

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of	:	
	:	
MILWAUKEE POLICE ASSOCIATION	:	
	:	Case 283
Requesting a Declaratory Ruling	:	No. 38353 DR(M)-424
Pursuant to Section 111.70(4)(b),	:	Decision No. 24728
Wis. Stats., Involving a Dispute	:	
Between Said Petitioner and	:	
	:	
CITY OF MILWAUKEE	:	
(POLICE DEPARTMENT)	:	
	:	

Appearances:

Murray & Moake, S.C., Attorneys at Law, by Mr. Kenneth J. Murray and Ms. Laurie Eggert, 1840 North Farwell Avenue, Suite 403, Milwaukee, Wisconsin 53202-1778, for the Association.
 City of Milwaukee, by Mr. Thomas C. Goeldner and Ms. Roxane Crawford, Assistant City Attorneys, 800 City Hall, Milwaukee, Wisconsin 53202-3551.

FINDINGS OF FACT, CONCLUSIONS OF LAW
AND DECLARATORY RULING

The Milwaukee Police Association having on February 16, 1987 filed a petition with the Wisconsin Employment Relations Commission seeking a declaratory ruling pursuant to Sec. 111.70(4)(b), Stats., as to the City of Milwaukee's duty to bargain with the Association over certain matters; and the City having on March 9, 1987 filed a statement in response to said petition pursuant to ERB 18.03; and hearing having been held on April 20, 1987, in Milwaukee, Wisconsin before Examiner Peter G. Davis; and the parties having submitted written argument, the last of which was received on May 18, 1987; and the Commission having considered the matter and being fully advised in the premises, makes and issues the following

FINDINGS OF FACT

1. That the City of Milwaukee, herein the City, is a municipal employer which provides law enforcement services to its citizens through its Police Department and has its principal offices at City Hall, Milwaukee, Wisconsin 53202.
2. That the Milwaukee Police Association, herein, the MPA, is a labor organization which functions as the exclusive collective bargaining representative of certain City employes who perform law enforcement functions in the Police Department and has its principal offices at 1840 North Farwell, Suite 400, Milwaukee, Wisconsin 53202.
3. That pursuant to Chapter 36 of the Milwaukee City Charter, there is an Employees' Retirement System of the City of Milwaukee which is administered by the Annuity and Pension Board; that one of the benefits provided by the Retirement System is a Duty Disability Retirement Allowance which is available to City employes, including those represented by the MPA, who become ". . . permanently and totally incapacitated for duty as a natural and proximate result of an injury occurring at some definite time and place while in the actual performance of duty . . ."; that a medical panel makes the determination as to whether an applicant is "incapacitated for duty" which is used by the Pension Board when granting or denying a Duty Disability Retirement Allowance application; that pursuant to City Charter the medical condition of employes who receive a Duty Disability Retirement Allowance is subject to periodic review at the request of department heads; and that employes whose benefit applications are denied have access to administrative and judicial review of the decision of the Annuity and Pension Board.
4. That within the Police Department, there are "limited duty" positions/assignments, primarily in the Communications Bureau and Clerical and Property Bureau, which are in the MPA unit and which are highly unlikely to

require the employe to perform the full range of physical activity likely to be encountered by a patrol officer; that such positions/assignments have historically been assigned to employes who have no physical impairment, to individuals whose physical condition has been temporarily impaired due to injury, illness or pregnancy, and to individuals who have a permanent disability or impairment which does not affect their ability to perform the "limited duty" in question.

5. That in September, 1982, the MPA filed a prohibited practice complaint with the Wisconsin Employment Relations Commission alleging the following:

3. Respondent Harold A. Breier is Chief of Police for the Milwaukee Police Department, a department within Respondent City. Respondent Breier is a municipal employer in that he acts on behalf of Respondent City within the scope of his authority under Section 62.50 Stats. (sic) and authority granted to him by Respondent City and by the terms of the collective bargaining agreement referred to in Paragraph 2 above.

4. Breier has created a new job classification, status or assignment known as "limited duty" and has assigned certain officers to that classification; certain officers assigned to limited duty are physically unable to perform all of the job responsibilities of a police officer.

