

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of

CITY OF MILWAUKEE

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

**MILWAUKEE POLICE ASSOCIATION,
LOCAL #21, I.U.P.A., AFL-CIO**

Case 448
No. 56184
DR(M)-589

Decision No. 29547

Appearances:

Attorney Thomas J. Beamish, Assistant City Attorney, City of Milwaukee, 800 City Hall, 200 East Wells Street, Milwaukee, Wisconsin 53202-3551, appearing on behalf of the City of Milwaukee.

Eggert Law Offices, S.C., by **Attorney Laurie A. Eggert**, 840 North Farwell Avenue, Suite 303, Milwaukee, Wisconsin 53202, appearing on behalf of Milwaukee Police Association, Local #21, I.U.P.A., AFL-CIO.

Podell, Ugent, Haney & Delery, S.C., by **Attorney Alvin R. Ugent**, 611 North Broadway, Suite 200, Milwaukee, Wisconsin 53202-5004, appearing on behalf of District Council 48, AFSCME, AFL-CIO.

Shneidman, Myers, Dowling, Blumenfield, Ehlke, Hawks & Domer, **Attorney Jeffrey P. Sweetland**, P. O. Box 442, Milwaukee, Wisconsin 53201-0442, appearing on behalf of Association of Law Enforcement Allied Services Personnel, Local 218, I.U.P.A., AFL-CIO.

FINDINGS OF FACT, CONCLUSION OF LAW AND DECLARATORY RULING

On February 24, 1998, the City of Milwaukee filed a petition with the Wisconsin Employment Relations Commission pursuant to Sec. 111.70(4)(b), Stats., seeking a declaratory ruling as to the City's duty to bargain with the Milwaukee Police Association, Local #21, International Union of Police Associations, AFL-CIO over certain matters. The

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Association filed a response and amended response to the petition on March 9, 1998 and March 18, 1998, respectively.

The parties thereafter met on May 13, 1998 in Milwaukee, Wisconsin with Commission Examiner Peter G. Davis to determine whether some of the matters in dispute could be resolved. After further discussion between the parties, the matters in dispute were reduced to Association proposals regarding pension and payroll deduction for the Police Officers Defense Fund.

On September 15, 1998, the City filed an amended petition for declaratory ruling which reflected the change in the scope of the parties' dispute. In its amended petition, the City alleged that the Association's pension proposal is a prohibited subject of bargaining and the payroll deduction proposal is a permissive subject of bargaining.

Hearing was held before Examiner Davis on September 17, 1998 in Milwaukee, Wisconsin. During the hearing, the Association of Law Enforcement Allied Services Personnel, Local 218, I.U.P.A., AFL-CIO, herein ALESAP, and District Council 48, AFSCME, AFL-CIO, herein District Council 48, appeared and were allowed to intervene as to the pension issue.

The parties thereafter supplemented the record with additional evidence and filed written argument. The record was closed on December 29, 1998 upon receipt of the Association's argument regarding the Wisconsin Supreme Court's December 15, 1998 denial of the City's petition for review in *MILWAUKEE POLICE ASS'N ET AL V. CITY OF MILWAUKEE*, 222 Wis.2d 259 (CT.APP. 1998).

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

FINDINGS OF FACT

1. The City of Milwaukee, herein the City, is a municipal employer having its principal offices at 800 City Hall, 200 East Wells Street, Milwaukee, Wisconsin 53202.
2. The Milwaukee Police Association, Local #21, I.U.P.A., AFL-CIO, herein the Association, is a labor organization representing certain law enforcement employees of the City for the purposes of collective bargaining.
3. During bargaining between the City and the Association, a dispute arose between the parties as to the City's duty to bargain with the Association over the following proposals:

ARTICLE 19

PENSION BENEFITS

Pension benefits for an employee covered by this Agreement who is a member of the Employee's Retirement System of Milwaukee (ERS) shall be those benefits defined in Chapter 36 of the City Charter (ERS Act) that are applicable to a "policeman". Except for the following changes enumerated below, these pension benefits shall continue unchanged during the term of this Agreement:

For employees covered by this Agreement, the City will make changes in existing benefits as follows:

1. An employee's service as a "policeman" shall be credited at the rate of ~~2.5~~2.8% of his/her final average salary per year for all years of creditable service or part thereof.
2. Escalator
 - a. For any employee who is or who becomes eligible to retire on a service retirement on or after January 1, ~~1995~~ 1998, the City shall on the anniversary date of the employee's retirement and on each anniversary thereafter, increase the monthly pension benefit by ~~the increase in the Consumer Price Index (All Urban Consumers CPIU), U.S. Cities Average as reported by the U.S. Department of Labor, Bureau of Labor Statistics, for the preceding calendar year, but in no event in an amount which exceeds 3.0%.~~
 - b. If a retired employee who is eligible for an adjustment under 2.a., above, elects a survivorship option, the spouse survivor allowance shall be computed based on the amount of the retired employee's service retirement allowance, including adjustments, at the date of death.
 - c. If a retired employee who is eligible for an adjustment under 2.a., above, has not received an adjustment prior to death, a surviving spouse, who is eligible for a survivorship option, shall have his/her survivor allowance increased by the amount provided in Sec. 2.a., above, effective with the pension check in which the eligible retired employee would have received his/her adjustment had the retiree lived. If an eligible retired employee has received an adjustment prior to death, a surviving spouse, who is eligible for a survivorship option, shall have his/her survivor allowance increased by the amount provided in Sec. 2.a., above, effective with the pension check in which the eligible retired employee

