BY THE COURT:

DATE SIGNED: October 30, 2023

Electronically signed by Jacob B. Frost
Circuit Court Judge

STATE OF WISCONSIN **CIRCUIT COURT BRANCH 9** **DANE COUNTY**

WISCONSIN PROFESSIONAL POLICE ASSOCIATION, et al.,

Petitioners,

v. Case Number 22CV1674

WISCONSIN EMPLOYMENT RELATIONS COMMISSION, WERC Decision 39446-A

Respondent,

and

CITY OF RACINE,

Interested Party.

DECISION AND ORDER ON CERTIORARI

This case presents a question important to many in the State of Wisconsin. The Wisconsin Employment Relations Commission (WERC) decided questions relating to collective bargaining between the City of Racine (City) and the Racine Police Association (RPA), the local affiliate of the Wisconsin Professional Police Association (WPPA), and separately issues involving Racine and its firefighters represented by IAFF Local 321. Specifically, WERC decided that Racine is not required to offer any health insurance plan to the police or firefighter employees, and only if Racine chooses to offer a health insurance plan do employees have a

right to bargain over the split of the premium cost for the plan between the City and employees. Whether state law provides municipalities the right to choose not to offer any health insurance plan was not raised or briefed by any party to WERC. After offering that sua sponte opinion, WERC decided the issues specific to the collective bargaining between Racine, the RPA and IAFF Local 321 with reference to its decision that Racine need not offer any health plan at all.

RPA and IAFF Local 321 each appealed WERC's decisions. I consolidated their cases and granted intervention by the Professional Fire Fights of Wisconsin and the Milwaukee Police Association. The parties briefed whether WERC properly interpreted state statute. Having considered the briefs, I declare that WERC incorrectly interpreted the statutes, violating bedrock principles of statutory interpretation and rendering an absurd result contrary to the statute's plain language. Because the remainder of WERC's decisions as to the RPA and IAFF Local 321 rested on WERC's improper statutory interpretation, I vacate WERC's decisions in their entirety and remand for WERC to review the grievances and apply the correct statutory interpretation as set forth in this Decision.

PROCEDURAL BACKGROUND

In February 2021, the City petitioned WERC for declaratory rulings relating to the CBAs with RPA and IAFF Local 321. In July 2022, WERC issued its decisions on those issues. RPA and IAFF Local 321 filed petitions for administrative review, the former in Dane County and the latter in Racine County. The two cases were consolidated into this action. The Professional Fire Fighters of Wisconsin (PFFW) and the Milwaukee Police Association (MPA) moved to join as intervening parties. I granted their request and they participated in all proceedings thereafter.

This case first came to the Court for a preliminary decision in May 2023. At that oral argument on Petitioners' Motion to Stay WERC's decisions, I granted the Motion and issued a stay of WERC's decision pending my full review. Specifically, I ordered as follows:

> 1. The WERC is stayed from enforcing the Decisions' holding that Wisconsin statutes make whether a municipal employer offers public safety employees any health insurance plan a prohibited subject of bargaining.

> The parties shall act toward one another as though that part of the WERC Decision does not exist.
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> 2. The WERC shall not rely on the Decisions' holding that Wisconsin statutes make whether a municipal employer offers public safety employees any health insurance plan a prohibited subject of bargaining. The WERC shall not rely on that decision in any proceeding, whether between these parties or with any other persons or entities.

Dkt. 149 at 2.

STANDARD OF REVIEW

This is an administrative review under Wis. Stat. Ch. 227. Wisconsin statute section 227.57 delineates the scope of my review in relevant part as follows:

> (1) The review shall be conducted by the court without a jury and shall be confined to the record, except that in cases of alleged irregularities in procedure before the agency, testimony thereon may be taken in the court and, if leave is granted to take such testimony, depositions and written interrogatories may be taken prior to the date set for hearing as provided in ch. 804 if proper cause is shown therefor.
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> (2) Unless the court finds a ground for setting aside, modifying, remanding or ordering agency action or ancillary relief under a specified provision of this section, it shall affirm the agency's action.
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> (3) The court shall separately treat disputed issues of agency procedure, interpretations of law, determinations of fact or policy within the agency's exercise of delegated discretion.
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> ….
>
> (5) The court shall set aside or modify the agency action if it finds that the agency has erroneously interpreted a provision of law and a correct interpretation compels a particular action, or it shall remand the case to the agency for further action under a correct interpretation of the provision of law.
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> ….
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> (9) The court's decision shall provide whatever relief is appropriate irrespective of the original form of the petition. If the court sets aside agency action or remands the case to the agency for further proceedings, it may make such interlocutory order as it finds