5. Breier has refused to bargain with the MPA regarding the impact that such classification will have upon wages, hours and conditions of employment, including, but not necessarily limited to, the following:

a) Applicability of departmental disciplinary rules and regulations, including the rule requiring all officers to respond and make arrests 24 hours a day, to officers placed on limited duty.

b) Job description and responsibilities for officers on limited duty.

c) Identification of job duties and assignments which officers on limited duty may be required to perform and which officers on limited duty may not be required or ordered to perform.

d) The effect of seniority on shift assignment and job assignment for officers on limited duty.

e) Criteria for placement on and removal from limited duty.

6. Breier has a duty to bargain with the MPA regarding the effect of limited duty status upon wages, hours and conditions of employment; his refusal to bargain is in violation of Secs. 111.70(3)(a)4 and 111.70(3)(a)1, Stats.

that the City and the MPA thereafter agreed that the complaint could be dismissed with the understanding that paragraphs 5(a) through (e) would be treated by the City as a demand for bargaining by the MPA to which the City would respond with a proposal; that in February, 1983, the City made the following proposal to the MPA:

1. The City shall continue its practice with respect to making job assignments to employees who have been determined by the Police Medical Panel to be fit for limited duty. Subject to the availability of an opening in the Police Department for such an assignment, all such assignments and their duration shall be determined by the Chief of Police. The term "Police Medical Panel," as used herein, shall be a panel comprising (sic) one or more Police Physicians.

2. During the time period an employee is found by the Police Medical Panel to be fit for limited duty, he/she will not be disciplined for failure to take police action that he/she is physically incapable of performing.
3. An employee eligible for day shift duty in accordance with Rule 4, Section 90, of the Milwaukee Police Department Rules and Regulations and who has been determined by the Police Medical Panel to be fit for limited duty, shall be given a day shift assignment if such an assignment is available.
4. Nothing herein shall in any way diminish or change the unilateral right and authority of the Chief of Police to make assignments within the Police Department, nor shall anything herein be subject to any of the provisions of Article 8 of the City/MPA Agreement entitled, GRIEVANCE AND ARBITRATION PROCEDURE.

that the MPA responded to the City's proposal with a proposal which stated:

The Association's response to the City's proposal regarding Limited Duty is one that has been consistently (sic) the same. There is no Limited Duty. Therefore, there is no discussion regarding the issue.

that the parties continued to bargain over the issue; and that the parties ultimately reached agreement on a 1983-1984 contract which contained the following provision:

ARTICLE 59

ASSIGNMENTS MADE CONSISTENT WITH EMPLOYEE'S MEDICAL CAPABILITIES

1. If an employee is ineligible for the disability benefits provided by the ERS Act, or by Chapter 35 of the Milwaukee City Charter, in accordance with the terms and conditions established thereunder for that purpose and if the employee is ineligible to receive the sick leave or injury pay benefits provided by this Agreement for reasons other than that the benefits have been exhausted, the Chief of Police shall assign the employee to perform duties structured consistent with the employee's medical capabilities.
2. In the event of a dispute over such assignment made by the Chief of Police, the employee shall have the right to grieve and the right to arbitrate under the Grievance and Arbitration Procedure provisions of this Agreement except that instead of being appealable to an arbitrator or permanent umpire, the dispute shall be appealable to a panel consisting of three physicians, one physician to be designated by the Association, one physician to be designated by the Chief of Police and the third physician to be selected by agreement of the other two physicians. The panel's jurisdiction shall be limited to deciding the medical appropriateness of the Chief's assignment. Decisions made by the panel on matters which are properly before it shall be by majority action and shall be final and binding on the parties. All other provisions of the Grievance and Arbitration Procedure shall remain unchanged and in full force and effect.
3. The provisions of this Article shall only cover assignments made by the Chief of Police on or after the execution date of this Agreement.

that the 1985-1986 contract between the City and the MPA contains the following amendment to the foregoing provision of the 1983-1984 contract:

