

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

 :
 In the Matter of the Petition of :
 :
 MILWAUKEE POLICE ASSOCIATION :
 :
 Requesting a Declaratory Ruling : Case 401
 Pursuant to Sec. 111.70(4)(b), Stats. : No. 49585 DR(M)-527
 Including a Dispute Between : Decision No. 27996
 Said Petitioner and :
 :
 THE CITY OF MILWAUKEE :
 :

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 In the Matter of the Petition of :
 :
 THE CITY OF MILWAUKEE :
 :
 Requesting a Declaratory Ruling : Case 402
 Pursuant to Sec. 111.70(4)(b), Stats. : No. 49659 DR(M)-529
 Involving a Dispute Between : Decision No. 27997
 Said Petitioner and :
 :
 MILWAUKEE POLICE ASSOCIATION :
 :

Appearances:

Mr. Thomas C. Goeldner, Assistant City Attorney, 800 City Hall, 200 East Wells Street, Milwaukee, Wisconsin 53202-3551, for the City.
Adelman, Adelman & Murray, S.C., by Mr. Kenneth J. Murray, 1840 North Farwell, Suite 403, Milwaukee, Wisconsin 53202, for the Milwaukee Police Association.
 Law Offices of Gerald P. Boyle, by Ms. Judy Ogorchock, Attorney at Law, 1124 West Wells Street, Milwaukee, Wisconsin, for the Milwaukee Police Supervisors' Organization.

FINDINGS OF FACT, CONCLUSIONS OF LAW
AND DECLARATORY RULING

On July 28, 1993 and August 13, 1993, the Milwaukee Police Association (MPA) and the City of Milwaukee (City), respectively, filed petitions with the Wisconsin Employment Relations Commission pursuant to Sec. 111.70(4)(b), Stats., seeking a declaratory ruling to resolve a dispute as to whether certain MPA proposals are mandatory subjects of bargaining.

Hearing on the petitions was held October 11, 12 and 14, and, November 12, 1993 in Milwaukee, Wisconsin, before Examiner Peter G. Davis. During the first day of hearing, a motion from the Milwaukee Police Supervisors' Organization to intervene in Case 402 was granted.

Post hearing written argument was filed and the record was closed January 5, 1994 when the City and the MPA advised the Examiner that they would not be filing reply briefs.

Having considered the evidence and argument, the Commission makes and

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issues the following

FINDINGS OF FACT

1. The City of Milwaukee, herein the City, is a municipal employer having its principal offices at 200 East Wells Street, Milwaukee, Wisconsin 53202-3551.

2. The Milwaukee Police Association, herein the MPA, is a labor organization representing certain non-supervisory sworn employees of the City of Milwaukee Police Department for the purposes of collective bargaining and having its principal offices at 1840 North Farwell Avenue, Suite 400, Milwaukee, Wisconsin 53202.

3. The Milwaukee Police Supervisors' Organization, herein the MPSO, is a labor organization representing certain supervisory sworn employees of the City of Milwaukee Police Department for the purposes of collective bargaining and having its principal offices at 1124 West Wells Street, Milwaukee, Wisconsin 53233.

4. During collective bargaining between the City and the MPA and the City and the MPSO, a dispute arose as to whether the following proposal is a mandatory subject of bargaining

Existing roll-call time practices will be maintained for the term of this Agreement or any agreed-upon extension thereof.

5. During collective bargaining between the City and the MPA a dispute arose as to whether the following proposals are mandatory subjects of bargaining:

ARTICLE 12

SPECIAL DUTY PAY AND PROMOTIONS

Delete the present language in its entirety and recreate to read as follows.

1. "Each employee within the Milwaukee Police Association shall be paid an additional amount for time spent underfilling or performing work for an exempt position or classification that is compensated at a higher rate. The additional amount for time so spent shall be equivalent to the difference between the base salary hourly rate of the employee and the next highest pay step of the rank, position or classification the employee is underfilling.
2. In the event the position underfilled is an authorized exempt position or classification members shall not be required to underfill such position for more than two (2) pay periods in a one (1) year period. Said position shall thereupon be filled by the appointment of an eligible member of the Association through the

appropriate procedures set out by statute, ordinance and applicable Administrative procedures.

3. If a vacancy exists beyond one (1) pay period in a non-exempt rank as defined by the Fire and Police Commission, the Chief of Police shall nominate the next qualified member at the following Fire and Police Commission Regular meeting pursuant to Fire and Police Commission Rules.
4. Any payment(s) made under the provisions of this Article for underfilling shall not have any sum deducted for pension benefits nor shall such payments be included in the determination of pension benefits or other fringe benefits.
5. A member of the Milwaukee Police Association shall be eligible for the competitive promotional examination administered by the Fire and Police Commission, to the rank of Detective or Sergeant of Police if the member has attained three (3) years of active service seniority prior to the actual date of the written examination. Active service as used herein shall be defined in Article 9 of this Agreement except, time spent on military leave, duty disability retirement, educational leave, maternity leave, sick leave of less than one (1) year, medical leave of less than one (1) year, workers compensation leave of less than one (1) year and unpaid suspension(s) of sixty (60) work days or less, shall count towards the three (3) year active service requirement.
6. Seniority shall count towards the final aggregate score in determining placement on the eligibility list for the rank of Detective and Sergeant of Police according to the following schedule.

3-6 years of service	30%
7-10 years of service	35%
11 or more years of service	40%

ARTICLE 28

VACATIONS

Maintain present language except for the following modifications.

1. Amend section 6. first sentence to read as follows.
 6. "An employee on authorized injury leave as a result of a duty-incurred injury may use vacation scheduled during the period of such leave provided the employee submits a written advance request to a District Commander to use the vacation, and provided further, the

employee's private physician has authorized use of this vacation."