> necessary to preserve the interests of any party and the public pending further proceedings or agency action.
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> (10) Subject to sub. (11), upon such review due weight shall be accorded the experience, technical competence, and specialized knowledge of the agency involved, as well as discretionary authority conferred upon it.
>
> (11) Upon review of an agency action or decision, the court shall accord no deference to the agency's interpretation of law.
>
> ….

Wis. Stat. §227.57.

The Wisconsin Supreme Court in *Tetra-Tech EC, Inc. v. Dep't of Revenue*, and then the Legislature in revising Wis. Stat. §227.57(11), changed prior law to make clear that this Court owes no deference to WERC's interpretation of law. 2018 WI 75, ¶¶3, 84, 382 Wis. 2d 496, 914 N.W.2d 21. At most, the Court gives due weight to WERC regarding areas of its special experience, technical expertise or specialized knowledge. Even then, due weight means only "giving respectful, appropriate consideration to the agency's views," which "is a matter of persuasion, not deference." *Id.* at ¶78; *see also* Wis. Stat. §227.57(10) and (11). As the issue before me rests solely on interpreting statutes, I give no deference to WERC's decision or reasoning.

DISCUSSION

I. BACKGROUND.

A. Statutory Background.

This case centers on Wis. Stat. §111.70(4)(mc)(6). Before I turn to that statute subsection, background on the law regarding collective bargaining rights of public employees sets the stage to understand the issue before me. Wisconsin long ago enacted statutes preserving the collective bargaining rights of public employees and requiring municipalities to bargain regarding "wages, hours and conditions of employment." This law, the Municipal Employee Relations Act ("MERA"), was interpreted to include a duty to bargain regarding the health insurance plans municipalities offered their employees. Significant case law and WERC jurisprudence developed regarding the statutory rights to bargain.

In 2011, the Legislative and Executive branches dramatically curbed the rights of public employees to collectively bargain. The monumental changes enacted in 2011 Act 10 are well known in the State and were the subject of significant activity, including protests and a recall election relating to then-Governor Scott Walker. Act 10 was also a subject of significant challenge in the judicial branch, resulting in decisions of the Wisconsin Supreme Court upholding that law.

Though Act 10's restrictions on collective bargaining for most public employees were near total, the Legislature initially retained many rights of "public safety employees" to collectively bargain regarding the terms of their employment. These rights were pared back further by 2011 Act 32, which removed public safety employees' right to bargain regarding health insurance plan design and the impact of plan design on employee compensation. Following that amendment, the Wisconsin Court of Appeals interpreted the statute as still allowing public safety employees to bargain over whether employee or employer pays deductibles owed under a health care plan. *See Wisconsin Pro. Police Ass'n v. Wisconsin Emp. Rels. Comm'n*, 2013 WI App 145, 352 Wis. 2d 218, 841 N.W.2d 839.

Unhappy with that holding, the Legislature again modified the statute through 2013 Act 20. That Act changed §111.70(4)(mc)6 to its current version, which reads 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.

Wis. Stat. § 111.70(4)(mc)6 (underlined language added by 2013 Act 20). This is the statute I must interpret.

