight multiple response fires will be inoperative at least until off-duty personnel arrive. For those reasons, Complainant asserts that the first unit employes responding to a fire will be without needed safety equipment for at least some period of time.

The record also established, however, that there have been no reductions in the number of men ordinarily riding on each piece of apparatus 17/ and that each piece of apparatus is equipped with numerous items of safety equipment including at least one oxygen mask per fire fighter aboard. In addition, Fire Chief Edward Schweitzer testified that he did not consider his revisions in the fire call response assignments as final but rather only "an experiment". The Chief further testified that his expectations of the work performance of each man at a fire have not changed; he formerly and presently ". . . wouldn't expect any man to do anything he wasn't capable of doing or take any chance that would hinder his life."

To repeat, Complainant argues that the number of unit employes on duty significantly affects working conditions (to wit, safety and workload) or nonlaid-off employes. The Commission finds, however, that said working conditions are much more directly and intimately affected by decisions as to the types and quantities of safety equipment transported to first responses, the safety practices and procedures followed at fires, and the amount and type of non-fire-extinguishing work to be required of unit employes as a group. Moreover, the record facts do not establish that unit employes have experienced so unreasonably hazardous or unduly burdensome a workload--either before or after the number of employes normally on duty was reduced by two--that their interests and concerns in safety and workload could not be substantially fulfilled and protected without bargaining about the number of unit employes to be on duty daily. Therefore, since their interests in safety and workload seem amenable to protection and fulfillment by bargaining about the above-mentioned subjects that are more directly and intimately related thereto and since bargaining about those subjects is much less restrictive of Respondent's freedom to determine the basic scope of protective services to be provided to the public, the Commission concludes, as did the Examiner, that determinations as to the number of unit employes to be on duty daily do not directly and intimately affect the wages, hours and working conditions of nonlaid-off employes. That result both serves the public policy underlying MERA and reflects an effort to harmonize MERA with Sections 62.11(5), 62.13(5m) and (8).

Therefore, Respondent did not, and does not, have a duty to bargain collectively about the number of unit employes to be on duty during each 24-hour Fire Department shift.

17/ Tr. 59. For that reason, the size of crew riding on each vehicle is not at issue herein as it was in City of Wauwatosa (10670-A) 12/71.

The Commission's decision in this regard was not appealed and thus was not before the Wisconsion Supreme Court in Brookfield, supra. The Supreme Court did hold in Brookfield that a municipal employer need not bargain over an economically motivated decision to reduce the overall size of the firefighting force in order to implement budget cuts which reflect a policy decision by a community to reduce the level and quality of services to achieve lower tax rates.

The issue of firefighter shift size came before the Commission again in City of Manitowoc, Dec. No. 18333 (WERC, 12/80). The Commission held:

DISCUSSION

The parallel between this situation and that presented by the City of Brookfield decision is compelling. Both situations involve minimum man-power requirements as applied to municipal fire departments. Both raise the issue of the possible impact of such requirements on firefighter safety and well-being on the one hand, and on the authority of a municipality to determine the extent and level of services that are to be provided its constituents, on the other. The only apparent difference between the two situations is the possibility of layoffs or other personnel actions, i.e. in Brookfield, layoffs of firefighters were imminent and indeed the motivating factor behind the City's challenge to a minimum manning provision, while in this instance, no such layoffs are contemplated. For purposes of determining the issue involved herein, this distinction is not of great significance.

The Supreme Court's Brookfield decision stated that economically motivated layoffs of public employes resulting from budgetary restraints constituted non-mandatory subjects of bargaining, insofar as other state statutes, in particular Chapter 62, Wis. Stats. 3/, granted municipalities the power to decide the necessity of layoffs in view of the policy objectives of the affected citizenry - as expressed through their elected representatives. However, the Commission's decision in Brookfield 4/ specifically determined the status of a minimum daily manpower requirement as a non-mandatory subject of bargaining. The Union's proposal in that instance was a daily minimum manpower requirement of not less than 16 men with the rank of Captain and under for each 24-hour duty period (with certain exceptions not material herein). In Brookfield, the City had actually reduced by two the number of bargaining unit employes on duty daily, which affected response time and the quantity of men and equipment available to respond to fire calls. The Commission determined that the City did not have a duty to bargain on the number of unit employes on duty in and of itself:

. . .

