STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of

CITY OF RIVER FALLS

Requesting a Declaratory Ruling Pursuant
to Sec. 111.70(4)(b), Stats., Involving
a Dispute Between Said Petitioner and

THE LABOR ASSOCIATION OF WISCONSIN, INC.

Case 28
No. 51676 DR(M)-548
Decision No. 28384

Appearances:

Mr. Cyrus F. Smythe, Consultant, Labor Relations Associates, Inc., 7501 Golden Valley Road, Golden Valley, Minnesota 55427, for the City.

Mr. Thomas A. Bauer, Labor Consultant, The Labor Association of Wisconsin, Inc., 206 South Arlington Street, Appleton, Wisconsin 54915, for the Association.

FINDINGS OF FACT, CONCLUSION OF LAW AND DECLARATORY RULING

On October 10, 1994, the City of River Falls filed a petition with the Wisconsin Employment Relations Commission pursuant to Sec. 111.70(4)(b), Stats., seeking a declaratory ruling that it did not have a duty to bargain with the Labor Association of Wisconsin, Inc., over certain matters.

On October 19, 1994, Labor Association of Wisconsin, Inc., and its affiliate Local 207, City of River Falls Police Department Employees' Association filed a response to the petition.

The City requested a hearing by letter dated October 31, 1994. By agreement of the parties, hearing was held on January 6, 1995, in River Falls, Wisconsin before Examiner Peter G. Davis, a member of the Commission's staff. A stenographic transcript of the hearing was received by the Examiner January 26, 1995. The post-hearing briefing schedule was closed March 6, 1995. Having reviewed the pleadings, the record and the parties' written argument and being fully advised in the premises, the Commission makes and issues the following

FINDINGS OF FACT

1. The City of River Falls, herein the City, is a municipal employer having its principal offices at 123 East Elm Street, River Falls, Wisconsin 54022.

2. The Labor Association of Wisconsin, Inc., and the River Falls Police Department Employees' Association, herein the Associations, are labor organizations having their principal offices at 206 South Arlington Street, Appleton, Wisconsin 54915. The Associations are the collective bargaining representative for full-time sworn police officers employed by the City.

3. The City and the Associations are bargaining a successor to the 1992-1993 contract covering the full-time sworn police officers represented by the Associations. The City asserts that it does not have an obligation to bargain with the Associations over the following proposals:

Article XIX - Overtime and Compensatory Time. Section 19.1.

> All available bargaining unit work which is normally performed by regular full-time bargaining unit employees shall continue to be offered to the regular full-time bargaining unit employees prior to such work being offered to part-time, reserve, casual and/or seasonal employees.

Article XXIII - Health Care and Insurance. Section 23.1.

> A) The EMPLOYER shall reimburse employees all costs in excess of two dollars ($2.00) for each outpatient prescription drug claim, and ten dollars ($10.00) for each emergency room visit which does not result in a hospital admittance, said amounts representing the differences in coverage between the current health insurance plan (Blue Cross/Blue Shield) and the plan in existence prior to August 1, 1994.
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> B) The EMPLOYER shall pay the out-of-pocket costs for co-payment (20% up to $5,000; maximum $1,000) and deductible ($500 per individual; $1,500 aggregate per family) for life-threatening emergencies which occur either outside the State of Minnesota and Wisconsin, or more than 25 miles from a provider in the Blue Cross/Blue Shield United of Wisconsin, or Preferred One, provider networks,

where those networks extend beyond the boundaries of the two states, provided notice is received by the City within forty-eight (48) hours after emergency treatment is begun. The intent of the parties is not to create duplicate benefits.

4. The proposals set forth in Finding of Fact 3 primarily relate to wages, hours and conditions of employment.

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

CONCLUSION OF LAW

The proposals set forth in Finding of Fact 3 are mandatory subjects of bargaining within the meaning of Sec. 111.70(1)(a), Stats.

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

DECLARATORY RULING 1/

1. The City of River Falls has a duty to bargain within the meaning of Secs. 111.70(1)(a) and (3)(a)4, Stats., over the proposals set forth in Finding of Fact 3 with the Labor Association of Wisconsin, Inc., and the River Falls Police Department Employees' Association.

2. The Labor Association of Wisconsin, Inc., and the River Falls Police Department Employees' Association have the right to proceed to interest arbitration pursuant to Sec. 111.77, Stats., as to the proposals set forth in Finding of Fact 3.