2. Delete section 11. and recreate to read as follows.

11. "All members, except as otherwise provided, who will have been in the service continuously twelve months or more shall, on the third Monday in January, unless otherwise ordered, select their annual vacation periods on a seniority basis by shift or by other approved methods, as arranged by their commanding officers in the bureaus or divisions to which they are attached. Vacations may be selected for any week of the year; however, members shall be limited to two (2) weeks or ten (10) working days of vacation during the period of June 1 through September 15 of each year, hereinafter referred to as the "Summer Vacation Period". Nothing herein should be construed as prohibiting members from taking three (3) to five (5) weeks vacation consecutively at any other time of one year, provided, however such vacations are arranged at the discretion of the commanding officer, with due regard to the needs of the service.

Selection of vacations for the current year must be finalized by March 15 of said year. After a member has made the vacation selection to which he/she is entitled, he/sh will not be permitted to trade a vacation with another member or change dates of such vacation. Trading of vacations is strictly prohibited, however, when a member selects his/her non-segmented vacation the trading of off days to start a vacation will be permitted.

Members may "split" (divide vacations into allowed divisions) their vacation into weekly periods. Each selected vacation period will consist of at least five (5) vacation days preceded by two (2) regular off days, except as otherwise provided for in section 9. of the ARTICLE. Members electing to split vacation periods must make all

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selections on their first pick. One (1) overtime off day or Holiday may be added to all such vacation periods. This shall apply to any single vacation period of ten (10), fifteen (15), twenty (20) or twenty-five (25) working days each. Additional earned overtime off days or Holidays which extend a vacation in excess of ten (10), seventeen (17), twenty-four (24), thirty-one (31) or thirty-eight (38) days respectively, may be granted only in emergencies during the "Summer Vacation Period" with the approval of the Assistant Chief of Police. However, at all other times during a calendar year, a Bureau/District Commander may grant such additional earned overtime off days or Holidays with due regard to the requirement of the police service.

A member whose service is expected to continue so as to complete a years active service may, after six (6) months of service and at the sole discretion of the Chief of Police be allowed to take vacation time within the year of appointment. However, if the member leaves the service of the City before the completion of the initial 12-month period, that vacation shall be deemed unearned and payments made during the vacation shall be deducted upon termination of employment.

Commanding Officers will grant members of the Police Band two (2) weeks or ten (10) working days of earned vacation during the "Summer Vacation Period". Such two (2) weeks of vacation shall not be drawn or made part of the regular shift vacation schedule, but shall be assigned by the commanding officer with consideration for the members and the needs of the service. Band members entitled to three (3), four (4) or five (5) weeks of vacation will be required to pick such additional weeks as part of the regular shift vacation schedule, except as otherwise provided for in section 9. of this ARTICLE.

Members entitled to choose their vacation pursuant to being awarded a Citation or Commendatory Letter and by virtue of a Department Order are to be allowed a choice of vacation mutually agreeable to the member and his commanding officer,

and for the \good of the service. Such choices are not to be regarded as part of the regular shift vacation schedule.

A military training leave of absence, not to exceed fifteen (15) successive calendar days and granted upon receipt of Official Department of Defense Orders, shall in no way affect the selection of vacations. Police Department personnel who are members of a National Guard or Reserve Unit will pick their vacation at the same time as all regular employees and shall not be given special consideration dependent upon the time of such Military Training Leave.

Members shall not be permitted to pick for three (3), four (4) or five (5) week vacations prior to the time of drawing. Members whose anniversary date falls during the current calendar year will be awarded their additional week vacation by the commanding officer, after said date, with consideration for the member and the needs of the service.

The administration of all vacation periods, Holiday off time, and regular off days shall be strictly in accord with City Ordinances and current labor agreements.

The vacation selection process shall be conducted pursuant to the following goals at District Stations in determining the number of personnel off at any one time.

- a. 12% off on the day shift.
- b. 10% off on the early shift
- c. 10% off on the power shift, and
- d. 9% off on the late shift.

Anything herein to the contrary notwithstanding, the Association acknowledges the right of the Chief to suspend the rights of its members to select or, having selected, to take a scheduled vacation in the event the Chief is unable to provide essential services by any other means, or in the event civil disorder, riot, insurrection, or some Act of God requiring the

summoning of as many possible
officers as possible to an on duty
status."

ARTICLE 55

DUTY ASSIGNMENT

1. Delete the Article in its entirety and recreate to read as follows.

1. "An employee shall, upon appointment and after taking and subscribing his/her oath of office, be assigned to night duty in a police district designated by the Chief of Police.

2. The Regularly Scheduled Shifts shall be defined as:

DAY SHIFT - Starting time between 7:30 a.m. and 8:00 a.m. excluding roll call, (First Shift).

EARLY SHIFT - Starting time between 3:30 p.m. and 4:00 p.m. excluding roll call, (Second Shift).

POWER SHIFT - Starting time between 7:00 p.m. and 8:00 p.m. excluding roll call.

LATE SHIFT - Starting time between 11:30 p.m. and 12:00 midnight excluding roll call, (Third Shift).

3. Members shall be assigned to day shift according to seniority in their respective ranks and positions. When an opening exists on the day shift, eligible personnel shall be transferred to such shift unless the employee waives such transfer to such opening. If an employee waives his right to transfer to the day shift, upon a subsequent request the member shall be eligible for the next day shift opening. Seniority shall be defined as set forth in ARTICLE 9, of this Agreement for all ranks, positions or classifications.

4. When a vacancy occurs within a special assignment, position, rank or classification or a newly created special assignment, position, rank or classification the Chief of Police shall cause a memorandum to be published and posted at all work locations. The memorandum shall indicate the minimum eligibility criteria that are reasonably required for said opening, affording all eligible personnel expressing interest the same opportunity for selection. All

results shall be posted.

a. If a special assignment or newly created special assignment vacancy occurs on the day shift, personnel assigned to the day shift shall be given priority to such special assignment subject to the memorandum positing set forth above. Special assignments specifying criteria that day shift personnel cannot meet and cannot be trained to meet within a reasonable period of time may be filled on a temporary basis not to exceed thirty (30) calendar days.