The portion of our decision in Brookfield that concerned minimum daily manpower requirements was not appealed and said subject did not become part of the Supreme Court's subsequent decision relating to the status of economically-motivated layoffs as a subject of bargaining. Therefore, in light of the fact that the proposal involved herein is virtually identical in substance to that involved in Brookfield and since there was no evidence adduced herein to establish that the size of the firefighter crew on any particular shift primarily affected the safety of the firefighters on duty, we conclude that the proposal involved does not relate to a mandatory subject of bargaining.

3/ See in particular Section 62.11(5) Wis. Stats. (setting forth the powers of a municipality's common council) and Section 62.13(5m) (relating to dismissals and re-employment in municipal service).

4/ City of Brookfield (11489-B, 11500-B) 4/75.

The issue of firefighter rig manning was touched upon in City of Brookfield, Dec. No. 19944 (WERC, 9/82) where the Commission found the following proposal to be a permissive subject of bargaining:

> A truck to be operated by unit employees shall require the assignment of an additional equipment operator daily to serve as tillerman.

The Commission commented:

> As to the portion of the proposal requiring the assignment of an additional equipment operator, we believe that the Association is in effect placing a manning requirement upon the City which, absent a showing of a substantial impact on employe safety, primarily relates to the City's policy choice of how to assign manpower to provide the desired service. 3/

3/ City of Manitowoc, Dec. No. 18333 (WERC, 12/80); Manitowoc County, Dec. No. 18995 (WERC, 9/81).

The Manitowoc County decision cited in City of Brookfield involved a dispute over the bargainability of a proposal which required two law enforcement officers per squad car during evening hours. The Commission found the proposal to primarily relate to the employer's right to manage and to determine the quality of service citing a lack of evidence regarding increased hazards during evening hours and noting that under departmental procedures, officers regardless of shift were not required to respond to situations which would endanger their safety unless two officers were present. The Commission noted therein that it is evidence regarding local conditions and experience which is determinative.

The foregoing decisions provide some guidance as to the specific analytical framework which is applicable to the resolution of the parties' dispute. As just noted, it is evidence regarding local conditions which is determinative. Manitowoc County, supra; aff'd (CirCt Manitowoc, 12/82). Evidence of a relationship to safety and thus to conditions of employment must be balanced against the degree to which a proposal restricts the employer's freedom to determine the basic scope of protective services and the manner in which they will be provided. City of Brookfield, Dec. No. 11489-B, 11500-B (WERC, 4/75); Manitowoc County, supra. Lastly, firefighter safety is affected by a variety of factors, including types and quantities of safety equipment and applicable safety procedures. City of Brookfield, Dec. No. 11489-B, 11500-B (WERC, 4/75).

Ambulance Manning

We initially note that the City has objected to that portion of the proposal which specifies that "All ambulances shall be manned in accordance with state Statutes." This part of the proposal requires compliance with Sec. 146.50(4), Stats., which specifies:

> (4) AMBULANCE STAFFING. (a) During an ambulance run, the following persons shall be present in the ambulance:
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> 1. Any 2 licensed ambulance attendants, emergency medical technicians-advanced (paramedics) licensed under s. 146.35, registered nurses, physician's assistants or physicians, or any combination thereof; or
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> 2. One licensed ambulance attendant plus one person with a temporary permit under sub. (9).
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> (b) The ambulance driver may assist with the handling and movement of a sick, injured or disabled person without an ambulance attendant's license if a licensed ambulance attendant, emergency medical technician-advanced (paramedic), registered nurse, physician's assistant or physician directly supervises the driver. No ambulance driver may administer emergency care procedures without an ambulance attendant's license.