B. Statutory Interpretation.

I next set forth the principles I must apply when interpreting the statute. The Supreme Court provided a detailed recitation of the statutory interpretation framework:

> It is, of course, a solemn obligation of the judiciary to faithfully give effect to the laws enacted by the legislature, and to do so requires a

> determination of statutory meaning. Judicial deference to the policy choices enacted into law by the legislature requires that statutory interpretation focus primarily on the language of the statute. We assume that the legislature's intent is expressed in the statutory language. Extrinsic evidence of legislative intent may become relevant to statutory interpretation in some circumstances, but is not the primary focus of inquiry. It is the enacted law, not the unenacted intent, that is binding on the public. Therefore, the purpose of statutory interpretation is to determine what the statute means so that it may be given its full, proper, and intended effect.
>
> Thus, we have repeatedly held that statutory interpretation "begins with the language of the statute. If the meaning of the statute is plain, we ordinarily stop the inquiry." Statutory language is given its common, ordinary, and accepted meaning, except that technical or specially-defined words or phrases are given their technical or special definitional meaning.
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> Context is important to meaning. So, too, is the structure of the statute in which the operative language appears. Therefore, statutory language is interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results. Statutory language is read where possible to give reasonable effect to every word, in order to avoid surplusage. "If this process of analysis yields a plain, clear statutory meaning, then there is no ambiguity, and the statute is applied according to this ascertainment of its meaning." Where statutory language is unambiguous, there is no need to consult extrinsic sources of interpretation, such as legislative history. "In construing or interpreting a statute the court is not at liberty to disregard the plain, clear words of the statute."

State ex rel. Kalal v. Cir. Ct. for Dane Cnty., 2004 WI 58, ¶¶44-46, 271 Wis. 2d 633, 681 N.W.2d 110 (Cleaned up).

II. THE STATUTES PROVIDE PUBLIC SAFETY EMPLOYEES THE RIGHT TO COLLECTIVE BARGAINING, INCLUDING REGARDING HEALTH CARE PLAN PREMIUM SHARING.

I turn now to the statutes. Again, to understand the specific subsection that controls here, other subsections of the same statute provide needed context. Wisconsin Statute §111.70(2) enumerates the rights of municipal employees to collectively bargain. It states:

> (2) Rights of municipal employees. Municipal employees have the right of self-organization, and the right to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to

> engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection….

Wis. Stat. §111.70(2). Public safety employees, as municipal employees, have the right to self-organize and collectively bargain.

What does that mean? The statute defines "collective bargaining" as follows:

> (a) "Collective bargaining" means 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…. Collective bargaining includes the reduction of any agreement reached to a written and signed document.

Wis. Stat. §111.70(1)(a) (emphasis added to highlight portion applicable here).

All parties agree that the employees at issue in the dispute before me are "public safety employees" as defined in Wis. Stat. §111.70(1)(mm). Public safety employees have the right, and municipal employers cannot refuse, to bargain over "wages, hours and conditions of employment." As interpreted in case law predating Act 10, this language on its own would give public safety employees the right to bargain over all aspects of health insurance plans and cost sharing for those plans.

The Legislature pared back public safety employees' right to collectively bargain over wages, hours and conditions of employment by creating prohibited subjects of bargaining. This gets us to the specific subsection WERC interpreted and applied here. Section 111.70(4) states in relevant part:

> (mc) Prohibited subjects of bargaining; public safety employees. The municipal employer is prohibited from bargaining collectively with a collective bargaining unit containing a public safety employee with respect to any of the following:
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> ….
>
> 6. 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.

Section 111.70(4)(mc).

The duty to collectively bargain on non-prohibited subjects of bargaining is meaningful. Section 111.70(3)(a)4. makes it a prohibited practice for a municipal employer "[t]o refuse to bargain collectively with a representative of a majority of its employees in an appropriate collective bargaining unit." Wis. Stat. §111.70(3)(a)4. Though not directly relevant to the issue before me, the statute further makes it a prohibited practice "[t]o refuse or otherwise fail to implement an arbitration decision lawfully made under sub. (4) (cg)." Wis. Stat. §111.70(3)(b). This is relevant because it clarifies the interpretation of §111.70(4)(mc) as explained below. A municipal employer or employee engaging in prohibited practices leads to statutory consequences. Wisconsin Statute §111.07 sets forth a procedure and remedies when unfair labor practices occur.

