STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of

THE CITY OF EAU CLAIRE

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

THE INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, LOCAL 487

Case 288
No. 69198
DR(M)-696

Decision No. 33262

Appearances:

Stephen G. Bohrer, Assistant City Attorney, 203 South Farwell Street, Eau Claire, Wisconsin 54701, appearing on behalf of the City of Eau Claire.

John B. Kiel, Attorney, 3300 252nd Avenue, Salem, Wisconsin 53168, appearing on behalf of the International Association of Fire Fighters, Local 487.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECLARATORY RULING

On September 23, 2009, the City of Eau Claire filed a petition with the Wisconsin Employment Relations Commission pursuant to Sec. 111.70(4)(b), Stats. seeking a declaratory ruling as to the City's duty to bargain with the International Association of Fire Fighters, Local 487 over certain Local 487 proposals for inclusion in a collective bargaining agreement between the City and Local 487.

On December 1, 2009, Local 487 amended certain of the disputed proposals. On January 13, 2010, and February 3, 2010, the parties met in an unsuccessful effort to resolve the dispute. On February 26, 2010, the City advised the Commission and Local 487 that the City continued to dispute its obligation to bargain with Local 487 over certain Local 487 proposals.

Hearing was held on April 19, 2010 in Eau Claire, Wisconsin by Commission Examiner Peter G. Davis and the parties then filed written argument-the last of which was received on July 16, 2010.

On November 24, 2010 and February 7, 2011, the Examiner requested clarification as to the Local 487 proposals in dispute. Responses to those requests were completed on February 9, 2011.

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 Eau Claire, herein the City, is a municipal employer that provides a variety of services to its citizens including fire suppression and emergency medical services.

2. International Association of Fire Fighters, Local 487, herein Local 487, is a labor organization serving as the collective bargaining representative of certain employees of the City who provide fire suppression and emergency medical services.

3. During collective bargaining between the City and Local 487, a dispute arose as to the City's duty to bargain with Local 487 over certain Local 487 proposals.

4. Local 487's proposals as to Articles III, X, XI, XIII (3), XXXIV and XLI are primarily related to wages, hours and conditions of employment.

5. Local 487's proposals as to Article XIII (6) and Article XV are primarily related to the management and direction of the City or the formulation or management of public policy.

6. Local 487's proposals as to Article II (H), Article IV(5) and Article VII are primarily related to wages, hours and conditions of employment (in part) and primarily related to the management and direction of City or the formulation or management of public policy (in part).

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

CONCLUSIONS OF LAW

1. The proposals referenced in Finding of Fact 4 and 6 (in part) are mandatory subjects of bargaining.

2. The proposals referenced in Finding of Fact 5 and 6 (in part) are permissive subjects of bargaining.

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

DECLARATORY RULING

1. The City of Eau Claire has a duty to bargain within the meaning of Secs. 111.70(1)(a) and 111.70 (3)(a) 4, Stats. with the International Association of Fire Fighters, Local 487 over the proposals referenced in Findings of Fact 4 and 6 (in part).

2. The City of Eau Claire does not have a duty to bargain within the meaning of Secs. 111.70(1)(a) and 111.70 (3)(a) 4, Stats. with the International Association of Fire Fighters, Local 487 over the proposals referenced in Findings of Fact 5 and 6 (in part).

Given under our hands and seal at the City of Madison, Wisconsin, this 3rd day of March, 2011.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/
Judith Neumann, Chair

Susan J. M. Bauman /s/
Susan J. M. Bauman, Commissioner

THE CITY OF EAU CLAIRE

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

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, and for a school district with respect to any matter under sub. (4)(o), and for a school district with respect to any matter under sub. (4)(n), 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)

The Disputed Proposals

Article II (H) and Article VII

Article II (H) of the parties' 2008-2009 contract stated in pertinent part:

ARTICLE II
DEFINTIONS

. . .

H. "Grievance" shall mean a claimed violation, misinterpretation or misapplication of the existing rules, wages, procedures, or regulations covering working conditions applicable to the employees of the department and shall include all claimed violations, misinterpretations, or misapplications of the provisions of this Agreement.

