STATE OF WISCONSIN **CIRCUIT COURT** **MILWAUKEE COUNTY**
BRANCH 28

MILWAUKEE COUNTY,

Petitioner,

v. Case No. 11-cv-4978

WISCONSIN EMPLOYMENT
RELATIONS COMMISSION,

Respondent

and

MILWUAKEE DISTRICT
COUNCIL 48, AFSCME, AFL-CIO,

Interested Party.

Dec. No. 33265

NOV 15 2011

DECISION AND ORDER

The petitioner, Milwaukee County, seeks judicial review of a declaratory ruling by the Wisconsin Employment Relations Commission (WERC) regarding a collective bargaining agreement proposal drafted by Milwaukee District Council 48 (District Council 48). WERC concluded that under the Municipal Employment Relations Act (MERA), Wis. Stats. §§ 111.70 – 111.77, Milwaukee County has a mandatory duty to bargain over the management rights specified in section 1.05 of the collective bargaining agreement proposal. Because the management rights primarily relate to wages, hours and conditions of employment, this court affirms WERC's decision.

STATEMENT OF FACTS

Milwaukee District Council 48 ("District Council 48") is a labor organization serving as the collective bargaining representative of 3,378 Milwaukee County employees. Milwaukee County and District Council 48 entered into a collective bargaining agreement that was in effect from January 1, 2007 to December 31, 2008. On December 18, 2009, District Council 48 submitted a preliminary final offer for a successor agreement that included several proposals for modification to the previous collective bargaining agreement. Relevant for purposes of this review, District Council 48 proposed to modify section 1.05 of the agreement involving management rights. District Council 48 proposed that the section 1.05 be amended to read as follows:

> For the period of July 1, 2009 through December 31, 2010, the County shall not privatize work currently being performed by those bargaining unit employees who are current incumbents in such positions. The County may unilaterally reduce a bargaining unit employee's pay by ordering the employee not to report to work in either full day increments or by reducing the employee's workweek to no less than thirty-five (35) hours per week. *The total reduction effectuated by such unilateral across-the-board reduction in employee pay* shall not exceed forty-five (45) hours in the calendar year (prorated for a part-time employee based on his or her total hours of work). *Such* unilateral *across-the-board* reduction in pay by the County may not apply to those employees who work in 24-hour/seven hour/seven day per week operations or to employees working for elected officers of the County other than the County Executive or the County Board of Supervisors. However, if unilateral *across-the-board* reductions of bargaining unit employees' pay is implemented for employees who work in a 24-hour/seven day per week operation or for an employees working for elected officers of the County other than the County Executive or the County Board of Supervisors, the unilateral *across-the-board* reduction in pay of a bargaining unit employee means any County order or directive of whatever kind that requires a bargaining unit employee not to report for work on all or part of a regularly scheduled work day, or that suspends a bargaining unit employee from work without pay for reasons unrelated to discipline. *If it is necessary to reduce the workforce beyond the*

forty-five (45)hours set forth above, such reduction shall be made pursuant to Section 2.37 of this Memorandum of Agreement.

Milwaukee County refused to accept the proposed modifications to section 1.05, contending that collective bargaining over reduction of employee hours and wages is permissive but not mandatory.

On February 2, 2010, Milwaukee County petitioned WERC for a declaratory ruling. WERC designated Peter Davis to serve as examiner. On March 25, 2010, a hearing was held in which the parties discussed provisions of the agreement but presented no evidence or testimony. A week later, on April 1, 2010, District Council 48 submitted an amended final offer. On June 8, 2010, a hearing was held in which the parties submitted evidence and testimony in support of their respective positions.

Several months later, on March 11, 2011, WERC issued its written decision and found that section 1.05 of the proposed collective bargaining agreement primarily related to wages and hours and, therefore, the collective bargaining proposal was a mandatory subject of bargaining. The following month, Milwaukee County petitioned this court for judicial review of WERC's decision.

