STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of

INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, LOCAL 316, OSHKOSH

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

CITY OF OSHKOSH

Case 306
No. 57545
DR(M)-601

Decision No. 29971

Appearances:

Mr. William G. Bracken, Employment Relations Services Coordinator, Davis & Kuelthau, 219 Washington Avenue, P.O. Box 1278, Oshkosh, Wisconsin 54903-1278, appearing on behalf of the City of Oshkosh.

Schneidman, Myers, Dowling, Blumenfeld, Ehlke, Hawks & Domer, by **Attorney John B. Kiel,** 700 West Michigan Street, P.O. Box 442, Milwaukee, Wisconsin 53201-0442, appearing on behalf of the International Association of Firefighters, Local 316, Oshkosh.

FINDINGS OF FACT, CONCLUSION OF LAW AND DECLARATORY RULING

On May 7, 1999, the International Association of Firefighters, Local 316, Oshkosh, filed a petition with the Wisconsin Employment Relations Commission seeking a declaratory ruling pursuant to Sec. 111.70(4)(b), Stats., regarding a duty to bargain dispute between Local 316 and the City of Oshkosh.

Hearing was held in Oshkosh, Wisconsin on July 9, 27 and 30, 1999 by Examiner Peter G. Davis.

The parties filed post-hearing briefs, the last of which was received December 6, 1999.

At the request of the Examiner, the parties made a post-briefing effort to settle their dispute. On February 16, 2000, the parties advised the Examiner that settlement efforts had not been successful and the Commission should proceed to issue a decision.

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

FINDINGS OF FACT

1. International Association of Firefighters, Local 316, Oshkosh, herein Local 316 or the Union, is a labor organization functioning as the collective bargaining representative of firefighters employed by the City of Oshkosh.

2. The City of Oshkosh, herein the City, is a municipal employer having its principal offices at 215 Church Street, Oshkosh, Wisconsin.

3. The City provides fire protection and emergency rescue services 24 hours a day seven days a week to its citizens from six fire stations located throughout the City. The firefighter bargaining unit represented by Local 316 consists of approximately 85 City employees ranging in rank from Firefighter to Captain. These employees are managed by the Fire Chief, Assistant Fire Chief and six Battalion Chiefs.

4. Firefighting employees represented by Local 316 work an average of 56 hours per week -- a rotation of one 24 hour shift (7:00 a.m. to 7:00 a.m.) followed by two days off. The essential job responsibilities of employees during the 24 hour shift are responding to requests for firefighting and emergency services and being prepared to provide such services. Given these job responsibilities, employees generally remain in or in the immediate vicinity of the fire station during their 24 hour shift. During the 24 hour shift, employees are allowed to sleep after 8:00 p.m.

A management employee (the "Duty Chief") has overall general responsibility for each 24 hour shift.

When not responding to a request for firefighting or emergency services during the Monday through Friday 24 hour shifts, Local 316 represented employees typically perform various training, cleaning, and equipment inspection duties in the fire station from 7:00 a.m. to 11:00 a.m. and 1:00 p.m. to 4:30 p.m. with 11:00 a.m. to 1:00 p.m. reserved for the preparation and eating of lunch and the hours after 4:30 p.m. generally free of any assigned duty.

On Saturdays, training, cleaning and inspection duties are performed from 7:00 a.m. to 11:00 a.m. with the rest of the 24 hour shift typically free of any assigned duty.

On Sundays and holidays, employees are generally not assigned any duty during their 24 hour shift.

5. In 1993, Local 316 and the City had a dispute over what types of work firefighters could be required to perform. That dispute was settled by an agreement that firefighters could not be required to perform (but could volunteer to perform) the following types of work within the fire station or on the fire station grounds:

A. Painting
B. Roofing
C. Concrete/Blacktop
D. Repair or installation of fences
E. Remodeling/construction
F. Carpenter work
G. Electrical work
H. Plumbing
I. Installation/rewiring of communication equipment
J. Computer work
K. Installation/repair of equipment
L. Gardening, landscaping, sodding

Under the terms of this agreement, firefighters have painted rooms and varnished and installed shelving on a volunteer basis in various fire stations at the request of or with the approval of the City.

6. During the generally duty free periods of a 24 hour shift, firefighting employees are allowed to engage in various types of recreational activity. City of Oshkosh Fire Department Policy 116.04 provides:

> No personnel (sic) projects are authorized. Items or projects which are considered "hobby related" are permitted and need not be removed from the fire station, if the project can be stored in an assigned personal locker. Personnel will be responsible for any clean-up. Department stoves are not authorized for use with personal projects.

Under Policy 116.04, employees are limited to recreational activity such as reading, playing cards, watching television, listening to music, using a computer, working on personal finance or collections (stamp/coin, etc.), and improving/maintaining physical fitness by walking/running in the immediate vicinity of the fire station, lifting weights, playing basketball, etc.

Under Policy 116.04, "personal" projects are those which involve use of power tools, knives, solvents or paints while "hobby related" projects are those which do not involve use of such items.

Through the following proposal, Local 316 seeks to bargain over the right of employees to engage in additional types of recreational activity during duty free periods of a 24 hour shift:

> Firefighters shall be allowed to engage in standby time activities that do not create an unreasonable risk to health and safety. Employees shall be prohibited from bringing hazardous chemicals, tools, and/or equipment into fire houses without permission of the duty chief. Permission shall not be unreasonably denied. Any denial hereunder shall be based on risk to safety and health.