Given under our hands and seal at the City of Madison, Wisconsin, this 4th day of May, 1995.

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

(footnote 1 begins on page 4)

(footnote 1 referred to on page 3 begins here)

1/ Pursuant to Sec. 227.48(2), Stats., the Commission hereby notifies the parties that a petition for rehearing may be filed with the Commission by following the procedures set forth in Sec. 227.49 and that a petition for judicial review naming the Commission as Respondent, may be filed by following the procedures set forth in Sec. 227.53, Stats.

227.49 Petitions for rehearing in contested cases. (1) A petition for rehearing shall not be prerequisite for appeal or review. Any person aggrieved by a final order may, within 20 days after service of the order, file a written petition for rehearing which shall specify in detail the grounds for the relief sought and supporting authorities. An agency may order a rehearing on its own motion within 20 days after service of a final order. This subsection does not apply to s. 17.025(3)(e). No agency is required to conduct more than one rehearing based on a petition for rehearing filed under this subsection in any contested case.

227.53 Parties and proceedings for review. (1) Except as otherwise specifically provided by law, any person aggrieved by a decision specified in s. 227.52 shall be entitled to judicial review thereof as provided in this chapter.

(a) Proceedings for review shall be instituted by serving a petition 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.

. . .

(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 RIVER FALLS

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

BACKGROUND

It is useful to set forth the general legal framework within which the issues herein must be resolved. In Beloit Education Association v. WERC, 73 Wis. 2d 43 (1976), United School District No. 1 of Racine County v. WERC, 81 Wis. 2d 89 (1977) and City of Brookfield v. WERC, 87 Wis. 2d 819 (1979), the Court set forth the definition of mandatory and permissive subjects of bargaining under Sec. 111.70(1)(d), Stats., as matters which primarily relate to "wages, hours, and conditions of employment" or to the "formulation or management of public policy," respectively.

As the Court noted in West Bend Education Association v. WERC, 121 Wis. 2d 1, 9, (1984),

> As applied on a case-by-case basis, this primarily related standard is a balancing test which recognizes that the municipal employer, the employees, and the public have significant interests at stake and that their competing interests should be weighed to determine whether a proposed subject for bargaining should be characterized as mandatory. If the employees' legitimate interest in wages, hours, and conditions of employment outweighs the employer's concerns about the restriction on managerial prerogatives or public policy, the proposal is a mandatory subject of bargaining. In contrast, where the management and direction of the school system or the formulation of public policy predominates, the matter is not a mandatory subject of bargaining.

Proposal to Amend Article XIX

The Associations propose to add the following language to the parties' contract:

> All available bargaining unit work which is normally performed by regular full-time bargaining unit employees shall continue to be offered to the regular full-time bargaining unit employes prior to such work being offered to part-time, reserve, casual and/or seasonal employes.

Citing City of Oconomowoc, Dec. No. 18724 (WERC, 6/81), Northland Pines School District, Dec. No. 20140 (WERC, 12/82), and School District of Marinette, Dec. No. 20406

(WERC, 3/83), the Associations argue the proposal is a mandatory subject of bargaining which primarily relates to wages, hours, and conditions of employment. The Associations contend the proposal does not "abridge" the City's rights under the 1992-1993 contract to hire part-time employes or to otherwise "manage its own affairs." The Associations assert the proposal simply seeks to protect unit employes' work from subcontracting (i.e., being performed by non-unit employes).

The City contends the proposal is a permissive subject of bargaining because it would effectively prevent the City from hiring and utilizing part-time employes. The City asserts that it has a unilateral right to establish its own organizational structure and to include part-time employes in that structure if it wishes. The City argues the Associations' proposal would prevent the scheduling of part-time officers because full-time employes could demand to perform the work.

The City rejects the Associations' contention that scheduling part-time employes constitutes subcontracting. It argues no unit employe has been laid off or suffered a reduction in normal hours or pay due to the City's use of part-time officers. The City contends it is entitled to schedule part-time employes as it sees fit so long as full-time employes are not deprived of their normally scheduled hours.