ARTICLE 62

ASSIGNMENTS MADE CONSISTENT WITH EMPLOYEE'S MEDICAL CAPABILITIES

1. If an employee is ineligible for the disability benefits provided by the ERS Act, or by Chapter 35 of the Milwaukee City Charter, in accordance with the terms and conditions established thereunder for that purpose and if the employee is ineligible to receive the sick leave or injury pay benefits provided by this Agreement for reasons other than that the benefits have been exhausted, the Chief of Police shall assign the employee to perform duties structured consistent with the employee's medical capabilities within the Police Department that have historically been performed by members of the Association bargaining unit (including, but not limited to, temporary or permanent assignments to the Communications Bureau, Detective, Clerical or Property Bureau).
2. In the event of a dispute over such assignment made by the Chief of Police, the employee shall have the right to grieve and the right to arbitrate under the Grievance Arbitration Procedure provisions of this Agreement except that instead of being appealable to an arbitrator or permanent umpire, the dispute shall be appealable to a panel consisting of the three physicians, one physician to be designated by the Association, one physician to be designated by the Chief of Police and the third physician to be selected by agreement of the other two physicians. The panel's jurisdiction shall be limited to deciding the medical appropriateness of the Chief's assignment. Decisions made by the panel on matters which are properly before it shall be by majority action and shall be final and binding on the parties. All other provisions of the Grievance and Arbitration Procedure shall remain unchanged in full force and effect.
3. The provisions of this Article shall only cover assignments made by the Chief of Police on or after the execution date of this Agreement.

6. That prior to February 4, 1987, physicians who served on medical panels which reviewed the medical condition of MPA bargaining unit applicants for a Duty Disability Retirement Allowance received a Job Description for the position of Police Officer from the Pension Board, which listed the following duties and responsibilities:

Preservation of the public peace, protect life and property, prevent crime, arrest violators of the law; enforce all the laws of the Federal, State and City; Inspect every part of the beat as often as possible; prevent the commission of assaults and all other offenses. During such time that business houses are closed, a Police Officer must examine all windows, doors, check on unoccupied houses, investigate all suspicious circumstances, check suspicious persons, know all persons with bad character and note their habits, associations, premises they enter, and names and keep a record of same. Observe all public vehicles and drivers, stolen autos, observe autos parked in the beat, watch for houses of ill fame, gambling houses, report all persons who require a license, check and direct traffic, assist children and aged persons who may be exposed to danger, arrest vagrants, remove persons found begging in the streets. Take care of lost children, report any case of truancy. Note all defected sidewalks and streets. Observe any neglected child or homeless who depends upon the public for support and report same. Attend the Police Academy as assigned and make frequent court appearances. Perform strick (sic) duty, parade duty, and

serve as relief desk sergeant on occasion. Check suspicious autos and submit written reports. Be familiar with the operation of the two-way radio patrol in radio equipped squad cars and answer all alarms directed to squads. Prevent riots and eliminate racial discrimination. In general, perform all of these duties involved in the protection of life and property.

that prior to February 4, 1987, medical panel physicians occasionally requested information from the Pension Board as to the physical requirements of certain positions/assignments within the Police Department which could be performed by an employe whose physical condition was only partially impaired; that based upon the availability of such positions/assignments, the Pension Board has denied Duty Disability Retirement Allowances to MPA bargaining unit applicants for initial receipt of benefits and to individuals from the MPA unit whose eligibility for the continued receipt of benefits was being reviewed.

7. That on February 4, 1987, the Pension Board received the following letter from City of Milwaukee Police Chief Robert J. Ziarnik:

Monday, February 2, 1987

Mr. Robert Nehls
Secretary and Executive Director
Annuity and Pension Board
Employes' Retirement System
City Hall, Rm. 610

Dear Mr. Nehls:

The Police Department has identified positions of a clerical or support nature which are suitable for the placement of limited duty personnel. Because of the limited physical demands placed on officers occupying such positions, it is assumed that officers who are presently on a Duty Disability Retirement or Pension, can be returned to a productive capacity in such positions. Naturally, any return to duty would be conditional upon the officer's medically evaluated compatibility with the physical requirements of the limited duty position to which he/she would be assigned. In order to ensure a proper matching of returning officers to limited duty positions, the positions have been stratified into three categories based upon the level of physical demands inherent to the position. Category #1 jobs place the least physical demands upon the incumbent, Category #2 are more demanding, and Category #3 are the most physically demanding. See the attachment for a further amplification and description of the physical activities required of individuals occupying positions within the aforementioned categories.