Under the Local 316 proposal, firefighters would be allowed to engage in the following activities -- all of which have been engaged in by City firefighters at various times in the past and all of which Local 316 asserts do not present an unreasonable risk to the safety and health of employees or citizens and will not delay response time to requests for firefighting/emergency services.

- Assembling a pre-fabricated ice fishing tent
- Washing, cleaning and waxing personal vehicles
- Building models (cars, airplanes, etc.)
- Maintaining bicycles
- Minor maintenance and repair of personal vehicles, ATV's, snowmobiles, boats, boat motors, camping trailers, lawn mowers, etc.
- Canning, candy-making, cleaning and filleting fish, butchering deer-for personal/family consumption
- Leather tooling
- Stripping, varnishing, painting furniture (with commercially available products)
- Woodworking and wood carving (including use of power tools)
- Making fishing poles, repairing fishing reels, tying flies

During the many years that employees were allowed to engage in the foregoing activity, there were no significant injuries. There is the potential for injuries to occur when employees engage in personal activities which the City continues to allow (i.e. weight lifting, basketball, jogging, minor volunteer remodeling-painting, varnishing, etc.).

Years ago, City firefighting employees would on occasion overhaul engines and do welding and bodywork on personal vehicles, load shotgun shells, and melt lead for fishing lures. Through its proposal, Local 316 does not seek to bargain over the right of employees to perform these activities.

When viewed in the context of the ability of firefighters who are showering after exercise or running outside the fire station to nonetheless timely respond to requests for firefighting or other emergency services, emergency response time would not be harmed if employees were to engage in any of the activities covered by the Local 316 proposal.

When viewed in the context of the ability of firefighters who are using tools/chemicals on City approved projects to nonetheless safely respond to requests for firefighting and other emergency services, the quality of the emergency services would not be harmed if employees were to engage in any of the activities covered by the Local 316 proposal.

7. Historically, City firefighters have been allowed to bring personal vehicles into the fire station where they are working for various personal purposes including maintenance, washing, and avoiding cold/inclement weather. The presence of personal vehicles has never interfered with the timely provision of emergency services. In July, 1998, the Fire Chief decided to restrict the ability of firefighters to bring personal vehicles into the fire station and promulgated City Fire Department Policy 116.03 which provides:

> Privately owned vehicles/boats/snowmobiles, etc. are not be (sic) permitted in any fire station without permission of the Fire Chief.

Pursuant to this Policy, employees were not allowed to bring personal vehicles into a fire station for any purpose. From time to time, the City does allow the vehicles of non-employees (vendors, visiting fire chiefs, etc.) into a fire station. The Policy also allows the Fire Chief to park his personal vehicle in a fire station.

Through the following proposal, Local 316 seeks to bargain over the right of employees to bring vehicles into a fire station.

> Reasonable use of City facilities by on-duty firefighters for personal activities shall be allowed.

8. Historically, City firefighters have been allowed to use City equipment/ material/utilities when washing a personal vehicle or performing other types of personal projects. In July 1998, the Fire Chief decided to restrict the availability of such equipment/material/utilities and promulgated Fire Department Policy 116.02 which states:

> No city/county/fire department materials are available for personal use without the consent of the Fire Chief.

Under this Policy, from time to time, non-employees (visiting fire chiefs, vendors) are allowed to use City equipment/material/facilities in a fire station. The Policy also allows the Fire Chief to wash his personal vehicle in a fire station.

Through the following proposal, Local 316 seeks to bargain over the right of firefighters to use City equipment/material/utilities.

> Reasonable use of City utilities for personal activities by on-duty firefighters shall be allowed.

9. The policies/proposals set forth in Findings of Fact 6-8 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

The policies/proposals set forth in Findings of Fact 6-8 are mandatory subjects of bargaining.

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

DECLARATORY RULING

The City of Oshkosh has a duty to bargain within the meaning of Secs. 111.70(1)(a) and (3)(a)4, Stats., with Local 316 over the policies/proposals set forth in Findings of Fact 6-8.

Given under our hands and seal at the City of Madison, Wisconsin this 18th day of October, 2000.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

A. Henry Hempe /s/
A. Henry Hempe, Commissioner

Paul A. Hahn /s/
Paul A. Hahn, Commissioner

I concur in part and dissent in part.

James R. Meier /s/
James R. Meier, Chairperson

City of Oshkosh

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

The Applicable Legal Standards

Before considering the specific policies/proposals at issue herein, it is useful to set out the general framework within which we determine whether a matter is a mandatory or permissive 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.
>
> Section 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 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)

POSITIONS OF THE PARTIES

The City

The City argues that the disputed portions of Policy 116 and the Union's responsive bargaining proposal are both permissive subjects of bargaining.

In support of its position, the City contends that Policy 116 directly relates to the City's ability to control its materials and facilities and that the determination as to how facilities will be used is primarily related to the management and direction of the City. The City additionally asserts that Policy 116 reflects the City's right to determine what employees do while being compensated by the City.

The City contends that bargaining over the Union proposal (which allows on duty firefighters to work on personal projects using City materials and facilities and to park personal vehicles in fire stations) will jeopardize the City's ability to fulfill its mission and interfere with the management right to control facilities and material. Furthermore, work on personal projects creates safety risks for the employees and others. These risks expose the

City to legal liability, increased insurance costs and detract from the Department's ability to respond to emergencies -- thus threatening public safety.

