STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of CITY OF GLENDALE Requesting a Declaratory Ruling Pursuant to Section 111.70(4)(b), Wis. Stats., Involving a Dispute Between Said Petitioner and LOCAL 2958 AFFILIATED WITH MILWAUKEE DISTRICT COUNCIL #48, AFSCME, AFL-CIO	Case 59 No. 49859 DR(M)-530 Decision No. 27907

Appearances:
Davis & Kuelthau, S.C., Attorneys at Law, by Mr. Daniel G. Vliet, 111 East Kilbourn Street, Suite 1400, Milwaukee, Wisconsin 53202-6613, appearing on behalf of the City of Glendale.
Podell, Ugent & Cross, S.C., Attorneys at Law, by Ms. Monica Murphy, 611 North Broadway Street, Suite 200, Milwaukee, Wisconsin 53202-5004, appearing on behalf of the Union.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECLARATORY RULING

On September 28, 1993, the City of Glendale filed a petition with the Wisconsin Employment Relations Commission seeking a declaratory ruling pursuant to Sec. 111.70(4)(b), Stats. as to whether certain provisions of a 1991-1993 collective bargaining agreement between the City and Local 2958, Milwaukee District Council 48, AFSCME, AFL-CIO are permissive subjects of bargaining.

Local 2958 filed a Statement in Response to the City's petition on October 22, 1993.

The parties waived hearing and the record was closed November 11, 1993.

Having considered the matter, the Commission makes and issues the following

FINDINGS OF FACT

1. The City of Glendale, herein the City, is a municipal employer having its principal offices at 5409 North Milwaukee River Parkway, Glendale, Wisconsin 53209.

2. Local 2958, Milwaukee District Council 48, AFSCME, AFL-CIO, herein Local 2958, is a labor organization functioning as the exclusive collective bargaining representative for certain fire fighting employes of the City having its principal offices at 3427 West St. Paul Avenue, Milwaukee, Wisconsin 53208.

3. During collective bargaining over a successor to the parties' 1991-1993 collective bargaining agreement, the City advised Local 2958 of its belief that the following provisions of the 1991-1993 agreement are permissive subjects of bargaining:

> **Section 1.06 - Mutual Cooperation.**
>
> The bargaining unit employees pledge that they will cooperate with the City in a concerted effort to achieve a more efficient and qualified Department consistent with the

standards of the profession.

Article III, Section 3.03 - Access to Records.

During working hours, with notification and upon request, the City shall provide Union officers access to the following records:

A. All records pertaining to wages, hours or working conditions of the employees in the bargaining unit, including overtime, sick leave, longevity, vacations, duty incurred disability, etc.

B. Any records concerning appointment and promotion of personnel excluding confidential records.

C. Any records concerting appointment and promotion of personnel excluding confidential records, is limited to the individual member seeing his/her own record, and each member retains the authority and right to grant the Union permission to see his/her records.

Article XIV, Section 14.01(b) - Promotional Procedure.

(b) The minimum requirements for promotion to the rank of MPO shall be (3) years in the department; Lieutenant - five years in the department; Squad Leader - three (3) years in the paramedics and department. If no applicants meet minimum requirements, the City will have option to lower the requirements for the position.

Article XIV, Section 14.01(c) - Promotional Procedure.

(c) When the Police and Fire Commission decides to establish an eligibility list for promotion within the bargaining unit, the Commission shall require a written and/or practical exam, which shall be valued at 50 percent; and, an oral interview, which shall be valued at 25 percent. In addition, an individual's personnel record shall be valued at 15 percent, and seniority shall be valued at 10 percent.

Article XIV, Section 14.02 - Supervisory Positions Outside the Bargaining Unit.

It shall be the policy of the City to promote to supervisory positions insofar as possible from the ranks of the employees.

Article XVI, Section 16.06 - Job Description.

No firefighter shall perform duties other than those considered regular Fire Department type duties.

Section 16.09 - Future Changes - Revisions.

It is further greed that the City shall negotiate

with the Union on all matters concerning all wages, hours, and conditions of employment which are mandatorily bargainable in regard to the creation of a new operation, a new position, new equipment (but not as to the purchase thereof), reclassification and reallocations, which are not in existence during the execution of this Agreement, as an implementation of Section 111.70 of the Wisconsin Statutes. Each of the parties hereto agrees that it will make a sincere effort to reach an agreement on all matters herein set forth. Retroactive to the first date of regular operation.

If, after a reasonable period of negotiations, the parties are deadlocked with respect to the mandatorily bargainable wages, hours and working conditions of said new operation, new position, new equipment, reclassification and reallocations, the City has the right to implement the parties' latest position on the issue. It is expressly understood, however, that the issue may be subject to the mediation/arbitration process.