At present the Department has the following limited duty positions available:

<u>RANK</u>	<u>CATEGORY</u>
<u>Captain</u>	<u>I</u>
<u>Lieutenant</u>	<u>I</u>
<u>Sergeant</u>	<u>I & II</u>
<u>Police Officer</u>	<u>I, II & III</u>
<u>Alarm Operator</u>	<u>I</u>
<u>Detective</u>	<u>I</u>

In line with the above action, I now respectfully request that the Pension and Annuity Board proceed as expeditiously as possible in re-examining all former Police Department

employees who are currently certified for Duty Disability and who are being compensated at the 75% rate.

MILWAUKEE POLICE DEPARTMENT
LIMITED DUTY POSITION CATEGORIES

<u>ACTIVITY</u>	<u>CATEGORY I</u>	<u>CATEGORY II</u>	<u>CATEGORY III</u>
Sit	Occ/Freq	Freq/Contin	Continuously
Stand	Occ/Never	Frequently	Continuously
Walk	Occ/Never	Frequently	Continuously
Lift	0-10 lbs.	10-50 lbs.	50 lbs. plus
Carry	0-10 lbs.	10-25 lbs.	25 lbs. plus
Push	Occ/Never	Frequently	Continuously
Pull	Occ/Never	Frequently	Continuously
Twist	Occ/Never	Frequently	Continuously
Climb	Occ/Never	Frequently	Continuously
Balance	Occ/Never	Frequently	Continuously
Crawl	Occ/Never	Frequently	Continuously
Stoop	Occ/Never	Frequently	Continuously
Reach & Grasp	Occ/Never	Frequently	Continuously
Perform Repetitive Movements	Occ/Never	Frequently	Continuously
<hr/>			
Write	Yes	Yes	Yes
Answer & Operate A Telephone	Yes	Yes	Yes
Operate a Typewriter/Keyboard	Yes	Yes	Yes
Operate a Motor Vehicle	No	Yes	Yes
See, Hear & Speak Within Normal Parameters	Yes	Yes	Yes

NOTE: In terms of an eight (8) hour workday:
Occasionally (Occ) equals 1-3 hours.
Frequently (Freq) equals 3-5 hours.
Continuously (Cont) equals 5-8 hours.

that the Pension Board thereafter routinely sent all physicians serving on medical panels a copy of the February 2 communication from Chief Ziarnik and began the process of re-examining all Police Department employees currently receiving the standard 75% Duty Disability Retirement Allowance; and that on February 2, 1987 Chief Ziarnik also issued MEMO NO. 87-7 which stated:

M E M O R A N D U M

RE: LIMITED DUTY POLICE STATEMENT & RESPONSE
PROTOCOL FOR OFFICERS IN A LIMITED DUTY STATUS.

LIMITED DUTY POLICY STATEMENT

The Department recognizes that certain assignments do not require the same degree of physical ability or agility as

others, yet those assignments are important to the Department's overall operations. In some instances, these positions have been filled by trained police personnel who are healthy and possessing their full physical abilities. Placing healthy, highly-trained personnel in such limited-duty positions represents an underutilization of human resources which may hamper the Department's efforts to provide the best possible service to the community. Thus, the Department seeks to identify those assignments suitable for limited duty and channel into them members of the Department who are unable to perform their regular duty assignments due to the personal illness, injury, pregnancy, or other health-related problems. The Department's objective is to better manage its human resources, and, at the same time, assist those members who are recovering from an illness, injury, or other health-related problem.

A major consideration within the limited duty program is the member's welfare. Consistent with the judgment of the attending physician and the Police Physicians, specific physical parameters within which the employee can safely work will be determined and documented. Every effort will be made to ensure that program participants are placed in assignments which will provide the maximum safe use of his/her talents and abilities within those prescribed physical parameters. The full and safe recovery of the participating member will be facilitated and the community will benefit from the Department's enhanced operational efficiency.

RESPONSE PROTOCOL FOR OFFICERS IN A LIMITED DUTY STATUS

The premises upon which the limited duty program is based is that certain Department members with police powers, due to illness, injury, or other health-related problems, are physically or functionally impaired and therefore incapable of performing the full spectrum of physical activities required of a law enforcement officer. While the placement of a member in a limited-duty position reduces the likelihood of that officer being exposed to a situation requiring a full-duty police response, it certainly does not preclude the possibility. It would be unrealistic to have the same expectations of an officer in a limited-duty status as an officer physically capable of full performance of police functions. Hence, this guideline has been developed in conjunction with legal opinions rendered by the City Attorney.