STANDARD OF REVIEW

Petitioner seeks review from this Court under Chapter 227 of the Wisconsin Statutes. Specifically, Wis. Stat. § 227.57(1) mandates that this Court's review of an agency's decision "shall be confined to the record." The agency's factual findings must be upheld if they are supported by credible and substantial evidence in the record. *Princess House, Inc. v. DILHR*, 111 Wis. 2d 46, 54 (1983). Credible evidence is "that evidence which excludes speculation or conjecture." *Milwaukee Bd. of School Directors v. Wisconsin Employment Relations Com'n*, 2008 WI App 125, ¶ 7, 313 Wis. 2d 525. The test for substantial evidence is whether

"reasonable minds could arrive at the same conclusion as the agency." *Kitten v. State Dep't of Workforce Dev.*, 2002 WI 54, ¶ 5.

A reviewing court is not bound, however, by an agency's conclusions of law. *Richland School Dist. v. DIHLR*, 174 Wis.2d 878, 890 (1993). On judicial review, there are three levels of deference which may be given to an administrative agency's conclusions of law: great weight, due weight, and de novo review. *Kelley Co., Inc. v. Marquardt*, 172 Wis. 2d 234, 244-45 (1992). The level of deference afforded by the reviewing court depends on the agency's experience, technical competence and knowledge with regard to the question presented. *Id.*

For example, a court will accord an agency's determination great weight if: (1) the legislature has charged the agency with the duty of administering the statute; (2) the agency's interpretation is long standing; (3) the agency used its expertise or specialized knowledge in forming the interpretation; and (4) the agency's interpretation will provide uniformity and consistency in the application of the statute. *Mattila v. Employees Trust Funds Bd.*, 2001 WI App 79, ¶ 9, 243 Wis. 2d 90, 626 N.W.2d 33. Additionally, great weight deference applies "[w]here a legal question is intertwined with factual determinations or with value or policy determinations." *Jefferson County. v. WERC*, 187 Wis. 2d 647, 652, 523 N.W.2d 172, 174 (Ct. App. 1994) (*citing West Bend Educ. Ass'n v. WERC*, 121 Wis. 2d 1, 11-12, 357 N.W.2d 534, 539 (1984)). If the agency's decision is reviewed under great weight deference, its decision will be upheld if it is reasonable, "even if an alternative reading of the statute is more reasonable." *Barron Elec. Coop. v. Pub. Serv. Comm'n of Wisconsin*, 212 Wis. 2d 752, 761, 569 N.W.2d 726 (Ct. App. 1997) (citing *Harnischfeger Corp. v. LIRC*, 196 Wis. 2d 650, 661, 663, 539 N.W.2d 98 (1995)). An interpretation of a statute is reasonable unless it directly contravenes the words of the statute, is clearly contrary to legislative intent, or is without rational basis. *Harnischfeger*,

196 Wis. 2d at 662, 539 N.W.2d 98 (citing *State ex rel. Parker v. Sullivan*, 184 Wis. 2d 668, 700, 517 N.W.2d 449 (1994)). "The burden of proof to show that the agency's interpretation is unreasonable is on the party seeking to overturn the agency action; it is not on the agency to justify its interpretation." *Harnischfeger*, 196 Wis. 2d at 661, 539 N.W.2d 98 (citing *Weibel v. Clark*, 87 Wis. 2d 696, 704, 275 N.W.2d 686 (1979), *cert. denied*, 444 U.S. 834 (1979)).

In contrast, the "due weight" standard is appropriate when an "agency has some experience in an area, but has not developed the expertise which necessarily places it in a better position to make judgments regarding the interpretation of the statute than a court." *UFE, Inc. v. LIRC*, 201 Wis. 2d 274, 286 (1996). Under the due weight standard, a court will not overturn a reasonable interpretation "that comports with the purpose of the statute unless the court determines that there is a more reasonable interpretation available." *Id.* at 286-87. Finally, the "de novo" standard is applicable when the issue before the agency is clearly one of first impression or where the agency's position on an issue has been so inconsistent that it provides no real guidance. *Id.* at 285.