would have received his/her next adjustment had the retiree lived. If an employe has elected a protective survivorship option and dies on or after January 1, ~~1995~~ 1998, while in active service, a surviving spouse, who is eligible for a survivorship option, shall have his/her survivor allowance increased by the amount provided, and effective on the date provided in Sec. 2.a., above. After the first adjustment to the survivor allowance, there shall be an additional increase in the survivor allowance by the amount provided in Sec. 2.a., above, in each successive year effective with the pension check on the anniversary of the first adjustment to the survivor allowance. Each successive adjustment shall be computed on the survivor allowance as previously adjusted.

- d. If a retired employee elects ERS Option 4 and selects a reduced service retirement allowance with a benefit which is something other than a proportionate share of the retired employee's benefit payable to a surviving spouse after the retired employee's death, 2.b. and 2.c., above shall not apply to the surviving spouse allowance.
- e. This escalator benefit shall be in lieu of any other escalator benefits provided by the terms of prior collective bargaining agreements and City ordinances.
- f. Section 2.a through 2.d, above, shall not apply to employees receiving an immediate retirement allowance payable upon separation.
- g. Sections 2.a. through 2.e., above, shall apply to an employee with 25 years of service who separates from service on or after January 1, ~~1995~~ 1998 ~~on a deferred retirement under Sec. 36.05.6.e., provided however, that the pension adjustment shall be effective beginning on the anniversary of the date the employee commences receiving such deferred retirement allowance upon attaining age 52.~~

3. The City agrees that it will never seek to increase the age/service requirements applicable to employees in active service and covered by the ~~1995~~ 1997 1998-2000 City/MPA Labor Agreement on its effective date that are provided for under section 36-05-1-f of the ERS Act.

ARTICLE 72

CHARITABLE GIVING

- 1. Members of the bargaining unit may authorize the City to deduct from their payroll checks an amount of money which the City will remit directly to the PODF. If a member has so authorized a payroll deduction, the City will deduct such payments from his bi-weekly paycheck and remit these sums to the PODF c/o MPA within ten

calendar days after the payday from which the deduction was made. This agreement remains in effect only as long as the PODF remains as an IRS-approved 501(c)(3) non-profit charitable organization.

2. The MPA will reimburse the City for the costs of this check-off at the rate established by the City of Milwaukee per year per member of the unit who authorizes the deduction from his payroll check to the PODF.

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

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

CONCLUSION OF LAW

1. 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 on the above and foregoing Findings of Fact and Conclusion of Law, the Commission makes and issues the following

DECLARATORY RULING

1. The City of Milwaukee has a duty to bargain within the meaning of Secs. 111.70(3)(a)4 and 111.70(1)(a), Stats., with the Milwaukee Police Association over the disputed proposals set forth in Finding of Fact 3.

Given under our hands and seal at the City of Madison, Wisconsin this 3rd day of March, 1999.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Meier /s/

James R. Meier, Chairperson

Paul A. Hahn /s/

Paul A. Hahn, Commissioner

Commissioner A. Henry Hempe did not participate.

City of Milwaukee

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

The Applicable Legal Standards

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

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

"Collective bargaining" means the performance of the mutual obligation of a municipal employer, through its officers and agents, and the representative of its municipal employees 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 employee 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 employees 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 employees 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 employees 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 employees." 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.

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.

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

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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. 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).

The Pension Proposal

Given recent appellate court decisions regarding the City's Employees' Retirement System, the City contends that the Association's pension proposal infringes on the constitutional due process rights of current System members. Therefore, the City asserts the proposal is a prohibited subject of bargaining.

Citing WELTER V. CITY OF MILWAUKEE, 214 WIS.2D 484 (CT. APP. 1997) and MILWAUKEE POLICE ASSOCIATION, SUPRA, the City argues it is prohibited from bargaining over a proposal which uses System assets to benefit only a portion of the System's members. The City alleges the Courts have now held each individual System member has a property interest in the System's assets and that the diversion of such assets to benefit a limited group of members is an unconstitutional taking. Because it is clear the Association's proposed pension improvements would be funded by existing System assets, the City contends the Association proposal is a prohibited subject of bargaining.