Article XVI, Section 16.10(a) - Volunteers, Temporary Employees.

No part-time employee shall make a higher per hour rate than a regular employee, unless he/she exceeds the regular employee in rank or service with the Fire Department.

Article XVI, Section 16.12(a-d) - Paramedic Staffing.

The City agrees the most efficient operation of the Paramedic squad requires three paramedics. In accordance with this, the following is agreed to:

(a) All cases of paramedic overtime should be treated consistently, whenever possible.

(b) When only two (2) paramedics are available for duty, an off-duty paramedic should be called back for overtime, whenever possible. However, when more than five (5) personnel are on duty in the fire division, one (1) of these personnel will be assigned to the EMT driver of Med 8.

(c) When no paramedic is available for overtime, an off-duty Local 2958 EMT qualified person should be called back for duty as EMT Driver of Med 8.

(d) As necessary, when a paramedic or EMT Driver is coming in from home, an off-going paramedic will be held over to provide coverage.

In its Statement in Response to Petition filed October 22, 1993, Local 2958 concedes that Section 1.06, Article XIV, Section 14.02 and Article XVI, Section 16.10(a) are permissive subjects of bargaining but contends that the remaining contract provisions are mandatory subjects of bargaining.

4. Proposals identified as Article III, Section 3.03 - Access to Records; Article XVI, Section 16.06 - Job description; and Article XVI,

Section 16.09 -Future Changes-Revisions are primarily related to wages, hours and conditions of employment.

5. Proposals identified as Article XIV, Section 4.01(b) - Promotional Procedure; Article XIV, Section 14.01(c) - Promotional Procedure; and Article XVI, Section 16.12(a-d) - Paramedic Staffing are primarily related to the management and direction of the City.

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

CONCLUSIONS OF LAW

1. The proposals identified in Finding of Fact 4 are mandatory subjects of bargaining.

2. The proposals identified in Finding of Fact 5 are permissive subjects of bargaining.

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

DECLARATORY RULING 1/

1. The City of Glendale and Local 2958, Milwaukee District Council 48, AFSCME, AFL-CIO have a duty to bargain with the meaning of Secs. 111.70(1)(a) and (3)(a)4, Stats., over the proposals identified in Finding of Fact 4.

2. The City of Glendale and Local 2958, Milwaukee District Council 48, AFSCME, AFL-CIO do not have a duty to bargain within the meaning of Secs. 111.70(1)(a) and (3)(a)4, Stats. over the proposals identified in Finding of Fact 5.

Dated at Madison, Wisconsin this 14th day of January, 1994.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

1/ Pursuant to Section 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.

(Continued)

By A. Henry Hempe /s/
A. Henry Hempe, Chairperson

Herman Torosian /s/
Herman Torosian, Commissioner

William K. Strycker /s/
William K. Strycker, Commissioner

(Continued)

> (a) Proceedings for review shall be instituted by serving a petition therefore 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. 227.49, 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.
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> . . .
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> (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.

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

Before considering the specific proposals 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 governmental 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.

It should be noted that in its October 1993 statement, Local 2958 asserted the City's petition was premature because the parties had not yet exchanged initial proposals for a successor to the 1991-1993 agreement. Local 2958 argued that under such circumstances, there could not yet be a dispute as to whether the provisions are mandatory or permissive.

In an affidavit filed November 11, 1993, the City asserted that on November 1, 1993, the parties had exchanged initial proposals and that the City's initial proposal included an assertion that all provisions contained in the declaratory ruling petition were permissive subjects of bargaining. The City's affidavit further asserted that Local 2958 had not thereafter conceded the permissive status of the disputed provisions.

Local 2958 has not contested the accuracy of the City's affidavit. Thus, aside from the provisions which Local 2958's responsive statement conceded were permissive, it is clear that there presently is a duty to bargain dispute between the parties which is appropriately resolved through this declaratory ruling.

Article III, Section 3.03 - Access to Records provides:

> During working hours, with notification and upon request, the City shall provide Union officers access to the following records:
>
> A. All records pertaining to wages, hours or working conditions of the employees in the bargaining unit, including overtime, sick leave, longevity, vacations, duty incurred disability, etc.

> B. Any records concerning appointment and promotion of personnel excluding confidential records.
>
> C. Any records concerning appointment and promotion of personnel excluding confidential records, is limited to the individual member seeing his/her own record, and each member retains the authority and right to grant the Union permission to see his/her records.

Citing School District of Janesville, Dec. No. 21466 (WERC, 3/84) the City argues this provision is permissive to the extent union access to records is not limited to working hours which do not interfere with the City's ability to operate efficiently. The City also asserts the proposal is permissive because the records covered extend beyond those at issue in Beloit.