This court will apply the great weight level of deference to WERC's conclusions of law. While Milwaukee County contends that WERC should not be afforded any deference because it has "departed from clear precedent," this court finds that great weight deference is the proper standard. First, the legislature has charged WERC with the duty of administering chapter 111 of the Wisconsin statutes. *Jefferson County*, 187 Wis. 2d at 653-54. Because the parties do not dispute this, it is assumed that the first requirement for great weight deference is met.

Second, the Wisconsin Supreme Court acknowledges that WERC's interpretation of permissive and mandatory subjects of bargaining is long standing. *See Dodgeland Educ. Ass'n v. WERC*, 2002 WI 22, ¶ 26, 250 Wis. 2d 357, 639 N.W.2d 733; *City of Beloit v. WERC*, 73 Wis.

2d 43, 67, 242 N.W.2d 231 (1976). In *City of Beloit*, the Wisconsin Supreme Court emphasized that Wisconsin's general rule is that "the construction and interpretation of a statute adopted by the administrative agency charged by the legislature with the duty of applying it is entitled to great weight." 73 Wis. 2d at 67. But, in that early case, the court applied due weight deference because there were "nearly questions of first impression raised concerning the areas of mandatory bargaining between a school board and a teachers' association." *Id.* at 68. Thus, the court determined that WERC's interpretation of mandatory bargaining was not yet developed enough to justify great weight deference.

However, eight years later, the Court of Appeals determined that WERC's interpretation of chapter 111 of the Wisconsin statutes had become developed enough to justify great weight deference. Accordingly, the court applied great weight deference to a teacher federation's challenge to a WERC determination that certain collective bargaining agreement provisions were the subject of permissive bargaining. *Blackhawk Teachers' Federation Local 2308, WFT, AFT, AFL-CIO v. WERC*, 109 Wis. 2d 415, 423, 326 N.W.2d 247 (1982). The court explained:

> Eleven years have elapsed since the legislature adopted the current statutory procedure that allows the WERC to issue declaratory rulings relating to the scope of municipal collective bargaining. The WERC issued the ruling challenged in *Beloit* eight years ago, and it has since gained substantial experience in determining whether contractual provisions are mandatory or permissive subjects of bargaining. The WERC no longer has a 'poverty of administrative experience' in determining the scope of bargaining under sec. 111.70(1)(d).

Id. (internal citations omitted). Thus, the court applied great weight deference "in view of the experience gained by the WERC" in interpreting the statute. *Id.*

It bears mentioning that great weight deference applies to the agency's determination even when the agency does not have a longstanding interpretation of the underlying subject

matter. In *Sch. Dist. of Drummond v. WERC,* 121 Wis. 2d 126, 133, 358 N.W.2d 285 (1984), the Wisconsin Supreme Court grappled with whether great weight deference should apply to a WERC decision mandating collective bargaining over a school district's anti-nepotism policy. The court accorded WERC's decision with great weight deference, finding that even though "[t]he commission ha[d] no experience on the subject of anti-nepotism rules and their effect on labor relation" the commission has substantial experience in determining subjects of mandatory bargaining. *Id.* The court opined that "[i]n any case where the commission is asked to determine whether a subject matter is mandatorily or permissibly bargainable, this court will apply the great weight-any rational basis standard. . . ." *Id.* Because WERC has substantial experience in distinguishing between mandatory and permissive subjects of bargaining, the second requirement for great weight deference is met.

Third, the agency used its expertise and specialized knowledge in forming its interpretation. WERC has developed "expertise in determining the bargaining nature of proposals." *Dodgeland Educ. Ass'n*, 2002 WI 22, ¶ 28. Courts should defer to WERC's decisions because "WERC, in contrast to the courts, has special competence in the area of collective bargaining and has developed significant experience in deciding cases involving the issue of mandatory bargaining." *Id.* (*citing West Bend Educ. Ass'n*, 121 Wis. 2d at 13). Accordingly, the third requirement for great weight deference is met.

