STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of

WASHBURN COUNTY

Requesting a Declaratory Ruling Pursuant to Section 111.70(4)(b), Wis. Stats.,
Involving a Dispute Between Said Petitioner and

WASHBURN COUNTY LAW ENFORCEMENT DEPARTMENT EMPLOYEES, LOCAL 225, WISCONSIN PROFESSIONAL POLICE ASSOCIATION/ LAW ENFORCEMENT EMPLOYEE RELATIONS DIVISION

Case 70
No. 71612
DR(M)-725

Decision No. 34803

Appearances:

Mindy Dale and **Ryan J. Steffes,** Weld, Riley, Prenn & Ricci, S.C., P.O. Box 1030, Eau Claire, Wisconsin, 54702-1030, appearing on behalf of Washburn County.

Roger Palek and **Andrew D. Schauer,** Staff Attorneys, Wisconsin Professional Police Association, 660 John Nolen Drive, Suite 300, Madison, Wisconsin, 53713, appearing on behalf of Washburn County Law Enforcement Department Employees, Local 225, Wisconsin Professional Police Association/Law Enforcement Employee Relations Division.

FINDINGS OF FACT, CONCLUSION OF LAW AND DECLARATORY RULING

On May 7, 2012, Washburn County filed a petition with the Wisconsin Employment Relations Commission seeking a declaratory ruling pursuant to Secs. 111.70(4)(b) and/or 227.41, Stats., as to whether Sec. 111.70(4)(mc)5, Stats. prohibits the County from bargaining over employee share Wisconsin Retirement System contributions for individuals who were employed by the County prior to July 1, 2011, but who did not become part of the public

safety employee bargaining unit represented by Washburn County Law Enforcement Department Employees, Local 225, Wisconsin Professional Police Association/Law Enforcement Employee Relations Division bargaining unit until after June 30, 2011.

Local 225 filed a response to the petition on May 25, 2012. The parties thereafter submitted stipulations of fact and filed briefs and reply briefs. The record was closed on December 20, 2012.

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

FINDINGS OF FACT

1. Washburn County, herein the County, is a municipal employer.

2. Washburn County Law Enforcement Department Employees, Local 225, Wisconsin Professional Police Association/Law Enforcement Employee Relations Division, herein the Union, is a labor organization serving as the collective bargaining representative of employees in a bargaining unit described in pertinent part in the parties' January 1, 2009-December 31, 2011 and January 1, 2012-December 31, 2013 collective bargaining agreements as:

> . . . all regular full-time and regular part-time deputy/patrol employees of the Washburn County Law Enforcement Department. . . .

3. Prior to July 1, 2011, two individuals were employed by the County as dispatcher/jailers in a public safety employee bargaining unit, but after July 1, 2011 were employed by the County as deputy sheriffs in a separate public safety employee bargaining unit represented by the Union.

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

CONCLUSION OF LAW

The individuals referenced in Finding of Fact 3 were "initially employed on or after July 1, 2011" within the meaning of Sec. 111.70(4)(mc) 5, Stats.

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

DECLARATORY RULING

Washburn County and Washburn County Law Enforcement Department Employees, Local 225, Wisconsin Professional Police Association/Law Enforcement Employee Relations Division are prohibited from bargaining over County payment of the employee share of contributions to the Wisconsin Retirement System for the individuals referenced in Finding of Fact 3.

Given under our hands and seal at the City of Madison, Wisconsin, this 22nd day of March, 2013.

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

Washburn County

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

Through this declaratory ruling, the County asks for a ruling on the narrow question of whether Sec. 111.70(4)(mc) 5, Stats. prohibits bargaining over County payment of the employee share of the Wisconsin Retirement System contribution for individuals employed by the County before July 1, 2011 but added to the Union bargaining unit on or after that date.