The City asserts that because the projects in dispute are "personal," the Union proposal does not relate in any way to "wages, hours and conditions of employment." Because the personal projects have nothing to do with the job duties of a firefighter and do not benefit the City, the City argues that the Union proposal is not a mandatory subject of bargaining.

Consistent with the mission of the Department, Policy 116 reflects the City's determination that the two primary responsibilities of firefighters are responding to emergencies and preparing to respond to emergencies. Commission precedent provides that the employer has the right to unilaterally assign employees duties that are fairly within the scope of their job responsibilities. CITY OF WAUWATOSA, DEC. NO. 15917 (WERC, 11/77); OAK CREEK SCHOOLS, DEC. NO. 11827-D, E (WERC, 9/74); MILWAUKEE SEWERAGE COMMISSION, DEC. NO. 17025 (WERC, 5/79). Given this precedent, the City asserts it should have the right to issue policies that ensure that employees are prepared to respond to emergencies in the most effective manner possible. If the City concludes that allowing employees to engage in risky personal projects detracts from the employees' ability to respond to an emergency, the City should have the unilateral right to ban such personal activities and direct employees to remain fully alert to respond to emergencies.

Looking more specifically at **personal use of Department material**, the City argues that it need not bargain over this issue because it primarily relates to the City's right to manage and control its facilities and materials. While it may be convenient for employees to use City materials such as electricity, stoves, and water, the City asserts that convenience does not rise to the level of a "condition of employment." Like the ability to ban employee purchase of material found to be permissive in CITY OF MADISON, DEC. NO. 28256-B (SHAW, 1/96), AFF'D BY OPERATION OF LAW, DEC. NO. 28256-C (WERC, 2/96), the City argues that it has an overriding interest in maintaining the public's trust and avoiding conflicts of interest. To that end, the City has personnel policies that ban unauthorized use of City equipment for non-City purposes and subject violators to discipline. Thus, the City asserts that use of material is primarily related to management and direction of the City in furtherance of its responsibility "to act for the government and good order of the jurisdiction which it serves, its commercial benefit and the . . . welfare of the public to assure orderly operations and functions within its jurisdiction . . ." under Sec. 111.70(1)(a), Stats.

Contrary to the contention of the Union, the City asserts that firefighters are no different than any other employees. Thus, firefighters are not entitled to a special benefit not otherwise available to other employees or to the public in general. Firefighters are being paid to work -- not to engage in personal projects. The right to use employer materials is not akin to the employer provided turkey found to be a mandatory subject of bargaining in

RICHLAND COUNTY, DEC. NO. 22939-A (ROBERTS, 4/86), AFF'D BY OPERATION OF LAW, DEC. NO. 22939-B (WERC, 5/86). The City argues that use of materials is more of a privilege/convenience than a benefit and thus does not override the City's express right to establish reasonable work rules that control its facilities and material.

Looking more specifically at the right of employees to bring **privately owned vehicles into a fire station,** the City contends that this issue is a permissive subject of bargaining because employee convenience does not outweigh the City's interest in controlling its facilities. Citing SCHOOL DISTRICT OF SHULLSBURG, DEC. NO. 20120-A (WERC, 4/84), the City argues that because the presence of privately owned vehicles in a fire station interferes with the normal operation of the Department, the City need not bargain over this issue. The City notes that because space is at a premium in a fire station, the presence of one private vehicle in the wrong spot can interfere with the timely response of emergency vehicles. Citing MILWAUKEE BOARD OF SCHOOL DIRECTORS, DEC. NO. 23208-A (WERC, 2/87) and MILWAUKEE BOARD OF SCHOOL DIRECTORS, DEC. NO. 20093-A (WERC, 2/83), the City argues that the Commission has historically acknowledged management's interest in controlling its own facilities.

Like the question of where police officers eat that was found to primarily relate to public safety in CITY OF MILWAUKEE, DEC. NO. 29198-A (GRECO, 8/98) AFF'D BY OPERATION OF LAW, DEC. NO. 29198-B (WERC, 9/98), the City argues that parking personal vehicles in the station also primarily relates to public safety because the presence of such vehicles jeopardizes response time.

Contrary to the Union, the City asserts that BROWN COUNTY, DEC. NO. 20620 (WERC, 5/83) supports its position in this litigation. Unlike the situation in BROWN COUNTY, the City argues that it is attempting to regulate use of its facilities -- not employee conduct.

Looking more specifically at the question of **performing personal projects on work time,** the City argues that the regulation of personal activities on work time is a permissive subject of bargaining. Because use of the City's materials and facilities is primarily related to the management and direction of the City, the City asserts that it has the unilateral right to control the types of projects employees can perform during work time.

The Commission has consistently held that the employer need not bargain over how the workday is allocated. Like the decision of whether police officers can use part of their workday to pick up and drop off fellow officers at home found to be a permissive subject of bargaining in CITY OF RIVER FALLS, DEC. NO. 29009 (WERC, 2/97), the City argues that the question of whether firefighters can use part of their workday to perform personal projects is also a permissive subject of bargaining. Further, in CITY OF WAUKESHA, DEC. NO. 17830

(WERC, 5/80), the Commission held that even control of firefighters' off-duty time was a permissive subject of bargaining primarily related to public safety and the mission of the fire department.

In addition, the City argues that firefighters should not have the right to bargain over the ability to perform projects that expose themselves, co-workers and the public to increased personal risk and the City to increased financial risk. The City asserts that the evidence in the record establishes that personal projects create such risks. The City contends that it must have the unilateral right to determine what, if any, risk it is willing to accept in the context of the Department's overall mission. Employee and public safety are not matters over which the City should be compelled to bargain. The City cites the decisions of several grievance arbitrators as additional support for its position in this regard.