5. The parties recognize members, as a matter of past practice, have regularly scheduled shifts, e.g., TEU 11:00 a.m. to 7:00 p.m., which are other than those identified in section 2/. of this ARTICLE and those deviations may continue. However, any further deviation in shifts beyond those in place as of the commencement of bargaining the terms of this agreement shall be negotiated between the parties except for temporary changes for thirty (30) days or less or in the event of a declared emergency."

ARTICLE 68

REAPPOINTMENT BENEFITS

1. Create the following language to read as follows.

1. "A current employee of the Milwaukee Police Department who left in good standing, within the time limits set forth below, may apply for reappointment by giving a written notice to the Chief of Police or a designee.

a. A current employee shall maintain the right to reappointment for a period of one (1) calendar year from the time of separation and upon reappointment shall be granted "full rights-benefits". For purposes of full rights-benefits interpretation an employee reinstated shall have restored the same base salary level, sick leave balance, seniority, classification or rank, promotional opportunity, vacation(s) and selection and all other benefits afforded by this agreement. No time-driven rights or benefits shall accrue during the period of separation.

b. Eligibility for pension,

health/dental insurance and life insurance benefits shall be as provided for respectively by the provisions of the contract in effect between the City and the MPA, the ERS Act (Pension Law), contracts between the city and its health/dental insurance providers (Basic plan as well as HMO's) and the contract between the City and its Life Insurance Carrier.

- c. A current employee that detaches from active service and applies for reappointment may be requested to submit to a medical examination prior to reappointment.
 - d. A current employee that detaches from active service and applies for reappointment may request, on an annual basis, from the Fire and Police Commission, extensions of separation not to exceed one (1) year increments and such extension if granted being subject to the terms as set forth in subsections 1.a., 1.b. and 1.c.
2. Nothing within this ARTICLE shall be construed to include leaves of absence as provided for by this Agreement, City Ordinances, State Statutes and/or benefits provided by custom or practice.
 3. In the event the applicant for reappointment was in good standing, the Chief of Police and Fire and Police Commission must have cause, for denial of reappointment to the Department. Denial of the right to reappointment in accordance with the terms of this Article must be supported by 'just cause' or the absence of a vacancy. The applicant will be entitled, if denied, at his/her option, to a hearing on the issue before the permanent umpire identified in Article 7 of this Agreement."

ARTICLE 69

NONDISCRIMINATION

1. Create the following language to read as follows.
 1. "The Fire and Police Commission and Milwaukee Police Department shall be prohibited from discriminating against all members of the Association with respect to the application and terms of the

Agreement, transfers, promotions, performance evaluation, job assignment criteria and selection, recruitment and other terms, conditions or privileges of employment. Further, the Fire and Police Commission and the Milwaukee Police Department shall be prohibited from discriminating based upon race, sex, religion, national origin, ancestry, color, creed, age, sexual orientation, marital or family status, disability, military status, political or labor affiliation or any protected characteristic as defined by Federal, State or Local regulations.

2. No member shall be retaliated against for exercising his/her rights for relief of an alleged violation identified in paragraph 1. above.

ARTICLE 71

FITNESS FOR DUTY

1. Create the following language to read as follows.
 1. "The Chief of Police may order a member of the Association to submit to a medical examination by a physician or psychiatrist who shall be licensed in the State of Wisconsin.
 2. An order to submit to a medical examination must be premised on reasonable suspicion founded on specific, objective and articulable facts either directly observed by at least two (2) direct line supervisors or learned from a reliable source corroborated by facts and circumstances from which a reasonable inference may be drawn that the member is unfit for duty. Reasonable suspicion based solely on an officers (sic) physical appearance, conduct and psychological demeanor must be premised on factors that are generally accepted within the scientific community. The Department shall make a record of the basis for its determination prior to a medical examination and this record shall be dated, and signed by the supervisor ordering such examination.
 3. When the Chief of Police orders a member to submit to a medical examination the Chief's physician shall be a member of a panel of three (3) physicians. The second physician to be designated by the Association and the third physician to be

selected by agreement of the first and second physicians, if needed. Decisions by the panel shall be solely limited to whether the member is fit or unfit for duty and shall be final and binding upon all parties.

4. All records reviewed by a physician of the panel shall be treated as being confidential pursuant to a doctor/patient relationship. The physicians shall only report to the Chief of Police whether the member is fit or unfit for duty.
5. If a panel physician determines a member is unfit for duty, the member shall be carried on Administrative Leave with full pay and benefits continuing until the member is medically released for duty by a physician. In no event shall the Administrative Leave continue beyond six (6) months. All time spent by a member outside the regularly scheduled shift for medical examinations shall be deemed Overtime pursuant to Article 15 of this agreement.
6. TRAUMATIC INCIDENTS

A minimum three (3) day administrative leave of absence with pay and benefits is mandatory for any officer directly involved in the death or great bodily harm (as defined by State Statute) of another person. This three day administrative leave of absence shall commence with the next calendar day after the traumatic incident. In the event a member has scheduled vacation, holiday time or compensatory time, within three (3) consecutive days following the incident that gave rise to the administrative leave of absence, such scheduled time shall be rescheduled immediately after the administrative leave, at the request of the employee. In addition, an officer directly involved will be afforded an additional seven (7) floating administrative leave days to be used at his/her discretion. Consideration shall also be given toward an administrative leave of absence, with pay and benefits continuing, being granted to members(s) involved in traumatic incident at the discretion of the Chief of Police.

- a. At all times a member while on an administrative leave of absence shall advise his/her commanding officer of a phone number where he/she can be contacted for follow-

up investigation."

6. The disputed portions of the proposals relating to Roll Call (in part), Vacations, Reappointment Benefits, Nondiscrimination, Duty Assignment (in part), and Fitness for Duty (in part) are primarily related to the wages, hours and conditions of employment.

7. The disputed portions of the proposals relating to Roll Call (in part), Special Duty Pay and Promotions, Duty Assignment (in part), and Fitness for Duty (in part) 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 6 are mandatory subjects of bargaining.

2. The proposals identified in Finding of Fact 7 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 and the MPA have a duty to bargain within the meaning of Secs. 111.70(1)(a) and (3)(a)4, Stats. as to the proposals identified in Conclusion of Law 1.

