STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Joint Petition of

CITY OF WAUKESHA and the INTERNATIONAL
ASSOCIATION OF FIREFIGHTERS, LOCAL 407, AFL-CIO

Requesting a Declaratory Ruling Pursuant to § 111.70(4)(b), Stats,
Involving a Dispute Between the Petitioners

Case ID: 506.0003
Case Type: DR_M

DECISION NO. 37481

Appearances:

James R. Macy, Attorney, von Briesen & Roper, 2905 Universal Street, Suite 2, Oshkosh, Wisconsin, appearing on behalf of the City of Waukesha.

John F. Fuchs, Attorney, Fuchs & Boyle, 13500 Watertown Plank Road, Suite 100, Elm Grove, Wisconsin, appearing on behalf of the International Association of Firefighters, Local 407, AFL-CIO.

FINDINGS OF FACT, CONCLUSION OF LAW, AND DECLARATORY RULING

On August 18, 2016, the City of Waukesha and the International Association of Firefighters, Local 407, AFL-CIO, jointly petitioned the Wisconsin Employment Relations Commission to issue a declaratory ruling pursuant to § 111.70(4)(b), Stats., as to whether a provision in their 2016-2018 collective bargaining agreement is a mandatory subject of bargaining. The parties thereafter engaged in a lengthy but ultimately unsuccessful effort to settle the matter and a hearing was held on May 25, 2018, by Commission Examiner Peter G. Davis in Waukesha, Wisconsin. The parties filed written post-hearing argument and the dispute became ready for Commission action on July 18, 2018.

Having considered the matter and being fully advised in the premises, the Commission makes and issues the following:

FINDINGS OF FACT

1. The City of Waukesha, herein the City, is a municipal employer that provides emergency services thru a fire department.

2. The International Association of Firefighters, Local 407, AFL-CIO, herein the Union, is a labor organization that serves as the collective bargaining representative for certain City employed public safety employees of the fire department.

3. The parties' 2016-2018 collective bargaining agreement contains the following provision:

ARTICLE 10 – ACTING PAY

> Section 2: An employee may not be assigned to act in the stead of another department employee of a different classification or rank unless such employee has successfully completed the current promotional process for said classification as per Article 21 - Promotions, except for EMSC, Special Service Team Member, and Battalion Chief. *[The parties agree to jointly request a declaratory ruling from the Wisconsin Employment Relations Commission to determine whether Article 10, Section 2, is a mandatory or permissive subject of bargaining. ...]*

Italics in original.

4. Article 10, Section 2, prevents the City from reassigning certain employees already scheduled to be on shift to perform work for which they are qualified.

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

CONCLUSION OF LAW

1. Article 10, Section 2, is primarily related to the management and direction of the City of Waukesha within the meaning of § 111.70(4)(p), Stats.

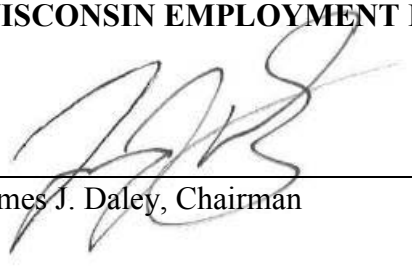
Based on the above and forgoing Findings of Fact and Conclusion of Law, the Commission makes and issues the following:

DECLARATORY RULING

Article 10, Section 2, is a permissive subject of bargaining with the meaning of § 111.70(4)(p), Stats.

Signed at the City of Madison, Wisconsin, this 10th day of August, 2018.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION



James J. Daley, Chairman

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

Analysis of whether a contractual provision is a mandatory or permissive subject of bargaining for public safety employees begins with a consideration of the relevant statutory provisions.