Section 111.70(4)(mc) 5, Stats. was created by 2011 Wisconsin Act 32 and provides:

> (mc) *Prohibited subjects of bargaining; public safety employees.* The municipal employer is prohibited from bargaining collectively with a bargaining unit containing a public safety employee with respect to any of the following:
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> 5. **If the collective bargaining unit contains a public safety employee who is initially employed on or after July 1, 2011,** the requirement under ss. 40.05(1)(b), 59.875, and 62.623 that the municipal employer may not pay, on behalf of that public safety employee any employee required contributions or the employee share of the required contributions, and the impact of this requirement on the wages, hours, and conditions of employment of that public safety employee. If the public safety employee is initially employed by a municipal employer before July 12, 2011, this subdivision does not apply to that public safety employee if he or she is employed as a public safety employee by a successor municipal employer in the event of a combined department that is created on or after that date. (emphasis added).[1]

The Union's view is that the statute does not prohibit bargaining over employee share pension contributions provided the employee was employed by the same employer in any capacity prior to July 1, 2011. If, for example, an employee worked in the parks department for Washburn County but was hired into a Union represented deputy sheriff position on or

[1] Section 40.05(1)(b), Stats. referenced in Sec. 111.70(4)(mc) 5, Stats. is the relevant retirement contribution statute applicable to this dispute and provides in pertinent part as follows:

> 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) shall be made by a reduction in salary . . .

after July 1, 2011, bargaining could occur over the question of who pays the employee portion of the retirement contribution. The County on the other hand believes the statute is ambiguous and that resort to legislative history is appropriate. Its view is that legislative history demonstrates that employees first hired into this public safety collective bargaining unit on or after July 1, 2011 are subject to the bargaining prohibition. However the County skirts the difficult question posed by this case. Here we have two employees employed in a different public safety unit (jailer/dispatchers) for Washburn County prior to July 1, 2011 and then initially hired into this public safety collective bargaining unit after July 1, 2011. That is not unusual in sheriff departments where sworn jailers and/or dispatchers are in a different bargaining unit than patrol deputies.

In our view, resort to the legislative history (which is itself unclear) is unnecessary. On its face Sec. 111.70(4)(mc) 5, Stats. prohibits bargaining for public safety employees with respect to payment of the employee pension contribution portion:

> "If the collective bargaining unit contains a public safety employee who is initially employed on or after July 1, 2011 . . . ."

We conclude that it is employment within the employee's current collective bargaining unit that is the correct benchmark, not employment with the County in a different bargaining unit whether it includes public safety employees or not. The scope of bargaining issues arise in the context of the employee's current bargaining unit and thus, it makes sense that it is the date of the employee's entry into the current unit that is determinative.[2] The Legislature intended to grandfather in existing public safety employees (i.e., employed in the unit before July 1, 2011) within existing public safety collective bargaining units relative to bargaining over who pays the employee portion of required pension contributions.

The Union argues that the interpretation we adopt is not wise public policy because it limits municipal employers from hiring from within. A jailer at Washburn County who is a sworn jailer may be discouraged from moving to a position as a patrol deputy in Local 225 because the employee will have to assume the payment of his or her share of the statutory pension contribution. That may be so but it does not justify a strained interpretation of the statute. As a practical matter employees contemplating a new position always weigh the benefits and detriments of moving to a new job. If the County believes that the transfer from other positions to the Sheriff's Department patrol positions should be encouraged they can negotiate other incentives to facilitate that movement. Our task is simply to interpret the statute, and not to make human resources policy decisions for those who fall within our jurisdiction.

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[2] Contrary to the position of the dissent the focus on the individual bargaining units is appropriate. This is after all a limitation on "collective bargaining" an obligation that falls on "collective bargaining units".

Clearly the legislative will was to minimize the payment by employers of the statutorily-mandated employee share of pension contributions. They created a limited exception (i.e., those employed in their current public safety bargaining unit prior to July 1, 2011) and our interpretation is consistent with that intent.