2. The City and the MPA do not have a duty to bargain within the meaning of Secs. 111.70(1)(a) and (3)(a)4, Stats. as to the proposals identified in Conclusion of Law 2.

3. The City and the MPSO have a duty to bargain within the meaning of Secs. 111.70(1)(a) and (3)(a)4, Stats. as to the portion of the Roll Call proposal identified in Conclusion of Law 1 but do not have a duty to bargain within the meaning of Secs. 111.70(1)(a) and (3)(a)4, Stats. as to the portion of the Roll Call proposal identified in Conclusion of Law 2.

Dated at Madison, Wisconsin this 25th day of March, 1994.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
A. Henry Hempe, Chairperson

Herman Torosian, Commissioner

William K. Strycker, Commissioner

1/ (Continued)

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

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.

(continued on pages 15 and 16)

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 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.

. . .

(continued on page 17)

1/ (Continued)

(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,
CONCLUSIONS OF LAW AND DECLARATORY RULING

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 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.

Roll Call

The disputed language from the most recent contracts between the City and the MPA and MPSO, respectively, provides:

Existing roll-call time practices will be maintained
for the term of this Agreement or any agreed-upon
extension thereof.

Citing City of New Berlin, Dec. No. 19185 (WERC, 12/81) the City contends the disputed language primarily relates to the managerial decision of who should stand roll call, when roll call should occur and what gets done during roll call. The City contends that because roll call duties are fairly within the scope of an officer's responsibilities, it need not bargain over such determinations. Thus, the City asserts the language is permissive because it requires that the existing "who, when and what" of roll call remain unchanged.

The City alleges that the safety argument of the MPA/MPSO is not persuasive, particularly because it fails to address the question of when roll call needs to occur.

The MPA/MPSO argue that the existing language is a mandatory subject of bargaining primarily related to officer safety. The MPA contends that the provision only applies to "street officers" whose ability to protect themselves

is vitally affected by the information received during roll call. To the extent the City argues roll call could be held at the start of a shift without affecting officer safety, the MPA disagrees asserting such a scheduling change reduces manpower levels needed to assist officers in distress.

When resolving the parties' dispute as to this issue, specific local evidence of a proposal's 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 Fond du Lac, Dec. No. 22373 (WERC, 2/85); aff'd. CirCt Fond du Lac; Manitowoc County, Dec. No. 18995 (WERC, 9/81) aff'd CirCt Manitowoc; City of Brookfield, Dec. No. 11489, 11500-B (WERC, 4/75).

The City correctly cites City of New Berlin as a case in which the Commission found permissive ^{2/} a proposal which mandated that police dispatchers spend 15 minutes of each shift receiving an informational briefing from supervisors and those employes completing their shift. The proposal's intrusion into the right of the employer to manage the police department was found to warrant a conclusion that the employer had no duty to bargain over the proposal. However, in City of New Berlin the employes in question were dispatchers not "street officers" and the union did not make any safety argument on behalf of its proposal. Thus, City of New Berlin is of no particular analytical value here.

The parties agree that the existing language prevents the City from unilaterally changing who stands roll call, when roll call occurs during a work day and what occurs during roll call. The record establishes that under the disputed proposal, roll call time must occur during the 12 minutes immediately prior to an eight hour shift and must continue to be used in many ways including providing officers with any subpoenas which require their presence in a civil or criminal proceeding; reviewing training bulletins and departmental procedures; reviewing criminal activity reported during the preceding 12 hours; visually

2/ It is important to acknowledge that the parties' dispute does not extend to the "wages" and "hours" ramifications of the proposal. The City acknowledges the right of the MPA/MPSO to insist that certain employes begin active duty 12 minutes prior to their shift and receive compensation for these minutes.

inspecting officers' uniform, equipment and physical/psychological fitness for duty; and checking station cash register balances. The record also establishes that some employes who are not working on the "street" on a daily basis presently stand roll call.

When balancing the proposal's intrusion into management's decision as to how to allocate the employes' work day so as to provide desired services against the relationship to employe safety, we are persuaded that the proposal is primarily related to safety to the extent it mandates that officers be evaluated to determine fitness for duty prior to leaving the station and that prior to commencing "street" duties an officer receive any information about criminal activity which may threaten the officer's safety. However, the proposal is primarily related to management prerogatives to the extent it mandates the timing of roll call without regard to when officers commence "street" duties and mandates whether and when and for how long functions not primarily related to safety (i.e., subpoenas, cash register balancing, training bulletins, etc.) are performed and who will receive/provide/perform same.

Special Duty Pay and Promotions

The disputed proposal provides:

1. "Each employee within the Milwaukee Police Association shall be paid an additional amount for time spent underfilling or performing work for an exempt position or classification that is compensated at a higher rate. The additional amount for time so spent shall be equivalent to the difference between the base salary hourly rate of the employee and the next highest pay step of the rank, position or classification the employee is underfilling.
2. In the event the position underfilled is an authorized exempt position or classification members shall not be required to underfill such position for more than two (2) pay periods in a one (1) year period. Said position shall thereupon be filled by the appointment of an eligible member of the Association through the appropriate procedures set out by statute, ordinance and applicable Administrative procedures.
3. If a vacancy exists beyond one (1) pay period in a non-exempt rank as defined by the Fire and Police Commission, the Chief of Police shall nominate the next qualified member at the following Fire and Police Commission Regular meeting pursuant to Fire and Police Commission Rules.
4. Any payment(s) made under the provisions of this Article for underfilling shall not have any sum deducted for pension benefits nor shall such payments be included in the determination of pension benefits or other fringe benefits.
5. A member of the Milwaukee Police Association shall be eligible for the competitive promotional examination administered by the Fire and Police Commission, to the rank of Detective

or Sergeant of Police if the member has attained three (3) years of active service seniority prior to the actual date of the written examination. Active service as used herein shall be defined in Article 9 of this Agreement except, time spent on military leave, duty disability retirement, educational leave, maternity leave, sick leave of less than one (1) year, medical leave of less than one (1) year, workers compensation leave of less than one (1) year and unpaid suspension(s) of sixty (60) work days or less, shall count towards the three (3) year active service requirement.

