STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of

SOUTH MILWAUKEE FIREFIGHTERS' PROTECTIVE ASSOCIATION, LOCAL 1633, IAFF

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

CITY OF SOUTH MILWAUKEE

Case 114
No. 66675
DR(M)-670

Decision No. 32059-A

Appearances:

Richard Saks, Hawks, Quindel, Ehlke & Perry, S. C., 700 West Michigan Avenue, Suite 500, Milwaukee, Wisconsin, 53201-0442, and **Thomas A. Woodley, Baldwin Robertson** and **Eric Hallstrom**, Woodley & McGillivary, 1125 Fifteenth Street, N.W., Suite 400, Washington, D.C. 20005, appearing on behalf of the South Milwaukee Firefighters' Protective Association, Local 1633, IAFF.

Joseph G. Murphy, City Attorney, P.O. Box 308, South Milwaukee,Wisconsin 53172, appearing of behalf of the City of South Milwaukee.

FINDINGS OF FACT, CONCLUSION OF LAW AND DECLARATORY RULING

On January 22, 2007, the South Milwaukee Firefighters' Protective Association, Local 1633, IAFF, filed a petition with the Wisconsin Employment Relations Commission pursuant to Sec. 111.70(4)(b), Stats., seeking a declaratory ruling regarding the City of South Milwaukee's duty to bargain with Local 1633 over the City's decision to reduce the minimum number of on duty employees available to provide fire suppression and emergency medical services from seven to six employees.

On March 2, 2007, the Commission issued an Order which denied the City's motion to dismiss the petition.

Hearing on the petition was held in South Milwaukee, Wisconsin on June 14 and June 29, 2007 by Commission Examiner Peter G. Davis. The parties thereafter filed written argument-the last of which was received October 30, 2007. The record was supplemented with additional evidence on May 27, 2008 and again on March 9, 2009.

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 South Milwaukee, herein the City, is a municipal employer. The City provides fire suppression and emergency medical services through a single station fire department, herein the Department, that consists of a chief, three captains, three lieutenants, 19 regular firefighters (13 of whom are also trained as paramedics), 12 on-call firefighters and a secretary.

2. The South Milwaukee FireFighters' Protective Association, Local 1633, IAFF, herein the Union, is a labor organization that serves as the exclusive collective bargaining representative of City employees in the Department holding the rank of lieutenant and regular firefighter.

3. In 2002, the Wisconsin Department of Commerce promulgated an administrative rule (Comm 30) which in pertinent part at Comm 30.14 (3) requires that at least five firefighters be present at the fire scene with at least two water lines charged before an initial interior attack on a structural fire is launched. Comm 30 does not preclude firefighters from launching an exterior water attack on a structural fire before five firefighters are present. The Department follows the mandates of Comm 30. Neither Comm 30 nor City policy require that a firefighter enter a burning building without at least five firefighters present even when a human life is in danger. In this regard, the Department's Risk Management Statement provides:

> In response to calls for service, the members of the South Milwaukee Fire Department are committed to:
>
> - Assume Great Risk, under carefully considered conditions, to save human life;
>
> - Assume Little Risk, under carefully considered conditions, to save property;

- Assume No Risk, under any conditions, to attempt to save human life or property, which are considered already lost.

However, Comm 30 acknowledges that a firefighter will enter a burning building whenever a human life is in danger and does not violate Comm 30 by doing so. The City also acknowledges that, although not required to do so, a firefighter will enter a burning building whenever a human life is in danger.

Between January 1, 2004 and January 1, 2009, there were no instances in which firefighters had to decide whether to enter a burning building when a human life was in danger.

4. The current number of employees scheduled to be on duty and available to provide fire suppression and emergency medical services during the Department's three rotating 24 hour shifts is nine, eight and eight employees, respectively. If the number of employees absent from their scheduled shift due to illness, injury, vacation or training will cause the number of employees present to otherwise fall below the Department's minimum shift staffing level, then the Department calls firefighters in to work on overtime pay in numbers sufficient to meet the minimum staffing level.

5. The Department's minimum staffing level been at issue for some time. In March 2002, the Department's captains and lieutenants sent the following letter to the City Mayor and Common Council members:

March 4, 2002

City of South Milwaukee
Mayor David Kieck
Members of the Common Council

Gentlemen:

The South Milwaukee Fire Department issue regarding staffing shortfalls has been a concern of the officers from within the department for the past several years. We, as fire officers, are ultimately responsible for overall emergency management and the safety of the citizens of South Milwaukee and the dedicated firefighters sworn to serve and protect them. We are deeply concerned with the level of public safety currently being provided to our citizens and therefore feel obligated to address yourselves concerning the seriousness of the current staffing levels.

Previously, fire department staffing has been portrayed as a firefighter union issue. In fact, it has been mentioned that it is a ploy for the union membership to guarantee job security and to bolster their numbers. Staffing has

also been viewed as a firefighter safety issue, when in reality it is an even greater citizen safety issue that has erupted into a crisis situation that demands immediate intervention. Thus, the fire officers' (sic) of South Milwaukee feel it is both our moral and ethical obligation to take a public stand concerning these staffing issues that affect the safety of the citizens we are sworn to protect.

Within the fire service there is a standard of care concerning emergency service of which citizens of a municipality should expect to receive. Collectively, these standards document that a minimum staffing level of 4 or more firefighters on each apparatus is required to deliver the ever-increasing array of sophisticated emergency services. The National Fire Protection Association (NFPA) is the industry leader and most nationally recognized authority regarding fire protection. The NFPA addresses hundreds of safety issues and promotes standards from fire protection systems to apparatus staffing and their standards are the basis for most, if not all, fire codes and laws.

The NFPA standard on staffing states that a minimum of 4 or more firefighters should staff and respond on each fire apparatus. In a 2001 study prepared by Tri-Data Corporation on behalf of both the cities of South Milwaukee and Cudahy, they reported; (sic) "The fact that both departments have been successfully mitigating incidents to the degree they have is positive testimony to the caliber of their personnel, their high level of dedication, and a function of the fires typically faced. **It does, however, run counter to current industry standards. When compared to NFPA Standards, including Standard 1500, Fire Department Occupational Safety and Health Program, fire suppression units are understaffed.** In particular, NPPA 1500 suggests that a minimum acceptable fire company staffing level should be four members responding or arriving with each engine and each ladder company responding to any type of fire."

The proposed draft of NFPA Standard 1712, *Standard for the Organization and Deployment of Fire Suppression, Emergency Medical Operations, and Special Operations to the Public by Career Fire Departments,* also suggests that fire suppression units be staffed with a minimum of four personnel. It should be noted that NFPA 1710 is no longer a *proposed* document as it has been successfully passed and adopted.