Given all of the foregoing, the City contends that Policy 116 and the Union's responsive proposal are both permissive subjects of bargaining.

The Union

The Union contends that Policy 116 and the Union's responsive proposal are mandatory subjects of bargaining primarily related to firefighters' conditions of employment.

To the extent the City argues that the matters in dispute are not even "conditions of employment" because they do not benefit the City, the Union asserts the City is proposing an analytical framework that is inconsistent with the existing "primarily related" test. The Union contends that there is no statutory or judicial support for the proposition that only those matters that benefit the employer are "conditions of employment." However, even if the Commission concludes that the City's approach has some merit, the Union disputes the contention that the City derives no benefit from firefighters' ability to work on personal projects, wash cars in the station house, etc. The evidence establishes that these types of activities improve morale and relieve stress. Thus, even under the City's analytical approach, the Union argues that it should prevail.

The Union alleges that CITY OF WAUWATOSA, SUPRA, and RICHLAND COUNTY, SUPRA support its position. In WAUWATOSA, the Commission acknowledged the unique work shift of a firefighter as part of its analysis. In RICHLAND COUNTY, the Examiner correctly concluded that even relatively small items of value are nonetheless mandatory subjects of bargaining.

The Union alleges that Policy 116 eliminates several long-standing "conditions of employment."

First, the Union contends that the substantial restriction on the type of projects firefighters can work on while awaiting an emergency call is a major change in "conditions of employment." The Union argues that the right to select a reasonable project of the employee's own choosing is a significant condition of employment which helps keep the employee's mind fresh and active during a 24 hour shift.

Second, the Union argues that eliminating the right of employees to park personal vehicles inside (particularly during the winter) deprives employees of a significant benefit.

Third, eliminating access to Department material further restricts the types of activities an employee can perform and thus represents a loss of a "condition of employment."

Citing Arbitrator Crowley in WINNEBAGO COUNTY (5/99), the Union asserts that all three of these unilateral changes are primarily related to conditions of employment and thus must be bargained.

The Union argues that there is no persuasive evidence that the personal projects or parking privileges pose safety risks or increase emergency response time. Nonetheless, the Union notes that it has incorporated a reasonableness standard into its proposal so as to protect the City's interest in assuring that safety/delayed response time cannot become a problem.

Even in the absence of safety/delayed response concerns, the Union contends that the City has taken the radical view that simply because the City owns the facilities/materials and is paying the employees during the time in question, the City can impose any restrictions it wishes. The Union argues that acceptance of the City's contention would "seriously undermine the efficacy of collective bargaining in this State, particularly among firefighters."

The Union asserts that the evidence it presented as to current practice in Wisconsin and nationally is relevant to the question of whether the practices outlawed by Policy 116 are mandatory subjects of bargaining. That evidence establishes that if the City were to prevail in this litigation, the conditions of employment for Oshkosh firefighters would be substantially less favorable than those enjoyed by firefighters across the State and nation.

The Union concludes by noting that a determination that these practices are mandatory subjects of bargaining only means that the parties must bargain over these issues. The City is not compelled to agree to the Union's proposal.

Given all of the foregoing, the Union asks that Policy 116 and the Union's proposals be found mandatory subjects of bargaining.

DISCUSSION

When applying the applicable legal standards to the dispute before us, we begin with the question of whether the rights sought by the employees regarding use City facilities and material during paid time have a relationship to "wages, hours and conditions of employment."

Relationship to Wages, Hours and Conditions of Employment

The City argues that the rights asserted (i.e. to work on personal projects and to park and/or wash and/or perform minor maintenance on personal vehicles in or outside the fire station using City material and utilities) have no relationship to wages, hours and conditions of employment because they are only personal conveniences to the employees and are unrelated to their assigned duties. We reject this City argument. That a matter is a personal convenience unrelated to an employee's duties is irrelevant to the question of whether the matter has a relationship to wages, hours and conditions of employment. Thus, for instance, in RACINE SCHOOLS, DEC. NO. 20652-A (WERC, 1/84) AFF'D CT. APPEALS, (DIST. III, UNPUBLISHED, 3/86) we concluded that the "personal security and convenience" to employees of having locked storage space at the work place was a sufficient relationship to "wages, hours and conditions of employment" to make such a proposal a mandatory subject of bargaining -- without regard to whether such storage space was related to the performance of employee duties.

As argued by the Union, the rights sought (and previously enjoyed) by the firefighters are clearly a type of "fringe benefit" which is part of the compensation the employees propose to receive in exchange for their services. As fringe benefits, the rights sought have a clear relationship to "wages, hours and conditions of employment."

Having found that the rights sought have a relationship to wages, hours and conditions of employment, our analysis shifts to considering the relationship of these rights to employer/management/public policy interests identified by the City.

Relationship to Employer Interests

Allocation of the Work Day

Among other matters, the City cites existing Commission precedent to the effect that an employer is not obligated to bargain over how the work day is allocated. CITY OF RIVERS FALLS, DEC. NO. 29009 (WERC, 2/97). See also OAK CREEK-FRANKLIN SCHOOL DISTRICT, DEC. NO. 11827-B (WERC, 9/74); MILWAUKEE BOARD OF SCHOOL DIRECTORS, DEC.