6. Seniority shall count towards the final aggregate score in determining placement on the eligibility list for the rank of Detective and Sergeant of Police according to the following schedule.

3-6 years of service	30%
7-10 years of service	35%
11 or more years of service	40%

The City contends that it need not bargain with the MPA over the second sentence of paragraph 2, all of paragraph 3, the three year requirement of paragraph 5 and all of paragraph 6.

As to the objectionable portions of paragraphs 2 and 3, the City asserts the MPA is attempting to require that all vacancies be filled and thereby impinging on the City's statutory budget authority. The City cites City of Waukesha, Dec. No. 17830, (WERC, 5/80) as holding that proposals which require maintenance of positions primarily relate to the formulation or management of public policy and thus are non-mandatory.

Through paragraphs 5 and 6, the City argues the MPA is seeking to establish minimum qualifications for positions. Citing City of Waukesha, the City acknowledges its duty to bargain over promotional selection criteria among qualified applicants but not over the qualifications necessary for a position or how those minimum qualifications are to be measured.

The MPA argues that the disputed portions of paragraphs 2 and 3 are primarily related to wages and seek to prevent the City from exploiting employes by having them "temporarily" fill vacant positions without paying the appropriate compensation.

Turning to the disputed language of paragraphs 5 and 6, the MPA asserts it is proposing selection criteria and not establishing minimum qualifications for a particular job classification. In support of its position, the MPA cites Sec. 111.70(4)(jm)4.d., Stats. and City of Waukesha, supra; City of Wauwatosa, Dec. No. 15917 (WERC, 11/77); City of Green Bay, Dec. No. 12402-B (WERC, 1/75); Oconto County, Dec. No. 12970-A (WERC, 3/75) and Brown County, Dec. No. 19042 (WERC, 11/81).

In City of Waukesha, the Commission was asked to determine whether the following proposal was a mandatory subject of bargaining:

ARTICLE 19 - PROMOTIONAL PROCEDURE

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

1. A notice of vacancy shall be posted on the

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

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

3. Application forms shall be provided by the Chief.

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

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

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

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

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

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

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

The Commission held:

After reviewing the Association's proposal we believe that are several sections which result in it being a non-mandatory subject of bargaining. To begin with, the first and last paragraphs of said proposals appear to require the City to fill all vacancies. 7/ We have previously held that a proposal which would

require a municipal employer to establish or maintain certain positions constitutes a non-mandatory subject of bargaining. 8/ Such proposals relate to the formulation or management of public policy.

Another portion of the Association's proposal which we find to be a non-mandatory subject of bargaining is that which requires the City to give an oral interview, and also states that said "interview

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

8/ Oak Creek-Franklin School District No. 1 (11827-0) 11/74 (aff. Dane Co. Cir. Ct. (1975); and see discussion in Milwaukee Board of School Directors (17504) 12/79.

will be given by a board of not less than 3 composed of the Chief and such staff officers as he may select," because it goes to the management's right to determine if a written examination or an oral interview is necessary, and if one is desired, and which and how many management officials will conduct the interview. Such matters relate primarily to the City's management function, as noted in our decision in City of Beloit. 9/

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

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

- 9/ Dec. No. 11831-C, 7/74, aff. 73 Wis. 2d 43 (1976).
- 10/ City of Madison (16590) 10/78; Milwaukee Sewerage Commission (17302) 9/79.
- 11/ 83 Wis. 2d 90 (1978).

Applying our holding in City of Waukesha to the MPA proposal, it is apparent that the minimum service requirement in paragraph 5 is a permissive subject of bargaining because it intrudes into the employer's right to determine the minimum qualifications necessary to perform the jobs in question (Detective or Sergeant). See also City of Glendale, Dec. No. 27907 (WERC, 1/94).

More difficult to determine is the impact of Waukesha on paragraph 6 of the MPA proposal. The proposal on its face is ambiguous as to whether the seniority percentages play a role in determining whether an applicant is at least minimally qualified. During the hearing, the MPA asserted that seniority only applies once the applicant is found to be minimally qualified by the City.

If the proposal were revised to clearly incorporate this contention, this portion of the proposal would be a mandatory subject of bargaining. As we held in Waukesha:

. . . the weight to be given 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.

However, as written, the MPA proposal is not reasonably susceptible to the interpretation put forth by the MPA at hearing. Thus, as written, paragraph 6 is permissive.^{3/}

Most difficult to determine is the impact of Waukesha on the MPA proposal that the City fill vacancies on a permanent basis. The City correctly argues that we have generally found a proposal which requires that vacancies be filled to be a permissive subject of bargaining. However, the MPA argues the proposal in dispute addresses situations in which the City wants to continue to have the work performed but fills the vacancy on a long term temporary/"underfilled" rather than a permanent basis.

Proposals which require vacancies to be filled are permissive because they prevent the employer from making management/public policy choices as to whether, how and at what level service will be provided. Here, in at least some circumstances described at hearing, it is apparent that the proposal addresses situations in which the City does not wish to change the manner or level of service (i.e., continues to want the work to be performed) when a vacancy occurs. In such circumstances, the proposal is not intruding into public policy choices but only addressing who fills the vacancy and what the fringe benefits and compensation should be. If the proposal were modified to clearly limit its application to circumstances in which the City continues to

3/ The MPA notes that Sec. 111.70(4)(jm)4.d, Stats. provides that an interest arbitrator has the power to:

- d. Determine a promotional program.

We are not persuaded that this statutory language changes the analysis which is appropriate for determining whether a promotional procedure is a mandatory subject of bargaining.

want the work of the vacant position performed, we would find it to be a mandatory subject of bargaining. However, as written, the proposal can reasonably be interpreted as preventing the City from making permissive service level choices and thus we find it permissive.

Vacations

The disputed language provides:

6. "An employee on authorized injury leave as a result of a duty-incurred injury may use vacation scheduled during the period of such leave provided the employee submits a written advance request to a District Commander to use the vacation, and provided further, the employee's private physician has authorized use of this vacation."