The record establishes the parties have an ongoing dispute as to whether their existing contract allows part-time employes (none of whom are in the bargaining unit) to work the regularly scheduled shift of a full-time employe (who is in the bargaining unit) when the full-time employe is absent due to illness, vacation, etc. 2/ Under the disputed proposal, such regular shift work could only be performed by part-time employes if the City had first offered the work to the available full-time employes and no full-time employe accepted the offer. 3/

Whether viewed as a specific response to the parties' ongoing shift replacement dispute or more broadly (as reflected in footnote 3), the impact of the proposal on the wages, hours and

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2/ We express no opinion as to the merits of the parties' dispute as to the meaning of existing contract language.

3/ The proposal is also broad enough to prohibit the City from: (1) laying off full-time employes or reducing their hours and replacing them with part-time, reserve, casual and/or seasonal employes; (2) filling full-time vacancies with the specified non-unit City employes; or (3) deciding that future expanded needs for regular shift law enforcement work would be met by hiring more of the specified non-unit employes instead of additional full-time employes.

conditions of employment of the full-time unit employes is substantial. 4/ If the proposal became part of the contract, at a minimum the wages of unit employes would be protected/improved by the shift opportunities which would be protected. Viewed more broadly, the proposal provides job security protection against shrinkage of the regular work available for full-time employes and the opportunity for transfer opportunities to new jobs with different/more desirable hours if the regular work available were to expand.

The proposal's impact on the formulation or management of public policy is more limited. The use of non-unit City employes does not represent a choice among alternative political goals or values. Under the proposal, the City would simply be prevented from substituting one group of its employes for another unless the unit employes decline the work.

The City asserts the proposal impacts on the management of public policy because it would prevent the hiring and retention of part-time officers. Neither the proposal nor the record provide a persuasive basis for the City's concern.

Initially, it should be noted that the language of the proposal does not prevent the City from continuing to employ part-time officers. Further, part-time officers provide a variety of services to the City aside from filling regular full-time shifts. None of this work (i.e., traffic control, special event and park security, etc.) is covered by the proposal. In addition, the extent to which full-time officers would accept the shift work in question is unknown. Thus, it is by no means clear whether the proposal will have any significant impact upon the City's ability to hire/retain part-time officers.

Even assuming arguendo that the City's concern as to part-time officers proved to be well founded, the concern would not have any substantial impact on the management of public policy. There is no evidence or assertion in the record that full-time officers are somehow unqualified

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4/ In Unified School District No. 1 of Racine County v. WERC, 81 Wis. 2d 89 (1977); Brown County v. WERC, 86-0731, unpublished, (CtApp III, 3/87); City of Oconomowoc Dec. No. 18724 (WERC, 6/81); Northland Pines School District, Dec. No. 20140 (WERC, 12/82); School District of Marinette, Dec. No. 20406 (WERC, 3/83); City of Green Bay, Dec. No. 18731-B (WERC, 6/83); Milwaukee Board of School Directors, Dec. No. 20093-A (WERC 2/83) and Dec. No. 20093-B (WERC, 8/83), Milwaukee Metropolitan Sewerage District, Dec. No. 21268 (WERC, 12/83); Racine Unified School District, Dec. Nos. 20652-A and 20653-A (WERC, 1/84); School District of Janesville, Dec. No. 21466 (WERC, 3/84); School District of Franklin, Dec. No. 21846 (WERC, 7/84); and Milwaukee Board of School Directors, Dec. No. 21893-B (WERC, 10/86) the impact on wages, hours and conditions of employment was sufficient for the substitution of non-bargaining unit personnel to be a mandatory subject of bargaining.

to perform any of the work in question. Indeed, the only advantage to the City of utilizing part-time officers appears to be that they are cheaper to use. Cost is not a legitimate factor in a mandatory/permissive analysis. 5/

Given all the foregoing, we conclude the proposal's impact on wages, hours and conditions of employment is greater than the impact on the formulation or management of public policy. Thus, the proposal is primarily related to wages, hours and conditions of employment and therefore a mandatory subject of bargaining.