The response of an officer on limited-duty status, whether on or off duty, when confronted with a situation demanding police action (e.g. crime in progress) should be commensurate with his/her physical limitations as previously determined by the attending physician and his/her police physician. A minimally appropriate response should include but not be limited to the following:

- * surveillance and the summoning of other officers
- * providing first aid and assistance to citizens
- * completion of necessary reports
- * providing assistance to the responding officers

8. That as of February 4, 1987, and continuing at least until the April 20, 1987, hearing on the MPA's petition for declaratory ruling, the City and the MPA had agreed to extend the terms of the 1985-1986 contract which contained the following provisions:

PREAMBLE

. . .

4. This Agreement is an implementation of the provisions of Section 111.70, Wisconsin Statutes, consistent with the legislative authority in effect on the execution date of this Agreement that is delegated to the City Common Council relating to: The Chief of Police and the Fire and Police Commission (as set forth in Section 62.50, Wisconsin Statutes); The Municipal Budget Law (as set forth in Chapter 65 of the Wisconsin Statutes); and any other statutes and laws applicable to the City. The Fire and Police Commission and the Chief of Police will abide by the terms of this Agreement.
5. It is intended by the provisions of this Agreement that there be no abrogation of the duties, obligations, or responsibilities of any agency or department of City government which is now expressly provided for respectively either by: State Statute and Charter Ordinances of the City of Milwaukee except as expressly limited herein.

. . .

ARTICLE 1

DURATION OF AGREEMENT AND TIMETABLE

. . .

3. Any matter which directly or indirectly relates to wages, hours or conditions of employment, or which relates to other matters, whether the same are specifically covered by this Agreement or not will not be a subject for bargaining during the term of this Agreement, provided, however, this item is subject to the provisions of the WAIVER OF FURTHER BARGAINING Article of this Agreement.

ARTICLE 3

ORDINANCE AND RESOLUTION REFERENCES

1. Except as provided in subsection 2, below, this Agreement contains benefits and the terms and conditions under which they are provided employees. At its option, the City may establish ordinances, resolutions and procedures to administer these benefits. These ordinances, resolutions and procedures, as well as any other ordinances or resolutions in effect, shall not be deemed a part of this Agreement unless the parties shall mutually consent thereto. In the event of differences between this Agreement and ordinances and resolutions, this Agreement shall control.
2. Subsection 1., above, shall not apply to the PENSION BENEFITS provision of this Agreement. Pension benefits for employees covered by this Agreement shall be those benefits defined in the applicable laws for the pension systems covering such employees.

ARTICLE 4

SUBJECT TO CHARTER

In the event that the provisions of this Agreement or application of this Agreement conflicts with the legislative

authority which devolves upon the Common Council of the City of Milwaukee as more fully set forth in the provisions of the Milwaukee City Charter, Section 62.50, Wisconsin Statutes, 1977, and amendments thereto, pertaining to the powers, functions, duties and responsibilities of the Chief of Police and the Board of Fire and Police Commissioners of the Municipal Budget Law, Chapter 65, Wisconsin Statutes, 1971, or other applicable laws or statutes, this Agreement shall be subject to such provisions.

ARTICLE 5
MANAGEMENT RIGHTS

1. The Association recognizes the right of the City, the Chief of Police and the Board of Fire and Police Commissioners to operate and manage their affairs in all respects in accordance with the laws of Wisconsin, ordinances of the City, Constitution of the United States and Section 111.70 of Wisconsin Statutes. The Association recognizes the exclusive right of the Board of Fire and Police Commissioners and/or the Chief of Police to establish and maintain departmental rules and procedures for the administration of the Police Department during the term of this Agreement provided that such rules and procedures do not violate any of the provisions of this Agreement.

. . .

ARTICLE 19
PENSIONS BENEFITS

For employees covered by this agreement, the City will make changes in existing benefits, or establish new pension benefits, as follows:

. . .