11. "All members, except as otherwise provided, who will have been in the service continuously twelve months or more shall, on the third Monday in January, unless otherwise ordered, select their annual vacation periods on a seniority basis by shift or by other approved methods, as arranged by their commanding officers in the bureaus or divisions to which they are attached. Vacations may be selected for any week of the year; however, members shall be limited to two (2) weeks or ten (10) working days of vacation during the period of June 1 through September 15 of each year, hereinafter referred to as the "Summer Vacation Period". Nothing herein should be construed as prohibiting members from taking three (3) to five (5) weeks vacation consecutively at any other time of one year, provided, however such vacations are arranged at the discretion of the commanding officer, with due regard to the needs of the service.

Selection of vacations for the current year must be finalized by March 15 of said year. After a member has made the vacation selection to which he/she is entitled, he/sh will not be permitted to trade a vacation with another member or change dates of such vacation. Trading of vacations is strictly prohibited, however, when a member selects his/her non-segmented vacation the trading of off days to start a

vacation will be permitted.

Members may "split" (divide vacations into allowed divisions) their vacation into weekly periods.

Each selected vacation period will consist of at least five (5) vacation days preceded by two (2) regular off days, except as otherwise provided for in section 9. of the ARTICLE. Members electing to split vacation periods must make all selections on their first pick. One (1) overtime off day or Holiday may be added to all such vacation periods. This shall apply to any single vacation period of ten (10), fifteen (15), twenty (20) or twenty-five (25) working days each. Additional earned overtime off days or Holidays which extend a vacation in excess of ten (10), seventeen (17), twenty-four (24), thirty-one (31) or thirty-eight (38) days respectively, may be granted only in emergencies during the "Summer Vacation Period" with the approval of the Assistant Chief of Police. However, at all other times during a calendar year, a Bureau/District Commander may grant such additional earned overtime off days or Holidays with due regard to the requirement of the police service.

A member whose service is expected to continue so as to complete a years active service may, after six (6) months of service and at the sole discretion of the Chief of Police be allowed to take vacation time within the year of appointment. However, if the member leaves the service of the City before the completion of the initial 12-month period, that vacation shall be deemed unearned and payments made during the vacation shall be deducted upon termination of employment.

Commanding Officers will grant members of the Police Band two (2) weeks or ten (10) working days of earned vacation during the "Summer Vacation Period". Such two (2) weeks of vacation shall not be drawn or made part of the regular shift vacation schedule, but shall be assigned by the commanding officer with consideration for the members and the needs of the service. Band members entitled to three (3), four (4) or five (5) weeks of vacation will be required to pick such additional weeks as part of the regular shift vacation schedule, except as otherwise provided for in section 9. of this ARTICLE.

Members entitled to choose their vacation pursuant to being awarded a Citation or Commendatory Letter and by virtue of a Department Order are to be allowed a choice of vacation mutually agreeable to the member and his commanding officer, and for the \good of the service. Such choices are not to be regarded as part of the regular shift vacation schedule.

A military training leave of absence, not to exceed fifteen (15) successive calendar days and granted upon receipt of Official Department of Defense Orders, shall in no way affect the selection of vacations. Police Department personnel who are members of a National Guard or Reserve Unit will pick their vacation at the same time as all regular employees and shall not be given special consideration dependent upon the time of such Military Training Leave.

Members shall not be permitted to pick for three (3), four (4) or five (5) week vacations prior to the time of drawing. Members whose anniversary date falls during the current calendar year will be awarded their additional week vacation by the commanding officer, after said date, with consideration for the member and the needs of the service.

The administration of all vacation periods, Holiday off time, and regular off days shall be strictly in accord with City Ordinances and current labor agreements.

The vacation selection process shall be conducted pursuant to the following goals at District Stations in determining the number of personnel off at any one time.

- a. 12% off on the day shift.
- b. 10% off on the early shift
- c. 10% off on the power shift, and
- d. 9% off on the late shift.

Anything herein to the contrary notwithstanding, the Association acknowledges the right of the Chief to suspend the rights of its members to select or, having selected, to take a scheduled vacation in the event the Chief is unable to provide essential services by any other means, or in the event of civil disorder, riot, insurrection, or some Act of God requiring the summoning of as many possible officers as possible to an on duty status."

The City asserts the last two paragraphs of the MPA proposal directly impact personnel allocations and thus interfere with the City's right to determine levels of service to be provided. The City contends that the vacation percentage goals convert the proposal to "minimum staffing" requirement such as those found permissive by the Commission in City of Brookfield, Dec. Nos. 11489-B, 11500-B (WERC, 4/75) and City of Manitowoc, Dec. No. 18333 (WERC, 12/80).

The MPA argues vacation rights are vital to officers' ability to establish "some semblance of family life on which their families can rely and plan." It contends its proposal clearly permits the City to respond to emergencies and to otherwise meet the fundamental law enforcement mission. The MPA asserts that the proposal's use of "goals" demonstrates that it is not unnecessarily intruding into management's policy making prerogatives.

We are satisfied that the MPA vacation proposal is primarily related to wages, hours and conditions of employment. Like the employes' hours of work, the scheduling of vacation fundamentally impacts on the employe's ability to plan his/her non-work life. See School District of Janesville Dec. No. 21466 (WERC, 3/84). We are further satisfied that the proposal provides the City with sufficient flexibility to provide law enforcement service as it identifies goals rather than precise requirements. The proposal does not establish minimum staffing requirements. The City remains free to determine whatever staffing levels are appropriate and fill those needs by expanding the number of officers on a shift, calling in officers on an overtime basis or exercising rights it has under the vacation proposal, to suspend employe vacation selections.

Duty Assignment

The disputed proposal provides:

1. "An employee shall, upon appointment and after taking and subscribing his/her oath of office, be assigned to night duty in a police district designated by the Chief of Police.
2. The Regularly Scheduled Shifts shall be

defined as:

DAY SHIFT - Starting time between 7:30 a.m. and 8:00 a.m. excluding roll call, (First Shift).

