STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of

CITY OF MILWAUKEE

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

MILWAUKEE POLICE SUPERVISORS' ORGANIZATION

Case 620
No. 73166
DR(M)-734

DECISION NO. 35042

Appearances:

Thomas J. Beamish, City Attorney's Office, City of Milwaukee, 800 City Hall, Milwaukee, Wisconsin, appearing on behalf of the City of Milwaukee

William R. Rettko, Rettko Law Offices S.C., 15460 West Capitol Drive, Suite 150, Brookfield, Wisconsin, appearing on behalf of Milwaukee Police Supervisors' Organization

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECLARATORY RULING

On April 22, 2014, the City of Milwaukee filed a petition for review with the Wisconsin Employment Relations Commission seeking a declaratory ruling pursuant to § 111.70(4)(b), Stats., as to the City's duty to bargain with the Milwaukee Police Supervisors' Organization over a particular proposal regarding a successor collective bargaining agreement between the parties. The parties declined the opportunity for hearing and the matter was submitted on briefs and has been fully briefed. The Milwaukee Police Supervisors' Organization in answering the petition also submitted a motion to dismiss which has been fully briefed by the parties. Both parties agreed that the Commission could address the petition and the motion in one decision.

FINDINGS OF FACT

1. The City of Milwaukee (hereinafter the "City") is a municipal employer, and it operates a Police Department which provides law enforcement services.

2. The Milwaukee Police Supervisors' Organization (hereinafter the "MPSO") is a labor organization that serves as the collective bargaining representative for certain public safety employees of the City.

3. The MPSO has proposed for inclusion in the 2013-2014 collective bargaining agreement between it and the City the following:

The City shall offer two Health Care Coverage Plans.

CONCLUSIONS OF LAW

1. The proposal relates to the design and selection of a health care coverage plan, as well as the impact of such design and selection of health care coverage plans on wages, hours and conditions of employment.

2. As such, the proposal is a prohibited subject of bargaining under § 111.70(4)(mc)6, Stats.

DECLARATORY RULING

The City of Milwaukee has no duty to bargain with the Milwaukee Police Supervisors' Organization as to the proposal set forth in paragraph three of the Findings of Fact.

Signed at Madison, Wisconsin, this 19th day of June 2014.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Scott, Chairman

Rodney G. Pasch, Commissioner

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

Prior to addressing the merits of the requested declaratory ruling, we explain our ruling on the MPSO's alternative motion to dismiss.

The MPSO has alleged that the petition is moot and, in the alternative, that it is untimely under Wis. Admin. Code § ERC 31.07(2).

Mootness

The MPSO notes without dispute that the City is currently offering two healthcare insurance plans and did so during 2013 as well. According to the MPSO, the City will continue to do so during 2014. In their view, the matter is moot on its face. The City counters that if a new agreement is not in place before expiration of this agreement, the City will have an obligation to maintain the status quo by offering two plans beyond 2014. It further argues that if the contract language encompasses a prohibited subject of bargaining the City would be barred from making a unilateral change by eliminating one of the plans.

We turn to *Putnam v. Time Warner Cable*, 2002 WI 108, 255 Wis.2d 447, 649 N.W.2d 626, for guidance. In *Putnam*, the plaintiffs, a group of cable subscribers, challenged the company's right to impose a $5.00 late fee on them. The company asserted that the claim was not ripe because none of the plaintiffs had made a late payment nor had any been charged for late payments. The subscribers sought declaratory and injunctive relief. The Supreme Court reiterated the four factors that need be present in order for a court to entertain an action for declaratory relief:

> (1) A controversy in which a claim of right is asserted against one who has an interest in contesting it.
>
> (2) The controversy must be between persons whose interests are adverse.
>
> (3) The party seeking declaratory relief must have a legal interest in the controversy – that is to say, a legally protectible interest.
>
> (4) The issue involved in the controversy must be ripe for judicial determination.

Id. at ¶41. The Supreme Court concludes that all four criteria were established even with no evidence of actual harm.