Article VII of said contract stated in pertinent part:

ARTICLE VII
GRIEVANCE ARBITRATION

Any unresolved grievances which relate to the interpretation, application or enforcement of any specific article or section of this Agreement or any written supplementary agreement and which has been processed through the last step of

> the grievance procedure, may be submitted to arbitration in strict accordance with the following:
>
> . . .
>
> Section 4. The arbitrator shall be without authority to require the City to delegate, alienate or relinquish any powers, duties, responsibilities, obligations or discretion, which by State law or City Charter the City cannot delegate, alienate or relinquish.
>
> . . .

Local 487 proposed that the above-quoted language be included in the successor to the 2008-2009 contract.

In its petition for declaratory ruling, the City asserts that because the definition of a "grievance" found in the above-quoted provisions is not limited to mandatory subjects of bargaining, the provisions are to that extent permissive subjects of bargaining.

In response to the petition, Local 487 amended its proposal by adding the following underlined language:

> H. "Grievance" shall mean a claimed violation, misinterpretation or misapplication of the existing rules, wages, procedures, or regulations covering working conditions applicable to the employees of the department and shall include all claimed violations, misinterpretations, or misapplications of the provisions of this Agreement. <u>With respect to claims of misapplication of the existing rules, procedures or regulations covering those working conditions that are not otherwise specifically covered by a provision of this Agreement, it is agreed that those rules, procedures and/or regulations, or the impact thereof, that primarily relate to wages, hours and/or conditions of employment are subject to the grievance process.</u>

Local 487 asserts that by its amendment to the proposal, it has limited the definition of a grievance to mandatory subjects of bargaining.

The City responded to the amendment by maintaining that the proposal continues to be permissive because: (1) only "misapplication" is addressed by the amendment; (2) the scope of coverage of a grievance remains indefinite; and (3) the new phrase "or the impact thereof" is not limited to mandatory subjects of bargaining.

We find the City's objection (1) to be persuasive but not objections (2) and (3). By failing to include " violations" and "misinterpretations" in its amended language, Local 487 continues to propose that claimed violations or misinterpretations of rules, procedures or regulations not covered by the contract can be grieved even if not mandatory subjects of bargaining. To that extent, the Local 487 proposal continues to be a permissive subject of bargaining. However, we reject City objection (2) because we have previously held that the contentions regarding lack of specificity or the potential for erroneous arbitral interpretation of contract language are relevant as to the merits of whether a proposal should become part of a collective bargaining agreement but are irrelevant as to the mandatory or permissive status of a proposal. WAUPACA COUNTY, DEC. NO. 26880 (WERC, 5/91); RACINE SCHOOLS, DEC. NO. 23380-A, p. 17, (WERC, 11/86); RACINE SCHOOLS, DEC. NO. 20652-A, p. 58, (WERC, 1/84). See also CITY OF WAUKESHA, DEC. NO. 17830 (WERC, 5/80). We reject City objection (3) because, as asserted by Local 487, we think it apparent that the "impact" language is limited to mandatory subjects of bargaining.

Given all of the foregoing, the Article II (H) and Article VII proposals are mandatory subjects of bargaining (in part) and permissive subjects of bargaining (in part). If Local 487 were to amend its Article II (H) proposal to include "violations" and "misinterpretations", then both proposals would be mandatory subjects of bargaining in their entirety.

Article III, Section 1

Article III, Section 1 of the parties' 2008-2009 contract provided in pertinent part:

ARTICLE III
UNION RECOGNITON AND ACTIVITIES

> Section 1. The Executive Board of the Union shall be allowed to hold its meetings at a Fire Station in the City of Eau Claire as the Executive Board designates whether Board members be on or off duty, upon 24 hours advance notification of the time, place and personnel attending the meeting to the Deputy Chief on duty at the time. Four hours notice of such meeting shall be given in case of an emergency.

Local 487 proposes that the above-quoted provision be included in the successor to the 2008-2009 contract.