Dated at Madison, Wisconsin this 22nd day of March, 2013.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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

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

Washburn County

DISSENTING OPINION OF COMMISSIONER JUDITH NEUMANN

The question in this case is whether the union representing two public safety employees, who were hired by the County *as public safety employees* before July 1, 2011, but transferred from one public safety job (and bargaining unit) with the County to another with the same County after July 1, 2011, has the right to bargain with the County for a continued contribution toward those employees' pensions. Deciding this case turns upon the meaning to be given to the term "initially employed" in Sec. 111.70(4)(mc), Stats. I agree with the majority that the term refers to the date of hire by a particular employer as a public safety employee. The majority, however, goes farther and adopts the narrowest possible interpretation, saying that it refers to the date of hire *in a particular public safety bargaining unit.* Because the two employees in this case were hired by the County into one public safety unit (dispatcher/jailer) before July 1, 2011, and transferred into another public safety unit of the same employer after that date, they would lose what they had before, i.e., the right to be covered by a negotiated pension contribution. Under my interpretation, they would remain grandfathered and retain that right.

As discussed below, the majority's textual analysis for making this fine distinction is circular and also fails to take into account the language in the intimately related amendments to the retirement statutes that were enacted at the same time as the provision of MERA that is under review. Even more troubling is the majority's policy argument. According to the majority, it is "clear" that "the legislative will was to minimize the payment by employers of the statutorily-mandated employee share of pension contributions." In other words, in the majority's view, the right resolution of issues arising under the instant "grandfathering" provision is the narrowest possible interpretation – in this case limiting "initially employed" not only to a public safety position within a particular municipality (narrow enough but compelled by the statutory language), but to a particular public safety bargaining unit of that particular employer.

I cannot agree that the Legislature intended only the utmost stingy interpretation of this this legislation. Certainly the Legislature wanted to phase out the practice of having public employers pay all or part of employees' pension contributions, but it is equally obvious that the Legislature took pains to prevent this burden from falling upon public safety employees hired before July 1, 2011. Here we are tasked with implementing the latter – generous – legislative purpose. Our task is made difficult by imprecision in the language, but there is no reason to assume that the Legislature intended to exempt only the smallest imaginable group where there are more logical options available.

The provision at issue, Sec. 111.70(4)(mc), Stats., was created by 2011 Wisconsin Act 32, and states in pertinent part as follows:

(4) …

(mc) *Prohibited subjects of bargaining; public safety employees.* The municipal employer is prohibited from bargaining collectively with a bargaining unit containing a public safety employee with respect to any of the following:

> 5. If the collective bargaining unit contains a public safety employee who is initially employed on or after July 1, 2011, the requirement under ss. 40.05(1)(b), 59.875, and 62.623 that the municipal employer may not pay, on behalf of that public safety employee any employee required contributions or the employee share of the required contributions, and the impact of this requirement on the wages, hours, and conditions of employment of that public safety employee. If a public safety employee is initially employed by a municipal employer before July 1, 2011, this subdivision does not apply to that public safety employee if he or she is employed as a public safety employee by a successor municipal employer in the event of a combined department that is created on or after that date.

The disagreement here is about the "grandfathering" portion of this provision, specifically the phrase "a public safety employee who is initially employed on or after July 1, 2011." If that phrase were taken literally, it would lead to an absurd result: anyone who was first employed by any employer (public or private) before July 1, 2011, but who is now a public safety employee in a bargaining unit, would be grandfathered. The exception would swallow the rule, and no one involved in the instant case has proposed that the language be given that construction. It does underscore, however, the grammatical problem giving rise to this case.

As the parties' briefs illustrate, once the statutory sentence is relieved of its literal meaning, it would permit a variety of interpretations, all of which – including the one adopted by the majority – require the implicit addition of words after the phrase "who is initially employed …." The majority and the County would implicitly import the words "in the same public safety bargaining unit." The Union would add "by the municipal employer," a construction that would cover public safety employees as long as they were initially hired by this particular employer, but would not require that they have been hired as public safety employees. For example, the Union's interpretation would encompass a County DPW worker hired before July 1, 2011, who became a deputy sheriff in this same County at some point after July 1, 2011. There are rational policy arguments for the Union's interpretation, but ultimately it conflicts with the text of both (4)(mc)5 and related legislation.[3]

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[3] The Union notes that the Legislature could have wanted to encourage in-house transfers, in that current employees are often less risky than less well-known employees brand new to County employment. The Commission majority mischaracterizes the Union's position as an argument that "the interpretation we adopt is not wise public policy because it limits municipal employers from hiring from within." The majority then disparages that argument (which the Union did not make) by stating that "Our task is simply to interpret the statute, and not to make human resources policy decisions for those who fall within our jurisdiction." The Union was not asking us to make an HR decision nor suggesting that the majority's interpretation would limit the employer from internal transfers. The Union was simply pointing out that its interpretation of the language could serve at least one reasonable public policy and was therefore not irrational. Our task of interpreting the statute gives us no choice but to consider "human resources policies" in order to evaluate whether potential statutory constructions are reasonable.