Fourth, the agency's interpretation of Wis. Stat. § 111.70(1)(a) will provide uniformity and consistency in statutory application. Milwaukee County contends that the fourth factor has not been met because "the Commission has not uniformly and consistently interpreted reducing the employees' work week and implementing furloughs as mandatory subjects of bargaining." Pet. Reply Br. at 4. Milwaukee County's argument is unpersuasive. WERC has uniformly and

consistently determined that matters primarily related to wages, hours and conditions of employment are mandatory subjects of bargaining. *See, e.g., Jefferson Cty.*, 187 Wis. 2d at 654. Furthermore, WERC has uniformly and consistently applied a balancing test comparing the parties' interests to determine whether collective bargaining is mandatory. *See, e.g., West Bend Educ. Ass'n*, 121 Wis. 2d at 9. But while WERC must apply the balancing test in a uniform and consistent way, it is not required "to develop broad and sweeping rules that are to apply across the board to all situations." *City of Beloit*, 73 Wis. 2d at 55. WERC's application of a uniform balancing test ensures consistent decisions, in which some actions require collective bargaining and others do not. It is for WERC to apply the balancing test and determine whether the imposition of furloughs and reduced work hours primarily relates to wages, hours and conditions of employment. Thus, for the above stated reasons, this court applies the great weight level of deference and upholds WERC's legal conclusions as long as they are supported by a rational basis. *Robertson Transportation Co. v. Public Service Comm.*, 39 Wis.2d 653, 661, 159 N.W.2d 636, 640 (1968).

ANALYSIS

The question presented before this court is whether District Council 48's collective bargaining proposal is a mandatory subject of bargaining. Wisconsin statute 111.70(1)(a) governs this matter. It provides, in relevant part:

> "Collective bargaining" means the performance of the mutual obligation of a municipal employer . . . . and the representative of its municipal employees in a collective bargaining unit, to meet and confer. . . . with respect to wages, hours and conditions of employment . . . . The duty to bargain, however, does not compel either party to agree to a proposal or require the making of a concession. . . . **The municipal employer shall not be required to bargain on subjects reserved to management and direction of the governmental unit except insofar as the matter of exercise of such functions affects the wages, hours and**

> **conditions of employment of the municipal employees in a collective bargaining unit**.. . .

Wis. Stat. § 111.70(1)(a) (2009-10) (emphasis added).

Based on this statutory definition, the Wisconsin Supreme Court has determined that "only subject matters that [are] primarily related to wages or hours or conditions of employment [are] mandatorily bargainable." *City of Beloit*, 73 Wis. 2d at 54. 'Primarily' has been defined to mean 'fundamentally,' 'basically,' or 'essentially.' *Id.* Thus, "[w]hat is fundamentally or basically or essentially a matter involving 'wages, hours and conditions of employment' is, under the statute, a matter that is required to be bargained." *Id.* Courts have interpreted this to mean that parties must collectively bargain as to matters which are primarily related to wages, hours and conditions of employment and also as to the impact of the policy affecting the wages, hours and conditions of employment. *City of Beloit*, 73 Wis. 2d at 54.

The Wisconsin Supreme Court emphasizes that the 'primarily related' test is, in fact, a balancing test. In the court's words:

> [T]his 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. . . . . formulation of public policy predominates, the matter is not a mandatory subject of bargaining.

West Bend Educ. Ass'n, 121 Wis. 2d at 9. The balancing test acknowledges that "governmental decisions fall along a spectrum from matters plainly bargainable. . . .to matters reserved to the exclusive discretion of the governmental unit. . . . . and that, while it is necessary to do so, 'drawing the line or making the distinction is not easy.'" *Unified School District No. 1 of Racine*

County. v. WERC, 81 Wis. 2d 89, 95, 259 N.W.2d 724 (1977) (*citing City of Beloit*, 73 Wis. 2d at 53). However, drawing the appropriate line in this case is made easier upon reviewing similar cases.

The Wisconsin Supreme Court first drew a line in 1976 when it determined that a proposal to lay off teachers based on seniority was a mandatory subject of bargaining. In *City of Beloit*, WERC mandated that a teachers' association collectively bargain with a local school board with respect to various proposals, including a proposal to lay off teachers in inverse order of teacher appointments. 73 Wis. 2d at 59. The circuit court affirmed the agency's decision but added a modification to prevent a situation in which "a more senior Fourth Grade athletic teacher must displace a less senior Twelfth Grade physics teacher." *Id.* The Wisconsin Supreme Court affirmed the circuit court's decision with the added modification, explaining that "the proposals stop well short of invading the school board's right to determine the curriculum, and to retain, in case of layoff, teachers qualified to teach particular subjects in such curriculum." *Id.* The court concluded that the order in which teachers could be laid off was primarily related to wages, hours and conditions of employment, and, therefore, collective bargaining was required.