The City contends that the proposal is a permissive subject of bargaining because if the members of the Executive Board are on duty or the location of the meeting hinders emergency response time, then the City's ability to respond to an emergency is compromised. Local 487 asserts that rights secured by the proposal have a direct relationship to wages, hours and conditions of employment by virtue of Local 487's obligation to represent employees and that the proposal has no impact on the City's ability to respond to an emergency. Local 487 argues that the City has complete discretion to respond to emergencies as the City sees fit if the on

duty status of Board members or the location of the meeting raises concerns regarding the adequacy or timeliness of a potential emergency response.

We have held that proposals which give union officials time off for activities related to collective bargaining and contract administration and/or allow union access to employer facilities for meetings do have a wage, hour and conditions of employment relationship derived from the union's obligations as the representative of employees. CITY OF MADISON, DEC. NO. 16590 (WERC, 10/78); SCHOOL DISTRICT OF JANESVILLE, DEC. NO. 21466 (WERC, 3/84); SCHOOL DISTRICT OF SHULLSBURG, DEC. NO. 20120-A (WERC, 4/84), ROCK COUNTY, DEC. NO. 30787-A (WERC, 9/04). Here, the City argues that the relationship of the proposal to the City's ability to provide service outweighs the wage, hour and conditions of employment relationship. We disagree. As argued by Local 487, if the City is concerned that the number of on-duty attendees and/or the location of the meeting has the potential to negatively impact the service the City may be asked to provide, the City has the right to call in other employees to provide the desired level of service coverage. Any additional cost the City may incur when doing so is relevant to the merits of this proposal but irrelevant to its mandatory or permissive status. We also reject the City contention that the proposal impermissibly interferes with City manning decisions. The choice as to how many employees to have available for emergency services remains the City's. Thus, we find this proposal to be a mandatory subject of bargaining.

Article IV, Section 5

Article IV, Section 5 of the parties' 2008-2009 contract stated:

> ARTICLE IV
> MANAGEMENT RIGHTS
>
> . . .
>
> Section 5. Any dispute with respect to management rights shall not in any way be subject to arbitration, but any grievance with respect to the reasonableness of the application of said management rights may be subject to the grievance procedures contained herein.

Local 487 proposes to include this provision in the successor to the parties' 2008-2009 contract.

The City asserts that this proposal is a permissive subject of bargaining because it allows Local 487 the right to challenge the exercise of rights as to which the City need not bargain. Local 487 contends this proposal is a mandatory subject of bargaining consistent with the holding in BROWN COUNTY, DEC. NO. 20620 (WERC, 5/83) that a union has a right to challenge the reasonableness of a management-created work rule.

We begin by noting that in BROWN COUNTY, the Commission concluded that the parties had contractually agreed that the employer had the management right to create reasonable work rules and that the union had the right to grieve the reasonableness of any such rules. Thus, the holding in BROWN COUNTY does not provide guidance as to whether the Local 487 proposal is a mandatory subject of bargaining.

The scope of the Local 487 proposal stretches far beyond the establishment of work rules and includes the right to arbitrate the reasonableness of the exercise of Article IV "management rights" such as:

> A. To determine the mission of the agency . .
>
> . . .
>
> H. To control the departmental budget.
>
> . . .
>
> I. To take whatever actions are necessary in emergencies or in the interest of public safety to assure the proper functioning of the department.
>
> . . .
>
> L. To assist other municipal jurisdictions in emergency situations when requested.

These employer decisions are examples of policy/service level choices as to which Local 487 thus has no right to bargain through a direct specific proposal restricting employer discretion. It follows from our perspective that the Union cannot indirectly seek to restrict those choices through a grievance arbitrator's judgment regarding the reasonableness of the exercise of such discretion. Thus, to the extent that the scope of the proposal extends to matters that are not primarily related to wages, hours and conditions of employment, the proposal is a permissive subject of bargaining. However, some portions of the "Management Rights" clause cover matters that are primarily related to wages, hours and conditions of employment such as:

> C. To establish . . . vacation schedules, . . .
>
> . . .
>
> J. To determine . . . . seniority of employees . . . .
>
> K. To promote, transfer . . . . employees . . . . .