NO. 20093-A (WERC, 2/83). This precedent is based on the view that the employer interests in public policy/resource allocation/management and direction of the workforce which are implicated by how the work day is allocated outweigh the impact on wages, hours and conditions of employment. The City contends that allowing bargaining over the ability of employees to perform personal projects during paid time would be contrary to this existing precedent.

This City argument brings into play the unique 24 hour work schedule of firefighters and prior Commission precedent regarding the portion of that 24 hour period during which duties other than firefighting can be assigned. In CITY OF WAUWATOSA, DEC. NO. 15917 (WERC, 11/77), AFF'D CT. APPEALS, (DIST. I, UNPUBLISHED, CASE NO. 80-291, 12/80), we concluded that in the context of a 24 hour work schedule, the employer does not have unilateral control over how the entire 24 hour shift will be spent beyond the provision of emergency services and thus that the employer must bargain over how much of the 24 hour period is available for the performance of non-emergency duties. Therefore, in the context of a 24 hour work shift, once the parties bargain the portion of that 24 hour period within which non-emergency duties can be assigned (which translates into the "work day" as used in the RIVER FALLS, OAK-CREEK, MILWAUKEE SCHOOLS precedent cited above), the employer need not bargain over how the "work day" portion of the 24 hour shift is to be spent so long as the duties assigned are fairly within the scope of a firefighter's duties. See CITY OF WAUWATOSA, SUPRA. Applying the foregoing to the dispute at hand, if the rights sought could be exercised within the "work day" (presently the period between 7:00 a.m. and 4:30 p.m. Monday through Friday and 7:00 a.m. and 11:00 a.m. Saturday), the management/resources allocation/public policy interests would predominate over the relationship to wages, hours and conditions of employment. However, through the references in its proposals to "standby time" and "personal activities," it is clear the Union does not propose that any of the rights in question can be exercised during the "work day" portion of the 24 hour shift. Thus, the precedent cited by the City does not render the Union proposals permissive subjects of bargaining.

Health and Safety-Interference with Mission-Increased Liability

The City correctly argues that it has a management/public policy interest in minimizing risks to employee and public safety. This interest is statutorily acknowledged in Sec. 111.70(1)(a), Stats., which specifies the following:

> 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 . . .

Particularly as to personal projects, the City argues that the rights sought by the employees will increase existing risks to employee and/or public safety. The Union responds by asserting that its personal project proposal incorporates protections to address the City's concerns and noting that there are risks inherent even in the personal activities that the City currently allows.

First, there is the question of whether performance of personal projects or parking personal vehicles in the fire station will delay employee response to a call for emergency service. In the context of the record before us, we conclude that the timely provision of emergency services will not be impacted by the proposals before us. As noted in Finding of Fact 6, employees are presently allowed to engage in various types of activities in and around the fire station (i.e. exercising, mowing grass, and performing the services referenced in Finding of Fact 5) which will of necessity delay the employee's ability to be properly dressed/equipped for an emergency response. The delays produced by these activities do not prevent the employees from nonetheless being ready to provide emergency services within a timeframe the City has found to be acceptable. There is no evidence in the record that the delay produced by the performance of personal projects will hinder response time to a greater extent than the hindrance created by presently allowed activity. There is no evidence in the record that a personal vehicle parked in a fire station has ever delayed an emergency response. Given the foregoing, we conclude that the rights sought will not interfere with the City's mission of providing timely emergency services.

The City has also expressed some concern that the safety of citizens receiving emergency services may be compromised by chemical residue on employees who were using solvents, etc. on personal projects prior to an emergency response. As was true for delay in response time, we are satisfied that whatever such risk would be created through personal projects is no greater than the risk already accepted by the City when it allows employees to use solvents, varnishes, etc. on projects for which they volunteer in the fire stations.

Given all of the foregoing, we conclude that the health and safety of citizens receiving emergency services will not be compromised by the proposals in dispute.

The City also argues that the risk of injury to employees is increased by some of the activity/material/tools which employees will use to complete personal projects. The Union counters by noting that the activities in question have not produced injury in the past and that there is risk of injury in the activities the City would allow.

Because the Union proposals will broaden the range of activities presently allowed, the proposals will necessarily increase the existing risk of injuries at the workplace. Whether viewed as a concern about City liability for the risk, about increased worker's compensation costs, about maintaining as healthy a workforce as possible or about all of the foregoing, we are satisfied that avoidance of such an increased risk is a management interest that is

legitimately considered when concluding whether the policies/proposals are mandatory or permissive subjects of bargaining. However, the strength of this interest is limited by the extent to which existing permitted activities generate these same risks.

Control of Facilities/Equipment

The City cites its management interest in controlling/determining the appropriate use of its own facilities and equipment. While the City is correct that this is a management interest which is relevant to the mandatory/permissive analysis, the presence of this interest does not dictate that a matter must be found to be a permissive subject of bargaining. As reflected in prior Commission cases, this management interest must be balanced against the relationship to wages, hours and conditions of employment to determine whether a matter is a mandatory or permissive subject of bargaining.

Thus, when balancing these competing relationships in BLACKHAWK TECHNICAL COLLEGE, DEC. NO. 16640-A, (WERC, 9/80), the Commission found that a proposal mandating the provision of restrooms and lounges in a school building was a mandatory subject of bargaining but that a proposal mandating that existing restroom/lounge facilities be maintained was a permissive subject of bargaining. See also SCHOOL DISTRICT NO. 5, FRANKLIN, DEC. NO. 21846, (WERC, 7/84).

