STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of VILLAGE OF WEST SALEM Requesting a Declaratory Ruling Pursuant to Sec. 111.70(4)(b), Stats., Involving a Dispute Between Said Petitioner and WEST SALEM POLICE ASSOCIATION	Case 10 No. 52539 DR(M)-557 Decision No. 28557

Appearances:

Klos, Flynn & Papenfuss, Attorneys at Law, 800 Lynne Tower Building, 318 Main Street, P. O. Box 487, LaCrosse, Wisconsin 54602-0487, by Mr. Jerome J. Klos, for the Village.

Cullen, Weston, Pines & Bach, Attorneys at Law, 20 North Carroll Street, Madison, Wisconsin 53703, by Mr. Richard Thal, for the Association.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECLARATORY RULING

On April 21, 1995, the Village of West Salem filed a petition with the Wisconsin Employment Relations Commission seeking a declaratory ruling pursuant to Sec. 111.70(4)(b), Stats., as to its duty to bargain with the West Salem Police Association. Hearing was held in West Salem, Wisconsin, before Examiner Peter G. Davis on July 27, 1995. The parties thereafter filed written argument, the last of which was received on September 25, 1995.

Having considered the matter and being fully advised in the premises, the Commission makes and issues the following

FINDINGS OF FACT

1. The Village of West Salem, herein the Village, is a municipal employer providing law enforcement services to its residents, and having its principal offices at 1755 Leonard Street,

West Salem, Wisconsin 54669.

2. The West Salem Police Association, herein the Association, is a labor organization functioning as the exclusive collective bargaining representative for certain law enforcement employes of the Village and having its principal offices at 1216 County Highway PH, Onalaska, Wisconsin 54650.

3. The 1993-1994 collective bargaining agreement between the parties provided the following:

ARTICLE XVIII
RETIREMENT FUND

18.01 The Village does not participate in the Wisconsin Retirement Fund and in lieu thereof provides a pension plan currently with La Crosse Trust Company wherein the Village contributes 13% of the employee's gross pay annually to the plan in the name of the employee with vesting rights as follows:

Less than 3 years	0%
3 years	20%
4 years	40%
5 years	60%
6 years	80%
7 years	100%

The Village retains the right to change carriers and trustees of said pension plan.

4. During collective bargaining for a successor to the parties' 1993-1994 collective bargaining agreement, the Association proposed to modify Article XVIII, Retirement Fund, as follows:

18.01 The Village does not participate in the Wisconsin Retirement Fund and in lieu thereof provides a pension plan currently with the La Crosse Trust Company wherein the Village contributes 13% of the employees gross pay annually to the plan in the name of the employee with vesting rights as follows:

Less than 3 years	0%

3 years	20%
4 years	40%
5 years	60%
6 years	80%
7 years	100%

18.02 Effective January 1, 1996, the Employer shall become participants in, and pay the entire cost of both employee's and employer's share of the Wisconsin Retirement Fund for all employees. The employer shall no longer make the contributions listed under section 18.01 of this article.

5. The proposal set forth in Finding of Fact 4 primarily relates to wages.

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

CONCLUSIONS OF LAW

1. The proposal set forth in Finding of Fact 4 does not violate or infringe upon the statutory or constitutional rights of the Village or any of its employes.

2. The proposal set forth in Finding of Fact 4 is a mandatory subject 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/

Within the meaning of Secs. 111.70(1)(a) and (3)(a)4, Stats., the Village of West Salem and the West Salem Police Association have a duty to bargain over the proposal set forth in Finding of Fact 4.

Given under our hands and seal at the City of Madison, Wisconsin, this 10th day of October, 1995.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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

1/ See footnote on pages 4 and 5.

Herman Torosian /s/
Herman Torosian, Commissioner

James R. Meier /s/
James R. Meier, Commissioner

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.

(footnote continued on page 5)

1/ (footnote continued from page 4)

(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.

VILLAGE OF WEST SALEM

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

Before considering the specific proposal at issue herein, it is useful to set out the general legal framework within which we determine whether a proposal is a mandatory, permissive or prohibited subject of bargaining.

