STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of

CITY OF SUN PRAIRIE

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

**FIREFIGHTERS LOCAL 311,
INTERNATIONAL ASSOCIATION OF FIREFIGHTERS**

Case 45
No. 66885
DR(M)-674

Decision No. 32276

Appearances:

Thomas R. Crone, Melli, Walker, Pease & Ruhly, S.C., Ten East Doty Street, Suite 900, Madison, Wisconsin 53701, appearing on behalf of the City of Sun Prairie.

Bruce F. Ehlke, Hawks Quindel Ehlke & Perry, 222 West Washington Avenue, Suite 705, Madison, Wisconsin 53701, appearing on behalf of Firefighters Local 311, International Association of Firefighters.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECLARATORY RULING

On April 6, 2007, the City of Sun Prairie filed a petition with the Wisconsin Employment Relations Commission seeking a declaratory ruling pursuant to Sec. 111.70(4)(b), Stats. as to the City's duty to bargain with Firefighters Local 311, International Association of Firefighters, over a Local 311 bargaining proposal. Local 311 filed a statement in response to the petition on May 14, 2007. The City contends the third paragraph of the Local 311 proposal set forth in Finding of Fact 7 is a permissive or prohibited subject of bargaining because it requires the City to classify emergency medical technicians as protective occupation participants for purposes of the Wisconsin Retirement System. Local 311 asserts the disputed portion of its proposal is a mandatory subject of bargaining.

On August 27, 2007, the Commission received a Stipulation from the parties in lieu of an evidentiary hearing and the parties thereafter filed written argument-the last of which was received October 18, 2007.

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 Sun Prairie is a municipal corporation organized and existing under the laws of the State of Wisconsin. The City is a "municipal employer" within the meaning of Sec. 111.70(1)(j), Wis. Stats. The Mayor of Sun Prairie is Joe Chase, who has his offices at 300 East Main Street, Sun Prairie, Wisconsin.

2. Firefighters Local 311, International Association of Firefighters, is a labor organization within the meaning of Sec. 111.70(1)(h), Wis. Stats. The principal representative of Firefighters Local 311 is Bruce Hill, IAFF State Representative, who has his offices at 821 Williamson Street, Madison, Wisconsin.

3. The City of Sun Prairie, for many years, has been signatory to two collective bargaining agreements, one with Dane County Wisconsin Municipal Employees, Local Union No. 60, AFSCME, AFL-CIO ("AFSCME") and the other with the Wisconsin Professional Police Association ("WPPA"). The AFSCME agreement generally covers a city-wide unit, while the WPPA agreement is limited to law enforcement personnel.

4. The City's law enforcement personnel are covered by the Wisconsin Retirement System ("WRS") as "protective occupation participants." None of the City's other employees, including those in the AFSCME unit, participate in the WRS. Instead, non-law enforcement employees participate in a 401A pension program administered by International City Management Corporation. There are currently 140 employees, both represented and non-represented, who participate in the 401A pension program, including currently all of the Paramedics.

5. On March 6, 2006, the Wisconsin Employment Relations Commission certified Firefighters Local 311 as the exclusive bargaining representative of a bargaining unit consisting of all regular full-time and all regular part-time Paramedic employees of the City of Sun Prairie, excluding limited-term, temporary and casual employees, and confidential, supervisory, managerial and executive employees. This bargaining unit currently consists of twelve employees.

6. The Paramedics are members of a uniformed service. They provide transport and emergency medical care to individuals in need of assistance. They are assigned to the Emergency Medical Services Office in Sun Prairie, where they work a schedule of three rotating 24-hour shifts averaging 56 hours/week during a nine-day work schedule. The Paramedics are required to possess a Wisconsin Paramedic license and related certifications.

7. The City and Firefighters Local 311 are engaged in bargaining a first collective bargaining agreement for the bargaining unit described at Paragraph 5 of this Stipulation. The preliminary final offer proposed by Firefighters Local 311 includes the following proposal:

Article 28 – Pension

Pension Contributions

For 2007 the City shall contribute an amount equal to twelve and four tenths percent (12.4%) of the employee's annual pay to the 401 Plan.

Effective 12/31/07 all employees will be one hundred percent (100%) vested in said plan.