2. Whenever the ERS Act provides that a medical panel make a determination affecting an employee's eligibility for benefits thereunder, a panel shall be substituted therefor consisting of three (3) physicians, one physician to be designated by the Association, one physician to be designated by the Employee Benefits Administrator and the third physician to be selected by agreement of the other two physicians. The panel may refer a member it is examining to an outside physician for examination. Decisions made by the panel on matters which are properly before it shall be by majority action and shall not be subject to the Grievance and Arbitration Procedure provisions of this Agreement. All costs associated with the panel, including costs of outside physicians used by the panel in making its determinations, shall be provided for by funds appropriated for that purpose from the budget of the City Annuity and Pension Board.

. . .

4. An employee who files an application for a duty disability retirement allowance with the ERS Board on or after August 1, 1985, shall not be eligible to continue to receive such allowance beyond the first of the month next following their 57th birthday; on and after the first of the month next following their 57th birthday, such an employee shall receive the service retirement allowance to which he/she would be

entitled upon normal retirement at age 57 and he/she shall have the time spent receiving such duty disability retirement allowance included as creditable service for purposes of determining his/her service retirement allowance. The City will hold the Association harmless from claims and actions against the Association based upon this subsection and any ordinance or administrative action implementing this subsection, and the Association does hereby agree to tender the defense of any such claim to the City forthwith.

5. An employee appointed to the Police Officer position classification on or after August 1, 1985, shall not be entitled to receive a duty disability retirement allowance for any injury he/she may sustain while on duty prior to the start of field training during the period of time he/she is assigned to the Police Academy for recruit training, including any subsequent injury related to the injury sustained during recruit training. Such an employee shall instead be covered by State of Wisconsin Worker's Compensation Act benefits during such period and shall be subject to all provisions pertaining to such Act.
6. Effective January 1, 1985, for employees in active service on or after that date:
 - a. Whenever the Annuity and Pension Board of the Employees' Retirement System of Milwaukee grants a disability retirement allowance to an employee under the provisions of Subsections 36.05(2) or 36.05(3) of the ERS Act, such allowances shall become effective on the date the employee filed an application for it with the Board.

ARTICLE 21

HEALTH INSURANCE

. . .

b. Duty Disability

Employees in active service who commence receiving duty disability retirement allowance between January 1, 1985 and December 31, 1986, as such allowance is defined in Section 36.05(3) of the ERS Act or Section 35.01(50) of the City Charter, shall be entitled to the benefits provided in subsection 1.a. or 1.b., of this Article, above, between January 1, 1985 and December 31, 1986, so long as they continue to receive such duty disability retirement allowance.

. . .

b. Duty Disability

- (1) Employees in Active Service on September 1, 1983
Depending on the individual's single/family enrollment status, the cost of coverage for individuals receiving a duty disability retirement allowance shall be as provided for in subsection 3.a.(1) of this Article, above.

. . .

ARTICLE 64

WAIVER OF FURTHER BARGAINING

1. The parties agree that each has had full and unrestricted right and opportunity to make, advance and discuss all matters within the province of collective bargaining. This Agreement constitutes the full and complete agreement of the parties and there are no others, oral or written, except as herein contained. Each party for the term of this Agreement specifically waives the right to demand or to petition for changes herein, whether or not the subjects were known to the parties at the time of execution hereof as proper subjects for collective bargaining.

9. That the City of Milwaukee's ability to provide the medical panels of the Annuity and Pension Board with accurate and relevant information as to the positions/assignments available to MPA bargaining unit members within the City of Milwaukee Police Department and the physical requirements thereof so that the Annuity and Pension Board can make Duty Disability Retirement Allowance eligibility determinations primarily relates to the formulation or management of public policy.

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

CONCLUSION OF LAW

That the City of Milwaukee's ability to provide the medical panels of the Annuity and Pension Board with accurate and relevant information as to the positions/assignments available to MPA bargaining unit members within the City of Milwaukee Police Department and the physical requirements thereof, is a permissive subject of bargaining.

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

DECLARATORY RULING 1/

That under Secs. 111.70(1)(a) and (3)(a)4, Stats., the City of Milwaukee has no duty to bargain with the Milwaukee Police Association over the ability of the City to provide the medical panels of the Annuity and Pension Board with accurate

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- 1/ Pursuant to Sec. 227.48(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. 227.49 and that a petition for judicial review naming the Commission as Respondent, may be filed by following the procedures set forth in Sec. 227.53, Stats.