Despite the opaque grammar, the legislative intent becomes more clear when the provision is considered in context with parallel provisions amending the retirement statute that were enacted in the same legislation (2011 Wis. Act. 32). "A statute's purpose or scope may be readily apparent from its plain language *or its relationship to surrounding or closely-related statutes ….*" State ex rel. Kalal v. Circuit Court for Dane County, 2004 WI 58, 271 Wis.2d 633 (Wis. 2004) at 665 (emphasis added). Here, the instant amendments to the collective bargaining law were part of a larger legislative initiative affecting all public employees' pensions, not just public safety employees and not just those in bargaining units. 2011 Wis. Act 32 also amended Chapter 40, the state's public employee pension law, by adding the following language, a portion of which extended the "grandfathered" pension contribution rights to *non-bargaining unit employees*:

> 40.05 …
>
> (b) 1. 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). …
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> 2. a. A municipal employer shall pay, on behalf of a nonrepresented law enforcement or fire fighting managerial employee or a nonrepresented managerial employee described in s. 111.70 (1) (mm) 2., who was initially employed by the municipal employer before July 1, 2011, the same contributions required by par. (a) that are paid by the municipal employer for represented law enforcement or fire fighting personnel or personnel described in s. 111.70 (1) (mm) 2. who were initially employed by the municipal employer before July 1, 2011.
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> b. An employer shall pay, on behalf of a nonrepresented managerial employee in a position described under s. 40.02 (48) (am) 7. or 8., who was initially employed by the state before July 1, 2011, in a position described under s. 40.02 (48) (am) 7. or 8. The same contributions required by par. (a) that are paid by the employer for represented employees in positions described under s. 40.02 (48) (am) 7. or 8. who were initially employed by the state before July 1, 2011.
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> c. A municipal employer shall pay, on behalf of a represented law enforcement or fire fighting employee or employee described in s. 111.70 (1) (mm) 2., who was initially employed by the municipal employer before July 1, 2011, and who on or after July 1, 2011, became employed in a nonrepresented law enforcement or fire fighting managerial position or nonrepresented managerial position described in s. 111.70 (1) (mm) 2. with the same municipal employer, or a successor municipal employer in the event of a combined

> department that is created on or after July 1, 2011, the same contributions required by par. (a) that are paid by the employer for represented law enforcement or fire fighting personnel or personnel described in s. 111.70 (1) (mm) 2. who were initially employed by a municipal employer before July 1, 2011.

The above Chapter 40 amendments support certain conclusions about the scope of the grandfathering language in the instant Chapter 111.70 amendments. First, contrary to the Union's argument, the legislature intended to limit grandfathering to public safety employees employed by the same employer both before and after July 1, 2011. Thus, subsection 40.05(b)2.b., above, refers to "the municipal employer" rather than "a" municipal employer, and subparagraph (b)2.c. refers to "the same municipal employer." This sensible but not explicit limitation is also supported by the caveat that appears in both subparagraph (b)2.c., above, and the language at issue in this case, that public safety employees will retain their grandfathered status if their employer should subsequently merge with another employer into a new "combined department" employer. Such a caveat would be unnecessary if the grandfathering protection applied to employees who had been hired by any public employer prior to July 1, 2011.[4]

