

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), Stats.,  
Involving a Dispute between Said Petitioner and

**MILWAUKEE POLICE SUPERVISORS' ORGANIZATION**

Case 521  
No. 65032  
DR(M)-661

**Decision No. 31936**

---

**Appearances:**

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

**William R. Rettko**, Rettko Law Offices, 15430 West Capitol Drive, Suite 200, Brookfield, Wisconsin, 53005-2621, appearing on behalf of the Milwaukee Police Supervisors' Organization.

**FINDINGS OF FACT, CONCLUSIONS OF LAW  
AND DECLARATORY RULING**

On August 9, 2005, 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 whether the City had a duty to bargain with the Milwaukee Police Supervisors' Organization (MPSO) over certain matters.

Pursuant to ERC 18.03, by letter dated August 15, 2005, the Commission asked that MPSO file a statement in response to the petition on or before August 26, 2005. The MPSO filed its response on September 12, 2005.

No. 31936

After discussion between the parties as to the need for an evidentiary hearing, the MPSO requested that such a hearing be scheduled. Hearing was held in Milwaukee, Wisconsin on December 1, 2005 before Examiner Peter G. Davis. The parties then filed post-hearing argument-the last of which was received February 3, 2006.

On August 24, 2006 and October 19, 2006, the Commission sought and received clarification from the MPSO as to the scope of the proposals in dispute.

On October 27, 2006, the MPSO amended one of its proposals and the City filed responsive argument on November 13, 2006. On November 15, 2006, the MPSO indicated that it did not wish to file any responsive argument as to the amended proposal.

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. The City has a Police Department which operates under the statutory authority contained in Sec. 62.50, Stats. and employs various individuals who provide law enforcement services.

2. The Milwaukee Police Supervisors' Organization, herein the MPSO, is a labor organization that serves as the collective bargaining representative for certain employees of the Police Department.

3. During collective bargaining between the City and MPSO over a successor to their 2001-2003 contract, a dispute arose as to whether the City had a duty to bargain with the MPSO over the following proposals:

### **ARTICLE 7**

As clarified after the submission of post-hearing briefs, the MPSO proposal as to discipline would give an employee who is suspended by the Police Chief for between 6 and 30 days (as a result of a complaint filed by the Chief) a contractual option of appealing the suspension to a grievance arbitrator in lieu of pursuing a statutory appeal to the Board of Fire and Police Commissioners (BFPC) pursuant to Sec. 62.50 (13), Stats.

### **ARTICLE 61**

### ***PROMOTIONAL PROGRAM***

**1. RECOGNITION**

The parties recognize that in order to establish and maintain public trust in the professional management and supervision of the Milwaukee Police Department, an open and transparent promotional process is necessary.

**2. POSTING OF EXAMINATIONS**

Not less than sixty (60) days prior to the commencement of an examination process, a department-wide posting shall be distributed by the Milwaukee Police and Fire Commission (PFC). Each posting shall include:

- a. The place, time, and date on which the first component shall be administered.
- b. The minimum requirements each candidate must meet in order to be eligible to participate in the respective examination process. Among other criteria, which the PFC may require, candidates must have completed a minimum of five (5) years uninterrupted active service in the rank immediately below the rank applied for, on the date of administration of the first testing component.
- c. The due-date by which all candidate applications must be submitted to the PFC. Due-dates may be no less than twenty-one (21) calendar days following the date of the posting.
- d. A listing of each component of the testing process, along with the percentage breakdown, which shall be applied to each component to arrive at the cumulative score.

**3. ELIGIBLE LISTS**

- a. Promotion to all positions covered by this agreement shall be made from "eligible lists" established by the PFC. A separate list shall be established for each respective rank.
- b. The PFC shall work within its responsibilities as outlined in Wisconsin State Statute 62.50 in establishing the eligible lists, consistent with all criteria outlined in this agreement.

- c. Eligible lists shall be active for a period of two (2) years following the date, which the respective list is first presented to the PFC by staff.
- d. Promotions shall be made in descending order from each respective list, for each respective rank.
- e. The components of each testing process shall include:
  - 1. Written test
    - a. Shall consist of 80 to 100 questions, all equally weighted to a total possible score of 100% and a passing score of 70%.
    - b. All questions shall be derived from Wisconsin State Statutes, Wisconsin Law Enforcement Officers Handbook, City of Milwaukee Ordinances, and Milwaukee Police Department Rules and Procedures.
    - c. All questions shall be in multiple-choice form, with four (4) or five (5) answer choices available.
    - d. The written test score shall comprise 25 to 40% of the cumulative score outlined in subsection 3(f).
  - 2. Oral Interview
    - a. Assessors shall pose no less than four (4) questions to the candidate. The total time of the oral interview shall last a minimum of thirty (30) minutes.
    - b. No less than three (3) assessors shall be impaneled. No assessor may be an employee/appointee of the City of Milwaukee. The ethnic makeup of the assessor panel shall be reflective of the population of the City of Milwaukee, as reported in the most recent United States Census data.

- c. The oral interview shall comprise 25 to 40% of the cumulative score outlined in subsection 3(f).

