

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of

CITY OF RACINE

Requesting a Declaratory Ruling Pursuant to Wis. Stat. § 111.70(4)(b)
Involving a Dispute Between the Petitioner and

RACINE POLICE ASSOCIATION, WISCONSIN PROFESSIONAL POLICE ASSOCIATION

Case ID: 53.0031

Case Type: DR_M

DECISION NO. 39446

Appearances:

Mark L. Olson and Brian J. Waterman, Attorneys, Buelow Vetter Buikema Olson & Vliet, 20855 Watertown Road, Suite 200, Waukesha, Wisconsin, appearing on behalf of the City of Racine.

Roger W. Palek, Attorney, Wisconsin Professional Police Association, 660 John Nolen Drive, Suite 300, Madison, Wisconsin, appearing on behalf of the Racine Police Association, Wisconsin Professional Police Association.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECLARATORY RULING

On February 22, 2021, the City of Racine filed a petition with the Wisconsin Employment Relations Commission seeking a declaratory ruling pursuant to Wis. Stat. § 111.70(4)(b) as to the City's duty to bargain with the Racine Police Association, Wisconsin Professional Police Association over certain Association proposals. The City, contrary to the Association, contends that the proposals are all prohibited subjects of bargaining.

The Association filed a response to the petition on April 27, 2021. The parties thereafter filed written argument and the record was closed on April 22, 2022.

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 Racine, herein the City, is a municipal employer.

2. The Racine Police Association, Wisconsin Professional Police Association, herein the Association, is a labor organization that serves as the collective bargaining representative of certain public safety employees of the City.

3. During bargaining over a successor collective bargaining agreement, a dispute arose between the City and the Association as to whether the following proposals are mandatory or prohibited subjects of bargaining.

Article X, Insurance

Medical Coverage: Full-time employee shall be eligible for Employer health insurance following acceptance into the plan. In accordance with the first sentence of this paragraph, every member of the unit shall be provided during the life of this contract with medical and hospitalization insurance under the self-funded City of Racine Health Insurance Plan beginning with the first day of the month following employment. The Employer shall define a notional health insurance premium.

...

Plan specification booklets of the health insurance program will be provided to all eligible employees upon request from the Human Resources Department; a Summary Plan Description will be on-line in the Human Resources Department page on CORI. All employees who retired after January 1, 1996 shall be subject to placement within the insurance program established for active bargaining unit employees. The Employer will continue to pay Medicare B and provide City health insurance and retirees will be required to enroll in Medicare B. Employees hired on, or after, 1/1/10 will not be eligible for Medicare B payments by the Employer. Employees hired on, or after, 1/1/10 will not be allowed to remain in the City of Racine's health insurance plan upon reaching the age of Medicare eligibility or federal retirement age, whichever occurs later.

...

3. Retired and Disabled Employees: All employees who retire on or after January 1, 2001 shall be subject to placement within the insurance program established for active bargaining unit employees.

a. Medical-Hospital Insurance for Retired Employees: The City shall pay the premiums on surgical, hospital and major medical insurance for any police officer who is forced to retire by virtue of duty incurred injury or disease and for any police officer who retires at age fifty-two (52) and effective January 1, 1999, age fifty (50) or over with twenty (20) years or more of continuous service immediately preceding retirement. In addition, in the event of duty incurred death, or death of the retiree, the City shall pay the premiums on surgical, hospital, and major medical insurance for the surviving spouse and dependent family members of the deceased officer until such time as the surviving spouse remarries.

Medical-Hospital Insurance for Disabled Employees: Those police officers retiring because of disability and having (11) or more years of continuous service with the City immediately preceding such retirement shall have the privilege of continuing under the City's regular medical hospital insurance plan on condition, however, that they pay the full cost of such insurance coverage. The City shall pay the premiums on surgical, hospital and major medical insurance for the employee, spouse and/or dependent survivors of any employee who dies or becomes disabled by virtue of a non-duty related injury or disease, provided that the employee has at least fifteen (15) years of continuous service with the Department. This privilege shall terminate upon the remarriage of the spouse and/or upon the dependent survivors reaching the age of twenty-five (25) years.