Local 2958 contends the proposal is a mandatory subject of bargaining reflecting a union's fundamental right to information necessary for bargaining and administering a contract. It argues that the proposal's inclusion of the phrase "with notification and upon request" limits any potential interference with City functions. Local 2958 argues that Janesville and Beloit both support the mandatory nature of the proposal.

As Local 2958 correctly argues, union access to the information referenced in the disputed proposal is generally related to a union's right to information necessary for meeting its responsibility as the exclusive collective bargaining representative. Thus, the Commission has found that proposals which primarily relate to a union's "authority and responsibility as the exclusive collective bargaining representative" are mandatory subjects of bargaining absent a showing of a substantial relationship to management's ability to manage and control its operations and facilities. Janesville at 22; City of Sheboygan, Dec. No. 19421 (WERC, 3/82). We have also held that a proposal giving union access to employe personnel files is generally a mandatory subject of bargaining. Janesville at 73-74.

Given our prior holdings, we think it clear that the records covered by the disputed provision are all necessary to Local 2958 fulfilling its role as the exclusive bargaining representative. Thus, a proposal giving Local 2958 access to these records is mandatory unless the proposal represents a substantial intrusion into management's control of its facilities. No such intrusion is present here. As Local 2958 points out, the proposal obligates Local 2958 to provide the City with "notification" and we further note that there are no strict time lines for compliance with a request. Thus, it seems apparent that the provision does not significantly impact on City control of its facilities and records. Therefore the proposal is a mandatory subject of bargaining.

Article XIV, Section 14.01(b) - Promotional Procedure provides:

> (b) The minimum requirements for promotion to the rank of MPO shall be (3) years in the department; Lieutenant - five years in the department; Squad Leader - three (3) years in the paramedics and department. If no applicants meet minimum requirements, the City will have option to lower the requirements for the position.

Citing City of Waukesha, Dec. No. 17830 (WERC, 5/80), the City contends this provision is a permissive subject of bargaining because it interferes with management's right to determine qualifications for bargaining unit positions.

Citing Sewerage Commission of the City of Milwaukee, Dec. No. 17302 (WERC, 9/79), Local 2958 argues the disputed language is a mandatory subject of bargaining because it establishes a selection criterion for promotions. Local 2958 contends the City's interest in determining qualifications is protected by the last sentence of the provision which allows the City to lower position requirements.

Local 2958 correctly cites a portion of Sewerage Commission of the City of Milwaukee for the proposition that the criteria used to determine which qualified employe will receive a promotion are mandatory subjects of bargaining. However, this proposal establishes minimum qualifications, not promotion criteria.

In Waukesha we found the following proposal permissive because it intruded into the employer's right to determine "necessary minimum qualifications" for a position.

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

Our holding in Waukesha is equally applicable here. The disputed proposal precludes the City from determining whether it should have a minimum service qualification and, if such a qualification is present, the minimum level of service which is appropriate. As our decision in Sewerage Commission also indicates, the determination of the qualifications "necessary" for a job is not a matter over which an employer must bargain. See also Milwaukee Board of School Directors, Dec. No. 23208-A (WERC, 2/87).

Article XIV, Section 14.01(c) - Promotion Procedure provides:

> (c) When the Police and Fire Commission decides to establish an eligibility list for promotion within the bargaining unit, the Commission shall require a written and/or practical exam, which shall be valued at 50 percent; and, an oral interview, which shall be valued at 25 percent. In addition, an individual's personnel record shall be valued at 15 percent, and seniority shall be valued at 10 percent.

Citing City of Waukesha, the City argues the disputed proposal is permissive because it unduly restricts management's right to select qualified employes for promotion.

Local 2958 responds by contending that the proposal does not establish qualifications but rather establishes selection criteria to be applied to applicants.

In City of Waukesha, we found the following proposal permissive:

> 6. The following weights shall be given to the examination interview and the prior department record of applicants
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> | | |
> |---|---|
> | Written Examination | 50% |
> | Oral Interview | 25% |
> | Department Record | 25% |
>
> to determine final grades. The passing grade shall be 70% and applicants with a grade of 70% or better shall

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

We reasoned:

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

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

Applying the foregoing rationale to the proposal before us, it is apparent that the disputed language is permissive. Contrary to the argument of Local 2958, contract language which dictates the manner in which qualifications will be measured has the effect of establishing the qualifications. However, as Waukesha reflects, Local 2958 does have the right to bargain over the weight seniority will be given among employes who are qualified. Further, as more fully discussed in Milwaukee Board of School Directors, the right of an employer to unilaterally establish qualifications is limited to those qualifications necessary to perform the job.

Article XVI, Section 16.06 - Job Description provides:

> No firefighter shall perform duties other than those considered regular Fire Department type duties.

The City argues this language is permissive because it is over broad and may prevent the City from assigning duties to firefighters which are fairly within the scope of their responsibilities.

