

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of

CITY OF BROOKFIELD

Requesting a Sec. 227.41 (1), Stats. Declaratory Ruling
Involving a Dispute Between Said Petitioner and

LOCAL 2051, BROOKFIELD PROFESSIONAL POLICE ASSOCIATION

Case 135
No. 71539
DR(M)-723

Decision No. 33892-A

Appearances:

James R. Korom, von Briesen & Roper, S.C. 411 East Wisconsin Avenue, Suite 700, Milwaukee, Wisconsin 53202, appearing on behalf of the City of Brookfield.

Andrew A. Schauer, Staff Attorney, Wisconsin Professional Police Association, 660 John Nolen Drive, Suite 300, Madison, Wisconsin 53713, appearing on behalf of Local 2051, Brookfield Professional Police Association.

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

On February 22, 2012, the City of Brookfield filed a petition with the Wisconsin Employment Relations Commission seeking a declaratory ruling pursuant to Sec. 227.41(1), Stats., as to whether Sec. 40.05(1)(b) 1, Stats. as created by 2011 Wisconsin Act 32 requires that City police officers hired on or after July 1, 2011 pay the employee contribution to the Wisconsin Retirement System despite a 2010-2012 collective bargaining agreement between the City and Local 2051, Brookfield Professional Police Association, which provides:

The City shall pay the entire contribution (Employer's and Employee's share) under the Retirement Program established under Chapter 40 of the Wisconsin Statutes.

No. 33892-A

On March 16, 2012, the Association filed a motion to dismiss arguing the petition does not raise an issue of state-wide significance and the issue presented can be resolved through the grievance arbitration process.

On June 27, 2012, the Commission issued an Order Denying Motion to Dismiss Petition for Declaratory Ruling. The parties thereafter filed a Stipulation of Facts and written argument-the last of which was received October 5, 2012.

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 Brookfield, herein the City, is a municipal employer.
2. Local 2051, Brookfield Professional Police Association, herein the Association, is a labor organization that serves as the collective bargaining representative of certain City employees identified in a January 1, 2010-December 31, 2012 contract between the Association and the City as:

All full-time sworn police personnel in the Brookfield Police Department except the Chief, Assistant Chief, Captains, Lieutenants, Sergeants, Clerks and Operators.

3. The January 1, 2010-December 31, 2012 was signed July 22, 2010 and, in addition to the description of the Association's bargaining unit recited in Finding of Fact 2 above, contains the following pertinent provisions:

ARTICLE X PENSION

Section 10.01: The City shall pay the entire contribution (Employer's and Employee's share) under the Retirement program established under Chapter 40 of the Wisconsin Statutes.

...

ARTICLE XXV SAVINGS CLAUSE

Section 25.01: If any part of this Agreement or any addenda shall be held invalid by operation of law or restrained thereby, the remainder of this Agreement and addenda shall not be affected thereby, and the parties shall immediately enter into negotiations for replacement.

4. Since July 1, 2011, the City has hired full-time sworn police personnel. As to these new hires, the City has not paid the employees' share/contribution under the "Retirement program established under Chapter 40 of the Wisconsin Statutes." because the City believes Sec. 40.05(1)(b) 1, Stats. precludes it from doing so.

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

CONCLUSIONS OF LAW

1. Employees hired by the City of Brookfield on or after July 1, 2011 as full-time sworn police personnel are "covered" within the meaning of Section 9135 of 2011 Wisconsin Act 32 by the 2010-2012 collective bargaining agreement between the City and Local 2051, Brookfield Professional Police Association.

2. The 2010-2012 collective bargaining agreement contains "provisions inconsistent with" Sec. 40.05(1)(b) 1, Stats. within the meaning of Section 9135 of 2011 Wisconsin Act 32.

3. During the term of the 2010-2012 collective bargaining agreement, Section 40.05(1)(b) 1, Stats. does not invalidate or restrain the City of Brookfield's Article X obligation to pay the employees' share/contribution under the "Retirement program established under Chapter 40 of the Wisconsin Statutes" for full-time sworn police personnel hired on or after July 1, 2011.

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

DECLARATORY RULING

The City of Brookfield is obligated under Article X of the 2010-2012 collective bargaining agreement to pay the employees' share/contribution under the "Retirement program established under Chapter 40 of the Wisconsin Statutes" for full-time sworn police personnel hired on or after July 1, 2011.

Given under our hands and seal at the City of Madison, Wisconsin, this 19th day of December, 2012.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Scott /s/

James R. Scott, Chairman

Judith Neumann /s/

Judith Neumann, Commissioner

Rodney G. Pasch /s/

Rodney G. Pasch, Commissioner

CITY OF BROOKFIELD

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

The City seeks a declaratory ruling holding that Sec. 40.05(1)(b) 1, Stats. prohibits it from making employee share retirement contributions for employees hired after July 1, 2011. The Association argues there is no such prohibition until the parties' 2010-2012 collective bargaining agreement expires.¹

Section 40.05(1)(b) 1, Stats. provides in pertinent part that:

Except as otherwise provided in a collective bargaining agreement entered into under subch. IV or V of ch.111 and except as provided in subd. 2., an employer may not pay, on behalf of a participating employee, any of the contributions required by par. (a).

