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

Case 482
No. 60139
DR(M)-625

Decision No. 30427

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,** 1840 North Farwell Avenue, Suite 303, Milwaukee, Wisconsin 53202, appearing on behalf of the Milwaukee Police Association.

FINDINGS OF FACT, CONCLUSION OF LAW AND DECLARATORY RULING

On July 16, 2001, 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 over certain matters. On August 3, 2001, the Association filed a statement in response to the petition.

By agreement of the parties, hearing on the petition was held on October 26, 2001 in Milwaukee, Wisconsin by Commission Examiner Peter Davis. During the hearing, the parties

also presented evidence as to an October 23, 2001 motion filed by the City seeking to deny an Association request to withdraw and refile a Sec. 111.70(4)(jm), Stats., interest arbitration petition.

The parties subsequently agreed that briefing on the issues in the declaratory ruling proceeding would be held in abeyance pending issuance of a Commission decision regarding the City's October 23, 2001 motion.

On March 21, 2002, the Commission issued an Order denying the City's October 23, 2001 motion (DEC. NO. 30296).

The parties completed briefing the declaratory ruling on May 22, 2002.

Having reviewed the record 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 200 East Wells Street, Milwaukee, Wisconsin. The City provides law enforcement services to its citizens through a Police Department.

2. The Milwaukee Police Association, herein the Association, is a labor organization functioning as the collective bargaining representative of certain law enforcement employees of the City.

3. During collective bargaining between the City and the Association, a dispute arose as to whether the City was obligated to bargain with the Association over the following proposal:

> Article 72 TRANSFER POLICY
>
> If any transfer or assignment (following the execution of this Agreement) is made in whole or in part to discipline an employee, such disciplinary transfer or assignment shall be subject to the grievance procedure. The employee shall bear the burden of demonstrating that the assignment or transfer was made in whole or in part to discipline the employee and that the discipline was not for cause.

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

CONCLUSION OF LAW

The proposal recited in Finding of Fact 3 is a mandatory subject of bargaining because it is primarily related to employee wages, hours and conditions of employment.

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 Milwaukee and Milwaukee Police Association have a duty to bargain within the meaning of Secs. 111.70(1)(a) and (3)(a)4, Stats., over the proposal recited in Finding of Fact 3.

Given under our hands and seal at the City of Madison, Wisconsin, this 18th day of July, 2002.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Steven R. Sorenson /s/
Steven R. Sorenson, Chairperson

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

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

City of Milwaukee

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

Before considering the specific proposal 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.

Section 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(a)(d) recognizes the municipal employer's duty to act 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 right 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 OR 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 weighted to determine whether a proposed subject for bargaining should be characterized as mandatory. If the employees' legitimate interests 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 or 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 contends that the Association proposal is a permissive subject of bargaining because the proposal's impact on employee wages, hours and conditions of employment is outweighed by the proposal's "enormous restriction on managerial prerogatives."

The City asserts that the proposal impermissibly intrudes into management's ability to transfer and assign personnel in a manner which allows the chief of police to meet his/her statutory responsibility under Sec. 62.50(23), Stats., to "preserve the public peace and enforce all laws and ordinances of the city." The City argues that if the proposal were to become part of the parties' collective bargaining agreement, all transfers and assignments would become subject to challenge and thus management personnel would lose their current freedom to make personnel allocations solely on a myriad of law enforcement related factors. In addition, should an arbitrator subsequently conclude that as little as one percent of a management action was motivated by disciplinary considerations, the arbitrator would be empowered to reverse the management action to the detriment of the City's citizens.

Unlike an existing contract provision that allows seniority to determine who works a specific shift **after** management has made its personnel allocations, the City contends that this proposal restricts management prerogatives **before** personnel decisions are made. This critical distinction renders the proposal a permissive subject of bargaining.

Citing BLACKHAWK TEACHERS' FEDERATION LOCAL 2308 V. WERC, 109, WIS.2D 415 (CT.APP. 1982), the City contends that the Commission and the Court have found a proposal is permissive to the extent is allows challenges to matters not primarily related to wages, hours and conditions of employment. Under the rationale of BLACKHAWK, the City argues that this proposal is a permissive subject of bargaining because it is not sufficiently focused on matters primarily related to wages, hours and conditions of employment. In this regard, the City notes the Association contention that the existing contract already allows employees to grieve transfers and assignments that the employee believes are disciplinary. Thus, the City reasons that this proposal is directed at more than discipline and thus impermissibly allows challenges to management decisions over which the City need not bargain.

The Association

The Association asserts that a proposal which seeks to protect employees against discipline that is not for cause is a mandatory subject of bargaining because it is primarily related to wages, hours and conditions of employment. The Association contends that its proposal is a mandatory subject of bargaining because it seeks to limit the chief's ability to discipline employees without cause through the mechanism of assignment and transfer rather than more traditional forms of discipline.