EARLY SHIFT - Starting time between 3:30 p.m. and 4:00 p.m. excluding roll call, (Second Shift).

POWER SHIFT - Starting time between 7:00 p.m. and 8:00 p.m. excluding roll call.

LATE SHIFT - Starting time between 11:30 p.m. and 12:00 midnight excluding roll call, (Third Shift).

3. Members shall be assigned to day shift according to seniority in their respective ranks and positions. When an opening exists on the day shift, eligible personnel shall be transferred to such shift unless the employee waives such transfer to such opening. If an employee waives his right to transfer to the day shift, upon a subsequent request the member shall be eligible for the next day shift opening. Seniority shall be defined as set forth in ARTICLE 9, of this Agreement for all ranks, positions or classifications.

4. When a vacancy occurs within a special assignment, position, rank or classification or a newly created special assignment, position, rank or classification the Chief of Police shall cause a memorandum to be published and posted at all work locations. The memorandum shall indicate the minimum eligibility criteria that are reasonably required for said opening, affording all eligible personnel expressing interest the same opportunity for selection. All results shall be posted.

a. If a special assignment or newly created special assignment vacancy occurs on the day shift, personnel assigned to the day shift shall be given priority to such special assignment subject to the memorandum positing set forth above. Special assignments specifying criteria that day shift personnel cannot meet and cannot be trained to meet within a reasonable period of time may be filled on a temporary basis not to exceed thirty (30) calendar days.

5. The parties recognize members, as a matter of past practice, have regularly scheduled shifts, e.g., TEU 11:00 a.m. to 7:00 p.m., which are other than those identified in section 2/. of this ARTICLE and those deviations may continue. However, any further deviation in shifts beyond those in place as of the commencement of bargaining the terms of this agreement shall be negotiated between the parties except for temporary changes for thirty (30) days or less or in the event of a declared emergency."

The City contends the MPA proposal primarily relates to the City policy choice of how to assign staff to provide necessary service. It argues the proposal would prevent the City from creating other regularly assigned shifts to meet the needs of the public. Citing City of Brookfield, Dec. No. 19944 (WERC, 9/82) and Crawford County, Dec. No. 20016 (WERC, 12/82) the City asserts the proposal is therefore non-mandatory.

The MPA argues its proposal primarily relates to hours and conditions of employment and thus is a mandatory subject of bargaining. The MPA asserts the starting times of shifts protect and define the "day shift" in a manner which allows officers to spend time with their families if their seniority is sufficient to work days. The MPA cites City of Brookfield, Dec. No. 17947 (WERC, 7/80) and School District of Janesville, Dec. No. 21466 (WERC, 3/84) in support of its position.

When an employe will be working and how an employe can change work schedules are fundamental employe interests. However, even more fundamental (at least in a law enforcement context) is the employer interest in being able to meet service level needs by allocating existing personnel resources as it deems necessary.

Section 3 of the proposal establishes the manner in which employes will be assigned to the "day shift." To the extent this portion of the proposal identifies how specific employes will be used to meet the service level needs established by the City (i.e., which officers will work the "day shift"), the proposal primarily relates to hours and conditions of employment. The record does not establish any substantial relationship between the specific identity of the officers who will work a shift and the City's ability to meet service needs. The mandatory/permissive status of Sections 2 and 5 of the MPA proposal hinges on the question of whether the proposal allows the City to require officers to regularly begin work at times other than those specified in Sections 2 and 5. If this question can be answered affirmatively (either because the City can establish new shifts or call officers in on a regular overtime basis, etc.) then the proposal is primarily related to hours and conditions of employment because it does not prevent the City from making service level choices. Crawford County; School District of Janesville. If this question cannot be answered affirmatively, then the proposal is permissive because it prevents the City from making service level choices and thus is primarily related to public policy.

Section 5 of the proposal indicates that "any further deviation in shifts" "shall be negotiated between the parties except for thirty (30) days or less or in the event of a declared emergency." From the language on its face, the discussion about the proposal during the hearing and the MPA brief, we cannot reasonably interpret the MPA proposal as allowing regular overtime assignments or the creation of new shifts. Absent such a clarification, we find the proposal permissive.

Reappointment Benefits

The disputed proposal states:

1. "A current employee of the Milwaukee Police Department who left in good standing, within the time limits set forth below, may apply for reappointment by giving a written notice to the Chief of Police or a designee.
 - a. A current employee shall maintain the right to reappointment for a period of one (1) calendar year from the time of separation and upon reappointment shall be granted "full rights-benefits". For purposes of full rights-benefits interpretation an employee reinstated shall have restored the same base salary level, sick leave balance, seniority, classification or rank, promotional opportunity, vacation(s) and selection and all other benefits afforded by this agreement. No time-driven rights or benefits shall accrue during the period of separation.
 - b. Eligibility for pension, health/dental insurance and life insurance benefits shall be as provided for respectively by the provisions of the contract in effect between the City and the MPA, the ERS Act (Pension Law), contracts between the city and its health/dental insurance providers (Basic plan as well as HMO's) and the contract between the City and its Life Insurance Carrier.
 - c. A current employee that detaches from active service and applies applying for reappointment may be requested to submit to a medical examination prior to reappointment.
 - d. A current employee that detaches from active service and applies for reappointment may request, on an annual basis, from the Fire and Police Commission, extensions of separation not to exceed one (1) year increments and such extension if granted being subject to the terms as set forth in subsections 1.a., 1.b. and 1.c.
2. Nothing within this ARTICLE shall be construed to include leaves of absence as provided for by this Agreement, City Ordinances, State Statutes and/or benefits provided by custom or practice.

3. In the event the applicant for reappointment was in good standing, the Chief of Police and Fire and Police Commission must have cause, for denial of reappointment to the Department. Denial of the right to reappointment in accordance with the terms of this Article must be supported by 'just cause' or the absence of a vacancy. The applicant will be entitled, if denied, at his/her option, to a hearing on the issue before the permanent umpire identified in Article 7 of this Agreement."