Section 111.70(1)(a), Stats., defines "collective bargaining" as

> … the performance of the mutual obligation of a municipal employer, through its officers and agents, and the representative of its municipal employees in a collective bargaining unit, to meet and confer at reasonable times, in good faith, with the intention of reaching an agreement, or to resolve questions arising under such an agreement, with respect to wages, hours, and conditions of employment for public safety employees or transit employees and with respect to wages for general municipal employees, and with respect to a requirement of the municipal employer for a municipal employee to perform law enforcement and fire fighting services under s. 60.553, 61.66, or 62.13 (2e), except as provided in sub. (4) (mb) and (mc) and s. 40.81 (3) and except that a municipal employer shall not meet and confer with respect to any proposal to diminish or abridge the rights guaranteed to any public safety employees under ch. 164. Collective bargaining includes the reduction of any agreement reached to a written and signed document

Section 111.70(4)(p) specifies:

> **(p)** *Permissive subjects of collective bargaining; public safety and transit employees.* A municipal employer is not required to bargain with public safety employees or transit employees on subjects reserved to management and direction of the governmental unit except insofar as the manner of exercise of such functions affects the wages, hours, and conditions of employment of the public safety employees or of the transit employees in a collective bargaining unit.

As is evidenced by the text of these statutory provisions, bargaining is mandatory as to wages, hours, and conditions of employment but permissive as to subjects reserved to management and direction of the governmental unit. Because many contractual provisions or proposals have a relationship both to wages, hours, and conditions of employment and to the management and direction of the governmental unit, the Commission and the courts have historically answered the mandatory/permissive question by balancing these competing relationships and determining where the "primary" relationship exists. *City of Brookfield v. WERC*, 87 Wis.2d 819 (1979); *Unified School District No. 1 v. WERC*, 81 Wis.2d 89 (1977); *Beloit Education Association v. WERC*, 73 Wis.2d 43 (1976). If a provision or proposal is found to primarily relate to wages, hours, and conditions of employment, then it is a mandatory subject of bargaining. If a provision or proposal is found to primarily relate to the management and direction of the governmental unit, then it is a

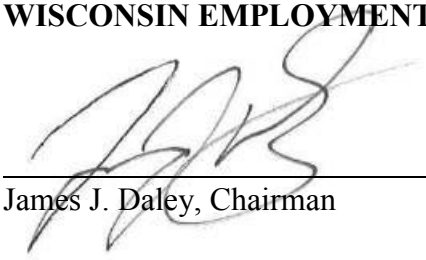
permissive subject of bargaining. While the current above-quoted statutory provisions differ from the statutory definitional provisions in effect when the "balancing test" was first adopted, the fundamental but competing interests of wages, hours, and conditions of employment versus the management and direction of the governmental unit continue to be statutory focal points. Thus, the Commission is persuaded that a balancing of interests continues to be the appropriate analytical tool to be applied when resolving mandatory/permissive issues.

Here, both parties agree that a contract provision which specifies the additional pay, if any, that an employee will received when serving in an "acting" role is primarily related to wages and thus is a mandatory subject of bargaining. The parties' dispute is over the portion of the proposal that limits who can be required to serve in an "acting" capacity. The City asserts that it has a management interest in being able to reassign any already scheduled qualified employees to perform available work in an "acting" capacity. To the extent the existing contract provision prevents it from doing so, the City contends that the provision interferes with its right to establish the minimum job-related qualifications needed to perform "acting" duties and to determine how to allocate scheduled shift employees to best meet its service needs. The Union argues that the City is simply attempting to avoid overtime and scheduling costs and that there may be employee safety implications if the pool of employees available for acting pay is expanded beyond the existing contractual limitations.

Having considered the matter, the Commission concludes that the existing contract provision significantly impacts the management and direction of the governmental unit by preventing the City from reassigning already scheduled qualified employees to a different location in the City to perform needed work. Critical to this conclusion is the determination that some current employees who are not currently contractually "qualified" to be reassigned actually do have the minimum job-related qualifications to perform the work. The Union is correct that the restriction in the contract provision generates overtime for employees not already scheduled and thus does have a wage impact. The Union is also correct that there may be certain employees who may possess the minimum "paper" qualifications but whose deployment in an "acting" capacity may create a significant safety risk to other employees. However, the Commission is satisfied that there are at least some employees who can safely perform "acting" duties who are currently contractually unavailable to the City. On balance, it is concluded that impact on the management and direction of the government unit outweighs the employee wage and conditions of employment (safety) interests. Therefore, the contract provision is a permissive subject of bargaining.

Signed at the City of Madison, Wisconsin, this 10th day of August, 2018.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION



James J. Daley, Chairman