STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Stipulation Requesting a Declaratory Ruling
Pursuant to Section 111.70(4)(b),Wis. Stats., between

**WISCONSIN PROFESSIONAL POLICE ASSOCIATION/
LAW ENFORCEMENT EMPLOYEE RELATIONS DIVISION**

and

EAU CLAIRE COUNTY

Case 240
No. 70886
DR(M)-713

Decision No. 33662

Appearances:

Andrew Schauer, Attorney, 660 John Nolen Drive, Suite 300, Madison, Wisconsin, 53713, appearing on behalf of Wisconsin Professional Police Association/Law Enforcement Employee Relations Division.

Keith R. Zehms, Corporation Counsel, Eau Claire County, 721 Oxford Avenue, Eau Claire, Wisconsin, 54703, appearing on behalf of Eau Claire County.

FINDINGS OF FACT, CONCLUSION OF LAW AND DECLARATORY RULING

On September 8, 2011, Eau Claire County and the Wisconsin Professional Police Association/Law Enforcement Employee Relations Division filed a Stipulation with the Wisconsin Employment Relations Commission seeking a declaratory ruling pursuant to Sec. 111.70(4)(b), Stats., as to whether an Association bargaining proposal is a prohibited subject of bargaining. The parties thereafter filed a stipulated record and briefs – the last of which was received October 28, 2011.

Having reviewed the record and being fully advised in the premises, the Commission makes and issues the following

FINDINGS OF FACT

1. Eau Claire County, herein the County, is a municipal employer.

2. Wisconsin Professional Police Association/Law Enforcement Employee Relations Division, herein WPPA, is the collective bargaining representative of certain public safety employees of the County's Sheriff's Department.

3. During bargaining between the parties as to a 2011-2012 collective bargaining agreement, a dispute arose as to whether the following WPPA proposal is a prohibited subject of bargaining within the meaning of Sec. 111.70(4)(mc)6, Stats.:

> The Association fully acknowledges the right of the Employer to choose the carrier and to establish the plan design. Should the Employer design or choose a plan design which includes a deductible, the employees shall be responsible for paying the first two hundred fifty ($250)/five hundred dollars ($500) of the deductible.

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

CONCLUSION OF LAW

The WPPA proposal in Finding of Fact 3 is a prohibited subject of bargaining within the meaning of Sec. 111.70(4)(mc)6, Stats.

Based upon the above and foregoing Findings of Fact and Conclusion of Law, the Commission makes and issues the following

DECLARATORY RULING

The WPPA and Eau Claire County are prohibited from bargaining over the WPPA proposal in Finding of Fact 3 and WPPA is prohibited from including said proposal in its final offer as part of the Sec. 111.77, Stats. interest arbitration process.

Given under our hands and seal at the City of Madison, Wisconsin, this 23rd day of February, 2012.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Scott /s/
James R. Scott, Chairman

Rodney G. Pasch /s/
Rodney G. Pasch, Commissioner

I dissent:

Judith Neumann /s/
Judith Neumann, Commissioner

Eau Claire County

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

The question litigated by the parties is narrow and can accurately be summarized as:

> Where the health insurance policy covering public safety employees contains a deductible, is the amount of the deductible that must be paid by public safety employees a prohibited subject of bargaining under newly created Sec. 111.70(4)(mc) 6, Stats.?

If the answer to that question is yes, then the WPPA proposal set forth in Finding of Fact 3 specifying the level of the public safety employees' deductible contribution is a prohibited subject of bargaining and cannot be part of the WPPA final offer in the Sec. 111.77, Stats., interest arbitration process. If the answer to that question is no, then the WPPA proposal is a mandatory subject of bargaining and can be included in the WPPA final offer in interest arbitration.

As part of its deliberations on the 2011-2013 Wisconsin State budget, the Joint Committee on Finance passed Motion #472 which stated in pertinent part:

> Provide that the design and choice of health care coverage plans to be offered by employers under MERA to represented law enforcement and fire personnel would be a prohibited subject of bargaining.

The "Note" that accompanied the Motion stated in pertinent part:

> The motion would provide that the design and choice of health insurance coverage plans to be offered by employers under MERA to represented law enforcement and fire personnel would be a prohibited subject of bargaining. The employee contribution requirements for any offered coverage for represented law enforcement and fire personnel would still be collectively bargained.

Pursuant to Motion #472, Sec. 111.70(4)(mc) 6, Stats., was created and provides in pertinent part:

> (mc) *Prohibited subjects of bargaining; public safety employees.*

. . .

