

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 528
No. 66695
DR(M)-661

Decision No. 32138

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.

ORDER DENYING MOTION TO DISMISS AND SHOW CAUSE

On February 7, 2007, the City of Milwaukee filed a petition with the Wisconsin Employment Relations Commission seeking a declaratory ruling pursuant to Sec. 111.70(4)(b), Stats. as to whether the City has a duty to bargain with the Milwaukee Police Supervisors' Organization (MPSO) over a December 20, 2006 MPSO proposal regarding promotions.

On February 27, 2007, the MPSO filed a motion to dismiss the petition asserting that the issues raised by the City's petition had been previously litigated and held to be mandatory subjects of bargaining in the context of CITY OF MILWAUKEE, DEC. NO. 31936 (WERC, 11/06). The City agreed that the matters had been litigated and decided but asserted that the Commission had concluded the issues in question were not mandatory subjects of bargaining.

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The parties thereafter filed written argument and position statements-the last of which was received April 27, 2007.

Having reviewed the record and being fully advised in the premises, the Commission makes and issues the following

ORDER

1. The Motion to Dismiss is denied.

2. The Milwaukee Police Supervisors' Association has 20 days from the date of this Order to show cause why the Commission ought not conclude that the disputed portion of the Association's promotion proposal is a permissive subject of bargaining.

Given under our hands and seal at the City of Madison, Wisconsin, this 27th day of June, 2007.

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 ORDER DENYING
MOTION TO DISMISS AND SHOW CAUSE**

In its petition, the City asserted that it has no obligation to bargain over the following portions of an MPSO proposal relating to promotional procedures:

3. ELIGIBLE LISTS

- a. Promotion to all positions covered by this agreement shall be made from “eligible lists” established by the FPC. A separate list shall be established for each respective rank.
- b. 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 FPC explaining the Chief’s decision and reason for it. At the meeting of the FPC 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 FPC final determination in this regard shall be subject to the Contract Enforcement Article of this Agreement.

The City initially rested its objection on two grounds. The first ground was that the proposal covers applicants/employees who are not represented by the MPSO. In its response to the petition, the MPSO clarified that the proposal is not intended to cover applicants/employees who are not represented by the MPSO. Thus, although the City asserts that some specific clarification/confirmation to that effect in the proposal itself would be appropriate, the City acknowledges that this issue has now been resolved.

The City also objects that the MPSO’s proposal conflicts with the Chief of Police’s statutory power to nominate and promote employees to the position of captain, and with the WERC’s November, 2006 declaratory ruling that MPSO cannot bargain over the process/person who determines which bargaining unit employees are at least minimally qualified for a position. In particular, it is the proposal’s requirement that the FPC establish a list of qualified employees that the City asserts intrudes into its managerial and statutory right to have the Chief of Police establish such a list.

Citing the doctrine of claim preclusion, the MPSO contends that the language of Sections 3 a. and b., quoted above, was before the Commission in the November 2006 declaratory ruling case and was not specifically held to be a permissive or prohibited subject of bargaining. Thus, the MPSO argues that the City cannot now re-litigate the status of this proposed contract language.

The City responds by asserting that Sections 3 a. and b. run afoul of the Commission's holding in the November 2006 decision that the MPSO has no right to bargain over the process/persons who determine/identify which bargaining unit employees are at least minimally qualified for a promotion.

We conclude the City has the better of this argument and thus deny the MPSO motion to dismiss. Further, given the basis for our denial of the motion to dismiss and because the parties have to some extent briefed the merits of their mandatory/permissive dispute, we conclude it is appropriate to issue an order to show cause why the MPSO proposal should not be found to be a permissive subject of bargaining.

In our November 2006 decision, we held at p. 21 that:

. . . [M]andatory bargaining over the right to receive a promotion is limited to the question of identifying which qualified employee will be promoted.

and

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 how those minimum job-related qualifications are established is a managerial prerogative that need not be bargained.

Consistent with these holdings, we also held at p. 22 that Section 3 .e. of the MPSO proposal was not a mandatory subject of bargaining because it:

. . . establishes the components of a testing process and **the identity of those evaluating qualifications.** (emphasis added)

In the face of these holdings in our November 2006 decision, the MPSO asserts that that decision nonetheless should be viewed as having implicitly concluded that the City had a duty to bargain over which management entity (the FPC or the Chief) would create the eligible list from which promotions will be made.

We disagree. As the above-quoted holdings indicate, a union has no right to bargain over the process the employer uses to identify and list who is eligible for promotion. Thus, any portion of the MPSO proposal then before us that conflicted with these holdings was found to be a permissive subject of bargaining. What are now identified as Sections 3.a and b. of the MPSO proposal were before us in November 2006 and were ruled to be permissive to the extent they require the FPC (rather than the Chief) to create the list of promotion-eligible employees.

We acknowledge that our November 2006 decision did not specifically identify what are now Sections 3 a. and b. as being permissive, and we regret the resulting confusion that has been caused. Nonetheless, viewing our decision as a whole (including our Conclusion of Law 6 that the portion of the MPSO promotion proposal that “primarily relates to the management and direction of the City is a permissive subject of bargaining”), we conclude this regrettable lack of specificity ought not overcome the clear import of our general holdings in the November 2006 decision. Thus, we have denied the MPSO motion to dismiss.

As is evident from the foregoing, we have in essence concluded that our November 2006 decision already holds that the portion of the MPSO proposal that dictates an FPC promotional list is a permissive subject of bargaining. However, since our own lack of specificity in the earlier decision has contributed to some confusion and in order to give all parties a full opportunity to be heard on the merits, we have issued an order to show cause allowing the MPSO an opportunity to raise additional argument before we issue a final dispositive ruling in response to the City’s petition.

Dated at Madison, Wisconsin, this 27th day of June, 2007.

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