Although the Association contends that its pension proposal does not specify how it must be funded, the City asserts that it is clear the proposed pension improvements would in fact be funded using System funds. Thus, the City argues the Commission must come to grips with the constitutionality of the System funding issue the City has raised. The City alleges that under WELTER and MILWAUKEE POLICE ASSOCIATION, even where existing System members will continue to receive their existing defined benefits, those System members suffer an unconstitutional taking of a property interest when increased benefits are provided to some but not all members of the System. While the Courts' holdings place substantial restraint upon

collective bargaining with respect to System established benefits, the City argues that those holdings cannot be ignored.

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Citing Sec. 111.70 (4)(jm) 4, Stats. and COUNTY OF LACROSSE, 180 WIS.2D 100 (1993), the Association argues it is clear that pension benefits are mandatory subjects of bargaining. It asserts that because its pension proposal does not identify how the benefits sought will be funded, the City's objection is irrelevant and the Commission could simply proceed to find the proposal to be a mandatory subject of bargaining. However, because it wishes to have the legitimacy of System funding established, the Association argues the Commission should proceed to resolve that issue in this proceeding.

Contrary to the City, the Association alleges that WELTER and MILWAUKEE POLICE ASSOCIATION do not hold that **increases** in benefits for Association represented employees would violate the due process rights of other System members. The Association contends that because other System members would continue to receive their benefits and because moneys will not be diverted from one fund to another, the holdings of the Court are not relevant to the mandatory nature of the Association's proposal. The Association asserts that if its proposal were funded from existing surpluses in the System's funds as well as from ongoing employer contributions, there would not be an unconstitutional taking from other System members.

Intervenor ALEASP argues that because it cannot be determined how the Association pension proposal would be funded, there is no existing duty to bargain "dispute" within the meaning of Sec. 111.70 (4)(b), Stats. Therefore, Intervenor ALEASP urges the Commission to avoid making an advisory opinion on the funding issue.

Should the Commission conclude it is appropriate to address the constitutional issue raised by the City, Intervenor ALESAP argues that WELTER and MILWAUKEE POLICE ASSOCIATION do not prohibit providing increased benefits to some but not all System participants.

Intervenor District Council 48 also argues that the Commission would be making an inappropriate advisory opinion if it were to resolve the merits of the City's constitutional argument. It asserts the Association has not proposed that the benefit improvements be funded from System surpluses nor required that System members lose rights without members' consent. District Council 48 notes that if the pension improvements were incorporated into a contract, the parties could agree that the benefits would not improve until and unless any necessary member consent occurred.

The constitutional issue raised by the City is premised on use of existing System assets to fund the proposed pension improvement. Because the pension proposal does not mandate any particular funding source, Intervenor District Council 48 and ALESAP (and to a lesser extent the Association) urge us to avoid resolving the constitutional issue. However, because the text of the proposal makes clear that the proposed benefits will flow from the System itself, we think the better course is to resolve the constitutional issue in this proceeding.

We have carefully considered the Court of Appeal's decision in *WELTER* and *MILWAUKEE POLICE ASSOCIATION* and the arguments of the parties to this proceeding. We conclude these decisions do not hold that an unconstitutional taking occurs whenever benefits are increased for some but not all of the System participants. In the context of the existing

surplus in the System, we further conclude that if the Association proposal becomes part of a successor contract and if the City funds the increased benefits from existing System assets, no violation of constitutional rights would occur.

Thus, we conclude the Association proposal is not a prohibited subject of bargaining and is a mandatory subject of bargaining primarily related to wages and conditions of employment.

The Police Officer Defense Fund Proposal

The City contends that this proposal is a permissive subject of bargaining because it is not primarily related to wages, hours and conditions of employment. It asserts that it should not be compelled to bargain over the direction of monies to any particular activity, philanthropic or otherwise. The City argues that the “talismanic” invocation of the term “wages” does not transform the proposal into a mandatory subject of bargaining.

The Association asserts the proposal is a mandatory subject of bargaining because it is related to wages and conditions of employment and is unrelated to public policy or the direction of the police department. It contends the proposal simply specifies how, when and where a portion of the employes’ wages are to be paid at the employes’ discretion. The Association argues that its proposal is no different than a proposal that would allow employes to directly deposit a portion of their wages to a financial institution or a deferred compensation plan.

We find the proposal to be a mandatory subject of bargaining primarily related to wages. It is apparent that the proposal simply gives the employes the option of using their wages in a certain fashion through payroll deduction. The Association correctly argues that the proposal is analytically indistinguishable from any other which seeks to give employes options as to how they will use the wages they earn. The City’s arguments go to the merits of whether such a proposal should become part of the contract -- not to its bargainability.

Dated at Madison, Wisconsin this 3rd day of March, 1999.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Meier /s/

James R. Meier, Chairperson

Paul A. Hahn /s/

Paul A. Hahn, Commissioner

Commissioner A. Henry Hempe did not participate.

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