> 6. The design and selection of health care coverage plans by the municipal employer for public safety employees, and the impact of the design and selection of health coverage plans on the wages, hours and conditions of employment of public safety employees.

The County argues that the language of Sec. 111.70(4)(mc) 6, Stats., is clear and requires a conclusion that the WPPA deductible proposal is a prohibited subject of bargaining. The County contends that the existence of a deductible is part of the "design and selection of health insurance coverage plans" or, in the alternative, that employee payment of a deductible falls within the scope of the "impact of the design and selection of health coverage plans on the wages, hours and conditions of employment of public safety employees." The WPPA concedes that the existence of a deductible is part of the "design and selection of health insurance coverage plans" but argues that the question of who pays the deductible falls within the scope of "employee contribution requirements" that remain subject to collective bargaining under Sec. 111.70(4)(mc)6, Stats.

Both parties agree, as do we, that the primary source of guidance for discerning the legislative intent is STATE EX REL KALAL V. CIRCUIT COURT FOR DANE COUNTY, 2004 WI 58, 271 WIS.2D 633, 681 N.W. 2D AT 110. The Supreme Court in KALAL instructs that we are to give statutory language its "common, ordinary and accepted meaning" and that "context" is likewise important to determine the meaning. *ID.* AT 91, 45-49, 271 WIS.2D AT 633. Evidence of legislative intent need only be consulted where statutory language is ambiguous "although legislative history is sometimes consulted to confirm or verify a plain-meaning interpretation." *ID.* AT 91 51, 271, WIS.2D AT 666-667.

In our judgment, the legislature, by prohibiting bargaining over both the "design and selection of health care coverage plans" as well as the "impact" of the design and selection of plans on wages, hours and conditions of employment clearly intended to prohibit bargaining over who pays plan deductibles.

In the common parlance of collective bargaining and health insurance plan documents, the design and coverage of a plan would typically encompass the deductible applicable to various aspects of the coverage. It would not be unusual for an employer to offer a "high deductible plan" with some type of flexible savings account as a means of reducing cost. The employer might also offer, at a higher cost to the employee, a "standard plan" with a lower deductible. As health insurance costs have steadily outpaced inflation, an ever increasing number of plan designs have been formulated. The clear impact of the statutory change at issue here was to remove the decision to offer one or more such plans and their content from the collective bargaining process for public safety employees.

That plain meaning is confirmed by an examination of the language in the Note that accompanied Motion #472. It provides in part that "the employee contribution requirements for any offered coverage for represented law enforcement and fire personnel would still be

collectively bargained". The WPPA argues that "contribution requirements" means any payment by an employee toward any cost connected with health insurance. We reject that argument as contrary to the plain meaning of the statute itself. Simply stated the "design" of a "coverage plan" fundamentally involves the question of what is covered under the plan. A deductible in any insurance plan limits the plan's coverage. A one thousand dollar deductible simply means that the first one thousand dollars of loss is not covered under the insurance policy. While one might argue that the question of who pays the deductible is not part of the plan design, the fact that the insured employee pays the deductible is a direct impact of the plan on the wages of the employee.

The logical problem with the "who pays" argument is that it overlooks the fact that such a proposal turns the employer into a co-insurer of benefits, a result the Legislature clearly did not intend.

The normal health insurance policy is replete with cost sharing provisions in the form of deductibles, co-pays, and coverage limitations. Payment may be restricted by preferred provider options as well. In the view of the Union and our dissenting colleague, any proposal designed to shift the responsibilities for some or all of those elements of cost sharing to the employee is not part of plan design.

The existence of "deductibles" or co-pays is not simply a matter of sharing the insurance cost, as is the case of the employer and the employee sharing the premium cost. The premium share does not modify behavior the way deductibles and co-pays do. For example, the co-payment requirement for generic prescription drugs is often much lower than for the branded version. That is obviously a deliberate design intended to encourage the use of generics. Suppose that the Union had proposed that it did not care whether the County offered prescription drug coverage, but that if it did, employees would only be responsible for paying one dollar per month for any prescription. Such a proposal would of course completely alter the plan design, yet under the "who pays" rationale would simply be a question of "contribution." The Union and the dissent suggest an exception which swallows the rule.

Contrary to our dissenting colleague's rationale, the amount one contributes to premium cost does not alter an employee's decision as to usage. All employees pay the same contribution, from the healthiest to the most sickly. In fact, higher employee premium contributions may encourage more use of health care services not less, e.g., ("if we are paying X dollars per month, we may as well use it.") Deductibles and co-pays on the other hand create financial incentives (or disincentives) to use. Handing over twenty-five dollars to the pharmacist rather than five dollars likely encourages the use of generic drugs over branded counterparts.