Tri-Data also reported, (sic) "These standards are recommendations and guidelines developed by committees of chief officers, volunteer representatives, union officials and industry representatives. . . . And although they are not legally binding, it is important to at least consider them regardless of whether they have been adopted locally, because NFPA standards have become the "standard of care" for the fire service industry. When considering litigation, lawyers often turn to the applicable standard of care to determine their course of

action. It is up to decision-makers in political jurisdictions to determine levels of acceptable risk and the degree of liability exposure they will tolerate." These studies are based on factual, hard data derived from actual, "hands-on" real-fire evolutions. The numbers may be disputable, but the resultant fact is that response to emergency incidents is still dependant on the human factor.

Due to the dynamic, exponential growth of fire, the window of opportunity for providing emergent intervention on the fire scene is extremely time-sensitive. Upon arrival at a fire, there are a number of objectives which must be met simultaneously in order to be successful. Meeting these objectives requires adequate staffing on the first arriving fire apparatus, not by dispatching additional less-than-adequately staffed apparatus that have extended response times.

On January 1, 2002, the State of Wisconsin, Department of Commerce, released the revised version of their law, COMM 30 - Fire Department Health and Safety. A major change in this law is the actions that are required to be taken upon the arrival of first-in units at a structural fire that has progressed beyond the level of control afforded by a portable fire extinguisher. COMM 30.14(3)(a) **requires** the following: "A fire fighter using self-contained breathing apparatus and operating in an interior structural fire shall operate in a team of ***2 or more fire fighters***. Except in the case of a structural fire which is in the initial or beginning stage and which can be controlled or extinguished by portable fire extinguishers, a back-up team of at least ***2 members*** wearing self-contained breathing apparatus shall be available at the scene for rescue if the need arises. . . In all structural fires in which fire fighters use self-contained breathing apparatus, at least ***one additional member*** shall be assigned to remain outside the structural fire and monitor the operations."

This law, which ***is*** legally enforceable, dictates to fire departments the minimum number of fire suppression personnel that ***must*** be present on the scene *prior* to initiating interior structural fire attack. With current staffing levels as they are, we often cannot meet these minimum requirements and would be forced to respond to the incident with an inadequate number of on-duty personnel. With a minimum crew of 5 or more fire fighters, rescue and fire attack could begin immediately and simultaneously, With a crew of 4 or fewer firefighters, the first arriving engine company can not provide early intervention on a routine structure fire unless an imminent life hazard is apparent.

Instead, the firefighters must wait outside the citizen's home until a later arriving fire apparatus, from a neighboring community no less, is on scene before entering the structure. Additionally, it is absolutely impossible to estimate the time delay experienced during this situation because with the current reliance on our Full Assignment agreement, the arrival of subsequent

personnel is dependent on the location of the incident in relation to the next nearest neighboring fire station and the availability of their personnel and apparatus. It cannot be ignored that the fire departments in our neighboring communities are experiencing an increase in call volume which makes their availability questionable at best and similar staffing concerns which reflects on the level of response and services they can provide, as well. During this time period, the fire will continue to grow, destroying the life-long possessions of our citizen's (sic) in a dynamic process that worsens exponentially with time.

It is our position that the City of South Milwaukee is not currently providing its citizens adequate public safety, either morally or legally, according to the "standard of care" established by both nationwide standards and state law. The fire officer's (sic) of the City of South Milwaukee are insisting on the immediate and permanent increase in staffing levels on the South Milwaukee Fire Department to require a minimum of eight **full-time members on duty at all times.**

Mr. Mayor and members of Common Council, the time is now . . . not tomorrow . . . but today. Mayor Kieck, you have the obligation to direct the Fire Chief and Common Council to immediately increase firefighter staffing in the interest of public safety in order to provide the high level of service our citizens deserve and to guarantee the department's ability to effectively and safely comply with the respective laws and standards.

In closing, and we're sure you'll agree, as long as America has a strong military, police officers and brave FIREFIGHTERS there will always be a tomorrow.

Respectfully submitted,

The Officers of the South Milwaukee Fire Department.

Captain Jay Behling Lieutenant Robert Lange

Captain Joseph Knitter Lieutenant James Dorangrichia

Captain John Czajkowski Lieutenant Daniel Lang

In response to the March 2002 letter, then City Fire Chief Omernik sent the following April 4, 2002 letter to the then-President of the City Common Council.

April 4, 2002

Alderman Michael Johnson, President
South Milwaukee Common Council

Dear Alderman Johnson,

In light of the recent letter written by the Fire Department Command Staff regarding staffing shortages in the department, and after meeting with them, I would like the Common Council to proceed with looking at increasing the daily minimum staffing level in the department from seven (7) to eight (8). The staffing level within the department has been an ongoing concern over the past years, however, the request for increased manpower has not been granted due to a number of various reasons. In 1988, three firefighter positions where (sic) eliminated from the fire department. If they had not been eliminated, along with the present staffing level, the department would be at its requested daily minimum staffing level of eight (8). Quite simply, I am requesting that the department be at the same staffing level it was in 1988.

The Tri Data study's ideal staffing level recommendation for this department, which is based on comparisons, would increase our current staffing level by 10 (9 Firefighters and 1 Training Officer) At this time, an increase of 10 in the department would have a vast impact on all city operations, but it is my opinion that a staffing level increase of 10 in the department should be the ultimate goal of both the city and the department to achieve.

Please take this as my formal request that the Common Council of the City of South Milwaukee meet to discuss the staffing shortage in the South Milwaukee Fire Department. It is my hope that the Council, in cooperation with the department, will meet and find a way to achieve my current request of increasing the department staffing level by 1 firefighter per shift. Over the next few days I will be forwarding to you and the mayor a number of options that may be used in achieving this request. It is also my intention to request of the Command Staff and union any suggestions they may have to help in attaining this goal.

If you have any questions regarding this letter or the different options I mentioned will be sent to you, please feel free to contact me. I felt that it was important for me to send you this letter so that meeting dates between the Council, the department and the mayor could be set up in the near future.

Respectfully Submitted

Richard L. Omernik /s/
Richard L. Omernik, Fire Chief

c/c Mayor Kieck

The Department's minimum shift staffing level remained at seven.

6. During bargaining for the 2006-2007 contract between the City and the Union, the City advised the Union that if the Union's financial proposal became part of the new contract, a reduction in the minimum shift staffing level was a possibility. The parties were unable to reach a voluntary agreement as to the 2006-2007 contract and proceeded to interest arbitration pursuant to Sec. 111.77, Stats.