Local 2958 contends the language is a mandatory subject of bargaining because it prevents the City from assigning duties which are not fairly within the scope of a firefighter's responsibilities.

Both parties correctly cite Sewerage Commission of the City of Milwaukee, Dec. No. 17025 (WERC 5/79) for the proposition that an employe's obligation or lack thereof to perform duties which are not fairly within the scope of "responsibilities applicable to the kind of work performed" is a mandatory subject of bargaining. See also City of Wauwatosa, Dec. No. 15917 (WERC, 11/77); Oak Creek Schools, Dec. No. 11827-D, E (WERC, 9/74) aff'd CirCt Dane 11/75. We understand Local 2958 to be arguing that the disputed proposal does no more than prevent the City from requiring firefighters to perform

duties which are not fairly within the scope of their responsibilities. Based on this interpretation of the language, we find it to be a mandatory subject of bargaining.

Section 16.09 - Future Changes-Revisions provides:

> It is further agreed that the City shall negotiate with the Union on all matters concerning all wages, hours, and conditions of employment which are mandatorily bargainable in regard to the creation of a new operation, a new position, new equipment (but not as to the purchase thereof), reclassification and reallocations, which are not in existence during the execution of this Agreement, as an implementation of Section 111.70 of the Wisconsin Statutes. Each of the parties hereto agrees that it will make a sincere effort to reach an agreement on all matters herein set forth. Retroactive to the first date of regular operation.
>
> If, after a reasonable period of negotiations, the parties are deadlocked with respect to the mandatorily bargainable wages, hours and working conditions of said new operation, new position, new equipment, reclassification and reallocations, the City has the right to implement the parties' latest position on the issue. It is expressly understood, however, that the issue may be subject to the mediation/arbitration process.

The City concedes that if the language constitutes a specific reopener, it is a mandatory subject of bargaining. However, the City contends that because the disputed language allows it to implement upon deadlock, the language cannot be viewed as a specific reopener because implementation and interest arbitration are mutually inconsistent.

Local 2958 argues that a reopener does not cease to be a reopener simply because Local 2958 has made the contractual concession of allowing implementation while interest arbitration proceeds.

We concur with the analysis of Local 2958. The City's implementation rights do not alter the reality that the provision is a specific reopener and as such a mandatory subject of bargaining.

Article XVI, Section 16.12(a-d) - Para Medic Staffing provides:

> The City agrees the most efficient operation of the Paramedic squad requires three paramedics. In accordance with this, the following is agreed to:
>
> (a) All cases of paramedic overtime should be treated consistently, whenever possible.
>
> (b) When only two (2) paramedics are available for duty, an off-duty paramedic should be called back for overtime, whenever possible. However, when more than five (5) personnel are on duty in the fire division, one (1) of these personnel will be assigned to the EMT driver of Med 8.

(c) When no paramedic is available for overtime, an off-duty Local 2958 EMT qualified person should be called back for duty as EMT Driver of Med 8.

(d) As necessary, when a paramedic or EMT Driver is coming in from home, an off-going paramedic will be held over to provide coverage.

The City argues the provision is permissive to the extent it sets minimum staffing levels for paramedics. Citing City of Fond du Lac, Dec. No. 22373 (WERC, 2/85) aff'd CirCt Fond du Lac 85-CV-197 (9/85); City of Manitowoc, Dec. No. 18333 (WERC, 12/80); and City of Brookfield, Dec. No. 11489-B (WERC, 4/75), the City asserts the language is primarily related to the scope of protective services and the manner in which they will be provided rather than the impact on wages and hours if the mandated staffing levels are not met.

Local 2958 contends the proposal is a mandatory subject of bargaining primarily related to overtime procedures and employe safety. In this regard, Local 2958 argues paramedic work is dangerous and stressful and thus that employe safety is directly impacted by staffing levels.

When analyzing minimum manning proposals to determine their mandatory or permissive status, the Commission balances evidence of the proposal's relationship to employe safety (and thus conditions of employment) against the restrictions which minimum manning provisions place upon service level choices. Fond du Lac; see also City of Brookfield, Dec. No. 19944 (WERC, 9/82); Manitowoc County, Dec. No. 18995 (WERC, 9/81). Here, because the parties waived hearing, we have no specific evidence by which to measure the proposal's relationship to employe safety versus the obvious implications the disputed language has on service level choices. Under such circumstances, we conclude the proposal is permissive to the extent it requires the "Paramedic squad" be staffed by three paramedics.

Dated at Madison, Wisconsin this 14th day of January, 1994.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By A. Henry Hempe /s/
A. Henry Hempe, Chairperson

Herman Torosian /s/
Herman Torosian, Commissioner

William K. Strycker /s/
William K. Strycker, Commissioner