The court drew a more definitive line in 1979 upon determining that economically motivated layoffs do not require collective bargaining but that the *impact* of those decisions does require collective bargaining. In *City of Brookfield v. WERC*, 87 Wis. 2d 819, 275 N.W.2d 723 (1979), the City of Brookfield was not required to bargain with firefighters before imposing layoffs due to budgetary constraints. Nonetheless, the court acknowledged that the City of Brookfield was required to bargain with respect to the impact of the layoffs on the remaining firefighters. *Id.* at 833. The court reasoned that "[a] reduction in the total work force caused by the economically motivated lay offs will affect the number of employees assigned to a particular

shift and thus alter their individual fire fighting responsibilities." *Id.* In spite of its managerial prerogatives, the City of Brookfield was required to bargain with the remaining firefighters regarding the impact of the layoff decision since "there is a primary relation between the impact of the lay off decision and the working conditions of the remaining unit employees." *Id.* The court made a critical distinction between the employees who were laid off and the remaining employees who maintained a strong interest in bargaining regarding their wages, hours and conditions of employment.

The court again made this critical distinction in *West Bend Educ. Ass'n*, a 1984 case, which held that a school district had a duty to bargain regarding the timing and effective date of layoff decisions. 121 Wis. 2d at 19-21. On a petition for a declaratory ruling, WERC determined that contract proposals related to the timing of layoffs were not the subject of mandatory bargaining because they related primarily to management prerogatives. *Id.* at 16. However, the Wisconsin Supreme Court disagreed, finding that "WERC stopped its analysis – that is, stopped its application of the 'primarily related' standard and stopped its balancing – when it concluded that the proposal was significantly related to questions of management prerogative." *Id.* at 14. While recognizing the school district's managerial and political interests in the school system's fiscal administration, the court found that the teachers had a greater interest in being "afforded fair and adequate lead-time within which to make important career decisions." *Id.* at 20. Because the "notice and timing of a layoff has a direct impact on the wages and job security of those laid off," the school district was prohibited from issuing layoffs without first engaging in collective bargaining. *Id.* at 19. The court thus reaffirmed the line it had drawn: a court may impose a layoff decision without collective bargaining but must bargain regarding the impact of that layoff decision.

Applying the 'primarily related' test to the facts of this case, this court finds that District Council 48's interest in maintaining employee wages, hours and conditions of employment outweighs Milwaukee County's management prerogatives. WERC reasonably balanced the interests of District Council 48 against the interests of Milwaukee County and determined that section 1.05 is a mandatory subject of bargaining. In a memorandum attached to its findings of fact and conclusions of law, WERC aptly explains:

> Consistent with our Supreme Court's holding in CITY OF BROOKFIELD V. WERC, 87 Wis. 2d 819 (1979), the AFSCME proposal acknowledges the County's right to reduce the level of service it wishes to provide by laying off employees. If the County elects not to reduce services by layoffs, the proposal gives the County the option of reducing services by cutting employee wages and hours up to 45 hours per full-time employee in a given calendar year. The County argues that the limitations on how the non-layoff service reduction option could be implemented make the proposal a permissive subject of bargaining. We disagree and find the AFSCME proposal to be a mandatory subject of bargaining primarily related to employee wages and hours.
>
> Critical to our finding is the fundamental freedom the AFSCME proposal gives the County to determine/reduce the level of service it wishes to provide. By exercising the right to lay off, the County can reduce services across-the-bard or target only certain service areas for reduction or elimination while leaving other services intact. By exercising the additional non-layoff rights contained within the proposal, the County gains further flexibility. Within the context of that freedom and flexibility, the AFSCME proposal fundamentally addresses the impact of the County's service level choices on employee wages and hours. The proposal establishes how the loss of wages and hours necessitated by the County's service level choices will be distributed among employees if the County elects not to accomplish service level reductions by layoff. The duty to bargain over such 'impact' proposals is specifically acknowledged in the definition of collective bargaining found in Sec. 111.70(1)(a), Stats.
>
> We acknowledge that by placing limitations on how the County may implement non-layoff service reductions, the AFSCME proposal does intrude into the ability of the County to fine tune its service reductions. However, as long as the fundamental freedom