The City contends the proposal is a permissive subject of bargaining because it primarily relates to the hiring of new employes. The City asserts that once an employe severs the employment relationship, the City is not obligated to bargain over the circumstances in which that former employe would be re-hired.

The MPA asserts that its proposal is a mandatory subject of bargaining which seeks to establish rights of current employes to reappointment.

The mandatory/permissive status of this proposal presents a close question. Viewed as a proposal which simply seeks an additional benefit (i.e., reappointment rights) as deferred compensation for the services of current employes, the proposal can be seen as akin to bargaining insurance benefits for current employes during retirement (a mandatory subject of bargaining). Viewed as a proposal which gives hiring preferences to former City employes not represented by the MPA, the proposal is non-mandatory.

We think the MPA has the better of the argument as to this proposal and conclude that the right to reappointment is a fringe benefit the MPA can mandatorily bargain for current employes it represents.

Nondiscrimination

The proposal provides:

1. "The Fire and Police Commission and Milwaukee Police Department shall be prohibited from discriminating against all members of the Association with respect to the application and terms of the Agreement, transfers, promotions, performance evaluation, job assignment criteria and selection, recruitment and other terms, conditions or privileges of employment. Further, the Fire and Police Commission and the Milwaukee Police Department shall be prohibited from discriminating based upon race, sex, religion, national origin, ancestry, color, creed, age, sexual orientation, marital or family status, disability, military status, political or labor affiliation or any protected characteristic as defined by Federal, State or Local regulations.
2. No member shall be retaliated against for

exercising his/her rights for relief of an alleged violation identified in paragraph 1. above.

The City contends the proposal is permissive because it would diminish the City's right to establish more stringent non-discrimination policies or to change such existing policies.

The MPA argues the proposal only provides a contractual mechanism for enforcing rights created by existing law.

We have consistently held that a union can require an employer to bargain over a proposal which gives employes a contractual mechanism for enforcing statutory rights. Racine Schools Dec. No. 20652-A and 20653-A (WERC, 1/84). Milwaukee Board of School Directors, Dec. No. 20093-A (WERC, 2/83). The proposal reflects the MPA's assertion that the proposal seeks only to establish such a contractual mechanism and does not preclude the City from creating more stringent anti-discrimination policies. The proposal is a mandatory subject of bargaining.

Fitness for Duty

The proposal provides:

1. "The Chief of Police may order a member of the Association to submit to a medical examination by a physician or psychiatrist who shall be licensed in the State of Wisconsin.
2. An order to submit to a medical examination must be premised on reasonable suspicion founded on specific, objective and articulable facts either directly observed by at least two (2) direct line supervisors or learned from a reliable source corroborated by facts and circumstances from which a reasonable inference may be drawn that the member is unfit for duty. Reasonable suspicion based solely on an officers (sic) physical appearance, conduct and psychological demeanor must be premised on factors that are generally accepted within the scientific community. The Department shall make a record of the basis for its determination prior to a medical examination and this record shall be dated, and signed by the supervisor ordering such examination.
3. When the Chief of Police orders a member to submit to a medical examination the Chief's physician shall be a member of a panel of three (3) physicians. The second physician to be designated by the Association and the third physician to be selected by agreement of the first and second physicians, if needed. Decisions by the panel shall be solely limited to whether the member is fit or unfit for duty and shall be final and binding upon all parties.
4. All records reviewed by a physician of the panel shall be treated as being confidential pursuant to a doctor/patient

relationship. The physicians shall only report to the Chief of Police whether the member is fit or unfit for duty.

5. If a panel physician determines a member is unfit for duty, the member shall be carried on Administrative Leave with full pay and benefits continuing until the member is medically released for duty by a physician. In no event shall the Administrative Leave continue beyond six (6) months. All time spent by a member outside the regularly scheduled shift for medical examinations shall be deemed Overtime pursuant to Article 15 of this agreement.

6. TRAUMATIC INCIDENTS

A minimum three (3) day administrative leave of absence with pay and benefits is mandatory for any officer directly involved in the death or great bodily harm (as defined by State Statute) of another person. This three day administrative leave of absence shall commence with the next calendar day after the traumatic incident. In the event a member has scheduled vacation, holiday time or compensatory time, within three (3) consecutive days following the incident that gave rise to the administrative leave of absence, such scheduled time shall be rescheduled immediately after the administrative leave, at the request of the employee. In addition, an officer directly involved will be afforded an additional seven (7) floating administrative leave days to be used at his/her discretion. Consideration shall also be given toward an administrative leave of absence, with pay and benefits continuing, being granted to members(s) involved in traumatic incident at the discretion of the Chief of Police.

- a. At all times a member while on an administrative leave of absence shall advise his/her commanding officer of a phone number where he/she can be contacted for follow-up investigation."

The City argues the proposal is non-mandatory because it places overbroad limitations upon the City's right to invoke fitness for duty examinations. It contends the magnitude of the potential consequences of an unfit officer kept on duty are so significant that the City must have "unfettered management rights" to conduct fitness for duty determinations consistent with the directive of Sec. 111.70(1), Stats.' directive that City responsibilities be exercised for the "health, safety and welfare of the public to assure orderly operations and functions within its jurisdiction. . . ."

The MPA acknowledges the City's concern about officers' fitness for duty but contends that it should be able to bargain protections so that medical evaluations are not used to harass or inappropriately discipline employees. The

MPA asserts that the City has the right to suspend employes with pay and benefits if it believes the officer is unfit for duty. The MPA argues the proposal merely provides that an officer is protected from being separated from employment (due to lack of sick leave, etc.) solely on the basis of examinations conducted by a City selected physician.

Based upon the record and argument presented, we find the proposal to be a mandatory subject of bargaining with the exception of Section 2 which we believe places overbroad restrictions on the circumstances in which the Chief can order a medical exam. These overbroad restrictions primarily relate to management of the work force. If the first two sentences of Section 2 were deleted, the proposal would be mandatory in its entirety.

Dated at Madison, Wisconsin this 25th day of March, 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