Section 111.70(1)(a), Stats., provides:

> 111.70(1)(a) "Collective bargaining" means the performance of the mutual obligation of a municipal employer, through its officers and agents, and the representative of its municipal employes in a collective bargaining unit, to meet and confer at reasonable times, in good faith, with the intention of reaching an agreement, or to resolve questions arising under such an agreement, with respect to wages, hours and conditions of employment, and with respect to a requirement of the municipal employer for a municipal employe to perform law enforcement and fire fighting services under s. 61.66, except as provided in sub. (4)(m) and s. 40.81(3) and except that a municipal employer shall not meet and confer with respect to any proposal to diminish or abridge the rights guaranteed to municipal employes under ch. 164. The duty to bargain, however, does not compel either party to agree to a proposal or require the making of a concession. Collective bargaining includes the reduction of any agreement reached to a written and signed document. The municipal 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 municipal employes in a collective bargaining unit. In creating this subchapter the legislature recognizes that the municipal employer must exercise its powers and responsibilities to act for the government and good order of the jurisdiction which it serves, its commercial benefit and the health, safety and welfare of the public to assure orderly operations and functions within its jurisdiction, subject to those rights secured to municipal employes by

> the constitutions of this state and of the United States and by this subchapter.

In West Bend Education Ass'n v. WERC, 121 Wis.2d 1, 7-9 (1984), the Wisconsin Supreme Court concluded the following as to how Sec. 111.70(1)(a), Stats., (then Sec. 111.70(1)(d), Stats.) should be interpreted when determining whether a subject of bargaining is mandatory or permissive:

> Sec. 111.70(1)(d) sets forth the legislative delineation between mandatory and nonmandatory subjects of bargaining. It requires municipal employers, a term defined as including school districts, sec. 111.70(1)(a), to bargain "with respect to wages, hours and conditions of employment." At the same time it provides that a municipal 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." Furthermore, sec. 111.70(1)(d) recognizes the municipal employer's duty to act for the government, good order and commercial benefit of the municipality and for the health, safety and welfare of the public, subject to the constitutional statutory rights of the public employees.
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> Sec. 111.70(1)(d) thus recognizes that the municipal employer has a dual role. It is both an employer in charge of personnel and operations and a governmental unit, which is a political entity responsible for determining public policy and implementing the will of the people. Since the integrity of managerial decision making and of the political process requires that certain issues not be mandatory subjects of collective bargaining, Unified School District No. 1 of Racine County v. WERC, 81 Wis. 2d 89, 259 N.W.2d 724 (1977), sec. 111.70(1)(d) provides an accommodation between the bargaining rights of public employees and the rights of the public through its elected representatives.
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> In recognizing the interests of the employees and the interests of the municipal employer as manager and political entity, the statute necessarily presents certain tensions and difficulties in its application. Such tensions arise principally when a proposal touches simultaneously upon wages, hours, and conditions of employment and upon managerial decision making or public policy. To resolve these conflict situations, this court has interpreted sec. 111.70(1)(d)

> as setting forth a "primarily related" standard. Applied to the case at bar, the standard requires WERC in the first instance (and a court on review thereafter) to determine whether the proposals are "primarily related" to "wages, hours and conditions of employment," to "educational policy and school management and operation," to "'management and direction' of the school system" or to "formulation or management of public policy." Unified School District No. 1 of Racine County v WERC, 81 Wis. 2d 89, 95-96, 102, 259 N.W.2d 724 (1977). This court has construed "primarily" to mean "fundamentally," "basically," or "essentially," Beloit Education Asso. v. WERC, 73 Wis. 2d 43, 54, 242 N.W.2d 231 (1976).
>
> 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 contract, 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. In such cases, the professional association may be heard at the bargaining table if the parties agree to bargain or may be heard along with other concerned groups and individuals in the public forum. Unified School District No. 1 of Racine Co. v. WERC, supra, 81 Wis. 2d at 102; Beloit Education Asso., supra, 73 Wis. 2d at 50-51. Stating the balancing test, as we have just done, is easier than isolating the applicable competing interests in a specific situation and evaluating them. (footnotes omitted)

When it is asserted that a proposal is a prohibited subject of bargaining, the question is whether the proposal irreconcilably conflicts with a statutory provision or limits constitutional rights. Fortney v. School District of West Salem, 108 Wis.2d 169 (1982); Professional Police Association v. Dane County, 106 Wis.2d 303 (1982); Glendale Prof. Policeman's Asso. v. Glendale, 83 Wis.2d 90 (1978); WERC v. Teamsters Local No. 563, 75 Wis.2d 602 (1977).