3. Practical exercise

- a. A practical test component, directly related to the duties and responsibilities of the respective classification shall be included. Examples of practical exercises are, but are not limited to; in basket exercise, mock crime scene command, and/or internal investigation(s).
- b. The practical exercise shall comprise 25 to 40% of the cumulative score outlined in subsection 3(f).

4. Seniority

- a. Candidates shall receive 1% for each year of active service completed in the previous rank, as of the date the written examination is taken.
- b. The maximum seniority score a candidate can receive is 10% of the cumulative score outlined in subsection 3(f).

f. Cumulative score

- 1. The total cumulative score shall be a maximum of 100%. The PFC shall determine the component value breakdown, as outlined in subsections 3(e)(1)(d), (2)(c), (3)(b), and (4)(b).
- 2. The total cumulative score shall be listed on the respective eligible list, next to the name of each candidate.

- g. If the Chief of Police determines there is cause to pass-over a candidate on the eligible list, the candidate shall be provided copies of all materials sent by the Chief, to the PFC explaining the Chief's decision and reason for it. At the meeting of the PFC wherein the matter is discussed, the affected member shall be given the opportunity to be heard if he/she so desires. A representative of the MPSO

may also appear and be heard on behalf of the member, if the employee so requests, and/or on behalf of the MPSO. Disputes involving the PFC's final determination in this regard shall be subject to the Contract Enforcement Article of this Agreement.

**4. CAPTAIN OF POLICE**

- a. The provisions of this subsection shall apply only to the rank of Captain of Police.
- b. In keeping with section 1 above, while complying with the Police Chief's responsibilities under Wisconsin State Statute 62.50(7)(b), the following special provision shall apply to the rank of Captain of Police.
- c. The Chief of Police shall have the discretion to deviate from subsection 3 (d) of this article by nominating any candidate from the next three (3) candidates available on the respective Captain of Police eligible list.
- d. If the Chief of Police exercises his/her discretion outlined in section 4(c), the Chief shall notify any candidate(s) he/she is passing-over; the fact that he/she is being passed-over, the reason(s) the Chief is passing the candidate over, and any recommendations the Chief may have for the candidate to better prepare him/herself for future promotional consideration.

**5. EMPLOYEE/COMMUNITY RIGHT TO REVIEW**

- a. For a period of one (1) calendar year following the date of first presentation of any eligible list to the PFC, a representative designated by the MPSO shall be allowed to view all graded components, which the PFC used to compile each cumulative score.
- b. In the event the MPSO files a grievance under the contract enforcement procedure of this agreement, the City shall provide the MPSO, before responding to the grievance, information and access to information, to include all assessor/evaluator training materials, notes, and comments generated by assessors and/or evaluators in the scoring process of all graded components of the affecting promotional examination.

## 6. IMPLEMENTATION

a. The provisions of this article shall commence as follows for each respective classification:

1. Deputy Inspector The posting (as outlined in subsection 2) for the Deputy Inspector of Police examination process shall be published no later than 120 calendar days following the execution date of this agreement.
2. Captain of Police The posting (as outlined in subsection 2) for the Captain of Police examination process shall be published no later than 90 calendar days following the execution date of this agreement.
3. Lieutenant of Police Upon expiration/termination of the Lieutenant of Police eligible list approved by the PFC on July 7, 2005.
4. Lieutenant of Detectives The posting (as outlined in subsection 2) for the lieutenant of Detectives examination process shall be published no later than 60 calendar days following the execution date of this agreement.
5. Identification Supervisor Upon expiration/termination of the Identification Supervisor eligible list approved by the PFC on September 2, 2004.
6. Police Sergeant Upon expiration/termination of the Police Sergeant eligible list approved by the PFC on September 16, 2004. The parties agree that this list shall expire/terminate no later than September 15, 2006.

4. Proposed Article 7 primarily relates to wages, hours and conditions of employment.

5. Proposed Article 61 primarily relates to wages, hours and conditions of employment (in part) and primarily relates to management and direction of the City (in part).

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

### **CONCLUSIONS OF LAW**

1. Although proposed Article 7 primarily relates to wages, hours and conditions of employment, it irreconcilably conflicts with Sec. 62.50, Stats. and thus is a prohibited subject of bargaining.

2. Proposed Article 61 does not irreconcilably conflict with Sec. 62.50, Stats.

3. A portion of proposed Article 61 irreconcilably conflicts with Secs. 19.36 (10) and 103.13 (6), Stats.

4. The portion of proposed Article 61 that primarily relates to wages, hours and conditions of employment and does not irreconcilably conflict with Secs. 19.36 (10), 62.50 or 103.13 (6), Stats. is a mandatory subject of bargaining.

5. The portion of proposed Article 61 that primarily relates to wages, hours and conditions of employment but does irreconcilably conflict with Secs. 19.36 (10) or 103.13 (6), Stats. is a prohibited subject of bargaining.

6. The portion of proposed Article 61 that primarily relates to the management and direction of the City is a permissive subject of bargaining.