> to layoff remains intact, the self-evident and substantial impacts on lost employee wages and hours created by non-layoff service level reduction options far outweigh this intrusion.

Milwaukee County makes four main arguments in favor of reversal of WERC's decision: (1) the decision to layoff, reduce hours or furlough employees based on budgetary restraint is primarily a matter of public policy; (2) the decision to layoff, reduce hours or furlough employees based on budgetary restraints is authorized by Chapter 59 of the Wisconsin statutes; (3) the County's ability to lay off, reduce hours or furlough employees is improperly limited by section 1.05 of the proposed collective bargaining agreement; and (4) WERC's decision lacks a rational basis and, therefore, is arbitrary and capricious.

First, Milwaukee County argues that any decision related to employee layoffs is governed by the Wisconsin Supreme Court's analysis in *City of Brookfield* in which the court determined that economically motivated layoffs are primarily related to the "integrity of the political process of municipal government." 87 Wis. 2d at 830. However, WERC counters that *City of Brookfield* is factually distinguishable because section 1.05 does not involve layoffs; rather, it involves a temporary reduction in work hours and pay. Furthermore, WERC suggests that, in accordance with *City of Brookfield*, even if reduction in hours or pay is a permissive subject of bargaining, the impact of that decision is a mandatory subject of bargaining. Thus, the County must bargain regarding the impact that its decisions have on employees.

Second, Milwaukee County argues that the County Executive has explicit statutory authority to impose cost-saving measures without collective bargaining. In support, Milwaukee County relies on Wis. Stat. § 59.17(2), which states:

> (2) *Duties and powers*. The county executive shall be the chief executive officer of the county. The county executive shall take care that every county ordinance and state or federal law is observed, enforced and administered within his or her county if the

> ordinance or law is subject to enforcement by the county executive or any person supervised by the county executive. The duties and powers of the county executive shall be, without limitation because of enumeration, to:
>
> > (a) Coordinate and direct all administrative and management functions of the county government not otherwise vested by law in other elected officers.

Milwaukee County also relies on Wis. Stat. § 59.60(12), which provides, in relevant part:

> (12) *Payments and obligations prohibited; certifications; penalties*. No payment may be authorized or made and no obligation incurred against the county unless the county has sufficient appropriations for payment. No payment may be made or obligation incurred against an appropriation unless the director first certifies that a sufficient unencumbered balance is or will be available in the appropriation to make the payment or to meet the obligation when it becomes due and payable.

Essentially, Milwaukee County contends that the County Executive has a "duty to administer Milwaukee County under circumstances when a deficit exists due to a shortfall in the receipt of anticipated revenue." In light of dire fiscal constraints, the County argues that it requires the flexibility to reduce working hours. WERC counters that Milwaukee County's interests do not exceed District 48's interests. Moreover, WERC contends that even if the decision to reduce hours or impose furloughs is not a mandatory subject of bargaining, the impact of that decision is a mandatory subject of bargaining. *See* Pet. Br. at 10.

Third, Milwaukee County argues that section 1.05 contains subjects which do not require bargaining, including the County's right to reduce the hours of bargaining unit employees to thirty-five hours per week for no more than thirty work days or six calendar weeks and the County's right to reduce the hours of bargaining unit employees up to forty-five hours in a calendar year. According to Milwaukee County, these matters are subjects of permissive, not mandatory, bargaining. Milwaukee County also argues that it should not be required to impose

reductions or layoffs "across-the-board" to all specified employees and that District Council 48 should not be allowed to challenge whether a reduction of employee hours beyond forty-five hours per calendar year is "necessary to reduce the workforce." WERC responds that it was reasonable in balancing competing interests to conclude that the impact of the County's decisions on employees' wages, hours and conditions of employment is a mandatory subject of bargaining.