The “contributions required by par. (a)” are the employee share contributions to the Wisconsin Retirement System. The reference to “subch. IV . . . of ch. 111” is to the Municipal Employment Relations Act which is generally applicable to the City and the Association and is the law pursuant to which they bargained their 2010-2012 agreement. The exceptions to the prohibition in “subd. 2.” relate to law enforcement and firefighting employees who are not represented by a union and specify that a municipal employer shall pay the employee share contributions for said employees to the same extent that the employer makes said contributions for union represented law enforcement and firefighting employee “initially employed by the municipal employer before July 1, 2011.”

Section 40.05(1)(b) 1, Stats., was created by 2001 Act 32 which generally took effect July 1, 2011. However, Section 9315 of Act 32 created specific initial applicability language for Sec. 40.05(1)(b) 1, Stats. and states that the new statute first applies to:

. . . . employees who are covered by a collective bargaining agreement that contains provisions inconsistent with those sections on the day on which the agreement expires or is terminated, extended, modified, or renewed, whichever occurs first.

The City argues that Section 9315 does not postpone the application of Sec. 40.05(1)(b) 1, Stats. to employees hired on or after July 1, 2011 because: (1) said employees were not “covered by a collective bargaining agreement” on July 1, 2011; and (2) Article X is invalid as

¹ The Association correctly acknowledges that upon expiration of the 2010-2012 agreement, the City cannot make employee share contributions for the post-June 30 hires and that Sec. 111.70(4)(mc) 5, Stats. prohibits bargaining over that subject for said employees.

to the post June 30 new hires and thus the 2010-2012 agreement no longer contains a provision that is “inconsistent” with Sec. 40.05(1)(b) 1, Stats. The Association disagrees and asserts that Section 9135 postpones the applicability of Sec. 40.05(1)(b) 1, Stats. because: (1) the 2010-2012 bargaining agreement covers all employees who work during its term and thus the post-June 30, 2011 employees are “covered by a collective bargaining agreement” within the meaning of Section 9135; and (2) Article X was not invalidated as to post-June 30 hires and thus the existing agreement continues to be “inconsistent” with Sec. 40.05(1)(b)1, Stats. until it expires.

Looking first to the question of whether an employee is “covered by a collective bargaining agreement” within the meaning of Section 9315, we conclude that question is answered by reference to the terms of the specific collective bargaining agreement in question. If the provisions of the agreement apply to employees hired during its term, then those employees are “covered” within the meaning of Section 9315 and application of Sec. 40.05(1)(b)1, Stats. is postponed if the agreement has terms inconsistent with Sec. 40.05(1)(b)1, Stats. If the provisions of the agreement do not apply to employees hired during its term, then those employees are not “covered” and Sec. 40.05(1)(b) 1, Stats., takes effect immediately.

Here, a review of the terms of the 2010-2012 agreement satisfies us that the agreement is applicable to employees hired during its term. As noted in Finding of Fact 2, the agreement applies on its face to “All full-time sworn police personnel” and the Article X Pension provision does not contain any exclusion for new hires.² Thus, we conclude that the employees hired on or after July 1, 2011 are “covered by a collective bargaining agreement” within the meaning of Section 9135.

The City correctly argues that even if the new hires are “covered” by the 2010-2012 agreement, Section 9135 only postpones the application of Act 32 if the agreement contains provisions that are “inconsistent” with Act 32. Particularly in the context of the Savings Clause historically contained in their collective bargaining agreements, the City asserts that the parties have a practice of modifying existing contract provisions to conform to changes in the law and that such a practice should prevail here so as to conform Article X to the terms of Act 32. If the parties did so, then Article X would not be “inconsistent” with Act 32 and the Act’s provisions would immediately become applicable to post-June 30 hires.

On its face, the contractual Savings Clause is triggered when an existing contract provision is “held invalid by operation of law or restrained thereby.” In the past instances cited by the City, the City concluded that a contract provision had been invalidated and moved to modify the offending contract provision accordingly. The Association did not object to the City’s action or demand to bargain. The City asserts that the past modifications all benefited

² We also note that the application of a collective bargaining agreement to employees hired during its term is the norm in our collective labor relations experience. While parties could agree otherwise, they would then confront the need to bargain again and again during the term of the contract whenever an employee was hired.

the employees and argues that simply because the Association (and the employees it represents) are not benefited in this instance by the City's actions, the Association should nonetheless be held to the past practice of how the Savings Clause has been administered and must honor the City's judgment as to the "invalidity" of Article X.

We do not find this argument to be persuasive. Based on the record before us and the City's arguments, in the past instances cited by the City, external law did in fact invalidate the contract provisions. Here, Act 32 did not "invalidate" Article X as to post-June 30, 2011 hires because the employees are "covered" by the 2010-2012 agreement. Thus, neither the language of the Savings Clause nor any past practice as to how said Clause has been applied provide a persuasive basis for modifying Article X so that it is no longer "inconsistent" with Act 32.

Given the foregoing, we conclude that Section 9135 of Act 32 serves to postpone the applicability of Sec. 40.05(1)(b) 1, Stats. to the post-June 30 new hires until the 2010-2012 agreement expires because both the "covered" and "inconsistent" requirements in Section 9135 are present. Thus, we issue a declaratory ruling that the City is not prohibited by Sec. 40.05(1)(b)1, Stats. from honoring its contribution obligations under Article X of the 2010-2012 agreement.

Dated at Madison, Wisconsin, this 19th day of December, 2012.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Scott /s/

James R. Scott, Chairman

Judith Neumann /s/

Judith Neumann, Commissioner

Rodney G. Pasch /s/

Rodney G. Pasch, Commissioner