7. While the interest arbitration proceeding was ongoing, prompted by fiscal concerns and his interest in maximizing the number of firefighters available to respond to fire calls in certain circumstances, Fire Chief Behling announced his plans to reduce the number of firefighter/paramedics staffing the Department's Advanced Life Support (ALS or Med-10) ambulance unit from three to two. The plan would increase by one the number of firefighters in the fire station available to respond to fire calls received when the ALS unit was out of the fire station providing emergency medical services.

Typically, when the ALS unit is dispatched to provide emergency medical services, the Basic Life Support (BLS) unit also is dispatched to the same call. However, when the BLS unit is dispatched to provide emergency medical services, the ALS is not also dispatched.

On or about October 13, 2006, the Chief sent the following letter to the Union President with copies to the City Mayor and City Administrator:

October 13, 2006

Glen McCoy
Local 1633 President
929 Marshall Ct.
South Milwaukee, WI 53172

Dear President McCoy:

Thank you for the invitation to speak to our union members at the October 26th, 2006 meeting. Unfortunately, I'll be out of town and unable to attend. Please

feel free to convey to the membership all the matters of staffing we spoke about in my office with Captain Knitter and FF/P Nebel, on Friday, 10/13/06.

As I have stated to you before and with the budget constraints we are under, my first priority is to maintain the department's 7-man-shift-minimum. As long as we are providing ALS service through Milwaukee County's Paramedic Program, in addition to our own EMS and Fire Services, I believe the present 7-man-minimum is required to safely provide these services and protect our citizens.

You and I both know there are going to be budgetary challenges for this department in 2007 and beyond. I look forward to working with the Captains and the rest of our membership to discover the best and most reasonable solutions for working within these budgetary constraints. I hope you and the membership will take into consideration the proposals we discussed concerning Med-10's two man operation, as well as the vacation schedule.

Sincerely,

Jay B. Behling /s/
Jay B. Behling, Chief
South Milwaukee Fire Department.

CC: Thomas Zepecki, Mayor
Tamara Mayzik, City Administrator

8. On October 23, 2006, the interest arbitrator selected the Union's final offer and thereby established the terms of the 2006-2007 contract. In his award, the interest arbitrator characterized a portion of the City's position as follows:

> The City said that the levy limit will limit the amount of new revenues the City can raise to $178,000. The City is attempting to negotiate contracts with all three of its Unions at this time. If the City increases the tax levy by more than 2% it will lose $385,640 of State Expenditure Restraint funding. The loss of that money would cause more layoffs. At $71,571 average cost per employe, that's five new layoffs in addition to the elimination of $675,589 worth of positions since 2003. The City has made identical wage and fringe benefit offers to this Union and to the AFSCME Union. It will make the same offer to the Police Union whose contract expires on December 31, 2008. The other negotiations are at an impasse over the same issues. The outcome of this proceeding "will undoubtedly substantially affect" those proceedings.

Following receipt of the interest arbitration award, the City Mayor asked the Fire Chief if a reduction in minimum shift staffing from seven employees to six employees would be unsafe for the community and/or firefighters. The Chief indicated that he did not know and did not want to find out, but ultimately told the Mayor that he did not believe the reduction would be unsafe but that such a reduction would not be as safe as a seven employee minimum shift.

Following receipt of the interest arbitration award, the Fire Chief asked the Union if it would be willing to restrict the number of firefighters who could be on vacation on any given day so as to reduce the overtime costs associated with the seven employee minimum shift staffing. The Union rejected the suggestion and the City elected not to pursue the matter further.

9. On December 1, 2006, pursuant to the following November 30, 2006 Order from City Mayor Zepecki, the City reduced the Department's minimum shift staffing from seven to six employees.

> Pursuant to the authority vested in me as Mayor of the City of South Milwaukee under Wisconsin Statute Section 62.09(8)(d) you are hereby ordered to reduce your department's minimum staffing from 7 to 6. This order is to take effect immediately.
>
> In issuing this order I have taken into account and weighed the constraints put upon the City by the 2% tax levy limit, the needs of the Fire Department, the impact of the Arbitration Award on the budget of the Fire Department and the safety of the residents of South Milwaukee. I have also considered all your comments and I recognize that you would prefer to keep the minimum staffing at 7. I know you also understand the need to meet the budget of the Department which the Common Council has adopted.
>
> Please be advised that I intend to monitor the Department's expenditures in relation to the budget and to make further adjustments in manpower and staffing and expenditures as I determine may be necessary throughout the coming year. I understand that this reduction alone will not be sufficient to meet the budget and that other reductions will be necessary. I intend to carefully determine what actions will best serve the community's safety within the limitations imposed upon the City by the Arbitration Award and the Levy Limit.
>
> Thomas Zepecki /s/
> Thomas Zepecki, Mayor
>
> 11-30-06 /s/

The reduction in the number of firefighters staffing the ALS unit from three employees to two employees (referenced in the October 13, 2006 letter from Chief Behling contained in Finding of Fact 7) was in effect at the time of the reduction in minimum shift staffing.

10. The number of City fire department employees available to provide the initial response to fight a structural fire depends on the number of employees on duty during a 24 hour shift, whether one or both of the emergency medical services units (ALS unit staffed by two regular firefighters and BLS unit staffed by two regular firefighters) are providing emergency medical services which prevent them from responding immediately to the fire scene, whether the firefighters who provide building inspection services can respond to the fire scene, and the number of regular off duty firefighters and on-call firefighters who respond to such a fire.

11. The National Fire Protection Association (NFPA) promulgates national standards as guidelines for: (1) fire department administration; (2) employee training, education and professional development; (3) fire apparatus, equipment and drivers/operators; (4) protective clothing and protective equipment; (5) emergency operations; (6) facility safety; (7) medical and physical requirements; (8) employee assistance and wellness; and (9) critical incident stress programs.

One of the NFPA standards provides that a minimum of four firefighters arrive together on a single apparatus as part of the initial response to a structural fire. Under either the seven employee or six employee minimum shifts, if both the ALS and BLS units are out of the fire station when response to a structural fire is needed, the Department's response does not meet this NFPA standard.

12. Due to the reduction of the number of firefighter/paramedics manning the Department's ALS unit from three to two employees, the reduction in minimum shift staffing from seven to six employees does not reduce the number of shift employees available to initially respond to a fire call after November 30, 2006 except in those situation where six employees are manning the shift, the shift employees manning the ALS unit are available to respond to the fire scene and the shift employees manning the BLS unit are not. During the period January 1, 2004 through November 30, 2006 when the minimum shift staffing was seven firefighters, there were three structural fires in which the number of scheduled shift employees available to respond would have been reduced if a minimum of six firefighters had been on duty. Between December 1, 2006 and December 31, 2008, there were four such instances in which the number of scheduled shift employees available to respond to a structural fire would have been reduced if the new shift minimum of six firefighters had been on duty.