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

### **DECLARATORY RULING**

1. The City of Milwaukee has no duty to bargain within the meaning of Sec. 111.70(1) (a), Stats. as to the Article 7 proposal.

2. The City of Milwaukee has a duty to bargain within the meaning of Sec. 111.70(1) (a), Stats. as to the portions of the Article 61 proposal referenced in Conclusion of Law 4.



3. The City of Milwaukee has no duty to bargain within the meaning of Sec. 111.70(1)(a), Stats., as to the portions of the Article 61 proposal referenced in Conclusions of Law 5 and 6.

Given under our hands and seal at the City of Madison, Wisconsin, this 21st day of November, 2006.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/

---

Judith Neumann, Chair

Paul Gordon /s/

---

Paul Gordon, Commissioner

Susan J. M. Bauman /s/

---

Susan J. M. Bauman, Commissioner

**CITY OF MILWAUKEE**

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

**ANALYTICAL FRAMEWORK**

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

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

“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 non-mandatory 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 subject of bargaining. In contract, where the management and direction of the school system or the formulation of public

policy predominates, the matter is not a mandatory subject of bargaining. In such cases, the professional association may be heard at the bargaining table if the parties agree to bargain or may be heard along with other concerned groups and individuals in the public forum. UNIFIED SCHOOL DISTRICT NO. 1 OF RACINE CO. V. WERC, *supra*, 81 Wis. 2D at 102; BELOIT EDUCATION ASSO., *supra*, 73 Wis. 2D at 50-51. Stating the balancing test, as we have just done, is easier than isolating the applicable competing interests in a specific situation and evaluating them.

(footnotes omitted)

When it is asserted that a proposal is a prohibited subject of bargaining because collective bargaining generally or a specific proposal/contract provision irreconcilably conflicts with statutory provisions, the question to be resolved is whether bargaining over the specific proposal /contract provision can be harmonized with other relevant statutory provision(s) (in which case the proposal/provision is not a prohibited subject of bargaining) or whether there is an irreconcilable conflict (in which case the proposal/provision is a prohibited subject of bargaining). CITY OF JANESVILLE V. WERC, 193 Wis 2D 492 (Ct. App. 1995; FORTNEY V. SCHOOL DISTRICT OF WEST SALEM, 108 Wis.2D 169 (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 DISPUTED PROPOSALS**

### **Article 7**

As clarified after the submission of post-hearing briefs, the MPSO proposal as to discipline would give an employee who is suspended by the Police Chief for between 6 and 30 days (as a result of a complaint filed by the Chief) <sup>1</sup> a contractual option of appealing the suspension to a grievance arbitrator in lieu of pursuing a statutory appeal to the Board of Fire and Police Commissioners (BFPC) pursuant to Sec. 62.50 (13), Stats.

Section 62.50 (13), Stats. provides:

(13) DISCHARGE OR SUSPENSION; APPEAL. The chief discharging or suspending for a period of exceeding 5 days any member of the force shall give written notice of the discharge or suspension to the member and immediately report the same the secretary of the board of fire and police commissioners together with a complaint setting forth the reasons for the discharge or

---

<sup>1</sup> Suspensions of 5 days or fewer can be pursued to grievance arbitration. BALCERZAK V BOARD OF FIRE & POLICE COM'RS, 233 Wis. 2D 644 (2000). Suspensions of over 30 days cannot be imposed except after a statutorily required trial before the BFPC. If a complaint is filed by someone other than the Police Chief, a trial before the BFPC is statutorily required.

suspension and the name of the complainant if other than the chief. Within 10 days after the service of the notice of discharge or suspension order the members so discharged or suspended my appeal the order of discharge or suspension to the board of fire and police commissioners . . .

The City contends that the proposal is a prohibited subject of bargaining because it irreconcilably conflicts with the Sec. 62.50 (13), Stats. right of appeal to the BFPC or, in the alternative, is a permissive subject of bargaining because it is primarily related to the management and direction of the governmental unit.

The MPSO asserts that the proposal is a mandatory subject of bargaining because it is primarily related to wages, hours and conditions of employment.

We look first at the issue of whether the MPSO proposal is a prohibited subject of bargaining. As to this issue, the result turns on whether the statutory right of appeal to the BFPC contained in Sec. 62.50 (13), Stats., is the exclusive means by which an employee can seek to overturn a suspension of 6 to 30 days imposed by the Police Chief as a result of a complaint filed by the Chief or whether a contractual appeal mechanism can be bargained as an alternative.

Both parties correctly cite the Court of Appeals' decision in *CITY OF JANESVILLE V. WERC*, 193 Wis. 2d 492 (1995) as being relevant to the resolution of this dispute.

In *JANESVILLE*, one of the issues confronting the Court of Appeals was whether the employer was obligated to bargain over a proposal that gave an employee the option of appealing a suspension imposed by a police chief to a grievance arbitrator under a collective bargaining agreement rather than to the Police and Fire Commission (PFC) under Sec. 62.13(5)(c), Stats. Although the Court acknowledged that Sec. 62.13 (5)(c), Stats. provided that a hearing before the PFC "*shall* be held only if requested by the subordinate", the Court concluded that the option of requesting a PFC hearing only indicated a legislative intent that the employee need not challenge the suspension at all (as opposed to an intent of allowing an alternative appeal mechanism) and thus that it was clear that an officer wishing to challenge a suspension must do so before the PFC. Therefore, the Court concluded that a proposal allowing the option of arbitral review of a suspension imposed by a police chief was a prohibited subject of bargaining because it irreconcilably conflicted with Sec. 62.13 (5)(c), Stats.