As noted earlier herein, in RACINE SCHOOLS, DEC. NO. 20652-A (WERC, 1/84), AFF'D CT. APPEALS, (DIST. III, UNPUBLISHED, CASE NO. 85-0158, 3/86), the Commission concluded a proposal mandating provision of lockable storage space for teachers was a mandatory subject of bargaining based on the employee convenience and personal security thereby provided and the absence of any "significant" interference with the employer's ability to manage its facilities.

In SCHOOL DISTRICT OF JANESVILLE, DEC. NO. 21466 (WERC, 3/84) and SCHOOL DISTRICT OF SHULLSBURG, DEC. NO. 20120-A, (WERC, 4/84), the Commission concluded that a proposal allowing union use of employer facilities/equipment when meeting its responsibilities as the exclusive collective bargaining representative would be a mandatory subject of bargaining despite the intrusion into management control of facilities -- but only if the proposal contained a proviso specifying that use would not interfere with school functions/activities and previously scheduled community activities.

In BROWN COUNTY, DEC. NO. 20620, (WERC, 5/83) and BROWN COUNTY, DEC. NO. 27477 (WERC, 12/92), in the context of a no smoking ban, the Commission concluded that an employer's control of facility/public policy health and safety interests predominated over the employee "condition of employment" interests -- but only in those buildings where there were no exceptions for non-employees/visitors/clients/patients. In buildings with such

exceptions, the Commission concluded that such a ban was a mandatory subject of bargaining, noting that the exceptions undercut the cited employer interests to an extent that the employer was seeking to regulate employee conduct more than control facilities or advance a consistent public policy interest.

How does the foregoing precedent impact on the resolution of the dispute before us? BLACKHAWK and RACINE establish that the degree to which a proposal interferes with facility/equipment control is an important analytical issue. The BROWN COUNTY decisions reflect that the presence of exceptions can weaken the strength of the management interest. JANESVILLE and SHULLSBURG establish the need to be concerned with whether proposed facility/equipment use interferes with the facility's/equipment's primary use.

Applying the foregoing to the dispute before us, we conclude that the strength of the City's management interest in controlling its facilities/equipment is significantly limited by: (1) the exceptions to the no-use Policy which exist for vendors, visiting chiefs, and the Fire Chief; and (2) the absence of any persuasive evidence that the Local 316 proposals will interfere with providing emergency service or compromise the health and safety of citizens receiving emergency services.

Public Trust

The City cites an interest in maintaining the public trust which it argues would be compromised by use of fire stations as employee parking garages/vehicle maintenance sites. We concur that maintenance of the public trust is a legitimate consideration in a mandatory/permissive analysis. However, because the previously noted exceptions to the ban on use of City facilities/equipment also have the potential to negatively implicate the public trust, the strength of this interest is diluted.

Balancing of Competing Interests

Summarizing the foregoing, we have concluded the following:

1. The rights in questions are "fringe benefits" which have a relationship to wages, hours and conditions of employment.

2. Exercise of the rights in questions will not negatively impact the timeliness or the quality of emergency services.

3. The rights in question impact on the City's management/employer public policy interests in: (a) controlling its facilities/equipment; (b) maintaining a safe work

> place/limiting its liability; and (c) maintaining the public trust. However, the strength of these interests is diluted to the extent the City allows non-employees/management employees to use its facilities/equipment and to the extent employees are presently allowed to engage in activities which can produce injuries/risk/liability.

When balancing the City's interests against the relationship to wages, hours and conditions of employment, we conclude that a very close question is presented. On balance, we conclude that the proposals/policies in dispute primarily relate to wages, hours and conditions of employment. Particularly important to our conclusion is the absence of any persuasive evidence that the Union proposals will negatively impact on the timeliness or quality of emergency services. Important to us also is the "reasonableness" standard built into the Union proposals that we are satisfied will allow management to regulate the activities/access in question to insure that safety/liability risks are minimized.

As both parties have correctly noted in their written argument, our decision does not constitute any endorsement of the merits of either the proposals put forth by the Union or the policies of the City. Our decision only reflects our view that the Union has the right to bargain over the policies/proposals during the parties' efforts to reach agreement on a new contract.

Dated at Madison, Wisconsin this 18th day of October, 2000.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

A. Henry Hempe /s/
A. Henry Hempe, Commissioner

Paul A. Hahn /s/
Paul A. Hahn, Commissioner

City of Oshkosh

CONCURRING AND DISSENTING OPINION OF CHAIRPERSON JAMES R. MEIER

I concur with the majority's decision as it relates to the use of City utilities and to requiring bargaining regarding some of the standby activities. I dissent from the majority's decision as to certain other of the standby activities at issue and as to the presence of personal vehicles in the fire station.

Based on the record, I dissent because although parking personal vehicles in a fire station and pursuit of certain personal standby activities both constitute conditions of employment, after applying the balancing test, I find the City's interest in the management and direction of fire and emergency services outweighs the employees' interests and thus these matters are permissive subjects of bargaining.

In November of 1989, Stanley Tadych became Fire Chief of the City of Oshkosh Fire Department. Workplace safety has been a focus of his tenure and his management team has been pro-active in developing policies to improve workplace safety. The workplace for Oshkosh firefighters includes the station itself, the emergency vehicles they utilize and the fire scene or emergency scene. Safety policies instituted include mandatory use of protective equipment including breathing apparatus, hearing protection, face protection and safety alarm protection for the emergency scenes as well as seat belt use in vehicles. [Tr. 235-36]

The Department, in pursuance of its mission "to provide for the personal safety (and) protection of life and property to the inhabitants of Oshkosh" has a response time standard of four minutes from receipt of a call to arrival at the scene.