We have previously concluded that proposals which provide a contractual forum for adjudication of disputes over compliance with statutes which are related to employe wages, hours and conditions of employment are mandatory subjects of bargaining. Milwaukee Board of School Directors, Dec. No. 20093-A (WERC, 2/83) (Dept. of Public Instruction class size regulations); Milwaukee Board of School Directors, Dec. No. 20979 (WERC, 9/83) (compensation procedures); Racine Unified School District, Dec. No. 20652-A (WERC, 1/84) (teacher certification and licensure requirements) aff'd (CirCt Racine, 10/84); School District of Janesville, Dec. No. 21466 (WERC, 3/84) (employe right to representation). See also Blackhawk, supra, where the Court indicated that a proposal which sought to protect an employe from being disciplined when exercising constitutional rights was a mandatory subject of bargaining.

The Union's proposal here has a relationship to employe conditions of employment in that it relates to the amount and allocation of work which each employe will perform during an ambulance run. We need not balance this relationship against any impact upon management prerogatives and policy choices because the Legislature has eliminated employer discretion as to such matters by mandating a specific manning level. Consistent with our above-cited decisions, we therefore find this portion of the Union's proposal to be mandatory. We now turn to the manning proposal applicable to pumpers and ladder trucks.

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The Union specified during the hearing that the proposal's manning requirements are applicable to all vehicles which are available for a first response to an emergency call. Since all units are potentially available for a first response, depending on the type and location of the emergency, the proposal would require, absent "rare and unexpected emergency situations," that the specified manpower be present with the vehicle either at the station or elsewhere. The specified number of firefighters would then ride the vehicle to the emergency scene.

From the foregoing it can be seen that the Union's proposal does not create a direct prohibition against the City reducing the overall number of firefighters it employs or the number of firefighters assigned to a shift. Nor does it preclude the City from altering its first response procedures (i.e., the number and location of vehicles responding) or from determining that it would utilize a smaller number of firefighting vehicles to provide fire services. The proposal does require that the City have the specified number of firefighters on duty and with any vehicle which is available for a first response. Thus, while the proposal would not prevent the City from deciding to reduce service levels by reducing the number of vehicles available to the Fire Department (and thus the number of employes on duty), the proposal would prevent the City from altering manpower levels if the existing number of vehicles were to be maintained. Service reductions could only be accomplished by reductions in first response vehicles. In addition, the proposal would prevent the City from deciding to allocate existing manpower and vehicles in a manner which would run afoul of the proposal's mandated two or three men per truck. Thus the City could not seek to improve existing service levels from existing resources by experimenting with concepts such as a community safety officer who would patrol the City in a car or light truck and respond to an emergency independent of the pumper or ladder truck.

To be balanced against the foregoing relationship to public policy choices and management prerogatives is the Union's assertion that the specified manning levels primarily relate to the safety of firefighters.

The City has asserted that the relationship between safety and manpower levels only comes into play upon arrival at the emergency scene and that the pre-arrival manning requirements contained in the Union's proposal thus do not relate to conditions of employment and do relate to service level choices and management options regarding how best to provide the service. The Union counters by contending that any reduction in manning levels below those specified does relate to safety because (1) it will preclude effective use of the "buddy system" at the fire scene and because (2) arrival on the scene as a unit is critical to effective and thus safe fire suppression. We will proceed to examine the record to evaluate these competing contentions.

We initially conclude that there is not enough evidence in this record to persuade us that there is any significant safety concern which would relate to how

many firefighters ride a piece of equipment in transit to an emergency scene. As noted by the City, the Union's proposal does not specify that two firefighters should ride in the pumper cab so that one can alert the driver to hazards during the trip. The Union also has not argued a safety issue in this regard within its briefs. The record itself is inconclusive and thus we shall disregard the safety in transit factor during our analysis.