The City points to the parallels between *JANESVILLE* and the instant dispute. Both Sec. 62.13, Stats. and Sec. 62.50, Stats. establish a citizen board to review discipline imposed by a chief of police. Neither statutory provision requires an employee to pursue an appeal to the citizen board nor states that the right of appeal contained therein is the employee's exclusive appeal mechanism. Given these parallels, the City asserts the WERC should follow the Court and conclude that Sec. 62.50, Stats., (like Sec. 62.13, Stats in *JANESVILLE*) is the exclusive means by which review of suspensions covered by the MPSO proposal can be sought.

The MPSO acknowledges the holding of JANESVILLE but points out that the Court therein did not address Sec. 62.50, Stats., which does not require that an employee seek BFPC review and does not indicate that such review is exclusive. In addition, MPSO points to Supreme Court's decision in EAU CLAIRE CTY. V. TEAMSTERS UNION 662, 235 Wis. 2d 385 (2000) wherein the Court held that a law enforcement employee's statutory right to seek circuit review of discipline imposed by a county civil commission under Sec. 59.52(8)(c), Stats. did not exclude the alternative option of seeking review through contractual grievance arbitration.

As to EAU CLAIRE, the City counters by arguing that the Court's decision addressed a different issue than presented here (i.e. the right of arbitral review of discipline imposed after civil service review as opposed to the right of arbitral view of discipline imposed by the head of the law enforcement entity ) and was premised in part upon distinctions between Sec. 62.13, Stats and Sec. 59.52, Stats. in terms of the nature of the bodies responsible for making disciplinary determinations and the procedural protections afforded the employee. The City contends that both the nature of the entity making disciplinary decisions under Sec. 62.50, Stats. and the procedural protections therein afforded to an employee are much more comparable to those present under Sec. 62.13, Stats. than to those in play under Sec. 59.52, Stats.

After giving the matter careful consideration, we conclude that the City's position is the more persuasive and thus that the MPSO proposal is a prohibited subject of bargaining. We do so primarily because of the Court's analysis in JANESVILLE. But for that analysis, we would likely conclude that the optional nature of appeal to the BFPC and the absence of statutory language indicating that appeal to the BFPC is exclusive would combine to allow bargaining over the option of arbitral review. See, CITY OF JANESVILLE, DEC. NO. 27645 (WERC, 5/93) However, the Court in JANESVILLE rejected our reasoning in that regard and we see no persuasive basis for distinguishing the statutory scheme under Sec. 62.50, Stats. from that presented to the Court in JANESVILLE under Sec. 62.13, Stats. Thus, although JANESVILLE does not interpret Sec. 62.50, Stats. and thus does not bind us here, we conclude it is appropriate to follow the Court's rationale therein when deciding this matter.

In reaching this conclusion, we have considered the Court's holding in EAU CLAIRE. However, EAU CLAIRE specifically left JANESVILLE intact and, as noted by the City, involved a different issue and substantively different statutory frameworks in terms of the nature of the review body and the procedural rights of the employees. It is also noteworthy that Sec. 59.26 (9)(b), Stats. expressly references the potential applicability of collective bargaining agreements to suspensions of deputy sheriffs-a reference that is lacking in Sec. 62.50, Stats.

Having concluded that this MPSO proposal is a prohibited subject of bargaining, we need not and do not address the City's argument that the proposal is also a permissive subject of bargaining.

## **Article 61-Promotions**

The MPSO proposal provides as follows:

### **ARTICLE 61**

#### ***PROMOTIONAL PROGRAM***

##### **1. RECOGNITION**

The parties recognize that in order to establish and maintain public trust in the professional management and supervision of the Milwaukee Police Department, an open and transparent promotional process is necessary.

##### **2. POSTING OF EXAMINATIONS**

Not less than sixty (60) days prior to the commencement of an examination process, a department-wide posting shall be distributed by the Milwaukee Police and Fire Commission (PFC). Each posting shall include:

- a. The place, time, and date on which the first component shall be administered.
- b. The minimum requirements each candidate must meet in order to be eligible to participate in the respective examination process. Among other criteria, which the PFC may require, candidates must have completed a minimum of five (5) years uninterrupted active service in the rank immediately below the rank applied for, on the date of administration of the first testing component.
- c. The due-date by which all candidate applications must be submitted to the PFC. Due-dates may be no less than twenty-one (21) calendar days following the date of the posting.
- d. A listing of each component of the testing process, along with the percentage breakdown, which shall be applied to each component to arrive at the cumulative score.

