

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of
GREEN BAY PROFESSIONAL POLICE ASSOCIATION

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

CITY OF GREEN BAY

Case 454
No. 67924
DR(M)-683

Decision No. 32463

Appearances:

Thomas J. Parins, Parins Law Firm, S.C., Attorneys at Law, 422 Doty Street, P.O. Box 817, Green Bay, Wisconsin 54305, appearing on behalf of the Green Bay Professional Police Association.

Christopher M. Toner, Ruder Ware, Attorneys at Law, P.O. Box 8050, 500 First Street, Suite 8000, Wausau, Wisconsin 54402-8050, appearing on behalf of the City of Green Bay.

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

On April 9, 2008, the Green Bay Professional Police Association 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 of Green Bay's duty to bargain with the Association over a promotion proposal.

The City filed a Statement in response to the petition on April 28, 2008 and the parties then agreed to file written argument, the last of which was received June 2, 2008.

Having considered the matter and being fully advised in the premises, the Commission makes and issues the following

Dec. No. 32463

FINDINGS OF FACT

1. The City of Green Bay, herein the City, is a municipal employer that employs individuals who provide law enforcement services within the City.

2. The Green Bay Professional Police Association, herein the Association, is a labor organization that serves as the collective bargaining representative of non-supervisory law enforcement employees of the City.

3. There is an organization that represents supervisory law enforcement employees (including employees holding the rank of Lieutenant) for the purpose of negotiating with the City.

4. During collective bargaining between the Association and the City, the Association made the following proposal:

SELECTION PROCEDURE FOR PROMOTION TO LIEUTENANT. GBPPA members who have applied (bid) for promotion to the rank of Lieutenant will be selected for promotion to that rank on the basis of seniority amongst those qualified. The City (1) shall provide all members equal opportunity apply; (2) shall provide each applicant with a copy of the qualifications for the position; (3) shall not provide any information regarding qualifications or preparation to any applicant that is not also provided to all other applicants; and (4) shall apply qualification standards or criteria on a fair, objective, equal and non-discriminatory basis amongst those applying. (Underlining added).

5. The underlined portion of the proposal set forth in Finding of Fact 4 is primarily related to the management and direction of the City and the remainder of said proposal is primarily related to wages, hours and conditions of employment.

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

CONCLUSION OF LAW

The underlined portion of the proposal set forth in Finding of Fact 4 is a permissive subject of bargaining and the remainder of said proposal is a mandatory subject of bargaining.

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 Green Bay does not have a duty to bargain within the meaning of Secs. 111.70(1)(a) and (3)(a) 4, Stats, with the Green Bay Professional Police Association over the portion of the proposal set forth in Finding of Fact 4 which is a permissive subject of bargaining.

The City of Green Bay does have a duty to bargain within the meaning of Secs. 111.70 (1)(a) and (3)(a) 4, Stats, with the Green Bay Professional Police Association over the portion of the proposal set forth in Finding of Fact 4 which is a mandatory subject of bargaining.

Given under our hands and seal at the City of Madison, Wisconsin, this 3rd day of July, 2008.

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 GREEN BAY (POLICE DEPARTMENT)

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

Before considering the specific proposal at issue herein, it is useful to set out the general legal framework within which we determine whether a proposal is a mandatory or permissive 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 representatives of its municipal employees in a collective bargaining unit, to meet and confer at reasonable times, in good faith, with the intention of reaching an agreement, or to resolve questions arising under such an agreement, with respect to wages, hours and conditions of employment, and with respect to a requirement of the municipal employer for a municipal employee to perform law enforcement and fire fighting services under s. 61.66, except as provided in sub. (4)(m) and s. 40.81(3) and except that a municipal employer shall not meet and confer with respect to any proposal to diminish or abridge the rights guaranteed to municipal employees under ch. 164. The duty to bargain, however, does not compel either party to agree to a proposal or require the making of a concession. Collective bargaining includes the reduction of any agreement reached to a written and signed document. The municipal employer shall not be required to bargain on subjects reserved to management and direction of the governmental unit except insofar as the manner of exercise of such functions affects the wages, hours and conditions of employment of the municipal employees in a collective bargaining unit. In creating this subchapter the legislature recognizes that the municipal employer must exercise its powers and responsibilities to act for the government and good order of the jurisdiction which it serves, its commercial benefit and the health, safety and welfare of the public to assure orderly operations and functions within its jurisdiction, subject to those rights secured to municipal employees by the constitutions of this state and of the United States and by this subchapter.