III. THE STATUTES REQUIRE MUNICIPAL EMPLOYERS TO OFFER PUBLIC SAFETY WORKERS A HEALTH CARE COVERAGE PLAN.

I now address Wis. Stat. §111.70(4)(mc)6. head-on. But for this section, public safety employees would have the right to bargain regarding all aspects of the employer offering health care coverage plans. If such were not true, the Legislature would not have needed to make all aspects of such plans other than employee premium contribution a prohibited subject of bargaining. The language creating prohibited subjects of bargaining reflects the Legislature's understanding that, pre-Act 10, the right to bargain over wages, hours and conditions of employment included the right to bargain over all aspects of the health plan employers offered. As explained above, through Acts 10, 32 and 20, the Legislature restricted the rights of public safety employers to bargain relating to the health plans by enacting the current §111.70(4)(mc)6., prohibiting bargaining over all aspects of the health plan except regarding "the employee premium contribution." That the statute excepts from its prohibition the right to bargain as to "employee premium contribution" means the terms regarding employee premium contribution for a health care coverage plan remains a mandatory subject of

bargaining. Nobody disputes that the statute's plain language preserves public safety employees' right to bargain regarding their premium contribution.

WERC added an option to the statute that is not in the language. Namely, WERC decided a municipal employer can determine not to offer any health care coverage plan at all, such that it then need not bargain over the employee premium contribution as none would exist. Per WERC's interpretation, only if a municipal employer chooses to offer a health plan must it collectively bargain with the public safety employees regarding how the employer and employees split responsibility for the premium owed on the plan. This interpretation ignores rules of statutory construction and renders absurd results. I therefore reject it.

Applying the standards for statutory interpretation, I must first determine if the statute's language unambiguously sets forth the legislative intent. It does. That the Legislature rendered most aspects of health care coverage plans a prohibited subject of bargaining yet carved out from that prohibition the right to collectively bargain over their premium contribution expresses a clear and unambiguous intent. Public safety workers must have the right to bargain on this issue and employers are prohibited from refusing to bargain as to it. This right is only meaningful under all circumstances if municipal employers are required to offer a health care coverage plan. If the employer gets to choose not to offer a plan, the statutory language guaranteeing the right to bargain regarding the premium split is meaningless. I must avoid an interpretation that renders some language meaningless. Reading the statute as requiring a health care coverage plan be offered achieves that result.

The way the statutes are written confirms that a requirement to provide health plans is implied. The statutes are written as granting rights to collectively bargain over wages, hours and conditions of employment. This broad grant is then only limited through select provisions setting out specific prohibited subjects of bargaining. The Legislature could have, but did not, take the opposite approach. Specifically, the Legislature could have drafted the statute as prohibiting all collective bargaining except as to the limited permitted topics. Such a construction would show the intent that those rights to bargain are narrowly limited to the items

specifically designated as not being prohibited. The clear intent of the way in which the Legislature wrote these statutes is that the rights provided to employees to collectively bargain are only limited as expressly stated. That the statute preserves the right to bargain over health plan premium contributions and prohibits employers from refusing to bargain as to this subject means employers must offer some form of health care coverage. The employer cannot negate the right (and duty) to bargain regarding premium contribution by refusing to offer any plan at all. As the Legislature bars municipal employers from directly refusing to bargain regarding sharing the premium, I dare not read into the statute an unwritten, indirect means of accomplishing that same prohibited result. To do so would be absurd and render these rights and protections meaningless. Thus, the statute plainly requires municipal employers to offer public safety employees a health care plan, subject to the right to collectively bargain regarding the employees' share of the premium costs for such a plan.

Had the Legislature wanted to allow a municipal employer to not offer a plan at all, it knew how to say so. As noted above, this statute was amended in Act 10, Act 32 and again in Act 20. The Legislature each time explicitly limited additional aspects of bargaining. When the Legislature wanted to whittle down the bundle of rights public safety employees held relating to bargaining regarding health care coverage, it did so explicitly. When it eliminated all rights except the right to bargain over premium contribution, that enumerated preservation of this final straw in the bundle of rights must be given meaning. The Legislature clearly and explicitly intended to protect that declared right. WERC's interpretation reflects the exact opposite intent, rendering this right illusory. Thus, the statute requires municipal employers to offer health care coverage.