### **3. ELIGIBLE LISTS**

- a. Promotion to all positions covered by this agreement shall be made from “eligible lists” established by the PFC. A separate list shall be established for each respective rank.
- b. The PFC shall work within its responsibilities as outlined in Wisconsin State Statute 62.50 in establishing the eligible lists, consistent with all criteria outlined in this agreement.
- c. Eligible lists shall be active for a period of two (2) years following the date, which the respective list is first presented to the PFC by staff.
- d. Promotions shall be made in descending order from each respective list, for each respective rank.
- e. The components of each testing process shall include:

#### **1. Written test**

- a. Shall consist of 80 to 100 questions, all equally weighted to a total possible score of 100% and a passing score of 70%.
- b. All questions shall be derived from Wisconsin State Statutes, Wisconsin Law Enforcement Officers Handbook, City of Milwaukee Ordinances, and Milwaukee Police Department Rules and Procedures.
- c. All questions shall be in multiple-choice form, with four (4) or five (5) answer choices available.
- d. The written test score shall comprise 25 to 40% of the cumulative score outlined in subsection 3(f).

#### **3. Oral Interview**

- a. Assessors shall pose no less than four (4) questions to the candidate. The total time



of the oral interview shall last a minimum of thirty (30) minutes.

- b. No less than three (3) assessors shall be impaneled. No assessor may be an employee/appointee of the City of Milwaukee. The ethnic makeup of the assessor panel shall be reflective of the population of the City of Milwaukee, as reported in the most recent United States Census data.
- c. The oral interview shall comprise 25 to 40% of the cumulative score outlined in subsection 3(f).

3. Practical exercise

- a. A practical test component, directly related to the duties and responsibilities of the respective classification shall be included. Examples of practical exercises are, but are not limited to; in basket exercise, mock crime scene command, and/or internal investigation(s).
- b. The practical exercise shall comprise 25 to 40% of the cumulative score outlined in subsection 3(f).

4. Seniority

- a. Candidates shall receive 1% for each year of active service completed in the previous rank, as of the date the written examination is taken.
- b. The maximum seniority score a candidate can receive is 10% of the cumulative score outlined in subsection 3(f).

f. Cumulative score

- 1. The total cumulative score shall be a maximum of 100%. The PFC shall determine the component value breakdown, as outlined in subsections 3(e) (1)(d), (2)(c), (3)(b), and (4)(b).

2. The total cumulative score shall be listed on the respective eligible list, next to the name of each candidate.
- g. If the Chief of Police determines there is cause to pass-over a candidate on the eligible list, the candidate shall be provided copies of all materials sent by the Chief, to the PFC explaining the Chief's decision and reason for it. At the meeting of the PFC wherein the matter is discussed, the affected member shall be given the opportunity to be heard if he/she so desires. A representative of the MPSO may also appear and be heard on behalf of the member, if the employee so requests, and/or on behalf of the MPSO. Disputes involving the PFC's final determination in this regard shall be subject to the Contract Enforcement Article of this Agreement.

#### **4. CAPTAIN OF POLICE**

- a. The provisions of this subsection shall apply only to the rank of Captain of Police.
- b. In keeping with section 1 above, while complying with the Police Chief's responsibilities under Wisconsin State Statute 62.50(7)(b), the following special provision shall apply to the rank of Captain of Police.
- c. The Chief of Police shall have the discretion to deviate from subsection 3 (d) of this article by nominating any candidate from the next three (3) candidates available on the respective Captain of Police eligible list.
- d. If the Chief of Police exercises his/her discretion outlined in section 4(c), the Chief shall notify any candidate(s) he/she is passing-over; the fact that he/she is being passed-over, the reason(s) the Chief is passing the candidate over, and any recommendations the Chief may have for the candidate to better prepare him/herself for future promotional consideration.

#### **5. EMPLOYEE/COMMUNITY RIGHT TO REVIEW**

- a. For a period of one (1) calendar year following the date of first presentation of any eligible list to the PFC, a representative designated by the MPSO shall be allowed to view all graded components, which the PFC used to compile each cumulative score.

b. In the event the MPSO files a grievance under the contract enforcement procedure of this agreement, the City shall provide the MPSO, before responding to the grievance, information and access to information, to include all assessor/evaluator training materials, notes, and comments generated by assessors and/or evaluators in the scoring process of all graded components of the affecting promotional examination.

## **6. IMPLEMENTATION**

a. The provisions of this article shall commence as follows for each respective classification:

1. Deputy Inspector The posting (as outlined in subsection 2) for the Deputy Inspector of Police examination process shall be published no later than 120 calendar days following the execution date of this agreement.
2. Captain of Police The posting (as outlined in subsection 2) for the Captain of Police examination process shall be published no later than 90 calendar days following the execution date of this agreement.
7. Lieutenant of Police Upon expiration/termination of the Lieutenant of Police eligible list approved by the PFC on July 7, 2005.
8. Lieutenant of Detectives The posting (as outlined in subsection 2) for the lieutenant of Detectives examination process shall be published no later than 60 calendar days following the execution date of this agreement.
9. Identification Supervisor Upon expiration/termination of the Identification Supervisor eligible list approved by the PFC on September 2, 2004.
10. Police Sergeant Upon expiration/termination of the Police Sergeant eligible list approved by the PFC on September 16, 2004. The parties agree that this list shall expire/terminate no later than September 15, 2006.