13. During 2007, there were 155.5 days when the Department operated with a six person minimum shift. During 2008, there were 183 days when Department operated with a six person minimum shift.

14. During 2007, there were 1176 instances in which the ALS unit was in the fire station and the BLS unit was out of the station providing service. In 2008, there were 1631 such instances. The length of time a BLS is out of the station on a service call is an average of 40 minutes.

15. During the each of following years, the maximum number of structural fires at which water hoses were laid and filled was:

2005-15
2006-12
2007-10
2008 - 6

16. Firefighter safety when attacking a structural fire is primarily impacted by the following factors which are within the City's direct control: (1) the training received by firefighters; (2) the equipment used by firefighters; (3) the amount of time the fire has been burning between the call for service and the initial interior attack by at least five firefighters; and (4) the number of firefighters in the initial attack.

17. City firefighters' training is sufficient to protect firefighter safety. Firefighters are cross-trained to successfully fill a variety of roles at a fire scene.

18. City firefighter equipment is sufficient to protect firefighter safety.

19. There will be one structural fire per year at which the number of available initially-responding firefighters will be reduced by the reduction of minimum shift staffing from seven employees to six employees.

20. There will be one structural fire per year where there is some level of increased delay in the arrival of a minimum five-person initial response due to the reduction of minimum shift staffing from seven employees to six employees. Between December 1, 2006 and December 31, 2008, there was no significant delay in initial response attributable to a six-employee shift.

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

CONCLUSION OF LAW

In the instant circumstances, the City of South Milwaukee's decision to reduce minimum shift staffing from seven employees to six employees is primarily related to the City's management and public policy judgments as to fiscal and service level choices and not to firefighter safety.

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 South Milwaukee did not and does not have a duty to bargain within the meaning of Secs. 111.70(1)(a) and (3)(a)4, Stats., with the South Milwaukee Firefighters' Protective Association, Local 1633, IAFF over the decision to reduce the minimum shift size from seven firefighters to six firefighters.

Given under our hands and seal at the City of Madison, Wisconsin, this 15th day of July, 2009.

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 SOUTH MILWAUKEE (FIRE DEPARTMENT)

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

The issue before us is whether the City of South Milwaukee is obligated to bargain with the South Milwaukee Firefighters' Protective Association, Local 1633, IAFF, over the decision to reduce the minimum size of a 24 hour shift from seven employees to six employees.

Applicable Law-General

We begin our analysis with the following definition of collective bargaining found in Sec. 111.70(1)(a), Stats.:

> (a) "Collective bargaining" means the performance of the mutual obligation of a municipal employer, through its officers and agents, and the representative of its municipal emp1oyees 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 subs. (3m), (3p), and (4)(m) and (mc) 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.

When applying Sec. 111.70(1)(a), Stats. to a specific dispute, the Wisconsin Supreme Court has concluded that collective bargaining is mandatory over matters primarily related to employee "wages, hours and conditions of employment" but permissive as to matter primarily related to "formulation of basic policy" and/or the "exercise of municipal powers and responsibilities in promoting the health, safety, and welfare of its citizens." CITY OF

BROOKFIELD V. WERC, 87 Wis 2D 819, 829 (1979). Regarding the balancing of these respective relationships, our Supreme Court stated the following in WEST BEND EDUC. ASS'N V. WERC, 121 Wis. 2D 1, (1984), 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(l)(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(l)(a), to bargain "with respect to "wages, hours and conditions of employment." At the same time it provides that a municipal employer "shall not be required to bargain on subjects reserved to management and direction of the governmental unit except insofar as the manner of exercise of such functions affects the wages, hours and conditions of employment of the employes." Furthermore, Sec. 111.70(1)(d) recognizes the municipal employer's duty to act for the government, good order and commercial benefit of the municipality and for the health, safety and welfare of the public, subject to the constitutional statutory rights of the public employees.
>
> 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(l)(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)

Applicable Law-Specific

The Commission first addressed the duty to bargain over the number of firefighters on a 24 hour shift in CITY OF BROOKFIELD, DEC. NOS. 11489-B, 11500-B (WERC, 4/75). The Commission therein stated:

> Minimum Daily Manpower
>
> The Complainant sought to show that Respondent's decisions as to the number of unit employes to be on duty daily affect the on-the-job safety and workload of the represented employes. Respondent argues that Complainant has not satisfactorily proven that relationship.
>
> The record evidence establishes that the Respondent has reduced the number of unit employes on duty daily by two and that, therefore, each unit employe remaining will be subjected to an increased workload in order to perform the static or increasing total amount of fire extinguishing and non-fire extinguishing work expected to be performed by unit employes as a group. In addition, as noted in Complainant's brief, "It is conceded by Respondents that approximately four major fires occur each year in Brookfield requiring all available fire fighters . . . In such instance, two additional men could provide a margin of safety by warning of actual or potential hazards or assist in the rescue of fellow fire fighters when so needed."
>
> The record also shows that following said reduction in the number of unit employes on duty daily, the Chief of the Department instituted new fire call

response assignments which caused the Department's aerial ladder track (which carries safety equipment in quantities and of types not carried on other apparatus) to respond less quickly and to fewer first calls than was the case prior to December 31, 1972. There is also evidence that one tank truck formerly available to fight multiple response will be inoperative at least until off-duty personnel arrive. For those reasons, Complainant asserts that the first unit employees responding to a fire will be without needed safety equipment for at least some period of time.

The record also established, however, that there have been no reductions in the number of men ordinarily riding on each piece of apparatus 17/ and that each piece of apparatus is equipped with numerous items of safety equipment including at least one oxygen mask per fire fighter aboard. In addition, Fire Chief Edward Schweitzer testified that he did not consider his revisions in the fire call response assignments as final but rather only "an experiment". The Chief further testified that his expectations of the work performance of each man at a fire have not changed; he formerly and presently ". . wouldn't expect any man to do anything he wasn't capable of doing or take any chance that would hinder his life."