The very essence of "plan design" is making decisions which steer insureds in a particular direction and encourage various behaviors. It is illogical to assume that decisions regarding co-pays and deductibles are not integral parts of plan design.

The fact that the Note accompanying Motion #472 did not use the term "premium" is hardly dispositive, nor does it support the "who pays" argument. Employees contribute towards the health insurance premium cost each month. The employer pays the premiums. Employees who utilize health care pay the full cost of the deductible or co-payment. They do not contribute to the cost of deductibles or co-pays. Simply put, insured parties do not "contribute" to deductibles, they pay them.

The phrase "employee contribution requirements for offered coverage" plainly refers to the employee premium cost, not the potential additional cost the employee may incur to satisfy a deductible. The language from the Note accompanying Motion #472 confirms the plain language interpretation of the statute. The Association proposal is a prohibited subject of bargaining.

Dated at Madison, Wisconsin, this 23rd day of February, 2012.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Scott /s/
James R. Scott, Chairman

Rodney G. Pasch /s/
Rodney G. Pasch, Commissioner

Eau Claire County

DISSENTING OPINION OF COMMISSIONER NEUMANN

Section 111.70(4)(mc)6, Stats., prohibits represented public safety employees from negotiating over the "design" and "selection" of health insurance plans and over any "impact" of those decisions on employee wages. An interpretive problem presents itself here because, taken literally, the statute could be read to forbid any attempt by public safety employees to mitigate the effect of an employer's health insurance decisions – perhaps even a proposal for increased wages to offset potentially harsh deductibles. Taken literally, the exception regarding health insurance could swallow the rule which requires collective bargaining over public safety employees' wages and benefits.

In this case, all agree that the Legislature did not intend the most strictly literal application of the statutory language. The County and the Commission majority have rightly concluded that public safety employees may negotiate with their employers over employee contributions to health insurance premiums, even though the premium is arguably part of health plan design and unarguably an "impact" of the plan design on employee wages. This departure from the strictest literal reading of the statute is based upon language in a legislative note accompanying the motion to enact what became (4)(mc)6. That note states, "employee contribution requirements for any offered coverage for represented law enforcement and fire personnel would still be collectively bargained."

Where I part company with the majority is over the interpretation of the term "employee contributions" in the legislative note. To my colleagues it is "clear" and "plain" that "contribution requirements for any offered coverage" means – and only means – *premium* contributions. This is despite the fact that the note does not use the term "premium," which is hardly an obscure term in the field of health insurance. I believe that the Legislature's omission of the more specific term (premium) was not a result of confusion or ineptitude, but was instead intentional. We can best adhere to the canons of statutory construction if we are faithful to the language actually used in the legislative history, rather than speculating that the Note meant something it did not say but easily could have said. I would conclude that the proposal at issue here, which would limit how much employees contribute toward deductibles by having the employer share those costs, is fully within the scope of "contribution requirements for any offered coverage" as stated in the legislative note.

The majority rests its conclusion that "contributions" is limited to premium contributions on three main points. First, they expend considerable energy demonstrating that the existence and amount of deductibles is an element of plan design and therefore specifically not bargainable per the language of subsection (4)(mc)6. This energy is misplaced, since neither I nor the Union disputes that point. The Union's contract proposal specifically acknowledges the County's right to decide all elements of plan design, including the amount of deductibles. We all understand that plans are designed with various mechanisms to limit insurer payouts and discourage subscriber utilization of medical services. These elements of

plan design in turn affect the price of the premium, which is itself an element or at least an "impact" of the design. Thus, when the majority criticizes me for supposedly believing that "any proposal designed to shift the responsibilities for some or all of those elements of cost sharing to the employee is not part of plan design," they mischaracterize my view. The point is that both deductibles and premiums are elements of plan design and/or impacts of design on employee wages. Premium sharing is bargainable even though it is an element or an impact of plan design. Characterizing deductibles as part of plan design, therefore, is not helpful for purposes of interpreting what the Legislature meant when it stated that "employee contributions" would remain bargainable. Proposing that the employer share some of the costs of high deductibles is a proposal that relates to "employee contributions" within the meaning of the legislative note, *even though* deductibles, like premiums, are an aspect of plan design. This prong of the majority's reasoning is simply a red herring.