The City contends that the proposal is a prohibited subject of bargaining because collective bargaining over this topic cannot be harmonized with the BFPC's and Police Chief's

statutory authority over promotions under Sec. 62.50, Stats. The City also asserts that even if bargaining over promotions is generally permitted, the specifics of the MPSO proposal make it a prohibited subject of bargaining. In the alternative, the City argues that the proposal is a permissive subject of bargaining because it primarily relates to the management and direction of the City.

The MPSO asserts that the proposal is a mandatory subject of bargaining.

The Wisconsin Supreme Court's decision in *GLENDALE PROF. POLICEMAN'S ASSOC. V. GLENDALE*, 83 Wis. 2D 90 (1978), provides substantial guidance to us in resolving this matter.

First, the Court generally recognized that:

Promotions are a condition of employment and are subject to mandatory collective bargaining.

Second, the Court confirmed a grievance arbitration award that required the police chief/ board of fire and police commissioners to promote the most senior qualified employee. In doing so, the Court harmonized the duty to bargain under the Sec. 111.70, Stats. with the statutory promotional authority of the chief/board under Sec. 62.13, Stats. and concluded that the contractual promotion provision interpreted by the arbitrator was not a prohibited subject of bargaining because it did not require the promotion of an unqualified employee and thus restricted but did not eliminate the chief/board's statutory discretion in this regard.

Given the result in *GLENDALE*, we reject the City's general argument that bargaining over promotions is prohibited because the authority of the BFPC and the Chief under Sec. 62.50, Stats cannot be harmonized with the duty to bargain under Sec. 111.70, Stats. We do so because the Sec. 62.50, Stats. statutory provisions at issue in this proceeding are comparable to those Sec. 62.13, Stats. provisions before the Court in *GLENDALE* and thus we see no reason for concluding that a different result should be reached.

In addition, the Court in *GLENDALE* specifically noted that an argument to the effect that bargaining over promotions was an illegal restriction of statutory discretion could not be made as to City of Milwaukee employees covered by Sec. 111.70(4)(jm) 4.d., Stats. because:

Sec. 111.70(4)(jm) 4. d., Stats., provides that a collective bargaining impasse between the City of Milwaukee and representatives of the police department a promotional program can be established by an arbitrator.

By virtue of Sec. 111.70(8), Stats. the supervisors represented by the MPSO are entitled to use the interest arbitration procedures in Sec. 111.70(4)(jm), Stats. to resolve impasses in collective bargaining and, as noted by the Court, Sec. 111.70(4)(jm) 4.d., Stats. specifically states that the interest arbitrator "shall have the power to:

d. Determine a promotional program.”

Lastly, we note that Sec. 111.70 (9) provides:

- (9) **POWERS OF CHIEF OF POLICE.** Nothing is s. 62.50 grants the chief of police in cities of the 1<sup>st</sup> class any authority which diminishes or in any other manner affects the rights of municipal employees who are members of a police department employed by a city of the 1<sup>st</sup> class under this section or under any collective bargaining agreement which is entered into between a city of the 1<sup>st</sup> class and a labor organization representing the members of its police department.

Thus, at least as to the Police Chief, the Legislature has made an explicit recognition that the Chief’s statutory powers do not trump the right to collectively bargain.

Given all of the foregoing, it is clear that bargaining over the subject of promotions for MPSO is not a prohibited subject of bargaining.

We turn to the question of whether the specific provisions of the MPSO proposal are mandatory subjects of bargaining.

While it is clear that the general topic of promotions is a mandatory subject of bargaining, *GLENDALÉ, supra.*, and that determining “a promotional program” is a specific matter as to which the MPSO can proceed to interest arbitration pursuant to Sec. 111.70 (4)(jm) 4.d., Stats, we have consistently concluded that mandatory bargaining over the right to receive a promotion is limited to the question of identifying which qualified employee will be promoted. *MILWAUKEE SEWERAGE COMMISSION, DEC. NO. 17302 (WERC, 9/79); CITY OF WAUKESHA, DEC. NO. 17830 (WERC, 5/80); CITY OF BROOKFIELD, DEC. NO. 19944 (WERC, 9/82); MILWAUKEE COUNTY, DEC. NO. 26247 (WERC, 11/89); CITY OF GLENDALÉ, DEC. NO. 27907 (WERC, 1/94); CITY OF MILWAUKEE, DEC. NOS. 27996, 27997 (WERC, 3/94).* Thus, consistent with the Court’s holding in *GLENDALÉ*, we have long held that determining the minimum job-related qualifications needed to receive a promotion is a management prerogative which is not a mandatory subject of bargaining. *MILWAUKEE SEWERAGE COMMISSION, supra.*, *CITY OF WAUKESHA, supra.*, *CITY OF WAUKESHA, supra.*, *CITY OF BROOKFIELD, supra.*; *MILWAUKEE COUNTY, supra.*; *CITY OF GLENDALÉ, supra.*; *CITY OF MILWAUKEE, supra.* In addition, in *CITY OF MILWAUKEE, supra.*, we specifically concluded the “promotional program” language of Sec. 111.70(4) (jm) 4. d., Stats. did not restrict this management right.