To repeat, Complainant argues that the number of unit employes on duty significantly affects working conditions (to wit, safety and workload) or (sic) non laid-off employes. The Commission finds, however, that said working conditions are much more directly and intimately affected by decisions as to the types and quantities of safety equipment transported to first responses, the safety practices and procedures followed at fires, and the amount and type of non-fire-extinguishing work to be required of unit employes as a group. Moreover, the record facts do not establish that unit employees have experienced so unreasonably hazardous or unduly burdensome a workload -- either before or after the number of employees normally on duty was reduced by two -- that their interests and concerns in safety and workload could not be substantially fulfilled and protected without bargaining about the number of unit employes to be on duty daily. Therefore, since their interests in safety and workload seem amenable to protection and fulfillment by bargaining about the above-mentioned subjects that are more directly and intimately related thereto and since bargaining about those subjects is much less restrictive of Respondent's freedom to determine the basic scope of protective services to be provided to the public, the Commission concludes, as did the Examiner, that determinations as to the number of unit employes to be on duty daily do not directly and intimately affect the wages, hours and working conditions of non laid-off employes. That result both serves the public policy underlying MERA and reflects an effort to harmonize MERA with Sections 62.11(5), 62.13(5m) and (8).

Therefore, Respondent did not, and does not, have a duty to bargain collectively about the number of unit employes to be on duty during each 24-hour Fire Department shift.

17/ Tr. 39. For that reason, the size of crew riding on each vehicle is not at issue herein as it was in City of Wauwatosa (10670-A) 12/71.

The Commission revisited the issue of the duty to bargain firefighter shift size in CITY OF MANITOWOC, DEC. NO. 18333 (WERC, 12/80) and held as follows:

> The parallel between this situation and that presented by the City of Brookfield decision is compelling. Both situations involve minimum man-power requirements as applied to municipal fire departments. Both raise the issue of the possible impact of such requirements on firefighter safety and well-being on the one hand, and on the authority of a municipality to determine the extent and level of services that are to be provided its constituents, on the other. The only apparent difference between the two situations is the possibility of layoffs or other personnel actions, i.e. in Brookfield, layoffs of firefighters were imminent and indeed the motivating factor behind the City's challenge to a minimum manning provision, while in this instance, no such layoffs are contemplated. For purposes of determining the issue involved herein, this distinction is not of great significance.
>
> The Supreme Court's Brookfield decision stated that economically motivated layoffs of public employees resulting from budgetary restraints constituted non-mandatory subjects of bargaining, insofar as other State statutes, in particular Chapter 62, Wis. Stats. 2/, granted municipalities the power to decide the necessity of layoffs in view of the policy objectives of the affected citizenry - as expressed through their elected representatives. However, the Commission's decision in Brookfield 4/ specifically determined the status of minimum daily manpower requirement as a non-mandatory subject of bargaining. The Union's proposal in that instance was a daily minimum manpower requirement of not less than 16 men with the rank of Captain and under for each 24-hour duty period (with certain exceptions not material herein). In Brookfield, the City had actually reduced by two the number of bargaining unit employes on duty daily, which affected response tine and the quantity of men and equipment available to respond to fire calls. The Commission determined that the City did not have a duty to bargain on the number of unit employes on duty in and of itself:
>
> > ". . .Complainant argues that the number of unit employes on duty significantly affects working conditions (to wit, safety and workload) of non laid-off employes. The Commission finds, however, that said working conditions are much more directly

> and intimately affected by decisions as to the types and quantities of safety equipment transported to first responses, the safety practices and procedures followed at fires, and the amount of non-fire-extinguishing work to be required of unit employes as a group. Moreover, the record facts do not establish that unit employes have experienced so unreasonably hazardous or unduly burdensome a workload--either before or after--the number of employees normally on duty was reduced by two--that their interests and concerns in safety and workload seem amenable to protection and fulfillment by bargaining about the above-mentioned subjects that are more directly and intimately related thereto and since bargaining about those subjects is much less restrictive of Respondent's freedom to determine the basic scope of protective services to be provided to the public, the Commission concludes, as did the Examiner, that determinations as to the number of unit employes to be on duty do not directly and intimately affect the wages, hours and working conditions of non laid-off employes. That result both serves the public policy underlying MERA and reflects an effort to harmonize MERA with Sections 62.11(5), 61.l3(5m), and (8).
>
> Therefore, Respondent did not, and does not, have a duty to bargain collectively about the number of unit employes to be on duty during each 24-hour Fire Department shift." 5/

The portion of our decision in Brookfield that concerned minimum daily manpower requirements was not appealed and said subject did not become part of the Supreme Court's subsequent decision relating to the status of economically-motivated layoffs as a subject of bargaining. Therefore, in light of the fact that the proposal involved herein is virtually identical in substance to that involved in Brookfield and since there was no evidence adduced herein to establish that the size of the firefighter crew on any particular shift primarily affected the safety of the firefighters on duty, we conclude that the proposal involved does not relate to a mandatory subject of bargaining.

2/ See in particular Section 62.11(5), Wis. Stats. (setting forth the powers of a municipality's common council) and Section 62.13(5m) (relating to dismissals and re-employment in municipal service).

4/ City of Brookfield (11489-B, 11500-B) 4/75.

5/ Id. at pp. 15-16.

In the context of this case, we commented as follows in DEC. NO. 32059 (WERC, 3/07) as to the appropriate analysis to be followed when resolving this dispute:

> To the extent the City is arguing that the Department of Commerce administrative rules and the City's alleged compliance therewith are relevant to the resolution of the duty to bargain dispute, we agree. To the extent the City is arguing that City compliance with those Department rules prohibits the Commission from concluding that the safety relationship of the manning change outweighs the relationship to service level choices, we disagree, for the reasons that follow.
>
> In CITY OF FOND DU LAC, DEC. NO. 22373 (WERC, 2/85), the Commission concluded that a variety of factors must be considered when evaluating the effect of a manning change on firefighter safety, which, in turn, is balanced against the relationship between the manning change and the municipal employer's service level choices. Primary among those "safety" factors was "evidence of local conditions" which was viewed as "determinative." "Evidence of local conditions" includes "types and quantities of safety equipment and applicable safety procedures." We also noted the relevance of what we identified as the "heroic factor" – the potential for firefighters to act contrary to safety procedures in life threatening situations.
>
> We do not know whether the Department of Commerce considered all of these relevant factors when promulgating the Department's rules on firefighter safety. But even if the Department did so, we are satisfied that within our duty to bargain dispute resolution jurisdiction, it remains our judgment as to the relationship between a manning decision and firefighter safety that is dispositive. Thus we do not agree with the City's view that a manning decision that may comport with the Commerce Department's rules is ipso facto a permissive subject of bargaining
>
> Therefore, we have denied the City's motion to dismiss.

DISCUSSION

Impact of Comm 30 and NFPA Standards

As reflected in the above-quoted portions of DEC. NO. 32059 (WERC, 3/07) and in the parties' post-hearing argument, both the City and Union assert Comm 30 plays a significant role in this litigation. The City contends that despite the reduction in minimum shift size, it will continue to comply with Comm 30 and that said compliance is highly persuasive evidence that firefighter safety will not be significantly affected by the reduction The Union argues that the reduction in minimum shift size increases the likelihood that Comm 30 will be violated thereby establishing that the City must bargain over the decision.