To the extent that the Article IV Section 5 proposal covers mandatory subjects of bargaining, it is a mandatory subject of bargaining.

Article X

Article X of the parties' 2008-2009 contract stated in disputed part:

Article X

. . .

Section 2. The Deputy Chief of Operations will, as soon as possible, send out to each station a blank Duty Roster. The duty roster will contain the requirements for each slot on the duty roster. For example:

Station #5

Officer (1)
Engineer (1)
Fire Fighter (3)
Paramedic (3 of the above)
Total personnel (5)

[The Duty Roster will be sent out in the last quarter of the prior calendar year.]

. . .

Section 8. Shift transfers may cause personnel to work out of the normal rotation. For example, a shift transfer could cause a person to work two shifts, back to back (48 hours), or less than 4 days off could be realized because of the shift transfer. To the extent possible, transfers will be made so individuals comply with the 27-day cycle and work nine (9) days in each cycle.

Sample Duty Roster

Station #2	*Station #2*	*Station #2*
A Shift	*B Shift*	*C Shift*
Officer	*Officer*	*Officer*
Engineer	*Engineer*	*Engineer*
Engineer	*Engineer*	*Engineer*
Fire Fighter	*Fire Fighter*	*Fire Fighter*
Fire Fighter	*Fire Fighter*	*Fire Fighter*
Fire Fighter	*Fire Fighter*	*Fire Fighter*
Fire Fighter	*Fire Fighter*	*Fire Fighter*
Fire Fighter	*Fire Fighter*	*Fire Fighter*

Station #5	*Station #5*	*Station #5*
Officer	*Officer*	*Officer*
Engineer	*Engineer*	*Engineer*
Fire Fighter	*Fire Fighter*	*Fire Fighter*
Fire Fighter	*Fire Fighter*	*Fire Fighter*
Fire Fighter	*Fire Fighter*	*Fire Fighter*
Station #6	*Station #6*	*Station #6*
Officer	*Officer*	*Officer*
Engineer	*Engineer*	*Engineer*
Fire Fighter	*Fire Fighter*	*Fire Fighter*
Station #8	*Station #8*	*Station #8*
Officer	*Officer*	*Officer*
Engineer	*Engineer*	*Engineer*
Fire Fighter	*Fire Fighter*	*Fire Fighter*
Station #9	*Station #9*	*Station #9*
Officer	*Officer*	*Officer*
Engineer	*Engineer*	*Engineer*
Fire Fighter	*Fire Fighter*	*Fire Fighter*
Fire Fighter	*Fire Fighter*	*Fire Fighter*
Fire Fighter	*Fire Fighter*	*Fire Fighter*
Station #10	*Station #10*	*Station #10*
Officer	*Officer*	*Officer*
Engineer	*Engineer*	*Engineer*
Fire Fighter	*Fire Fighter*	*Fire Fighter*
Fire Fighter	*Fire Fighter*	*Fire Fighter*
Fire Fighter	*Fire Fighter*	*Fire Fighter*

Each shift will have Two Captains and Four Lieutenants.
Each shift will have Three Paramedics at Stations 5, 9 and 10.
Each Station will have One Captain.
Each station will have Two Lieutenants.
Three SCUBA Divers on each shift minimum per shift.
Four Level A Hazmat Team members minimum per shift.

Local 487 proposes that the disputed Article X be included in the successor to the 2008-2009 contract.

The City contends that Article X establishes minimum staffing levels and thus is a permissive subject of bargaining. Local 487 asserts that the staffing levels contained in Article X are examples/samples only and that the proposal only establishes shift/station selection procedures for whatever manning levels/classification types the City determines are appropriate. We find Local 487's interpretation of its own proposal to be consistent with the language of the proposal itself and thus reject the City contention that the proposal establishes minimum manning levels. Because selection of shifts and work locations primarily relate to wages, hours and conditions of employment, we find the Local 487 proposal to be a mandatory subject of bargaining.

Article XI, Section 1

Article XI, Section 1 of the parties' 2008-2009 contract provided:

> Section 1. It shall be the policy of the Fire Department to ensure and maintain a satisfactory level of on-duty staffing at all stations through a staffing replacement system whereby off-duty departmental employees voluntarily agree to work replacement shifts.