Consistent with our determination that establishing the minimum job-related qualifications is a management prerogative that need not be bargained, we have also concluded that the determination as to how those minimum job-related qualifications are established is a managerial prerogative which also need not be bargained. Thus, we have concluded that decisions such as whether to conduct a written exam or oral interview, who grades an exam or

conducts an interview, the minimum years of service needed to apply, and the weight to be given to scores on any exam or interview or to the employee's departmental record were not mandatory subjects of bargaining. CITY OF WAUKESHA, *supra.*, CITY OF MILWAUKEE, *supra.* Contrary to the arguments of the MPSO, we conclude that this long-standing Commission precedent is consistent with and not contrary to the Court's decision in GLENDALE.

Applying the foregoing to the MPSO promotion proposal, we conclude that proposed Article 61 is not a mandatory subject of bargaining <sup>2</sup> in the following respects:

1. Section 2. b. which requires a minimum of five years of service in the rank below the promotional rank.
2. Section 2. d. to the extent "the testing process' language would require that a test be administered.
3. Section 3. b. which requires the BFPC to follow the contractually established selection criteria.
4. Section 3.c. which requires that eligibility lists be maintained for a specified period of time thus depriving management of the right to determine that new/revised criteria are needed to establish minimum job-related qualifications.
5. Section 3.d. which requires promotions be made based on lists created by an examination process.
6. Section 3.e. which establishes the components of a testing process and the identity those evaluating qualifications.
7. Section 3. f. to the extent it incorporates permissive portions of the overall proposal.
8. Section 4 to the extent it incorporates permissive provisions of the overall proposal.
9. Section 6 to the extent it incorporates permissive provisions of the overall proposal.

However, to the extent the City contends that Section 3 g is a permissive or prohibited subject of bargaining because no arbitral review of any promotional decision can be bargained, we disagree. We do not read GLENDALE as holding that employer judgments that, for instance, an employee is not minimally qualified for a position or that a union's contention that the minimum qualifications established for a position are not job related cannot be subjected to arbitral scrutiny. MILWAUKEE BOARD OF SCHOOL DIRECTORS, DEC. NO. 23208-A at 57-59

---

<sup>2</sup> To some overlapping extent, the City argues the specifics of the promotional proposal are prohibited if not permissive subjects of bargaining because, contrary to the teachings of GLENDALE, the MPSO proposal would eliminate the City's statutory discretion to insure that promotions occur only from among qualified candidates. Where we have concluded that the MPSO has no right to require the City to bargain over a component of the promotional proposal, we have not found it necessary to parse the matter between the prohibited and permissive categories. Where we conclude that the MPSO proposal is a mandatory subject of bargaining, we will of necessity respond to all GLENDALE-related argument made by the City.

(WERC, 2/87). We do not read GLENDALE as holding that a union cannot seek arbitral scrutiny of, for instance, alleged denials of promotion because of an employee's age, race, sex, national origin or lawful concerted activity. RACINE SCHOOLS, DEC. NO. 23381-A (WERC, 11/86). Contrary to the City, we also do not read the Court of Appeals decisions in MPA V. CITY OF MILWAUKEE, 113 Wis. 2d 192 (1983) and 121 Wis. 2d 291 (1984) to require a contrary result. Thus, we conclude Section 3.g. is a mandatory subject of bargaining to the extent it entitles the employee to receive any written explanation for the Chief to the BFPC as to why he/she did not receive a promotion despite being determined to be the "best qualified" candidate, allows the employee/MPSO to communicate with the BFPC about the "Pass-over" and ultimately allows the employee/MPSO to grieve and potentially arbitrate the matter in the contexts referenced above.

Remaining for resolution is amended Section 5 of the proposal which gives the MPSO the right to review of certain information if used by the City to make promotion decisions. The City contends that Secs. 103.13 and 19.36(10), Stats. prohibit giving the MPSO such access and thus that the MPSO proposal is not a mandatory subject of bargaining. Should the Commission wrongly conclude that these statutory provisions do not prohibit but rather entitle MPSO to some or all of the information in question, the City nonetheless argues that the proposals are not mandatory subjects of bargaining under existing Commission precedent because they lack an explicit assertion that the rights are limited to those created by Secs. 103.13 and 19.36 (10), Stats.

Section 103.13 (6), Stats., provides that the right of an employee (or the employee's designated representative in the context of a current grievance against the employer) to inspect the employee's personnel records does not extend to:

- (c) Any portion of a test document, except that the employee may see a cumulative test score for either a section of the test document or for the entire test document.
- (d) Materials used by the employer for staff management planning, including judgments or recommendations concerning future salary.

Section 19.36 (10), Stats., states:

(10) **EMPLOYEE PERSONNEL RECORDS.** Unless access is specifically authorized or required by statute, an authority shall not provide access under s. 19.35 (1) to records containing the following information, except to an employee or the employees representative to the extent required under s. 103.13 or to a recognized or certified collective bargaining representative to the extent required to fulfill a duty to bargain under ch. 111 or pursuant to a collective bargaining agreement under ch. 111:

. . .