227.49 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.

227.53 Parties and proceedings for review. (1) Except as otherwise specifically provided by law, any person aggrieved by a decision specified in s. 227.52 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

(Footnote 1/ continued on page 12)

and relevant information as to the positions/assignments available to MPA bargaining unit members within the City of Milwaukee Police Department and the physical requirements thereof.

Given under our hands and seal at the City of Madison, Wisconsin this 29th day of July, 1987.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Stephen Schoenfeld
Stephen Schoenfeld, Chairman
Herman Torosian
Herman Torosian, Commissioner
Danae Davis Gordon
Danae Davis Gordon, Commissioner

1/ (Continued)

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. 227.49, 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. 227.48. If a rehearing is requested under s. 227.49, 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. 77.59(6)(b), 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. 227.57 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 MILWAUKEE

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

Before entering into a specific consideration of the issue before us, it is useful to set forth the general legal framework within which the issue herein must be resolved. Section 111.70(1)(d), 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 employees, 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 governmental unit except insofar as the manner of exercise of such functions affects the wages, hours and conditions of employment of the employees" (emphasis added)

When interpreting Sec. 111.70(1)(d), Stats., the Wisconsin Supreme Court has concluded that collective bargaining is required with regard to matters "primarily", "fundamentally", "basically" or "essentially" related to wages, hours or conditions of employment. The Court also concluded that the statute required bargaining as to the impact of the "formulation or management of public policy" affecting the "wages, hours and conditions of employment." The Court found that bargaining is not required with regard to "formulation or management of public policy." 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) and City of Brookfield v. WERC, 87 Wis.2d 819 (1979).

POSITIONS OF THE PARTIES:

The MPA

The MPA asserts that the issue to be resolved in this proceeding is whether the procedure used by the Annuity and Pension Board to determine employees' eligibility for a Duty Disability Retirement Allowance is a mandatory subject of bargaining. The MPA argues that because the Duty Disability Retirement Allowance is part of the compensation package for Milwaukee police officers, employee eligibility for this benefit primarily relates to wages and thus is a mandatory subject of bargaining. The MPA contends that by providing the Pension Board with new information regarding the physical requirements of various positions, the City made a change which will adversely affect employee eligibility for the Allowance and thus has decreased the value of the employee's total compensation package. The MPA argues that given the foregoing, it is apparent that the information provided to the medical panel by the City is a mandatory subject of bargaining.

The MPA contends that Article 62 of the 1985-1986 agreement has nothing to do with the issues raised by its petition because said Article deals only with those employees who are ineligible for the Allowance. The MPA also views the existence of alleged light duty assignments as being irrelevant herein because such evidence cannot change the bargainable status of procedures for determining duty disability eligibility.

Given the foregoing, the MPA respectfully urges the Commission to rule that the procedures used to determine eligibility for duty disability benefits, including the information provided to physicians on the medical panel, are mandatory subjects of bargaining.

The City

The City initially asserts that the MPA petition should be dismissed because the City has already bargained with the MPA over the issue of limited duty assignments. In the alternative, the City argues that because no change in eligibility procedures has occurred, it has no duty to bargain over the subject area with the MPA. Lastly, citing the statutory management rights clause contained in Sec. 111.70(1)(a), Stats., the contractual management rights clause in the 1985-1986 agreement, and the Chief's statutory obligation under Sec. 60.50(23), Stats., to act "for the efficiency" of the Police Department, the City concludes that it has no duty to bargain over matters raised by the MPA.

The City contends that there have always been temporary and permanent assignments available to police officers which are less physically demanding than patrol functions and that employes capable of performing such limited duty assignments have been denied duty disability benefits. By providing physicians with a written document detailing the physical demands of light duty assignments, the City asserts that it is simply providing evidence to an impartial fact finder regarding the manner in which the Department has always operated; evidence which physicians serving on the medical panel have sought out independently in the past.