A finding that a proposal is mandatory and thus subject to collective bargaining and, if necessary, to interest arbitration does not compel either party to agree to include the proposal in a

collective bargaining agreement and does not represent a Commission opinion regarding the merits of the proposal under the statutory interest arbitration criteria. Racine Schools, Dec. No. 23380-A, 23381-A (WERC, 11/86).

POSITIONS OF THE PARTIES

The Village

The Village asserts the Association's retirement proposal is a permissive subject of bargaining because it primarily relates to the management and direction of the governmental unit and the public policy of allowing the Village to select a pension plan for the good of all employes, not just those represented by the Association. The Village further contends the proposal is a prohibited subject of bargaining to the extent it will have the effect of depriving Village employes who are not represented by the Association of their existing pension rights without due process.

The Village concedes that the Association has a right to bargain for an increase in the contribution level for the existing pension plan. However, because of the many adverse consequences for the Village and non-unit employes which flow from the Wisconsin Retirement Fund's requirement that all employes of the governmental unit be covered if any employes wish to become part of the Fund and from the Fund's legislative authority to dictate benefit levels, contribution levels, etc., the Village contends it need not bargain over the Association proposal. In this regard, the Village specifically claims:

> Effecting the Union request for the four police employees would have the following adverse effects on the nine non-police employees:
>
> 1. The annual Village contribution for retirement would be reduced from 13% to 11.5% and effectively from 13% to 10% as the 1.5% benefit adjustment portion is not included as a part of a separation benefit (Exhibit 7) (while the four police employees' annual contribution would increases (sic) from 13% to a minimum of 16.9%)
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> 2. The current Village pension plan would terminate and vest all benefits, but rollover to this state plan being prohibited, the opportunity for immediate cash redemption would be contrary to the purpose and policy of the plan, to-wit: to provide monies at time of retirement.

3. The newly hired employee would receive nothing and would lose the pre-eligibility time accumulated from her work.

4. All would be forced into a new 0% vesting until five years under the plan which jeopardizes their right to benefits in the event of early retirement, death, disability, or job transfer in that period. In effect, it involuntarily binds them to this employer for at least five years at the price of forfeiture of accrued retirement benefits.

5. Future adjustments of retirement contributions no longer would be a matter of negotiation with the Village Board but would be set by state fiat.

Effecting the Union request would have the following adverse effects to the Village:

1. Force the coverage of part-time employees over 600 hours (now over 1,000 hours per year).

2. Prevent the Village from making an independent decision on whether it will contribute the employees (sic) share as to non-police employees as all contribution systems must be identical.

In response to the Association's recitation of existing precedent that deferred compensation proposals and proposals specifying the identity of insurance carriers are mandatory subjects of bargaining, the Village contends that this is a case of first impression which must be decided based upon the specific facts presented herein. The Village asserts the general rule allowing bargaining over retirement benefits must be modified to protect the liberty and property rights of non-bargaining unit employes to constitutional due process.

Accordingly, the Village asks the Commission to conclude that the Association's retirement proposal is not a mandatory subject of bargaining.

The Association

Citing County of LaCrosse v. WERC, 180 Wis.2d 100 (1993), the Association asserts it is clear that proposals establishing retirement benefits are mandatory subjects of bargaining. Because it is undisputed that its proposal establishes retirement benefits, the Association contends its proposal is a mandatory subject of bargaining. Furthermore to the extent Madison School District

v. WERC, 133 Wis.2d 462 (1986) makes it clear that the designation of a specific health insurance carrier is a mandatory subject of bargaining, the Association argues the designation of a specific retirement plan is similarly a mandatory subject of bargaining.