Effective the first pay period of 2008, employees shall be covered under the State of Wisconsin Retirement Fund in accordance with Wisconsin Statutes, protective occupation under social security category. The City shall pay 100% of the employee's contribution to the Wisconsin Retirement Fund.

Employee accounts currently part of the 401 pension plan shall remain active, with or without future contributions, until such time as the employee separates, retires or transfers those funds to an IRS approved account.

8. The proposal in Finding of Fact 7 is primarily related to wages.

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

CONCLUSIONS OF LAW

1. The City's discretionary right to classify emergency medical technicians as "protective occupation participants" pursuant to Sec. 40.02 (48)(bm), Stats. does not deprive the Union of the right to bargain over a proposal which would require that the City to classify the emergency medical technicians as "protective occupation participants."

2. The proposal in Finding of Fact 7 is a mandatory subject of bargaining within the meaning of Sec. 111.70 (1)(a) Stats.

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

DECLARATORY RULING

The City of Sun Prairie has a duty to bargain within the meaning of Secs. 111.70(1)(a) and (3)(a) 4, Stats, with Firefighters Local 311, International Association of Firefighters over the proposal in Finding of Fact 7.

Given under our hands and seal at the City of Madison, Wisconsin, this 19th day of November, 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 SUN PRAIRIE

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 the 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 ASSN. 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 of 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 evaluating the applicable competing interests in a specific situation and evaluating them.
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> (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).

DISCUSSION

The disputed portion of the Union's proposal requires the City to classify the emergency medical technicians, herein EMTs, as "protective occupation participants", herein POPs, for the purposes of the Wisconsin Retirement System in 2008. The statutory provision which authorizes the City to take such action is Sec. 40.02 (48)(bm), Stats. which states:

> (bm) "Protective occupation participant" includes any participant who is an emergency medical technician if the participant's employer classifies the participant as a protective occupation participant and the department receives notification of the participant's name as provided in s. 40.06(1)(d) and (dm). Notwithstanding par. (a), an employer may classify a participant who is an emergency medical technician as a protective occupation participant without making a determination that the principal duties of the participant involve active law enforcement or active fire suppression or prevention. A determination under this paragraph may not be appealed under s. 40.06(1)(e) or (em), but a determination under this paragraph regarding the classification of a state employee is subject to review under s.40.06(1)(dm). Notwithstanding sub. (17)(d), each participant who is classified as a protective occupation participant under this paragraph on or after January 1, 1991, shall be granted creditable service as a protective occupation participant for all covered service as an emergency medical technician that was earned on or after the date on which the department receives notification of the participant's name as provided in s. 40.06(1)(d) and (dm), but may not be granted creditable service as a protective occupation participant for any covered service as an emergency medical technician that was earned before that date.

We begin our analysis by noting the absence of any dispute over the fiscal impact of the disputed proposal. Classifying emergency medical technicians as "protective occupation participants" impacts the level of employees' retirement benefits. Thus, it is apparent that there is a relationship between the proposal and employee "wages." While the City contends that the decision to classify EMTs as POPs is a matter of public policy and/or the management and direction of the City, the City has not identified and we cannot discern any specific public policy or managerial interest that is implicated by the decision. Based on the evidence before us, the decision as to whether or not EMTs should be POPs is strictly a fiscal one. [1] Thus, when balancing the relationship to wages against the relationship to public policy and/or managerial interests, the relationship to wages predominates.

Despite this relationship to employee wages and the absence of any apparent specific public policy/managerial implications, the City contends that through the above-quoted statutory language of Sec. 40.02 (48)(bm), Stats., the Wisconsin Legislature placed the City's decision as to whether to classify EMTs as POPs outside the scope of matters as to which the City can be compelled to bargain. We disagree.