In *WEST BEND EDUCATION ASS'N v. WERC*, 121 Wis. 2d 1, 7-9 (1984), the Wisconsin Supreme Court concluded the following as to how Sec. 111.70(1)(a), Stats., (then Sec. 111.70(1)(d), Stats.) should be interpreted when determining whether a subject of bargaining is mandatory or permissive:

Sec. 111.70(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 the 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 on 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 system management and operation,” to “management and direction of the school system” or to “formulation or management of public policy.” *UNIFIED SCHOOL DISTRICT NO. 1 OF RACINE COUNTY V. WERC*, 81 Wis. 2d 89, 95-96, 102, 259 N.W. 2d 724 (1977). This court has construed “primarily” to mean “fundamentally”, “basically” or “essentially”, *BELOIT EDUCATION ASSO. V. WERC*, 73 Wis. 2d 43, 54, 242 N.W. 2d 231 (1976). As applied on a case-by-case basis, this primarily related standard is a balancing test which recognizes that the municipal employer, the employees, and the public have significant interests at stake and that their competing interests should be weighed to determine whether a proposed subject for bargaining should be characterized as mandatory. If the employees’ legitimate interest in wages, hours and conditions of employment outweighs the employer’s concerns about the restriction on managerial prerogatives or public policy, the proposal is a mandatory subject of bargaining. In contract, where the management and direction of the school system or the formulation of public policy predominates, the matter is not a mandatory subject of bargaining. In such cases, the professional association may be heard at the bargaining table if the parties agree to bargain or may be heard along with other

concerned groups and individuals in the public forum. UNIFIED SCHOOL DISTRICT NO. 1 OF RACINE COUNTY 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.

The proposal in question states:

SELECTION PROCEDURE FOR PROMOTION TO LIEUTENANT. GBPPA members who have applied (bid) for promotion to the rank of Lieutenant will be selected for promotion to that rank on the basis of seniority amongst those qualified. The City (1) shall provide all members equal opportunity apply; (2) shall provide each applicant with a copy of the qualifications for the position; (3) shall not provide any information regarding qualifications or preparation to any applicant that is not also provided to all other applicants; and (4) shall apply qualification standards or criteria on a fair, objective, equal and non-discriminatory basis amongst those applying.

The City contends that because the Lieutenants are not represented by the Association, the Association has no right to bargain on behalf of the Lieutenants and thus that the proposal is not a mandatory subject of bargaining. The Association acknowledges that the position of Lieutenant is not in the bargaining unit that it represents. However, the Association asserts that the proposal nonetheless impacts on the conditions of employment of the employees that it represents who wish to be promoted to the position of Lieutenant. The Association also contends that under its proposal, the City is free to establish whatever qualifications the City deems appropriate and that the wages, hours and conditions of employment of the Lieutenants continue to be established as a result of negotiations between the City and the labor organization representing the Lieutenants.

In ASHLAND COUNTY, DEC. NO. 22142 (WERC, 11/84), the Commission concluded that the following proposal was a permissive subject of bargaining:

Section 3. It shall be the policy of the Employer to promote to supervisory positions insofar as possible from the ranks of employees. Such vacancies shall be posted on the various shop bulletin boards two weeks prior to filling the vacancy and all applications shall be in writing. All applicants will be interviewed by the Highway Committee and Highway Commissioner to determine their qualifications. Seniority will be recognized but may not necessarily be the deciding factor in filling such supervisory positions. Should the County seek to promote a qualified employee with less seniority than some other qualified employee, the matter shall first be submitted to a Committee of equal representation of the Employer and the Union to study the qualifications of each employee who has applied for the job.