Finally, Milwaukee County argues that WERC's findings of fact are not supported by substantial evidence and WERC's conclusions of law are not supported by rational basis. Specifically, Milwaukee County contends that WERC made an arbitrary distinction between layoffs and non-layoff reductions in order to conclude that non-layoff service reductions are the subject of mandatory bargaining. According to Milwaukee County, this conclusion makes no practical sense when the more drastic decision to lay off employees is subject to permissive bargaining. Additionally, Milwaukee County contends that it makes no practical sense to separate the impact of the County's decision from the decision itself in this case. The County has control over the management and direction of its operations, and it argues that mandatory bargaining over the impact of this decision will limit its statutory authority over decision-making on political and policy issues. However, WERC reminds the court that even if another interpretation is more reasonable, its determination that service level reductions are subject to mandatory bargaining may only be reversed if the decision lacks rational basis. WERC believes that its decision meets the rational basis test.

This court finds that WERC's findings of fact are supported by substantial evidence in the record and its conclusions of law are supported by rational basis. Accordingly, this court

affirms and finds that section 1.05 is primarily related to wages and hours. Consequently, collective bargaining is mandatory.

First, Milwaukee County is incorrect that WERC's decision undermines the holding in *City of Brookfield*. That case holds only that economically motivated lay offs are not the subject of mandatory bargaining. 87 Wis. 2d at 830. That case does not hold that a government entity may place restrictions on the wages, hours and conditions of employment of remaining employees without engaging in collective bargaining. *Id.* at 833. Although a government entity has the right to lay off due to budgetary constraints, the remaining employees have the right to collectively bargain with respect to those aspects of employment that matter most: wages, hours and conditions of employment. This appropriately balances the interests of the government entity in disbursing limited budgetary funds and the interests of the employee in protecting job security.

Moreover, Milwaukee County is incorrect that WERC's decision fails to harmonize with Wis. Stats. §§ 59.17(2), 59.60(12). By all accounts, the County Executive is faced with a precarious fiscal situation and has an interest in managing diminishing fiscal resources. However, mandatory collective bargaining does not prevent the County Executive from carrying out his statutory duties. While the County Executive is prohibited from authorizing a payment unless the county has sufficient appropriations for the payment, the County Executive is not directly prohibited from bargaining with employees regarding wages, hours and conditions of employment. To collectively bargain is to negotiate fundamental aspects of employment; it is not to authorize or not authorize payments. *See Milwaukee Dist. Council 48, Am. Fed'n of State, County & Mun. Employees, AFL-CIO v. Milwaukee County*, 2011 WI App 14, ¶ 13, 331 Wis. 2d 188, 795 N.W.2d 777 (confirming an arbitration award which determined that Milwaukee

County may not impose a reduction in work-week hours exceeding 45 days without a County Board resolution and noting that "the mandate of § 59.60 is not the issue here; the issue here is whether under the parties' collective-bargaining contract any shortfall may be eliminated in whole or in part by unilaterally reducing the work-week hours of the Union's members.") Thus, the issue of whether Milwaukee County must bargain regarding management rights does not implicate Wis. Stat. § 59.60, but rather implicates the 'primarily related' balancing test the court describes above. *See Unified School District No. 1 of Racine County*, 81 Wis. 2d at 95-96. WERC properly applied this test and determined that section 1.05 is a subject of mandatory bargaining.