DISCUSSION

As Finding of Fact 4 states, we are satisfied that the City of Milwaukee, through the Police Chief, has in the past and continues in the present to assign employes with some degree of physical impairment who are in the MPA unit to job responsibilities which are consistent with the employe's condition. Article 62 of the 1985-1986 contract is a collectively bargained response to some issues which the MPA itself initially raised in 1982 regarding limited duty assignment. The record also demonstrates that some physicians on the medical panel which effectively determines an applicant's eligibility for initial or continued receipt of a Duty Disability Retirement Allowance were aware prior to February, 1987, of the availability of limited duty positions or assignments within the Department and on occasion used that knowledge as a basis for denying an applicant the Duty Disability Retirement Allowance. However, it is clear that the physicians on the medical panel had never been systematically provided with information akin that in Chief Ziarnik's February 2 communication to the Pension Board. This change in the nature of the information provided by the City to the Pension Board is the focal point for the dispute before us wherein we are asked to rule upon the scope of the City's duty to bargain with the MPA over information provided to the Pension Board and medical panels.

The Employes' Retirement System is a creation of the Milwaukee City Charter and exists as a separate corporate entity administered by an Annuity and Pension Board 50% of whose membership consists of current or former employe members of the Retirement System. The medical panel making "incapacitated from duty" decisions as to Duty Disability Retirement Allowances is a creature of the Retirement System Charter provisions and the panels appear to have substantial discretion under the Charter and Article 19 of the 1985-86 agreement in determining the type of information needed to make eligibility determinations, including the matter of discovering what type of "duty" might be available for individuals whose physical condition is only slightly impaired. Thus, the issue before us is not whether the information which the medical panel elects to seek and consider is a mandatory subject of bargaining but rather, whether the information which the City unilaterally provides to medical panels (such as Chief Ziarnik's unsolicited February 2 memo) is a subject over which the City must bargain. 2/

The MPA has correctly argued that to the extent such information impacts upon unit employe eligibility for a benefit, there is an undeniable impact on employe "wages." We conclude that there is also a "formulation or management of public policy" dimension to the City being able to provide the medical panels and the Annuity and Pension Board with accurate and relevant information regarding the

2/ To the extent it might be argued by the MPA that it has a right to compel the City to bargain over the existence of limited duty positions or assignments, we have consistently held that municipal employer decisions regarding the duties and responsibilities which unit employes will be assigned are not mandatory subjects of bargaining unless such duties are not fairly within the scope of duties and responsibilities applicable to the kind of work in question. City of Wauwatosa, Dec. No. 15917 (WERC, 11/77); Milwaukee Sewerage Commission, Dec. No. 17025 (WERC, 5/79); City of Madison, Dec. No. 17300-C (WERC, 7/83); Milwaukee Board of School Directors, Dec. No. 23208-A (WERC, 2/87) at 84.

We have also consistently held that a municipal employer cannot be compelled to bargain over the establishment or maintenance of positions within its organizational structure. Milwaukee Sewerage Commission, *supra*; City of Waukesha, Dec. No. 17830 (WERC, 5/80); Brown County, Dec. No. 19042 (WERC, 11/81).

types of duty and the physical requirements thereof which are available within the Department for the purposes of making Duty Disability Retirement Allowance determinations. We reach such a conclusion because the integrity and viability of the Retirement System is compromised unless the City has the freedom to provide such information. In our view, this "public policy" impact would predominate over the "wage" impact as to any proposal which sought to preclude the City from providing information to the Pension Board or medical panels which was accurate and relevant to the issue of what if any "duty" was available within the Department and the physical requirements thereof. Thus, the MPA could not compel the City to bargain over a proposal which would preclude the City from providing information to the Pension Board medical panels about available "limited duty" assignments and the physical requirements thereof. However, the MPA could compel the City to bargain over a proposal which would require that any information provided be accurate and relevant to the panel's eligibility determinations. Under such a proposal, the "public policy" dimension is not present and the "wage" aspect of the proposal would predominate over any other management interests.

Given the foregoing, we conclude that to the extent the information contained in Chief Ziarnik's February 2 memo was accurate as to the types of limited duty assignments and the physical requirements thereof available within the Department, the City had and has no duty to bargain with the MPA over the provision of that information to medical panels and the Pension Board.

Dated at Madison, Wisconsin this 29th day of July, 1987.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Stephen Schoenfeld
Stephen Schoenfeld, Chairman

Herman Torosian
Herman Torosian, Commissioner

Danae Davis Gordon
Danae Davis Gordon, Commissioner