- (c) Information pertaining to an employee's employment examination, except an examination score if access to that score is not otherwise prohibited.
- (d) Information relating to one or more specific employees that is used by an authority or by the employer of employees for staff management planning, including . . . promotions, . . . or other comments or ratings related to employees.

Although we agree with the City that the interplay between Secs. 19.36 (10) and 103.13(6), is less than clear, we conclude that the two statutes can most reasonably be interpreted as: (1) Sec. 103.13 (6), Stats. gives a union the right to access test scores in the context of a grievance; and (2) Sec. 19.36 (10), Stats. provides that its prohibitions do not extend so far as to deny a union access to information required to fulfill the union's duty to bargain or to enforce rights under a collective bargaining agreement. More specifically in the context of this proceeding and proposal, we conclude: (1) Sec.103.13 (6), Stats. gives the MPSO, in the context of processing a grievance, the right to access the cumulative test score or the component tests scores of employees who took any promotional exam; and (2) Sec. 19.36(10), Stats. does not prohibit the MPSO from obtaining "Information pertaining to an employee's employment examination" and "Information relating to one or more specific employees that is used by . . the employer of employees for . . . promotions . . . or other comments or ratings related to employees." "to the extent required to fulfill a duty to bargain under ch. 111 or pursuant to a collective bargaining agreement under ch. 111."

As the City acknowledges, we have long held that a proposal is a mandatory subject of bargaining if it seeks to make contractually enforceable a statutory right related to wages, hours and conditions of employment. RACINE SCHOOLS, DEC. NO. 23381-A (WERC, 11/86). Given our long-standing precedent and the previously noted apparent relationship between promotions and "conditions of employment," we conclude the MPSO proposal is a mandatory subject of bargaining to the extent it incorporates rights the MPSO has under Secs. 103.13(6), 19.36 (10) or Chapter 111 (in this instance the Municipal Employment Relations Act). However, given the explicit prohibitions and references in Sec. 19.36 (10), Stats. to "ch. 111", we further conclude that MPSO's right to seek to bargain contractual access to information extends no further than the MPSO's already existent statutory rights under Secs. 103.13. 19.36(10) and Chapter 111 to that same information. To the extent the MPSO proposal is broader than the MPSO's existing statutory rights, it is a prohibited subject of bargaining.

In reaching this conclusion, we reject the City contention that there must be some explicit reference in the proposal to the statutory right before the proposal can qualify as mandatory under existing Commission precedent. We have never so held and decline to do so here. While such explicit references are helpful when determining the scope of a proposal, they are not necessary. If we are satisfied that the proposal in fact incorporates statutory rights



related to wages, hours and conditions of employment, that is sufficient. We turn to a consideration of the MPSO proposal in that context.

Section 5.a. of the proposal references access to “graded components.” In the context of the MPSO communications from which the amended proposal emerged, we conclude “graded components” refers to the employee scores on the components of any test. Section 103.13(6)(c), Stats., gives a union the right to receive such test scores if there is a current grievance. Because Section 5.a. lacks any reference to an existing grievance, it exceeds the scope of the MPSO’s statutory rights and thus is not a mandatory subject of bargaining. If reference to an existing grievance is added to Section 5.a, this proposal would parallel the MPSO’s statutory rights and thus be a mandatory subject of bargaining.

The duty to bargain referenced in Sec. 19.36(10), Stats. and defined in Sec. 111.70(1)(a), Stats. includes the employer obligation to furnish information which is relevant and reasonably necessary to the administration of a collective bargaining agreement if a good faith request for such information is made by the union. MADISON METROPOLITAN SCHOOL DISTRICT, DEC. NO. 28832-B (WERC, 9/98). In the context of a grievance filed over a promotion, all of the types of information referenced in Section 5. b. could be relevant and reasonably necessary to the MPSO’s processing of a promotion grievance. Thus, as a general matter, the proposal parallels the City’s general obligation under the duty to bargain to supply relevant and reasonably necessary information in the context of the administration of a collective bargaining agreement. However, in the context of any specific promotion grievance, it may be that not all of the types of information referenced in Section 5. b. are relevant and reasonably necessary. Thus, as worded, we conclude the proposal is not a mandatory subject of bargaining because it extends beyond the scope of the City’s obligations in the context of a specific grievance to provide information as part of its statutory duty to bargain with the MPSO. If Section 5.b were amended to incorporate the phrase “that are relevant and reasonably necessary to processing the promotion grievance” at the end the proposal, Section 5. b. would then parallel the MPSO’s statutory right under the duty to bargain (as left intact by Sec. 19.36(10), Stats.) and thus be a mandatory subject of bargaining.

Dated at Madison, Wisconsin, this 21st day of November, 2006.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/

---

Judith Neumann, Chair

Paul Gordon /s/

---

Paul Gordon, Commissioner

Susan J. M. Bauman /s/

---

Susan J. M. Bauman, Commissioner

gjc

31936