The Commission reasoned as follows:

The proposal at issue herein does not establish the wages, hours and conditions of employment for supervisory employees. Instead, it establishes certain rights and procedures applicable to bargaining unit employees who wish to pursue promotion to supervisory positions. As these rights and procedures are applicable to employees while they are in the bargaining unit and remain municipal employees, and as promotion to supervisory positions may well entail an increase in compensation or more desirable conditions of employment, the Union reasonably argues that this proposal does in fact have some relationship to the wages, hours and conditions of employment of municipal employees represented by the Union herein.

At the same time, however, it is clear that this proposal directly interferes with the County's ability to select individuals for management positions who the County believes will best implement County policy choices and will best supervise the County's employees in the desired manner.

On balance, we conclude this relationship to the management direction of the County outweighs any relationship to employee wages, hours and conditions of employment. 3/ We therefore find the proposal to be a permissive subject of bargaining.

3/ Accord, City of Green Bay, Dec. No. 12402-B (Schurke, 1/75) aff'd by operation of Sec. 111.07(5), Dec. No. 12402-D (2/75). See also Milwaukee Board of School Directors, Dec. No. 20399-A (WERC, 9/83) for discussion of the status of proposals concerning transfer to positions in another bargaining unit.

Consistent with ASHLAND COUNTY, the Association correctly argues that its proposal does have a relationship to unit employees' wages, hours and conditions of employment. The Association also correctly contends that its proposal leaves the City free to determine the minimum job related qualifications for the Lieutenant position and thus does not intrude into this management prerogative. Thus, if the promotional position covered by the proposal were in the bargaining unit represented by the Association, it would be a mandatory subject of bargaining. However, the proposal applies to a position that is not represented by the Association and most importantly is filled by individuals with responsibility for supervising employees of the City-in this case employees represented by the Association. As to such supervisory positions, consistent with ASHLAND COUNTY, we conclude that management has an overriding interest in selecting the person they believe will **best** fulfill those responsibilities. Thus, although the Association proposal may well provide the City with qualified applicants for the supervisory position, it does not allow the City to select the best qualified internal or

external applicant but rather requires promotion among qualified applicants by seniority. To this extent, the proposal therefore intrudes upon the management interest in selecting the supervisor the City concludes is best equipped to perform supervisory duties. When balancing these respective interests, we conclude that the management interest in selecting the best applicant is, on balance, the stronger one. Thus, we conclude the portion of the Association proposal which states “ . . . will be selected for promotion to that rank on the basis of seniority amongst those qualified” is a permissive subject of bargaining. ¹

However, the remaining portion of the Association proposal is a mandatory subject of bargaining. The four City obligations created by the proposal (numerically identified in the proposal itself) enhance the employees’ access to a promotional opportunity while still leaving the City free to establish the qualifications it sees fit, select the best applicant, and negotiate the Lieutenants’ wages, hours and conditions of employment with the labor organization that represents the employees filling that position. Thus, as to these four obligations, the relationship to employee wages, hours and conditions of employment predominates and to that extent the proposal is a mandatory subject of bargaining.

Dated at Madison, Wisconsin, this 3rd day of July, 2008.

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

¹ To the extent the Association would have us view ASHLAND as extending only to the selection of management/managerial employees, we decline to do so. The proposal in ASHLAND specified that the proposal then before the Commission related to “supervisory positions.” Both parties here agree that the Lieutenants have been held to be supervisors and, in light to the proposal and holding in ASHLAND, the question of managerial status is irrelevant. Thus, there is no need for an evidentiary hearing as to whether Lieutenants are managerial employees.