Here, the City and the MPSO satisfy items (1) and (2) and the City satisfies item (3). This dispute turns on whether the controversy is ripe for determination. We believe that under *Putnam*, this dispute clearly is appropriate for a declaratory determination. Declaratory relief is appropriate "prior to the time that a wrong has been threatened or committed." *Id*. at ¶43, citing *Lister v. Board of Regents*, 72 Wis.2d 282, 307, 240 N.W.2d 610 (1976). A party seeking

declaratory relief need not suffer actual injury before seeking such relief. This is particularly true under § 111.70, Stats., where the Commission has a specific declaratory role in the interest arbitration process. This matter presents a ripe controversy appropriate for declaratory relief.

Timeliness

The MPSO also moves to dismiss relying on Wis. Admin. Code § ERC 31.07(2) which bars changes in a parties' final offer after the investigation has been closed. Our understanding is that the investigation has not been formally closed and no order to that effect has been issued. Accordingly, the City's petition is timely.

Declaratory Ruling

During the course of bargaining a successor agreement for a 2013-2014 labor agreement, the MPSO proposed language as follows:

> The City shall offer two Health Care Coverage Plans.

The City takes the position that the proposal is a non-mandatory subject of bargaining and that it is a prohibited subject of bargaining. The MPSO disagrees.

Pursuant to § 111.70(4)(b), Stats., we are obligated to resolve disputes over whether there is a duty to bargain a particular subject by way of declaratory ruling. Permissive subjects of bargaining are those which are "primarily related to management and direction of the governmental entity and over which the employer may but need not bargain" and prohibited subjects are "those that would violate the law." *Dunn County v. WERC*, 2006 WI App. 120, ¶8, 293 Wis.2d 637, 718 N.W.2d 138.

Some background is important to understanding the issue in this case. In the wake of Act 10, which effectively eliminated bargaining over health insurance issues for most public employees, the ability to bargain health insurance issues in public safety units was limited by 2011 Act 32. The Act provided that municipal employers were prohibited from bargaining:

> 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 the health care coverage plans on the wages, hours, and conditions of employment of the public safety employee.

Following that legislative change, the labor organization in *WPPA v. WERC*, 2013 WI App. 145, 352 Wis.2d 218, 841 N.W.2d 839, proposed to the employer language that acknowledged the employer's right to choose a carrier and a plan design but required that, if the plan included a deductible, the employee payment would be capped at $250/$500. A majority of the Commission determined that the proposal was prohibited by the language quoted above. The Court of Appeals felt otherwise and reversed our decision. Pivotal to the Court of Appeals' decision was its view that "plan design" encompassed the decision to include a deducible in a plan but not the decision of who was going to pay the deductible.

In any event, following the decision, the Legislature modified § 111.70(4(mc)6, Stats., to read as follows:

> Except for the employee premium contribution, all costs and payments associated with health care coverage plans and the design and selection of health care coverage plans by the municipal employer for public safety employees, and the impact of such costs and payments and the design and selection of the health care coverage plans on the wages, hours, and conditions of employment of the public safety employee.

Clearly the import of that modification was to overrule the decision in *WPPA*, *supra*, and make it clear that the employee premium contribution was the only health insurance item subject to collective bargaining with public safety employees.[1]

Implicit in the MPSO's proposal is the fact that the two plans for health insurance coverage must be different. Whether the requirement is for two plans or ten plans the presentation of different plans creates choices for employees. We read the new language as limiting all health insurance decisions (other than premium payment) solely to the employer. Put another way, the employer has the discretion to make all decisions regarding the type of plan or plans to be offered. If the employer chose to offer more than one choice that is their prerogative, but a union cannot bargain for language requiring that a certain number of optional plans be offered. If an employer, for example, were to propose a health insurance plan, the union would be barred from offering an alternative plan with different coverage provisions. Requiring an employer to offer two or more plans is, in effect, similar to the union offering a counterproposal.

In our judgment, § 111.70(4)(mc)6, Stats., significantly restricts bargaining over all of the elements of health insurance coverage plans other than employee premium contributions, and we conclude therefore that the language is a prohibited subject of bargaining.

Signed at Madison, Wisconsin, this 19th day of June 2014.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Scott, Chairman

Rodney G. Pasch, Commissioner

[1] The Legislature has in the past modified § 111.70, Stats., to overturn appellate court decisions interpreting what is a prohibited subject of bargaining. *See City of Menasha v. WERC*, 2011 WI App. 108, ¶13, 335 N.W.2d 250, 802 N.W.2d 531.