Local 487 proposed to include Article XI, Section 1 in the successor to the 2008-2009 contract.

In its petition, the City asserts that Article XI, Section 1 creates minimum manning standards and thus is a permissive subject of bargaining. In response to the petition, Local 487 amended its Article XI, Section 1 proposal by adding the following sentence:

> The above is not intended to impair the City's fiscal/service level choice with respect to staffing unless the impact of those choices on employee safety predominates over the City's interest in making those fiscal/service level choices.

Through the amendment, Local 487 persuasively asserts that it has made clear that Article XI, Section 1 does not mandate any particular staffing level (so long as the impact on employee safety is not greater than the impact on fiscal/service level choices) and thus we reject the City's contention otherwise.

In response to the amendment, the City asserts that the proposal continues to be a permissive subject of bargaining because it requires that City to first seek volunteers when it wishes to fill vacant shifts and does not allow such vacant shifts to be filled by mandatory overtime if necessary. Local 487 contends that the proposal insures that the City will be able to fill any vacant shifts and only establishes a procedure which allocates overtime among eligible employees with volunteers being sought before overtime is mandated.

We have held that a proposal which does not interfere with employer decisions as to when to fill vacant shifts but determines how overtime opportunities are to be allocated among eligible unit employees is a mandatory subject of bargaining primarily related to wages, hours and conditions of employment. CITY OF BROOKFIELD, DEC. NO. 21808 (WERC, 6/84). The Local 487 proposal is just such a proposal and thus is a mandatory subject of bargaining.

Article XIII Section 3

Article XIII, Section 3 (B) of the parties' 2008-2009 contract provided:

ARTICLE XIII
EMT-Paramedic

. . .

Section 3. PRECEPTING

. . .

B. Precepting will be limited to non-holiday Mondays through Saturdays, with the exception of ECFD or IAFF members. For this purpose, "holidays" are defined by the contract between Fire Fighters Local 487 and the City of Eau Claire, with the exception of the employee's birthday.

Local 487 proposes that Article XIII, Section 3 (B) be included in the successor to the 2008-2009 contract.

The City contends that this proposal is a permissive subject of bargaining primarily related to the City's right to determine the level of service it wishes to provide and to assign work fairly within the scope of a paramedic's duties. Local 487 argues that providing "precepting" (supervision of the clinical or field experience of individuals in EMT training but not employed by the Fire Department) does not relate in any significant way to the management and direction of the Fire Department and thus it is a mandatory subject of bargaining primarily related to employee hours. We find the Union's arguments to be more persuasive. The training service in question applies to individuals who are not employees of the City and who are not providing any services to the City. Thus, it can well be argued that there is no impact of any consequence on City service level choices. In addition, the Union proposal contains a minimal limitation on when employees cannot be required to perform precepting duties. Thus, on balance, we conclude that the Local 487 proposal is primarily related to employee hours and thus is a mandatory subject of bargaining.

Article XIII, Section 6

Article XIII, Section 6 of the parties' 2008-2009 contract provided:

Section 6. TEMPORARY REASSIGNMENT POLICY

A. Paramedics may request a temporary reassignment from paramedic duties.

B. The request for reassignment shall be made in writing to the Deputy Chief of Operations and shall specify the desired duration of the reassignment.

C. All active paramedics shall have an opportunity to request a reassignment form paramedic duties if so desired. Each paramedic employee shall be entitled to use one reassignment of less than ninety (90) calendar days and one reassignment of a full year or less to coincide with station picks. Paramedics will be able to use each of these reassignments once in their career.

D. A maximum of two (2) paramedics will be allowed reassignment at one time.

E. It is recognized that in order to accommodate the temporary reassignment request, paramedic station transfers outside of the station pick policy may be required. Should such a transfer be necessary, Local 487 and Management shall work together to minimize the impact of any potential shift or station transfers on department personnel.