The Association concedes that requiring that all discipline be for cause, regardless of the form in which it is imposed, does interfere with management's ability to run the Department. However, the fact that it would be more efficient for management to be unconstrained by the potential for third party review does not render the proposal a permissive subject of bargaining. The Association asserts that the proposal more than generously acknowledges the chief's management interests by placing the burden of proof on the employee to establish that a transfer or assignment was disciplinary and, if so, that it was not for cause.

Contrary to the City, the Association argues that BLACKHAWK does not compel a finding that the proposal is a permissive subject of bargaining. Unlike the proposal in BLACKHAWK which allowed any policy or practice to be grieved, this proposal is limited to the issue of whether discipline is for cause – a mandatory subject of bargaining.

DISCUSSION

Given the substantial impact which discipline has on employee wages, hours and conditions of employment, proposals which seek to hold a municipal employer to a just cause

standard for disciplinary decisions have long been found to be mandatory subjects of bargaining. BELOIT SCHOOLS, DEC. NO. 11831-C (WERC, 9/74), AFF'D BELOIT EDUCATION ASSOCIATION V. WERC, 73 WIS.2D 43 (1976); CRAWFORD COUNTY, DEC. NO. 20116 (WERC, 12/82).

The City does not contest the general proposition that proposals seeking to apply a just cause standard to disciplinary decisions are mandatory subjects of bargaining. However, the City argues that based on the management prerogatives that are infringed upon by this Association proposal, the references to just cause and discipline contained therein are not sufficient to make the proposal a mandatory subject.

A primary focus of the City's argument is the contention that if this provision were to become part of the collective bargaining agreement, management decision-makers would be inhibited when making transfer and assignment decisions by the knowledge that their decision is subject to challenge and possible reversal by a third party decision-maker. The City argues that when management decision-makers are so inhibited, their ability to make appropriate personnel allocations based on law enforcement criteria is so compromised that the proposal becomes a permissive subject of bargaining.

We reject this City argument. The fact that an otherwise mandatory proposal will influence how management decision-makers make management or policy decisions does not provide a persuasive basis for transforming a mandatory proposal into a permissive subject of bargaining. We addressed and rejected a similar argument in SCHOOL DISTRICT OF JANESVILLE, DEC. NO. 21466 (WERC, 3/84) as to proposals specifying the level of additional compensation that would be received if the employer made certain permissive educational policy choices. We stated:

> The District herein asserts that the Association has, in some instances, submitted proposals the basic economic thrust of which would tend to inhibit exercise of employer discretion in matters primarily affecting educational policy. The District has asserted that such proposals are not mandatory "impact" proposals, simply because a dollar figure is used to impose the Association's policy preference. The District alleges that an "impact" proposal is mandatory only where the Association demonstrates that a policy decision (1) has an actual impact on the workload of a teacher; (2) there is a primary correlation between that impact and the proposal under examination; and (3) the impact predominates over the educational policy involved.
>
> The District asserts that the instant proceeding ultimately involves a determination as to who will set educational policy within the Janesville School

District. It asserts that the Association has proposed a myriad of restrictions upon the management of the District's facilities, its management techniques, its ability to match teacher skills and experiences to student's needs, the size of its classes, and the quantity and quality of the educational services to be provided. The District contends that in some cases the Association's proposals seek to directly intrude on managerial prerogatives. In other instances, the District asserts that the Association gives lip service to the managerial prerogative but then affixes dollar disincentives to the exercise of discretion for the purpose of effectively precluding the exercise of that discretion. The District contends that although its objections to Association proposals are numerous, its position is not that bargaining should be restricted to the point it becomes a fiction. However, the District argues that bargaining should not be required where it involves a proposal which proceeds on an assumption of impact where none appears on the record. Bargaining should not be required, in the District's opinion, where it interferes with the "still valid concern 'for the integrity of the political processes'." BLACKHAWK TEACHERS FEDERATION V. WERC, 109 WIS.2D 415 (CT.APP. 1982) at 428, citing RACINE, SUPRA, at 99.

Our analysis of the monetary impact proposals at issue herein differs from that proffered by the District. We initially conclude that, in general, proposals which specify varying wage levels for teachers and related professionals who, if ever, perform different types and amounts of work are primarily related to wages. Although the Association's compensation proposals differ from the traditional forms for setting teacher wages, they are nonetheless a method for determining the compensation level to be received by an employee.