The record does clearly establish the substantial potential for safety concerns to arise at the scene of the fire and we will thus focus on that relationship when discussing the Union's two basic arguments as to why it is critical to safety at the fire scene for the specified number of firefighters to arrive together on a vehicle. 3/

Looking first at the Union's "buddy system" argument, the record firmly establishes and the City does not contest the unacceptable level of danger to which a firefighter is exposed entering an emergency scene building alone. Training procedures in Fond du Lac and elsewhere universally emphasize the need for at least two firefighters to enter a building together to minimize the potential for firefighter injury due to an inability to maintain proper lookout for hazards and to maximize the possibility of rescue should an injury to a firefighter occur. The Union is correct when it asserts that this so-called "buddy system" safety procedure could not be maintained if a pumper or ladder truck were to arrive as the sole response vehicle with two 4/ or one firefighter, respectively. However, when more than one vehicle responds to a fire call, as in Fond du Lac, there will be sufficient manpower to allow for operation of the "buddy system" even if manpower levels were reduced. 5/ In addition, if the City were to provide alternative means of conveying the specified number of firefighters to the scene of the fire manning levels, the buddy system could be maintained at the fire scene without having the firefighters arrive on a single vehicle. The critical factor to maintaining the viability of the "buddy system" is the presence of adequate manpower at the fire scene. As the foregoing indicates, effective use of the buddy system can be maintained whether or not the firefighters arrive on the same vehicle. Therefore we find, contrary to the Union's argument, that the buddy system can be maintained by means other than arrival of the specified number of firefighters on a common vehicle.

Turning to the Union's argument regarding the safety related benefits of arrival on the fire scene as a unit, it should initially be noted that Fond du Lac's current standard first response procedures to building fires will often involve differing arrival times of units from the main station and from outlying stations. Thus our analysis of the Union's "unit arrival" argument must focus upon the arrival of a single firefighting crew riding on the same piece of equipment. The essence of that argument is that common arrival yields a more cohesive, coordinated and thus more effective and safe fire suppression effort. The City counters that the realities of cross-training and employe trading of workdays produce a group of firefighters which is fully prepared to work efficiently and effectively with whomever happens to be in their station on a given day or whomever would be present at the emergency scene after arriving on a different vehicle.

Our review of the record persuades us that in this case, unit manning upon arrival is not a significant safety factor. Given the cross-training, the shifting of personnel by trades, and the basically standard procedures which are to be

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3/ The parties and thus the record focus upon safety concerns arising at structural fires. Thus grass and car fires, for which the standard first response is to dispatch a single pumper, do not play any meaningful role in our analysis.

4/ Because the City does not have automatic pumpers, one firefighter stays with the standard pumper to regulate water pressure and water pump functioning.

5/ Indeed, even if the bare minimum of only one firefighter were to arrive on each of the three pieces of equipment (2 pumpers and a ladder) which are part of the current first response to a building fire, the two firefighters needed to extinguish the vast majority of building fires would be present and the "buddy system" would be preserved.

applied when fighting various types of fires, the constant identity of various station crew would seem to be a benefit which is not always currently enjoyed and, when present, is not a significant factor. We would note that common crews could be maintained even under a community safety officer concept whereby one member of the pumper crew, for instance, would respond in another vehicle. While we are also cognizant of the fact that speed of beginning the fire suppression effort may well be important for a certain number of fires, separate arrival does not necessarily equate with slower response times. If the crew member in a car or light truck arrives at the scene before or at the same time as the pumper or ladder truck, no delay would be involved.

There remains the impact, if any, of the "heroic factor" upon our analysis. If vehicles arrive with insufficient numbers of firefighters present to commence utilizing the buddy system and firefighters were thus awaiting arrival of their comrades, the presence of a life threatening situation could well prompt an individual firefighter to disregard safety procedures and enter a burning building alone. However, on balance, especially where the lack of a buddy system due to staggered arrival times is speculative, we do not find this potential alone to be a basis for finding that the proposal relates to safety to such a degree that it overcomes the proposal's above noted impact on service choices and their implementation.

Both parties have cited decisions from other states which directly or indirectly deal with the manning issues before us. 6/ We have not discussed those cases herein because their conflicting results, in our view, reflect differing statutory provisions and judicial interpretations thereof as well as differing records. Suffice it to say that our decision is based upon the statute and case law existent in Wisconsin as well as this specific record.