F. For periods of temporary reassignment as defined in Section 6, the paramedic employee on reassignment shall not receive "paramedic pay", while the paramedic temporarily assigned to fill the absence will receive the current paramedic premium as found in Appendix I – Pay Plan.

G. The reassignment period shall not count toward the relieved paramedic's service time as an "Active Paramedic" for the purpose of this agreement. It shall count towards the replacement of Paramedic's accrual of "Active Paramedic" service time. Actions to insure this step may include the completion of Personnel Action forms to adjust the employee's wage steps as appropriate, and the temporary suspension of the replacement Paramedic's 54 academic incentive points while assigned as an "Active Paramedic".

H. Paramedics shall maintain all certification as specified in Section 2. CERTIFICATION, while on temporary reassignment.

The Union proposes to include Article XIII, Section 6 in the successor to the 2008-2009 contract.

The City contends that this Union proposal entitles a paramedic to a temporary reassignment even where such reassignment adversely affects the City's ability to provide emergency services. The Union responds by asserting that Article XIII, Section 6 does not require that a temporary assignment be granted if the City's ability to deliver paramedic services would be adversely affected. As written, the disputed clause does not contain the assurance the Union asserts is implicit therein. If that assurance were added, we would conclude that disputed language primarily relates to employee wages, hours and conditions of employment. But without that explicit assurance, the Union proposal is a permissive subject of bargaining because of its potential to adversely affect the City's ability to provide emergency services.

Article XV, Section 9

Article XV of the parties' 2008-2009 contract contained language related to employee promotions. The Union proposed to include Article XV in the parties' successor agreement. The City's petition for declaratory ruling asserted that portions of Article XV were permissive subjects of bargaining. In response to the petition, the Union amended its Article XV proposal. Following the amendment, only the following language remains in dispute as to its mandatory or permissive status.

Section 9. Promotional exams shall be written and scored by a reputable educational or testing agency.

The City contends that it has the general managerial prerogative to determine who will write and score promotional exams and thus that the Union proposal is a permissive subject of bargaining. The Union asserts that its proposal is a mandatory subject of bargaining designed to protect employee promotional interests by ensuring that promotional exams will be "equitable, fairly scored, objective instruments that will measure a candidate's qualifications as established by the City."

Both parties have identified impacts/interests that are to be balanced when determining whether a proposal is a mandatory or permissive subject of bargaining. When we balance these interests, we conclude that the Union proposal intrudes too deeply into managerial prerogatives to be a mandatory subject of bargaining. For instance, it precludes the City from deciding that the City will write and score the promotional exam because the City is not a "educational or testing agency." Thus, while it is a mandatory subject of bargaining for the Union to propose that tests be written in an "equitable and objective manner" and "fairly" scored, we are satisfied that it remains a managerial prerogative to determine the entity that will write and

score promotional exams. Thus, as written, the Union proposal is a permissive subject of bargaining.

Article XXXIV

Article XXXIV of the parties' 2008-2009 contract stated:

ARTICLE XXXIV
WORK RULES

Section 1. Existing work rules are made part of this Agreement.

Section 2. The establishment of new work rules affecting wages, hours of work, or conditions of employment shall be subject to negotiations and mutual agreement prior to their effective date.

The Union proposed that the above-quoted language be included in the successor to the 2008-2009 agreement.

The City's petition for declaratory ruling asserted that this Union proposal is a permissive subject of bargaining because the proposal is not limited to mandatory subjects of bargaining.

In response to the City's petition, the Union amended its proposal by adding the underlined language and striking the italicized language as follows:

Section 1. Existing work rules that are primarily related to wages, hours and conditions of employment are made a part of this Agreement.

Section 2. The establishment of new work rules primarily related to *affecting* wages, hours of work, or conditions of employment shall be subject to negotiations and mutual agreement prior to their effective date.

The City responded by contending that the lack of specificity as to what constitutes a "work rule" makes both Sections of the proposal permissive subjects of bargaining. As to Section 2, the City further asserted that the prohibition against implementation without Union agreement is an additional basis upon which that portion of the proposal is permissive.