Comm 30.14(3) provides as follows:

> **(3)** RESCUE OF MEMBERS. (a) A fire fighter using self-contained breathing apparatus and operating in an interior structural fire shall operate in a team of 2 or more fire fighters. Except in the case of a structural fire which is in the initial or beginning stage and which can be controlled or extinguished by portable fire extinguishers, a back-up team of at least 2 members wearing self-contained breathing apparatus shall be available at the scene for rescue if the need arises. One back-up team member with a charged line shall be committed to a safe non-affected area in or near the structure. The other back-up team member shall remain within voice contact and may be assigned to additional roles so long as this individual is able to perform assistance or rescue activities without jeopardizing the safety or health of any fire fighter working at the scene. In all structural fires in which fire fighters use self-contained breathing apparatus, at least one additional member be shall be assigned to remain outside thc structural fire and monitor the operations.
>
> Note: It is not the intent of this rule to prevent any number of persons from responding to a fire call, setting up equipment and initiating exterior suppression at the fire scene. Also, it is not the intent of this rule to prohibit an individual fire fighter from taking an action to preserve the life or safety of another person.

As reflected in Finding of Fact 3, Comm 30 establishes the minimum staffing level (5 firefighters) that must be present at the structural fire scene before the fire is internally attacked. Comm 30 also specifically allows firefighters to internally attack a fire before the minimum staffing level is present if human life is in jeopardy. The record establishes that it is City policy (as well as the City's legal obligation) to honor Comm 30 requirements. Given the foregoing, we reject the Union argument that reduction in minimum shift staffing will increase the likelihood that Comm 30 will be violated.

However, in doing so, it continues to be our view (as expressed in DEC. NO. 32059) that compliance with Comm 30 does not resolve the duty to bargain dispute before us. At a minimum, there is the reality that a fire becomes more dangerous the longer it burns and thus delay in the arrival of the minimum of the Comm 30 required five firefighters increases the danger to firefighters. Evidence of such delay (where attributable to reduced shift manning) is a non-Comm 30 factor clearly relevant to the issue before us. Evidence of any such delay is also relevant because it increases the likelihood of circumstances in which a firefighter will engage in "heroic" rescue activity before the Comm 30 minimum arrives. No such circumstances occurred between January 1, 2004 and December 31, 2008.

The Union also argues that the Department's lack of compliance with NFPA standards is a relevant consideration. As reflected in Finding of Fact 11, there will be circumstances in which the City's response to a structural fire does not meet the NFPA standard of the first responders arriving together as a unit. However, the small size of the Department and the cross

training received by employees substantially limits any loss of cohesion caused by arrival on multiple units. Thus, we do not view non-compliance with this industry guideline to be a significant factor in our analysis.

Impact on City Fiscal/Service Level Choices

As reflected by our earlier recitation of existing duty to bargain law applicable to this dispute, whether the City was obligated to bargain over the decision to reduce minimum shift size from seven to six firefighters is determined by balancing the impact of the decision on firefighter safety in South Milwaukee against the impact on the City's fiscal/service level choices. [1] The Union contends that the balance easily swings to the employee safety side because the reduction in minimum shift size was simply an effort to reduce overtime costs [2] and thus was not a *bona fide* service level decision by the City. We begin our analysis with a consideration of this contention.

As reflected in the Findings of Fact, the decision to reduce minimum shift size was prompted by the City's loss of an interest arbitration case and the resultant stress on the City budget. The City, contrary to the Union, asserts that not only are its fiscal concerns legitimately part of a mandatory/permissive analysis but also that there can be no question that the reduction in shift size did reduce the level of service available to the community. From the City's perspective the reduction in service is produced by the slightly increased risk of delay (during which a fire may spread or increase in intensity) before the Comm 30 minimum of five firefighters arrive at the structural fire scene and can begin their interior attack. The Supreme Court's decision in BROOKFIELD persuades us that the Union is not correct when it argues that the fiscal trigger for the City's action diminishes the strength of the City interests that are to be balanced against employee safety impacts in this case.

In BROOKFIELD, the city cut the fire department budget and concluded that firefighter layoffs were needed to achieve the necessary savings. The Court held:

> As stated in sec. 111.70(1)(d) a mandatory subject of bargaining is a matter which affects "wages, hours and conditions of employment" The statute also provides for a public sector "management rights" clause guaranteeing as a management prerogative the exercise of municipal powers and responsibilities in promoting the health, safety and welfare for its citizens. Unless the bargaining topic affects "wages, hours and conditions of employment" a municipality is not compelled to collectively bargain but may choose to if not expressly prohibited

[1] The Union cites decisions from other jurisdictions in support of its position in this matter. Given statutory differences from jurisdiction to jurisdiction and most importantly the critical role that "local conditions" play in our analysis, decisions from other jurisdictions play no significant role in our analysis. See CITY OF FOND DU LAC, DEC. NO. 22373 (WERC, 2/85)

[2] The Union points out (and we concur) that the wage impacts of the change are mandatory subjects of bargaining.

by legislative delegation. Obviously, it is not the intent of the legislature to permit the elasticity of the phrase "bargaining topics affecting wages, hours and conditions of employment" to be stretched with each and every labor question.

In Beloit Education Asso. v. WERC, supra at 54, the court held that a mandatory subject of bargaining was distinguished from a permissive subject of bargaining if the topic "primarily" or "fundamentally" related to wages, hours and conditions of employment, now known as the "primary relation test." The primary relation test reflects a substantial change in public sector labor law. Prior to the Beloit case, mandatory and permissive subjects were delineated in the private sector "change of direction" test. This rule of law was adopted by the court in 1970 wherein Libby, McNeill & Libby v. WERC, supra recited "….most management decisions which change the direction of the corporate enterprise, involving a change in capital investment, are not bargainable," Id. at 282. In Unified School Dist. No. 1 of Racine v WERC, supra at 96, it was reasoned that the primary relation test rather then the change of direction standard better encompassed the inherent differences between public and private sector bargaining. See Weisberger, The Appropriate Scope of Mandatory Bargaining in the Public Sector: The Continuing Controversy and the Wisconsin Experience, 1977 Wis. L. Rev. 685, 694—99. The Racine County decision emphasized that:

> "[I]n the public sector, the principal limit on the scope of collective bargaining is concern for the integrity of political processes." Unified School Dist. No. 1 of Racine County v. WERC, supra at 96.