Firefighters pursue a variety of activities to pass the time while on standby status. Over the years, one or the other of the Oshkosh firefighters have engaged in one or the other of the personal activities or projects as listed on Exhibit 14 (attached) which was drawn up by Fire Chief Tadych for the hearing in this case.

In addressing workplace safety concerns, and in order to help assure the best possible response time, Chief Tadych promulgated policies affecting the firefighters' use of fire station premises and limiting how the firefighters used standby time for personal activities. The latest version of those policies is:

116.02 DEPARTMENTAL MATERIAL

No city/county/fire department materials are available for personal use without the consent of the Fire Chief.

116.03 PRIVATELY OWNED VEHICLES

Privately owned vehicles/boats/snowmobiles, etc. are not be (sic) permitted in any fire station without permission of the Fire Chief.

116.04 PERSONAL PROJECTS

No personnel (sic) projects are authorized. Items or projects which are considered "hobby related" are permitted and need not be removed from the fire station, if the project can be stored in an assigned personal locker. Personnel will be responsible for any clean-up. Department stoves are not authorized for use with personal projects.

On the second day of the hearing, after an extensive period of mediation by the Examiner, the Union offered the following proposed contract language for the stated purpose of narrowing the issues:

Reasonable use of City utilities for personal activities by on-duty firefighters shall be allowed.

Reasonable use of City facilities by on-duty firefighters for personal activities shall be allowed.

Firefighters shall be allowed to engage in standby time activities that do not create an unreasonable risk to health and safety. Employees shall be prohibited from bringing hazardous chemicals, tools, and/or equipment into fire houses without permission of the duty chief. Permission shall not be unreasonably denied. Any denial hereunder shall be based on risk to safety and health.

The offer was accepted by the Examiner over the objection of the City because the Examiner believed the language related to the issues raised by the petition and helped clarify the dispute between the parties.

116.02 Department Material and 116.03 Privately Owned Vehicles

Regarding Policy 116.02, relative to utilization of Department materials for personal use and the Union's proposed language on use of City utilities, I find both to be mandatory subjects of bargaining and hold that the City of Oshkosh has a duty to bargain regarding the

same. I see the availability of electricity and water for personal use as essentially fringe benefits, the use of which should be subject to bargaining.

Regarding Policy 116.03 relative to privately owned vehicles in fire stations, I would hold that (1) the City's interest in controlling the fire fighting equipment floor to help provide for firefighter safety and to provide fire services to its citizens and (2) the citizens' right to receive emergency services unimpeded by employees' personal vehicles outweighs the employees' interest in washing, waxing, etc., their personal vehicle on the fire equipment floor. Therefore, I would hold that the City has no duty to bargain over Policy 116.03 or the Union's proposed language as it relates to allowing the presence of personal vehicles in fire stations. To me, it is simple common sense that the presence of personal vehicles in the fire station is inherently incompatible with the mission of the Department. Citizens should not have to worry about personal vehicles obstructing fire fighting equipment or related issues such as wet slippery floors from the washing of personal vehicles. Employee morale might even improve if, in an emergency, employees do not have to dodge personal vehicles, etc. Thus, regarding the Union's proposed language relative to the use of City facilities, which was offered to require bargaining over personal vehicles in fire stations, I find the language is a permissive subject of bargaining except as it may apply to the subjects other than personal vehicles in fire stations. 1/

1/ I note that the use of the phrase "without the consent of the Fire Chief" in both 116.02 and 116.03 would cause the ordinary employee to be concerned with the potential for favoritism and the arbitrary and capricious granting of approval. Regardless, if the subject is a permissive rather than mandatory subject of bargaining, the inartful phrasing of a rule does not make it a mandatory subject of bargaining.

116.04 Personal Projects

Regarding Policy 116.04 and the Union's standby time proposal, I read the majority's analysis as starting with a presumption that since one or another employee has engaged in an activity listed on Exhibit 14 at some time in the past, the activity constitutes a condition of employment and that it is the City's burden to prove that the City's interest in workplace safety and providing public service outweighs the employees' interest in pursuing the activity. The majority then reasons that since one or another of the employees have engaged in one or another of the activities in the past with only minor safety repercussions and since the City would allow a little of some of a like activity for its own benefit, the City's interest in safety and service does not outweigh the employees' in filleting fish, etc.

Through the testimony of the only expert witness in this case, the City called into question the safety of many of the activities listed in Exhibit 14. The City has a substantial interest in the safety of these activities in that the Personal Comfort Doctrine of the Wisconsin Workers Compensation Law imposes liability on an employer for injuries received by employees in pursuing personal activities when the injury occurs in the workplace and during hours of compensation, even though the employee is performing no services for his/her employer. See MARMOLEJO V. ILRH DEPARTMENT, 92 WIS.2D 674, 678 (1979) and the PERSONAL COMFORT DOCTRINE, 1960 WIS. L. REV. 91. For instance, compensation has been ordered where the employee was injured while making a tool box for his own tools. See KIMBERLY-CLARK COMPANY V. INDUSTRIAL COMMISSION, 187 WIS. 53 (1925). Here, the majority has ruled that the City must bargain exposure to Workman's Compensation liability for personal activities such as canning, fish filleting and furniture refinishing up to eight hours per day, assuming the firefighters work eight hours and sleep eight hours per shift. Further, the City has an interest in the safety of these activities as it relates to its ability to provide services to the public.