The City's argument is based on those portions of of Sec. 40.02(48)(bm), Stats. which: (1) give the City the authority to classify EMTs as POPs; and (2) provide that City's decision "may not be appealed under s. 40.06 (1)(e) or (em) . . . "

As to the authority to classify EMTs as POPs, we do not find this grant of statutory authority to be indicative of a legislative intent to place this decision off limits for collective bargaining. As the Union correctly argues, the statutes are replete with grants of authority to municipal employers to take certain action but those authorizations do not automatically place the subject of the action outside the scope of collective bargaining if the matter is primarily related to wages, hours and conditions of employment. Thus, for instance, in MILWAUKEE COUNTY V. DISTRICT COUNCIL 48, 109 Wis. 2D 14, 32-34, (1982), the Court concluded that a county's statutory authority to establish the level of employee compensation did not deprive a union of the statutory right to bargain over wages and, if necessary, use the interest arbitration process to establish wage rates. Here, as was true in MILWAUKEE COUNTY, it is both possible and appropriate to conclude that the City's authority to decide whether EMTs should be POPs does not deprive the Union of the right to compel the City to bargain and, if necessary, proceed to interest arbitration over EMT/POP status.

[1] The City asserts that POP status for EMTs will have fiscal implications for other City employees in terms of participation in the Wisconsin Retirement System. The Union disputes this assertion. We need not resolve this dispute because the extent of the fiscal impact of the Union's proposal is not relevant to the Union's right to bargain over a "wage" proposal and instead is a matter for the parties to resolve at the bargaining table/before an interest arbitrator.

Our conclusion is not altered by consideration of the City's argument regarding the "may not be appealed under s. 40.06 (1)(e) or (em) . . . "[2] language found in Sec. 40.02 (48)(bm), Stats. The City equates this language with a legislative command that the City's choice regarding the classification of EMTs as POPs cannot be changed by any process including collective bargaining and/or interest arbitration. We find this interpretation of the statutory "may not be appealed" language to be strained and unpersuasive. On its face, this statutory language simply indicates that an employee cannot appeal the City's decision regarding EMT/POP classification to the Department of Employee Trust Finds, herein DETF, (see Sec. 40.06(1)(e), Stats.) and that the DETF cannot independently review the City's decision in this regard (see Sec. 40.06 (1)(em), Stats.). This absence of appeal is consistent with Sec. 40.02 (48)(bm), Stats. which establishes no standards/managerial interests/policies to be applied as to the City's EMT/POP choice (i.e why have a right to appeal when there is nothing on which to base an appeal) [3] However, the City nonetheless characterizes this "may not be appealed" language as an expression of legislative intent "expressly precluding any third party review" which, in turn, precludes "review" through the collective bargaining and/or interest arbitration process. As held above, this interpretation of the statute is simply not reasonable and thus is not persuasive.

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[2] Sections 40.06 (1)(e) and (em), Stats. provide as follows:

> (e) 1. An employee may appeal a determination under par. (d), including a determination that the employee is not a participating employee, to the board by filing a written appeal with the board. An appeal under this paragraph does not apply to any service rendered more than 7 years prior to the date on which the appeal is received by the board. The board shall consider the appeal and mail a report of its decision to the employee and the participating employer or state agency.
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> . . .
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> (em) The department may review any determination by a participating employer to classify an employee who is not a state employee as a protective occupation participant and may appeal the determination to the board by filing a written notice of appeal with the board. The determination by the employer shall remain in effect until the department receives a written notification from the board indicating a classification for the employee that is different from the employer's determination.

[3] Contrary to the City's arguments, the absence of (1) statutory standards for EMTs becoming POPs and (2) a statutory appeal mechanism distinguishes the dispute before us from the dispute in LACROSSE COUNTY, DEC. NO. 28733 (WERC, 6/96) where the Commission concluded that POP status for jailers was not a mandatory subject of bargaining because POP status was a matter of right if statutorily established standards were met and because DETF was an available appeal forum if a jailer believed he/she was improperly denied POP status by the employer. Given these critical distinctions between the applicable statutory provisions regarding POP status for jailers in LACROSSE and POP status for EMTs in the dispute presently before us, we reject the City argument that "common sense" requires us to conclude that if a proposal to classify jailers as POPs is not a mandatory subject bargaining, then neither is a proposal to classify EMTs as POPs.

In summary, we have concluded that the disputed portion of the Union proposal is primarily related to wages and that Sec. 40.02 (48)(bm), Stats., does not deprive the Union of the right to collective bargaining/interest arbitration over EMT/POPs status. Therefore, we have concluded that the disputed portion of the Union proposal is a mandatory subject of bargaining.

Dated at Madison, Wisconsin, this 19th day of November, 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

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