In reply, the Union contends that so long as the proposal is limited in its impact to mandatory subjects of bargaining, any lack of specificity is relevant to the merits of the proposal in terms of inclusion in an agreement but irrelevant as to whether the proposal is a mandatory or permissive subject of bargaining.

As to the City's concerns regarding lack of specificity, as we noted in our earlier discussion of the Union's grievance procedure proposal, such concerns are relevant to the merits of the proposal in terms of inclusion in an agreement but irrelevant to whether the proposal is a mandatory or permissive subject of bargaining. WAUPACA COUNTY, DEC. No. 26880 (WERC, 5/91); RACINE SCHOOLS, DEC. NO. 23380-A, p. 17, (WERC, 11/86); RACINE SCHOOLS, DEC. NO. 20652-A, p. 58, (WERC, 1/84). See also CITY OF WAUKESHA, Dec. No. 17830 (WERC, 5/80).

As to the City's argument regarding the inability to implement a new work rule without Union agreement, we understand the City to be concerned that it would be precluded from implementing portions of a new work rule that are permissive subjects of bargaining unless and until agreement is reached on the portions of a rule that are mandatory subjects of bargaining. As worded, we do not understand the Union's proposal to preclude such implementation. We also note that any such absolute prohibition would be a permissive subject of bargaining. CITY OF MILWAUKEE, DEC. NO. 32115 (WERC, 5/07).

Give all of the foregoing, because the Union's proposal is limited to mandatory subjects of bargaining, it is a mandatory subject of bargaining.

Article XLI

Article XLI of the parties' 2008-2009 contract stated:

> ARTICLE XLI
> DURATION
>
> This Agreement shall be effective as of July 1, 2008 and shall remain in full force and effect until its expiration date, June 30, 2009. If, during the term of this Agreement, problems arise with respect to the interpretation or application of any language in this Agreement, the City and the Union may jointly agree to enter into negotiations relating only to such specific problem. Any solution thereof, whenever reached, after such negotiations, shall become effective after July 2009, and shall not affect this Agreement.

The Union proposed that this Article be continued in the successor agreement with the applicable contract dates being updated.

The City's petition for declaratory ruling asserts that the provision is a permissive subject of bargaining because a "limitation on the implementation date of any changes, both mandatory and non-mandatory subjects of bargaining, as may otherwise be negotiated is a permissive subject of bargaining."

The Union responded to the petition by amending its Article XLI proposal as follows with the addition of the underlined language:

> This Agreement shall be effective as of and shall remain in full force and effect until its expiration date, . If, during the term of this Agreement, problems arise with respect to the interpretation or application of any language in this Agreement, the City and the Union may jointly agree to enter into negotiations relating only to such specific problem. Unless otherwise agreed to, any solution thereof, whenever reached, after such negotiations, shall become effect after and shall not affect this Agreement.

The Union contends that both the original and amended proposal are mandatory subjects of bargaining akin to a grievance procedure. The Union notes that the proposal only has impact on the City if the City elects to participate in the referenced negotiations and if the parties are able to reach an agreement.

As the Union has argued, this proposal does not mandate that the City do anything. The City can choose not to enter into "negotiations" and, even if it elects to do so, has no obligation to reach a "solution." Thus, we conclude the proposal has no impact on permissive employer prerogatives or permissive policy choices. As to the proposal's relationship to employee wages, hours and conditions of employment, we find the Union's grievance procedure analogy to be a persuasive one. Grievance procedures (which mandate employer participation in a process of dispute resolution that can be unilaterally initiated by the union or employee) have long been held to be mandatory subjects of bargaining. GREENFIELD SCHOOLS, DEC. NO. 14026-B (WERC, 11/77); RACINE UNIFIED SCHOOL DISTRICT, DEC. NO. 29203-B (WERC, 10/98); DODGELAND SCHOOLS, DEC. NO. 31098-C (WERC, 1/07). In that legal context, we conclude that a dispute resolution procedure in which the employer need not participate is also a mandatory subject of bargaining.

Dated at Madison, Wisconsin, this 3rd day of March, 2011.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/
Judith Neumann, Chair

Susan J. M. Bauman /s/
Susan J. M. Bauman, Commissioner

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