This case commenced with a petition by the Union for a declaratory ruling by the Commission to decide whether these sections of Policy 116 concern mandatory subjects of bargaining. The petition notes that the Commission determines whether a matter is a mandatory or permissive subject of bargaining based on a case-by-case analysis. The graveman of the petition's assertions is that revised Policy 116 constituted a unilateral change in working conditions -- the equivalent of a prohibited practice complaint. If this case arose on a complaint alleging a prohibited practice for refusing to bargain, the burden of proof would be on the Complainant of establishing the violation of law. See LACROSSE COUNTY INSTITUTION EMPLOYEES V. WERC, 52 WIS.2D 295, 302 (1971); MADISON TEACHERS, INC. V. WERC, 218 WIS.2D 75, 86 (1998). As the petition alleges the same issues as would be raised on a prohibited practice complaint for failure to bargain, I believe that, if either party has the burden of proof, the Union, as the petitioner, would have the burden to prove that the activities it wishes to pursue in the workplace primarily relate to "wages, hours and conditions of employment" as that term is used in Sec. 111.70(1)(a), Stats., because the employees' legitimate interest in these activities outweighs the City's concerns about the restriction on managerial prerogatives or public policy. Based on this record, the Union would not be able to meet any such burden as to some of the proposed standby activities.

Consistent with what I understand to be the Commission's duty to determine the bargainability of specific employee rights, I find that the Union wisely removed reloading shotgun shells, placing cars on jacks to perform mechanical duties, welding and body work, engine overhaul, lead melting and drill press operation from the list of activities the firefighters wish to continue pursuing. I commend the Union for making a considered effort to pare the most risky activities from Exhibit 14. However, I believe the Union and the majority have set the bar too low. I would add canning, candy making, fish filleting, deer butchering and wood carving as activities of heightened safety risk such that the City's interest in maintaining a safe

workplace and assuring the provision of prompt emergency services outweigh the employees' interests in pursuing these standby time activities, and would not order bargaining on those topics. While Policy 116.04 may not be well crafted, I am satisfied that the Fire Chief acted for the "good order of the municipality" and the "safety and welfare of the public" and that these concerns should predominate and that the City should have no duty to bargain over them. See CITY OF CUDAHY DEC. NO. 17139-A, (MCGILLIGAN, 1/80) AFF'D. BY OPERATION OF LAW, DEC. NO. 17139-B (WERC, 2/80).

What would the majority have done in this case if the firefighters had not struck shell reloading, etc., from Exhibit 14? From this decision it appears the majority would have held that since no fire station blew up and no one admitted to reduced response time, that these are more of the activities where the firefighters' interest outweighs the City's interest in managing the workplace and the public's interests in receiving emergency services. Are there no activities of a personal nature that are too risky as to be verboten in a fire station? The majority's decision provides little guidance. 2/

2/ I note that in CITY OF WAUKESHA (FIRE DEPARTMENT) DEC. NO. 17830 (WERC, 5/80), the Commission has held that a proposal requiring that off duty time of firefighters be free of City control relates to a non-mandatory subject of bargaining (subject however to impact bargaining) while the majority here finds no limits as to what firefighters may do during standby time.

Given the absence of guidance and the broad nature of the Union's proposal, I am very concerned that if the Union proposal becomes part of a future contract, disputes will arise as to whether other standby activities not listed on Exhibit 14 are permissive. Such disputes will be decided by a grievance arbitrator – not by the Commission. By considering the Union's broad proposal (as opposed to limiting ourselves to the specific activities listed on Exhibit 14), I am very concerned that we have improperly delegated to grievance arbitrators our statutory responsibility to balance the City's critical safety and service interests against employee interests and decide which prevails.

Dated at Madison, Wisconsin this 18th day of October, 2000.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Meier /s/
James R. Meier, Chairperson

rb
29971

CITY OF OSHKOSH – EXHIBIT 14

NON-EXHAUSTIVE LIST OF PERSONAL PROJECTS
CONDUCTED BY FIREFIGHTERS AT CITY-OWNED FIRE STATIONS

Construct an ice fishing tent/sled.

Wash and wax cars.

~~Fix oil leaks in cars~~

~~Overhaul engines~~.

~~Welding and bodywork of personal vehicles~~.

Detailing of cars.

~~Placing cars on jacks to perform mechanical duties~~.

Build model cars, airplanes, etc.

Build bikes.

Build cabinets.

Strip bedroom sets.

Work on ATV's.

Work on snowmobiles.

Work on outboard motors.

Canning.

Make candy. (Christmas)

~~Reloading shells~~.

Leather tooling.

Work on boats.

Varnish cabinet doors.

~~Put timing chains in cars~~.

~~Build trailers~~.

Fix lawnmowers.

~~Melt lead for fishing lures~~.

Tie flies.

Clean and fillet fish.

Clean and butcher deer.

Woodworking projects.

Wood carving.

~~Using a drill press~~.

Make fishing poles.

Repair fishing reels.

Assemble fishing lures.

Work on motor homes.

Work on camping trailers.

~~Work on airplanes~~.

~~Rotate personal vehicle tires~~.

*At the hearing the firefighters struck the lined out items from the list of personal activities they wished to pursue during standby time.