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 employee 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. 111.704)(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. Similarly, the numerous

> District arguments herein concerning the potential impact of Association compensation proposals tied to District decisions regarding class size, preparation time, etc., go to the merits of the proposed compensation rather than to the mandatory or permissive subject nature of the compensation proposals involved. District concerns as to whether the levels of compensation specified in the proposals are warranted because teachers may not be working harder or may not be exerting sufficient additional effort to justify the additional compensation are appropriate for discussion at the bargaining table or before a mediator-arbitrator. They are not relevant when determining whether a proposal is mandatory or permissive. We do not find BELOIT or any other existing Commission or court decision to be contrary to our conclusion in this regard.

As we stated in JANESVILLE, while the "inhibition" argument is relevant to bargaining table/interest arbitration discussions/decisions over the merits of a proposal, it is not a persuasive consideration when assessing the mandatory or permissive nature of a proposal. Thus, we reject this City argument as a basis for finding the Association proposal to be a permissive subject of bargaining. 1/

1/ The City also raises a series of concerns as to how/whether it will be able to establish the legitimacy of its actions given the large number of management actions potentially covered by the Association proposal and the uncertainty as to whether any particular assignment or transfer will be grieved. The Association counters with its own protests as to how difficult it will be for an employee to meet his/her burden under the proposal. These arguments are relevant to bargaining table/interest arbitration discussions/decisions over the merits of the proposal but not to its mandatory or permissive status.

A related City argument is that because the proposal subjects management transfer and assignment decisions to reversal by a grievance arbitrator even where disciplinary considerations played only a minor role, the proposal interferes with management decision to such an extent that it becomes a permissive subject of bargaining. In JANESVILLE, we commented on this "arbitral review" argument as follows:

> The District has also raised the specter of arbitral review of its actions under this proposal as a basis for the proposal being found to be permissive. In general we note that such an argument, if adopted, would render all contract

> provisions permissive as arbitral review is always theoretically available as to any employer action under a contract. Would a "just cause" provision as to discipline become permissive merely because of the potential for arbitral review of employee discipline? We think not and thus reject the broad brush scope of this argument. To the extent that the District focuses upon arbitral review of the "reasonableness" of the qualifications it establishes or the "uniformity" of their application, we recognize the potential for an arbitrator determining that a qualification is unreasonable or was not uniformly applied to all unit personnel. We would first note that we have given considerable direction in the previously quoted portions of MILWAUKEE BOARD OF SCHOOL DIRECTORS, 20093-B (8/83), regarding the job performance related minimum qualifications which a school district may unilaterally establish. In addition, balanced against this limitation upon management action is the Association's interest in ensuring that the District does not render assignment procedures a sham by developing qualifications which are tailored to only one individual or by treating equally qualified individuals differently. The relationship of these limitations on employer action to wages, hours and conditions of employment in our judgment predominates.
>
> See also RACINE UNIFIED SCHOOL DISTRICT, DEC. NO. 20652-A (WERC, 1/84).

As reflected by the record, aside from the general impact of discipline on employee conditions of employment, assignments and transfers can impact on employee wages and hours. Consistent with JANESVILLE and RACINE, we remain persuaded that the potential for arbitral reversal to limit management action is not sufficient to outweigh the instant proposal's relationship to employee wages, hours and conditions of employment. 2/

2/ We would also note that the Association proposal does not restrict the authority of the arbitrator to determine what remedy is appropriate if an assignment or transfer is found to be disciplinary. Thus, if an arbitrator determined that a disciplinary assignment or transfer was predominantly based on non-disciplinary considerations, the arbitrator would be free to determine that the assignment or transfer should not be overturned as part of the remedy. Such remedial discretion is consistent with the holding of the Court in STATE V. WERC, 122 WIS.2D 132 (1985) to the effect that where an employer's conduct is motivated only in part by illegal considerations, the "mixed motives" do not excuse the violation but can be considered when fashioning the appropriate remedy.

It should also be noted that because the arbitral review of management action will occur well after the transfer or assignment, there is no "prior restraint" on any management action and there is no realistic potential for any reversal of management action to occur within a timeframe that would negatively impact on the management's need to respond quickly to changing law enforcement needs.

The City also argues that the Association proposal is a permissive subject of bargaining under the holding in BLACKHAWK in which a proposal was found to be a permissive subject of bargaining because it allowed any policy or practice to be grieved. The City analogizes from BLACKHAWK that to the extent the Association proposal allows for challenges to even those disciplinary actions where non-disciplinary considerations substantially predominate, the proposal is permissive. We do not find this argument persuasive because, as argued by the Association, its proposal (unlike the proposal before the Commission and Court in BLACKHAWK) has a specific relationship to discipline. Even where the disciplinary component plays a minor role in management's decision, the disciplinary nexus (and the resultant impact on employee wage, hour and conditions of employment interests) is sufficient to make the proposal a mandatory subject of bargaining.

Dated at Madison, Wisconsin, this 18th day of July, 2002.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Steven R. Sorenson /s/
Steven R. Sorenson, Chairperson

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

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

rb
30427