We hold that economically motivated layoffs of public employees resulting from budgetary restraints is a matter primarily related to the exercise of municipal powers and responsibilities and the integrity of the poltical processes of municipal government. The citizens of a community have a vital interest in the continued fiscally responsible operation of its municipal services. Thus, it is imperative that we strike a balance between public employees bargaining rights, and protecting the public health and safety of our citizens within the framework of the political and legislative process.

Ch. 62, Stats., which enumerates legislatively delegated municipal powers and obligations mandates this result and recites in its relevant portions:

"(5) POWERS. Except as elsewhere in the statutes specifically provided, the council shall have the management and control of the city property, finances, highways, navigable waters, and the public service, and shall have power to act for the government and good order of the city, for its commercial benefit, and for the health, safety and welfare of the public, and may carry out

its powers by license, regulation, suppression, borrowing of money, tax levy, appropriation, fine, imprisonment, confiscation and other necessary or convenient means. The powers hereby conferred shall be in addition to all other grants, and shall be limited only by express language." Sec. 62.11, Stats. (emphasis supplied).

"(5m) DISMISSALS AND REEMPLOYMENT. (a) When it becomes necessary. because of need for economy, lack of work or funds, or for other just causes, to reduce the number of subordinates, the emergency, special, temporary, part-time or provisional subordinates, if any, shall be dismissed first, and thereafter subordinates shall be dismissed in the order of the shortest length of service in the department, provided that, in cities where a record of service rating has been established prior to January 1, 1933, for the said subordinates, the emergency, special, temporary, part-time provisional subordinates, if any, shall be dismissed first, and thereafter subordinates shall be dismissed in the order of the least efficient as shown by the said service rating." Sec. 62.13 (5m) (a), Stats. (emphasis supplied).

This court has held that Sec. 111.70 should be harmonized with existing statutes when possible, inasmuch as Sec. 111.70 "is presumed to have been enacted with full knowledge of the pre-existing statutes and that construction should give each section force and effect." Glendale Professional Policemen's Assoc. v. Glendale, citing Muekego-Norway C.S.T.S.D. No. 9 v, WERB, 35 Wis. 2d 540, 356, 151 N.W. 2d 617 (1967). In fulfilling the exclusive judicial role of interpreting and harmonizing diverse statutes as ch. 62 and 111.70(1)(d), we adhere when possible to the express legislative policy stated in sec. 62.04, Stats.:

"INTENT AND CONSTRUCTION. . .For the purpose of giving the cities the largest measure of self-government compatible with the constitution and general law, it is hereby declared that sections 62.01 to 62.26, inclusive, shall be liberally construed in favor of the rights, powers, and privileges of cities to promote the general welfare, peace, good order and prosperity of such cities and the inhabitants thereof." (emphasis supplied).

Ch. 62 requires that the city of Brookfield and other municipalities possess the power to decide when a lay off is necessary in order to secure the policy objectives of the community's citizenry as spoken through the actions of its duly elected representatives. The residents of Brookfield through their elected representatives on the city council requested city budget reductions. Unquestionably, fewer firefighters will reduce the level and quality of services provided, but this is a policy decision by a community favoring a lower municipal tax base. Ch. 62 does not expressly prohibit the topic of economically motivated lay offs from becoming a permissive subject of collective bargaining,

but the decision to discuss the topic at a bargaining table is a choice to be made by the electorate as expressed through its designated representatives and department heads.

This court's concern for the maintenance of the municipalities' political processes was forcefully stated in Unified School Dist. No. 1 of Racine County v. WERC, supra at 99-100:

> "As a public body composed of elected officials, a school board is vested with governmental powers and has a responsibility to act for the public welfare. The United States Supreme Court recognized this responsibility in Hortonville Jt. School Dist. No. 1 v. Hortonville Ed. Asso., 426 U.S. 482, 495, 96, 96 S. Ct, 2308, 49 L. Ed. 2d 1 (1976).
>
> "State law vests the governmental, or policymaking function exclusively in the School Board,… [T]he Board is the body with overall responsibility for the governance of the school district; it must cope with the myriad day-to-day problems of a modern public school system…; by virtue of electing them the constituents have declared the Board members qualified to deal with these problems, and they are accountable to the voters for the manner in which they perform…"
>
> "In municipal employment relations the bargaining table is not the appropriate forum for the formulation or management of public policy. Where a decision is essentially concerned with public policy choices, no group should act as an exclusive representative; discussions should be open; and public policy should be shaped through the regular political process. Essential control over the management of the school district's affairs must be left with the school board, the body elected to be responsible for those affairs under state law."

The court recognizes that unions, such as Local 2051, are not powerless in their ability to formulate and influence the direction of public policy decisions. As demonstrated in this case, unions can and do attend public budget meetings and can and do lobby with legislative bodies and organize and motivate the general public regarding the union's position. The distribution of informational fliers, newsletters and media releases as well as the solicitation of prominent and influential speakers are but a few of the ways in which unions can and do have a significant impact on the political processes. Local 2051 exerted acceptable political pressure upon the Brookfield City Council to halt the lay offs resulting from the budget cut. To decide the issue to be a mandatory

> subject of bargaining would destroy the equal balance of power that insures the collective bargaining rights of the union and protects the rights of the general public, to determine the quality and level of municipal services they consider vital. The legislature has made it clear that a budgetary lay off decision is not a subject of mandatory bargaining. If it were, the right of the public to voice its opinion would be restricted as to matters fundamentally relating to the community's safety, general welfare and budgetary management.
>
> While not at issue in this case, we add that the trial court correctly determine that the issue as to the effects of the lay offs was a mandatory subject of bargaining. A reduction in the total work force caused by the economically motivated lay offs will affect the number of employees assigned to a particular shift and thus alter their individual fire fighting responsibilities. Therefore, there is a primary relation between the impact of the lay off decision and the working conditions of the remaining unit employees. Brookfield, after initially refusing to discuss the issue, made an offer to do so on January 15, 1973. We view with disfavor Local 2051's refusal to bargain the effect of the lay offs unless the five firefighters were returned to work and reimbursed for lost time.
>
> In reaching our decision, we deem it important that the Brookfield City Council made the specific decision that the budget cuts would implemented by personnel lay offs pursuant to its powers. Our decision does not reinstate the WERC ordered remedy of re-employment for the five laid off firefighters and reimbursement of back wages. Therefore, we do not reach the second issue of whether the award was reasonable and appropriate under the circumstances.

As is apparent from the foregoing, there is an inevitable link between reduction in staffing and a reduction in the level of service. Further, the Court's decision makes clear that the fiscal trigger for a reduction in service in no way diminishes the weight of the municipal employer's interests. Indeed, the Court holds that fiscally motivated decisions to reduce service are permissive subjects of bargaining – even where jobs are lost.