A second prong of the majority's view is reflected in its remark that the Union's proposal will turn the employer into a "co-insurer of benefits." The majority asserts, tautologically, that this would be a "result the Legislature clearly did not intend." I fail to grasp what is so patently obvious about this assertion. To the contrary, self-insurance is commonplace among public employers, making it hard to understand why a relatively more modest form of "co-insurance" in the form of deductible-sharing would be legislative anathema. Rather than speculate about the Legislature's views of employer/employee cost-sharing arrangements, I would point to the language of the legislative note as the best evidence of what the Legislature intended regarding employer/employee contributions towards health insurance coverage. The note states that those contributions will remain bargainable.

My colleagues also try to distinguish between premiums, which they conclude are bargainable, and deductibles, which they would exclude from bargaining, by suggesting that deductibles are significant elements of plan design (and presumably premiums, in contrast, are not). The majority points out that deductibles are intended to affect subscriber behavior, by essentially steering subscribers towards less or cheaper medical care. They note that premiums do not affect employee behavior in the same way. This is unquestionably true but beside the point in terms of the purpose of the statute. The apparent purpose of subsection (4)(mc)6 is to empower public employers to reduce their overall health care costs. The employer's principal cost is the premium. The reason that insurers (and, indirectly, employers) want to change some employee behaviors is that those behaviors increase health care costs – and, most importantly for purposes of (4)(mc)6, the premium. From this perspective, there is little reason to distinguish premiums from any other aspect of employer-provided health insurance. An employer might happily agree to a "Cadillac" health care plan if employees paid 100% of the premiums. Yet, the Legislature, we all agree, did not give employers unilateral control over premium contributions, the most direct way of controlling employer health insurance costs. Similarly, it does not inherently impede the cost-saving purpose of subsection (4)(mc)6 for the County to pay a negotiated portion of the deductibles. It could be very cost-effective for an employer to select a plan with extremely – even excessively – high deductibles in order to lower the premium rates, with the expectation that it will agree with the Union to defray

portion of those deductibles. The synergy between premium costs and medical costs is simply too close to conclude that it is "plain" that the legislative note meant to permit bargaining over premium contributions, but not any other contributions, especially absent the explicit use of the easily available term "premium."[1]

The majority also offers a semantic basis for limiting the legislative note to premiums rather than deductibles. According to the majority, employees "pay" deductibles; they do not "contribute to" them. In contrast, says the majority, employers "pay" and employees "contribute to" the premiums. This too-fine semantic distinction would probably escape most employees, who certainly would characterize themselves as "paying" some portion of their premiums. In fact, they may pay the entire premium for some types of coverage. In any case, the legislative note accompanying the Motion simply referred to "employee contribution requirements for any offered coverage." Deductibles are a form of required employee contributions toward their health coverage, by any natural reading of the language of the note. Thus this semantic argument is not persuasive.

The majority also worries that a broad rather than narrow construction of "employee contribution requirements" would defeat the legislative purpose of allowing employers to control plan design and therefore health care costs, because the "exception would swallow the rule." However, it is crucial not to confuse a duty to negotiate with a loss of control. Bargaining does not mean or imply acquiescence. As noted above, an employer may very well select a plan with limited coverage in order to reduce its overall premiums, while nonetheless finding it fiscally prudent to mitigate the effects of those provisions on the relatively few employees for whom the provisions have a harsh effect. That choice would make economic sense if a particular work force is generally healthy. Employers with different demographics or fiscal interests presumably would reject a similar union proposal. In my view, the opportunity to negotiate serves the interests of both types of employers, as well as their public safety employees.

Finally, I would note that giving the language of the legislative note its broader but most straightforward meaning is completely consistent with the overall legislative design condoning collective bargaining for public safety employees. As the Union points out, the Legislature decided that collective bargaining for public safety employees remained an important public good, despite the dramatic reduction in such rights for non-public safety employees. Similarly, subsection (4)(mc)6 reflects a legislative judgment that employer control over health care costs as to public safety employees should not be completely unfettered but instead should be subject to negotiation as to "employee contributions, whether in the form of deductibles or premiums.

[1] I think the majority underestimates the extent to which premium costs, like deductibles and co-pays, may affect subscriber behaviors. It is generally thought that the more employees pay toward premiums, the greater their personal investment in healthy lifestyles. The deterrent effect is more direct with deductibles than with premiums but arguably also more harsh on the few employees who experience catastrophic medical events where no amount of deterrence would affect the decision to use medical care.

For the foregoing reasons, I dissent from the majority's holding and would hold instead that the Union's proposal, set forth in Finding of Fact 3, above, is a mandatory subject of bargaining.

Dated at Madison, Wisconsin, this 23rd day of February, 2012.

Judith Neumann /s/
Judith Neumann, Commissioner