While the Association does not concede the truth of the Village's claim that the Village and non-unit employes would be adversely affected by the Association proposal, the Association argues that the Village's opinion, even if true, does not provide a persuasive basis for concluding the Association's proposal is not primarily related to wages. The Association contends the Village's concerns are appropriately raised in a Sec. 111.77, Stats., interest arbitration proceeding or at the bargaining table where the issue is whether the Association's proposal should become part of the contract.

In response to the Village's position that the proposal violates the constitutional due process rights of non-unit employes, the Association argues that because it has no authority to grant or deny retirement benefit requests, it cannot deprive non-unit employes of any due process rights they may have. The Association further asserts that its right to bargain retirement benefits for unit employes should not be lost because such bargaining may affect the retirement benefits of non-unit employes.

Given the foregoing, the Association asks the Commission to rule that the Association's retirement proposal is a mandatory subject of bargaining.

DISCUSSION

As argued by the Association, it is generally undisputed that retirement benefits are primarily related to wages and thus are mandatory subjects of bargaining. LaCrosse v. WERC; City of Brookfield v. WERC, 153 Wis.2d 238 (1989). However, the Village urges us to depart from the general rule because of alleged negative fiscal and constitutional consequences for the Village and non-unit Village employes if the Association's proposal were to become part of the parties' bargaining agreement.

Looking first at the Village's claim that the proposal is permissive, we have previously addressed and rejected an argument that a compensation proposal can become a permissive subject of bargaining based upon its impact on public policy and the management and direction of the governmental unit. In Racine Schools, Dec. Nos. 20652-A, 20653-A (WERC, 1/84), Dec. No. 20653-C (WERC, 5/84), aff'd Case No. 85-0158 (CtApp 3/86 unpublished), we held:

> Equally unpersuasive is the District's argument that compensation proposals such as the Association's are nonetheless permissive because, despite their wage relationship, they serve to inhibit the District from making educational policy choices which

> will increase compensation levels. Even the most basic of wage proposals--base salary for teachers, for instance--if increased enough would probably cause a District to decide to reduce the size of its employe complement and the level of its services to the public. The statutory scheme leaves judgments as to the reasonableness of proposals for compensation in the form of base salary increases to be resolved at the bargaining table and, if necessary, through the mediation-arbitration process, in light of a variety of factors including the impact which implementation of the proposal would have on the welfare of the public and the District's ability to pay. See Sec. 111.70(4)(cm)7.c., Stats. Thus, arguments about the impact of a proposed increase in base teacher salary on District level of services decision-making go to the merits of the proposal and not to whether the proposal is a mandatory or permissive subject of bargaining.

While the specific public policy and management interests raised by the Village herein differ from those raised in Racine, we remain generally persuaded that arguments as to the adverse impact of a compensation proposal on public policy and management interests go to the reasonableness of the proposal, not whether the proposal is mandatory or permissive. Thus, we reject the Village's claim that the Association's retirement proposal is a permissive subject of bargaining.

Turning to the Village's argument that the proposal would deprive non-unit employes of a constitutionally protected liberty or property interest without due process, we again find the Village's position unpersuasive. If the Association's proposal were to become part of the bargaining agreement, it would have the effect of terminating non-unit employe participation in one retirement plan and beginning said employes' participation in another. The Village cites no precedent for its view that involuntary movement from one retirement plan to another has any constitutional overtones and we are not aware of any such precedent. While the Village might well respond by asserting that the absence of precedential support is a consequence of this being a case of first impression, we are ultimately persuaded that the proposal does not infringe on the constitutional rights of non-unit employes. Thus, we reject the Village's argument that the proposal is a prohibited subject of bargaining.

Given the foregoing, we conclude the Association's proposal is a mandatory subject of bargaining.

Dated at Madison, Wisconsin, this 10th day of October, 1995.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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

Herman Torosian /s/
Herman Torosian, Commissioner

James R. Meier /s/
James R. Meier, Commissioner