Second, subsection 40.05(b)2.c. necessarily implies, contrary to the Union's argument, that the grandfathering provision in 40.05(b)2.a. is limited to individuals who were hired *as public safety employees* prior to July 1, 2011. Like the provision at issue here, subsection 40.05(b)2.a. requires a municipal employer to pay the employee contribution for a public safety managerial employee who "was initially employed by the municipal employer before July 1, 2011…." Clearly "initially employed" should have a similar meaning in both statutes. Yet 40.05(b) 2.c. expressly grandfathers employees who move from represented positions into management positions after July 1, 2011, and vice versa. If the Union were correct that "initially employed" covers current public safety employees who had been hired by the employer *in any capacity* prior to July 1, 2011, there would have been no need for

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[4] Although, as noted, everyone involved in this case agrees that "initially employed" is implicitly limited to "by the same employer," the relevant legislative history (notes accompanying Joint Finance Committee Motion #472 to the 2011-2013 Budget), could support an interpretation that would extend beyond one employer. The note states: "The motion … would require that a MERA employer may not pay, on behalf of any law enforcement or fire fighting employee, the employee-required retirement contributions specified in 2011 Wisconsin Act 10, if that employee first becomes a participating employee in the WRS [Wisconsin Retirement System] on or after the bill's effective date." (Emphasis added). A custodian employed by one municipality prior to July 1, 2011, who has become "a participating employee in WRS" as a result of that employment, and who subsequent to July 1, 2011 becomes employed as a firefighter by a different municipality, could fit within the explanation of the grandfathering coverage offered by the notes to the Joint Finance motion.

Fortunately, we do not need to decipher the confusing language from the legislative note, since I am in agreement with my colleagues that the language of Sec. 111.70(4)(mc)5 is not ambiguous within the meaning of State ex rel. Kalal, supra; all of us believe that the meaning of the language can be ascertained through textual and contextual analysis. Kalal does not permit resort to extrinsic evidence such as legislative history unless the statutory language is beyond textual/contextual interpretation.

subparagraph 2.c.: those employees would already have been grandfathered under 2.a., because they would have been hired (albeit in a different capacity) prior to July 1, 2011. Adding 2.c. thus indicates that the Legislature intended "initially employed" to refer to public safety employment only.

Third, the Chapter 40 amendments, taken as a whole, suggest that the Legislature's goal was parity among public safety employees of a particular employer as to the right to bargain over employer pension contributions: movement back and forth between bargaining unit and non-bargaining unit (such as managerial) positions should not negate an employee's previously-acquired "grandfathered" status. The Legislature's likely concern was to encourage (or at least not discourage) promotions to management from within the rank and file public safety contingent. Even so, like their MERA counterpart, the language of the Chapter 40 amendments focuses solely on the *category* of "public safety" – whether employee or manager - and not upon any particular bargaining unit status. Since employees are grandfathered even if they have never been in any bargaining unit, it seems clear that the Legislature was not focused upon *bargaining unit* status, but rather upon *public safety employee* status. Once a public safety employee of a particular employer has the benefit of negotiated employer pension contributions, that employee is entitled to keep that benefit.

Other than a "narrowest imaginable" principle, the majority offers no sensible textual argument for limiting the benefit to employees only so long as they remain in one particular bargaining unit. The majority asserts that this "makes sense" because "the scope of bargaining issues arise in the context of the employee's current bargaining unit." This is a superficial analysis that is not suggested much less compelled by the grammar of the sentence. There is no question that the "bargaining unit contains" the two employees at issue here and that they are therefore subject to the employer's current duty to bargain. Therefore the observation upon which the majority relies – that the bargaining duty pertains to the unit which now includes these two employees – is completely circular. It tells us nothing about whether they were "initially employed" before July 1, 2011. Thus, despite claiming that the Legislature's meaning is textually clear, the majority must repeatedly supplement the actual statutory language with the phantom parenthetical "(in the bargaining unit)" when ostensibly quoting the statute.

In sum, I agree with my colleagues that "initially employed" means "by the same employer" and "in a public safety position." I see no textual or contextual reason to narrow the scope even further such that employees, once thus grandfathered, cannot transfer to another "same employer" public safety bargaining unit without losing that status.

Dated at Madison, Wisconsin this 22nd day of March, 2013.

Judith Neumann /s/
Judith Neumann, Commissioner

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