Other subsections of the statute confirm that municipal employers must offer a health care coverage plan in every contract. For example, "collective bargaining" is defined:

> "Collective bargaining" means 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…

Wis. Stat. §111.70(1)(a) (emphasis added). The Wisconsin Supreme Court adopted the federal understanding of good faith bargaining. Those decisions hold that the employer's "refusal to negotiate over mandatory subjects of collective bargaining violated the statutory duty to negotiate in good faith." *Milwaukee Dist. Council 48 v. Milwaukee Cnty.*, 2019 WI 24, ¶ 14, 385 Wis. 2d 748, 924 N.W.2d 153. So, too, does a unilateral change to the status quo of an expired contract while negotiations on the new contract are ongoing. *Id*.

For a municipal employer to offer no health care plan at all is worse than refusing to bargain regarding the premium share. At least when a municipal employer selects a health care plan for its numerous employees, the employee receives the benefit of access to a health care plan which presumably has better terms than the employee could secure individually. This is true even if the employer then says "Employees must pay 100% of the premium" and refuses to bargain on that issue. This is the point of insurance – pooling individuals together to secure favorable terms for insuring the group and sharing the cost of the most expensive users across the group. Even if the employee must pay 100% of the premium because the employer refuses to negotiate any employer contribution, the employee still retains the benefit of a group plan secured on behalf of all employees as a group. If no plan is offered, the employee loses all benefit of that group negotiation with the insurers. Nothing in the statutes supports that the Legislature intended to allow municipal employers to deprive the public safety workers of that benefit as against the insurance provider.

Further, reading Wis. Stat. §111.70(4)(mc) as carrying the implied requirement that municipal employers must offer public safety employees a health care plan is the only way to avoid absurd results. I am required to interpret the statute to "avoid absurd or unreasonable results" if possible. *Kalal*, 271 Wis. 2d 633, ¶46. Relatedly, I must "give reasonable effect to every word, in order to avoid surplusage." *Id*. WERC's interpretation of the statute that a municipal employer

can offer no health care plan renders the (4)(mc)6. language "[e]xcept for the employee premium contribution" meaningless. If the municipal employer has unilateral power to eliminate a mandatory subject of bargaining, then the subject is no longer mandatory. Such a reading is self-contradictory and absurd.

The absurdity bleeds into connected text as well, rendering statutes in the same subchapter void or illogical. For example, though not applicable to the parties before me, Wis. Stat. § 111.70(4)(jm)(4)(a) states that representatives of certain police departments, if at an impasse with a municipal employer in bargaining, may have an arbitrator "set all items of compensation, including … health, accident and disability insurance programs … relative contributions, and all eligibility conditions … and any other similar item of compensation." Though this arbitration requirement is unique to Milwaukee and its employees, the same definition of collective bargaining and of the prohibited subjects of bargaining apply to public safety workers in Milwaukee as apply to all others. If all public safety workers are not guaranteed that their municipal employer must offer a health care coverage plan, why is an arbitrator given the right to set "health, accident and disability insurance programs" for Milwaukee workers when Milwaukee could just choose not to offer a plan at all? Similarly, §111.70(3)'s language — making it a prohibited practice for a municipal employer "[t]o refuse to bargain collectively with a representative of a majority of its employees in an appropriate collective bargaining unit" or "[t]o refuse or otherwise fail to implement an arbitration decision lawfully made under sub. (4)(cg)," (Wis. Stat. §111.70(3)(a) and (b)) — would be meaningless if an employer could avoid the requirement to bargain or implement an arbitration decision regarding health care plan premium sharing by just declaring "We are not offering a health care coverage plan." My interpretation of the statute gives full meaning and avoids absurd results.

Therefore, in summary, Wis. Stat. Section 111.70 requires municipal employers to offer public safety employees a health care coverage plan. The employer is then required to bargain with the public safety employees regarding the "employee premium contribution" for that plan.

CONCLUSION

Because WERC incorrectly interpreted the statute, its Decisions rest on an error of law. I vacate the Decisions and remand for further proceedings consistent with this holding.

ORDERS

1. The Decisions of WERC subject to this review are vacated.
2. The cases are remanded to WERC for further proceedings applying the law as set forth in this Decision.
3. This is a final order for purposes of appeal.