

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of

**APPLETON FIRE FIGHTERS, INTERNATIONAL
ASSOCIATION OF FIRE FIGHTERS, LOCAL 257**

Requesting a Wis. Stat. §111.70(4)(b) Declaratory Ruling
Involving a Dispute Between the Petitioner and

CITY OF APPLETON

Case 452
No. 68216
DR(M)-688

Decision No. 32603

Appearances:

Timothy E. Hawks and **Jeffrey Sweetland**, Hawks, Quindel, Ehlke & Perry, S.C., Attorneys at Law, 700 West Michigan Avenue, Suite 500, P. O. Box 442, Milwaukee, Wisconsin 53201-0442, appearing on behalf of Appleton Fire Fighters, International Association of Fire Fighters, Local 527.

James R. Korom, von Briesen & Roper, S.C., Attorneys at Law, P.O. Box 3262, 411 East Wisconsin Avenue, Suite 700, Milwaukee, Wisconsin 53201-3262, appearing on behalf of the City of Appleton.

**ORDER DENYING MOTION TO DISMISS PETITION FOR DECLARATORY
RULING AND DENYING MOTION TO STAY ARBITRATION**

On August 12, 2008, the Appleton Fire Fighters, International Association of Fire Fighters, Local 257, filed a petition with the Wisconsin Employment Relations Commission seeking a declaratory ruling pursuant to Sec. 111.70 (4)(b), Stats. that a provision in an existing collective bargaining agreement between Local 257 and the City of Appleton was a mandatory subject of bargaining.

No. 32603

On August 27, 2008, the City filed a motion to dismiss the petition arguing that there is no present duty to bargain dispute for the Commission to resolve and noting that a grievance over the meaning of the contractual provision is pending before Arbitrator John Emery.

On August 27, 2008, Local 257 filed a motion to stay the arbitration proceeding before Arbitrator Emery. On September 5, 2008, the City filed a statement in opposition to the motion to stay.

On September 9, 2008, Local 257 filed an amended petition for declaratory ruling asserting that it had made a bargaining proposal to the City that raised the same duty to bargain issue presented in the pending grievance arbitration proceeding. Local 257 also filed a brief in opposition to the City's motion to dismiss and in support of its motion to stay.

On September 11, 2008, the City filed a response to Local 257's September 9, 2008 submissions. On September 16, 2008, Local 257 filed a reply.

Having reviewed all of the foregoing and being fully advised in the premises, the Commission makes and issues the following

ORDER

1. The City of Appleton's motion to dismiss the petition for declaratory ruling is denied.

2. The Appleton Fire Fighters, International Association of Fire Fighters, Local 257 motion to stay grievance arbitration is denied.

Given under our hands and seal at the City of Madison, Wisconsin, this 30th day of October, 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 APPLETON

**MEMORANDUM ACCOMPANYING ORDER DENYING MOTION TO DISMISS
PETITION FOR DECLARATORY RULING
AND DENYING MOTION TO STAY ARBITRATION**

Section 111.70 (4)(b), Stats., provides in pertinent part:

Whenever a dispute arises between a municipal employer and a union of its employees concerning the duty to bargain on any subject, the dispute shall be resolved by the commission on petition for declaratory ruling.

ERC 30.10 (1)(a) states in pertinent part:

Should either party assert, during negotiations or during commission mediation or investigation, that a proposal by the other party is a non-mandatory subject of bargaining, either party may commence a declaratory ruling proceeding before the commission under s. 111.70 (4)(b), Stats.,

Here, on September 8, 2008, Local 257 advised the City as follows:

In the current negotiations for a successor to the current labor agreement, which began last Thursday, Appleton Firefighters Union Local 257's proposals include a demand that Article 18, Promotions, remain in its current form. We also include a demand that the City acknowledge and agree, in writing, that its commitment in Article 18 that promotions "shall be offered to qualified existing employees on the basis of seniority" applies both to the Chief's discretion in the exercise of his appointment power under Wis. Stat. 62.13 (4)(a) and to the Police and Fire Commission's discretion in the exercise of its authority to approve or reject the Chief's appointments. We believe both demands involve mandatory subjects of bargaining.

Please add this issue to our list of proposals. I will send you a hard copy letter of this proposal.

The City asserts that there is no dispute over the duty to bargain as to the Local 257 proposal because the City has not refused to bargain over the proposal and may not need to do so depending on the course of future collective bargaining and/or the result of the pending grievance arbitration proceeding. We disagree.

The Local 257 proposal was made after negotiations for a successor agreement had reopened. Thus, we are satisfied that the "during negotiations" prerequisite of ERC 30.10(1)(a) has been met. As to whether the City has asserted "during negotiations" that the Local 257 proposal is a non-mandatory subject of bargaining, we note that prior to

the September 8, 2008 Local 257 offer, the City consistently argued that Wisconsin law does not allow existing Article 18 to be interpreted in the manner proposed by Local 257. In its argument filed after the September 8 proposal, the City does not disavow that legal position. In this context, we are satisfied that the City has thereby asserted “during negotiations . . . that a proposal by the other party is a non-mandatory subject of bargaining” within the meaning of ERC 30.10(1)(a) and that a “dispute” within the meaning of Sec. 111.70 (4)(b), Stats. has arisen. Thus, we deny the City’s motion to dismiss the petition for declaratory ruling.¹

We also deny Local 257’s motion to stay the grievance arbitration proceeding before Arbitrator Emery. We conclude that the issue of whether the arbitration should proceed is predominately a contractual one more appropriately resolved by the arbitrator after considering the positions of the parties before him.

Dated at Madison, Wisconsin, this 30th day of October, 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 As our ruling is based on the existence of the Local 257 proposal, we need not determine whether dismissal of the petition as it existed prior to said proposal would have been appropriate.