Proposal to Amend Article XXIII

The Associations propose to modify existing health insurance benefit language as follows:

> A) The EMPLOYER shall reimburse employees all costs in excess of two dollars ($2.00) for each outpatient prescription, drug claim, and ten dollars ($10.00) for each emergency room visit which does not result in a hospital admittance, said amounts representing the differences in coverage between the current health insurance plan (Blue Cross/Blue Shield) and the plan in existence prior to August 1, 1994.
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> B) The EMPLOYER shall pay the out-of-pocket costs for co-payment (20% up to $5000; maximum $1000) and deductible ($500 per individual; $1500 aggregate per family) for life-threatening emergencies which occur either outside the state of Minnesota and Wisconsin, or more than 25 miles from a provider in the Blue Cross/Blue Shield United of Wisconsin, or Preferred One, provider networks, where these networks extend beyond the boundaries of the two states, provided notice is received by the City within forty-eight (48) hours after emergency treatment has begun. The intent of the

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5/ We have consistently held that considerations of "cost" are fundamentally irrelevant to a proposal's mandatory or permissive status. City of Wauwatosa, Dec. No. 17947 (WERC, 7/80); School District of Campbellsport, Dec. No. 20936 (WERC, 8/83); Racine Unified School District, Dec. No. 20653-A (WERC, 1/84) aff'd (CtApp II, 1986, unpublished); School District of Janesville, Dec. No. 21466 (WERC, 3/84); Wausau Area Transit System, Dec. No. 25563 (WERC, 7/88). As we noted in Wausau, "... any analysis which included cost would ultimately lead to conclusions that even wage proposals are permissive because the cost is too high."

parties is not to create duplicate benefits.

The Associations argue the proposal specifically identifies certain benefits currently enjoyed by bargaining unit employes and thus is primarily related to wages, hours and conditions of employment.

As stated in its brief, the City contends the proposal is permissive because:

1. The existing language of the Labor Agreement contains a provision which states that the EMPLOYER must, if it changes insurance carriers, provide coverage equal to the policy currently in existence. The policy in existence includes the benefits outlined by the Association in "A" and "B" of its Final Offer.

   The new language requested by the Association would require the continuation of the specific benefits outlined by "A" and "B" above in perpetuity thus denying the City the opportunity of making decisions in the future as to which policy or mix of policies would provide the required equivalent insurance coverage to that in existence. The City would be obligated by the Association's requested language to continue to provide the benefits of "A" and "B" regardless of whether a new policy chosen by the City provided equivalent benefits to "A" and "B" as part of the new policy.

2. The City would be obligated to continue the named benefits because the Association requested language requires a specific cost program and specific circumstances of coverage regardless of the policy/carriers chosen by the City. The City would be required, therefore, to maintain the specifically named insurance provider mentioned in the Association's language for insurance coverage.

   Furthermore, if the provider(s) named in "A" and "B" ceased offering insurance coverage to the City, the City would be unable to meet its obligations under the language of the Agreement.

   Wis. Stats., Section 111.70(4)(b) does not require a public employer to negotiate with regard to a specific insurance company's coverage or a specific insurance company's insurance benefits. The Association's suggested new language in its modified final offer would require the City to provide insurance benefits at a specific level through a specific insurance carrier (Blue Cross/Blue Shield). Furthermore, the Association's final offer language would require the City to provide insurance coverage through a preferred provider carrier and deny the City the ability to choose carriers

offering equivalent insurance coverage through either an HMO or fee for service carrier.

As a general matter, it is well settled that the insurance benefits received by employes in return for their service to the municipal employer are "wages" within the meaning of Sec. 111.70(1)(a), Stats., and thus are mandatory subjects of bargaining. 6/ The City does not specifically take issue with the "wage" status of insurance benefits. Rather it argues that inclusion of specific benefits will restrict its ability to change the existing mix of benefits received by unit employes and/or restrict its ability to get these benefits from a different carrier/provider. In our view, these arguments all go to the merits of the proposal but not to its mandatory or permissive status. The City is free to argue to an interest arbitrator that the proposal restricts existing freedom it believes it has 7/ to change benefits/providers and thus should not be included in a new contract. But such arguments do not generate any impacts on the "formulation or management of public policy" or diminish the "wage" status of insurance benefits.

Given the foregoing, we are persuaded the Associations' proposal primarily relates to wages and thus is a mandatory subject of bargaining.

Dated at Madison, Wisconsin, this 4th day of May, 1995.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By A. Henry Hempe /s/

6/ Madison Metropolitan School District, Dec. No. 22129 (WERC, 11/84) aff'd 133 Wis. 2d 462 (CtApp Dist. IV, 1986), cert. denied, (Wis. SupCt, 1/87).

7/ The Associations contest the City's belief as to the amount of freedom under the current contract that the City has to change existing benefits/carriers. We need not and do not express any opinion as to the parties' dispute in this regard.

A. Henry Hempe, Chairperson

Herman Torosian /s/
Herman Torosian, Commissioner

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