In summary, the common arrival time and heroic factors make the mandatory/ permissive determination on this issue a close question. In the final analysis, however, we do not find that the Union's in transit rig manning proposal has a safety relationship which is sufficient to overcome its relationship to service level choices and management prerogatives. The safety concern created by separate arrival times of personnel needed to complete the buddy system is only speculative at this point. If, for instance, a change is made reducing in transit manning on a rig from three to two in favor of a patrolling safety officer and experience under such system establishes a time lag in arrival time between rig firefighters and the safety officer, then the Union would have a stronger case that its manning proposal primarily related to safety. As the record stands now, however, it is only speculative that such "outside" personnel would not routinely be able to arrive at the scene at or before the time that the first response rig arrives.

This finding does not leave the Union without the ability to bargain safety protections. Our decision reflects the reality that the significant danger in firefighting occurs at the fire scene, not in transit thereto. The Union can, as indicated in Brookfield, supra, bargain over the firefighting procedures to be followed at the fire scene which are safety related and thus could, for instance, mandatorily propose that no firefighter can be compelled to enter a burning building alone. Such a proposal directly addresses a safety concern with only a comparatively lesser impact on management prerogatives or public policy choices. The Union is also free to bargain the impact on wages, hours and conditions of employment which a reduction in transit manpower levels might produce.

Testing and Maintenance of Equipment and Vehicles

The last portion of the proposal to which the City has objected establishes an obligation upon the City to (1) test pumpers and ladder trucks annually to conform with N.F.P.A. standards and (2) to maintain all other equipment "in such a manner as to provide for the Firefighter's safety." The City has argued that absent proof as to N.F.P.A. standards or what equipment is covered, the mere assertion of a safety relationship is insufficient to establish mandatory status.

6/ In addition to the cases cited by the parties, we have reviewed IAFF v. City of Vallejo, 526 P.2d 971 (Cal. Sup. Ct. 1974); IAFF v. City of Portland, Maine L.R.B. Case No. 83-01 (1983); aff'd Superior Ct. (1983), aff'd Supreme Judicial Ct. (1984); IAFF v. City of Salem, Oregon ERB, Case No. C-61-83, aff'd Ct. of Appeals (1984).

Looking first at the Union's general proposal which requires that all equipment be maintained in a safe manner, we reject the City's assertion that the general nature of the proposal renders it permissive absent Union proof of a safety relationship. The Union's proposal seeks to generally protect employes from workplace and occupational hazards caused by improperly maintained items of equipment. To establish mandatory status, the Union bears no burden to prove that a cracked ladder or leaking airmask or even a pencil sharpener with a sharp crank either exists now or, if existent, would jeopardize safety. Nor, in our view, must the Unon specifically list all equipment covered by its proposal. Lack of specificity may lead to problems regarding the proposal's applicability or enforcement if placed in a contract but is not a basis for finding the instant proposal permissive. Our task here is limited to balancing the safety relationship of the proposal, if any, against the impact, if any, on public policy choices or management prerogatives. Just as no specific proof is needed to establish employe interests in protecting themselves against unjust discipline in order to establish impact on "conditions of employment," we conclude that specific proof is not needed to establish employe interests in protecting themselves against work place hazards in order to establish an effect on "conditions of employment." In both instances, whether it be retention of a job or retention of health, the impact is apparent and, if more substantial than competing relationships to policy choices or management, sufficient to warrant a mandatory finding. Any public policy or management prerogatives impacted by this proposal are outweighed by the proposal's relationship to employe safety and thus we find this portion of the proposal to be a mandatory subject of bargaining.

As to the portion of the proposal which references N.F.P.A. standards, we cannot specifically rule on its mandatory or permissive nature because the standards are not in the record. However, we do note that those N.F.P.A. standards which primarily relate to service level choices are permissive and those which primarily relate to employe safety are mandatory.

Dated at Madison, Wisconsin this 21st day of February, 1985.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Herman Torosian, Chairman

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Marshall L. Gratz, Commissioner

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Danae Davis Gordon, Commissioner