However, the issue of the impact of the reduction in services on employee safety was not before the Court in BROOKFIELD and the Court held in BELOIT EDUCATION ASSOCIATION V. WERC, 73 Wis. 2D 43 (1976) that proposals primarily related to employee safety are mandatory subjects of bargaining. Thus, as we understand the law, the City is generally free to provide whatever level of service it wishes/chooses to fiscally support (and determine the number of employees who will provide that service) without an obligation to bargain over that decision. However, that freedom can become subject to the duty to bargain if the impact on employee safety is more substantial than the impact on the City's fiscal/service choice interests.

As reflected by Findings of Fact 6 - 9 and the Court's holding in BROOKFIELD, the City's fiscal/service interests are substantial. [3] We turn to an analysis of the employees' safety interests.

Impact on Employee Safety

As the Commission held in CITY OF FOND DU LAC, DEC. NO. 22373 (WERC, 2/85), the analysis of the relationship to employee safety is focused on danger at the scene of a structural fire. As reflected in Finding of Fact 16, the primary factors in the City's direct control that relate to firefighter safety are training, equipment, the number of firefighters making the initial interior attack and the amount of time between the initial call for service and the launch of the initial attack.

The evidence establishes that the training received and equipment used by the City firefighters are adequate and thus do not adversely affect firefighter safety. Thus, the focus of our analysis is on the evidence presented by the parties as to the impact of the reduction in minimum manning on the number of employees responding to a structural fire and the time within which the initial interior attack is launched.

As noted in Finding of Fact 12, due to a contemporaneous reduction in ALS staffing from three firefighters to two firefighters, the reduction to six person shifts only reduced the number of firefighters available to launch an initial attack on a structural fire when the ALS unit is in the station and the BLS unit is out. During 2007 and 2008, there were 1176 and 1631 such instances, respectively. For the purposes of our analysis, we will use 1404 instances, the annual average of the two years. Existing evidence for 2006 indicates that the length of BLS call is 40 minutes. We do not have specific evidence for 2007 or 2008. For the purposes of our analysis, we assume a BLS call length of one hour. Combining these two statistics, produces the following as to the percentage of time in a year the BLS would be out but the ALS would be in.

Hours in a year 24x365=8760
Number of hours when BLS is in and ALS is out=1404
Percentage of time when BLS is in and ALS is out=16%

[3] As referenced in Finding of Fact 4, in December 2000 a Tri-Data Report was issued as to the fire departments of South Milwaukee and Cudahy which concluded among other matters that neither City "could independently mitigate a significant fire incident or multiple incidents without the use of mutual aid." The Tri-Data Report went on to recommend consolidation of the two departments and stated that "To develop and meet reasonable response standards independently, both departments would have to hire additional personnel at significant cost." Consolidation did not occur and the City chose not to hire additional firefighters. The City thereby elected to maintain existing service level choices and also thereby maintained whatever impact those choices had on firefighter safety. The issue before us in this proceeding is not whether there was a duty to bargain over the 2000 choices/impacts present when the Tri-Data Report was issued but rather whether there was/is a duty to bargain over the change in service level choices made by the City when it reduced minimum shift sizes in December 2006. Thus, although the Tri-Data Report provides some relevant context in this proceeding, it plays a very limited role in our analysis.

Translating 16% of the hours in a year when a daily reduction to six person shifts would reduce the number of available firefighters into the number of yearly 24 hour shifts when a daily reduction would be present yields 60 shifts/days.

During 2007, the Department operated at the six employee minimum 155.5 days. During 2008, the number of six employee days increased to 182. For the purposes of our analysis, we will assume that 50% of the time the Department will operate at the six employee minimum.Factoring the 50% of the time the six person minimum will be in effect in with the 60 days a year when the BLS is out with the ALS in the station, we conclude that there are 30 days per year when the reduction from seven to six employees will produce an actual reduction in the number of employees available to make an initial interior response to a structural fire. Thus, for 335 days of the year (88%), there is no reduction in the number of employees available to make an initial response to a structural fire and for 30 days of the year (12%) there is a reduction of one firefighter.

The last part of the statistical analysis is how often is there a structural fire which puts City firefighters in danger. The best measure of this danger is the number of fires at which fire hoses are charged (i.e. filled with water). The evidence presented is somewhat mixed. At the high end, the four year 2005-2008 total is 43 such fires (2005-15; 2006-12; 2007-10; 2008-6). Analysis of individual fire incident reports indicates a lower total of 28 such fires (2005-9; 2006-10; 2007-4; 2008-5). For the purposes of our analysis, we will use the higher total which yields a yearly average of 11 such fires.

Combining all of the foregoing, we conclude that there will be one structural fire a year (12% of 11) at which the number of available initially responding firefighters will be reduced by the six person minimum shift staffing.

The actual experience of the City and its firefighters is consistent with the foregoing statistical analysis. During the five year period of January 1, 2004 - December 31, 2008, there were a total of seven structural fire calls in which the number of firefighters responding from the station would have been reduced if a six person shift had been present.

The other safety-related factor impacted by the reduction in minimum manning is the potential for increased delay between the time a structural fire is called in and the Comm 30 minimum of five firefighters arrive at the fire scene. The potential for increase in delay is essentially the same as the potential for reduction in the number of responding firefighters discussed above. The potential for increased delay occurs when there is a structural fire call during a six firefighter shift when the ALS unit is in the station and the BLS unit is out. As discussed above, the likelihood is that there will be one structural fire per year where there will be some level of increased delay in the arrival of a minimum five person initial response. Importantly, from our review of the fire reports in the record, we find no evidence of significant delay in response that is attributable to a six firefighter shift responding to a structural fire at which lines were charged.

Balancing Impacts

As discussed earlier herein, under the Supreme Court's analysis in BROOKFIELD, the City does not have an obligation to bargain over the fiscal/service level choices it makes unless the impact of those choices on employee safety predominates over the City's interest in making those fiscal/service level choices. Based on the evidence and argument presented as to the impact on South Milwaukee firefighter safety produced by the reduction in the minimum shift size from seven to six firefighters, we conclude that this shift size reduction is primarily related to the City's fiscal/service level choices. Therefore, the City was not and is not obligated to bargain over the decision to reduce the shift size.

In reaching this conclusion, we acknowledge the ongoing reality that firefighting is an inherently dangerous job and that the City of South Milwaukee firefighters perform that dangerous job very well. We further acknowledge that whatever shift size is in place, South Milwaukee firefighters will always be willing to risk their lives to save the lives of others. However, we are satisfied that the City's reduction in shift size did not increase the level of danger to a point where the impact on employee safety predominates over the impact on the City's management and public policy interests.

Dated at Madison, Wisconsin, this 15th day of July, 2009.

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

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