Ultimately, Milwaukee County is incorrect that section 1.05 is a nonmandatory subject of bargaining. Milwaukee County must bargain with respect to furlough days and work week reductions because those decisions and the impact of those decisions fundamentally relate to employee wages, hours and conditions of employment. *See West Bend Educ. Ass'n*, 121 Wis. 2d at 8-9. Milwaukee County contends that the "across-the-board" language in section 1.05 provides an impermissible limitation on the County's right to lay off. This court disagrees. The "across-the-board" language in section 1.05 is a subject of bargaining because it also primarily relates to the wages and hours of remaining employees. Just as a school district had a duty to bargain regarding the timing of layoffs, the County has a duty to bargain regarding the across-the-board effect of layoff decisions on remaining employees. *Id.* at 14. However, the court notes that even District Council 48 concedes that while decisions affecting employees' wages, hours and conditions of employment may not be imposed on a group of employees without

regard to their seniority, the County has the ability to determine to which groups the across-the-board language applies.[1]

Finally, Milwaukee County contends that District Council 48's proposed "necessary" standard is a permissive subject of bargaining. At the June 8, 2010 hearing, District Council 48 conceded that Milwaukee County has the unilateral right to determine if it is necessary to reduce the workforce beyond the forty-five hours set forth in section 1.05.[2] Specifically, WERC noted in its decision:

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[1] The following is an excerpt from the June 8, 2010 hearing in which District Council 48's lawyer direct examined Richard Abelson, executive director of District Council 48. Hr'g Tr. 12:3-13:8.

> Q: And why is it important that the – or why is it important and why did we include the across-the-board restriction in the language in 1.05?
>
> A: Again across the board refers to the fact that it is done amongst a group of employees without regard to their seniority. And that group is a rather fluid group as the county has actually implemented certain furloughs for employees. It applies to employees in classifications, but in the same classification in other departments it doesn't apply to those employees.
>
> Two examples of that would be the clerical classifications, depending on whether an employee works under the direct supervision of the county executive and the county board or whether that employee works in a clerical classification for one of the other elected officials of Milwaukee County.
>
> Another example is the certified occupational therapist assistants, if they work at BHD they are not subject to the furloughs. If they work out in the field, if they are caseworkers out in the field, they are subject to the furloughs.
>
> So this refers to – again it doesn't limit the county's ability to decide to whom the across-the-board applies, but it distinguishes between a furlough that's applied to a group of employees without regard to seniority versus the layoff which is done strictly by classification and seniority applies.

[2] The following is an excerpt from the June 8, 2010 hearing in which Milwaukee County cross examines Richard Abelson. Hr'g Tr. 16:6-22.

> Q: And the last sentence in your proposal states, If it is necessary to reduce the workforce. I didn't see any definition of what is meant by if it is necessary. Is there a standard that you're incorporating in this proposal, or what is your understanding of what "if it is necessary" means?
>
> A: If it is necessary is a term of art that's used throughout our Collective Bargaining Agreement, and no meaning is applied to that other than the meaning that is applied in other sections of the Collective Bargaining Agreement.
>
> Q: And would it be your interpretation that the county has the unilateral right to determine if it necessary to reduce the workforce beyond the 45 hours as set forth above?

> The County asserts that the "If it is necessary" language found at the end of the AFSCME proposal is a permissive subject of bargaining because said language subjects the County's fiscal/service level choices to independent arbitral review. At hearing, the Union clarified the meaning of that "necessary" language (and is now bound thereby) so as to satisfy us that the County's fiscal/service level judgments as to whether to layoff are not subject to such review. Thus, we reject this County contention.

Given that District Council 48 clarified the meaning of "necessary" at the hearing, this court can find that WERC made a reasonable finding, based on that concession. District Council 48 gave context to the terms used in section 1.05, and WERC made its decision after considering the context provided. WERC properly determined that while Milwaukee County has the right to determine if it is necessary to reduce the workforce beyond the 45 hours, it does not have the right to walk away from bargaining with respect to section 1.05.

While there may be other, reasonable interpretations of section 1.05, this court finds that WERC's decision is supported by a rational basis and is not arbitrary or capricious. On that basis, this court affirms WERC's decision.

A: Except as otherwise limited in the Collective Bargaining Agreement, the answer to that is yes.

CONCLUSION AND ORDER

THEREFORE, based upon a thorough review of the record and the arguments of the parties as set forth in the parties' briefs, it is hereby ORDERED that the decision of the Wisconsin Employment Relations Commission is AFFIRMED.

Dated this 15 day of November, 2011, in Milwaukee, Wisconsin.

BY THE COURT:

Hon. Thomas R. Cooper
Milwaukee County Circuit Court, Branch 28