Retired and Disabled Employees: Employees retiring on January 1, 2006 through December 31, 2006 will be required to contribute 5% of the monthly premium for the coverage selected by the employee, to a maximum monthly amount of \$30 for single coverage and \$60 for family coverage. Any employee retiring on January 1, 2007, through December 31, 2009 will be required to contribute 5% of the monthly premium for coverage selected by the employee, to a maximum of monthly amount of \$40 for the single coverage and \$70 for family coverage. However, any employee retiring on or after 1/1/10 shall be required to pay the premium contribution for insurance in effect at the time of the employee's retirement.

Substitution of Insurance Coverage Provided by Other Employer: Any retired police officer covered under the provisions of Paragraph A or B of this section taking employment with any other employer providing medical hospital insurance coverage equivalent to the City's insurance plan shall be taken off the City's coverage while so employed, on condition, however, that such individual shall be immediately reinstated under the City's plan upon notice that his/her employment with such subsequent employer has been terminated.

5. **Spouses and Dependent Survivors:** Spouses and dependent survivors of employees not covered under the provisions of Section 3.a., above, may continue under the City's medical and hospitalization insurance program in accordance with the terms and conditions of that insurance plan provided that the spouse and/or dependent survivors pay the premium for said coverage. This privilege shall terminate upon the remarriage of the spouse and/or the dependent survivors reaching the age of twenty-five (25) years.

...

6. Employees may establish a Flexible Spending Account with voluntary employee contributions to a maximum of \$2,550 per year and \$500 per year for dependent care.

The City and the Association agree to the creation of a Healthcare Reimbursement Account/WEBA with the details to be determined in a Memorandum of Agreement developed by the parties.

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

CONCLUSIONS OF LAW

1. As to the underlined proposals set forth above in Finding of Fact 3, no conclusion can currently be reached as to whether the proposals are prohibited subjects of bargaining.

2. As to the proposals not referenced in Conclusion of Law 1, said proposals are all prohibited subjects of bargaining with the meaning of Wis. Stat. § 111.70(4)(mc) 6. except for the portion of a proposal that obligates the City of Racine to pay Medicare Part B premiums for employees who retire during the term of next collective bargaining agreement bargained by the City of Racine and Racine Police Association, Wisconsin Professional Police Association.

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 Racine is prohibited from bargaining with the Racine Police Association, Wisconsin Professional Police Association as to all of the disputed proposals referenced in Conclusion of Law 2 except for the portion of the proposal that obligates the City of Racine to pay Medicare Part B premiums for employees who retire during the term of next collective bargaining agreement between the City of Racine and the Racine Police Association, Wisconsin Professional Police Association.

Issued at the City of Madison, Wisconsin, this 6th day of July, 2022.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James J. Daley, Chairman

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

The question to be answered in this proceeding is whether the Wisconsin Legislature has made it illegal for public safety employee unions to bargain over any subject related to a municipal employer provided health care coverage plan other than the premium contribution to be paid by a public safety employee the municipal employer has chosen to cover by the plan. The City answers that question in the affirmative. The Association does not.

The statute to be interpreted is Wis. Stat. § 111.70(4)(mc) 6., which provides:

(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:

...

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.

When interpreting the statute, the Commission will be following the holding in *State ex rel. Kalal v. Cir. Ct. for Dane Cnty.*, 271 Wis. 2d 633 (2004)

General Context

In 2011 Act 10, the Wisconsin Legislature prohibited bargaining over all health insurance issues in all public sector employee bargaining units except for transit and public safety employee units. Shortly thereafter, in 2011 Act 32, the Legislature limited the right to bargain health insurance issues in public safety employee bargaining units. Act 32 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 Commission was confronted with a duty to bargain dispute over a proposal 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 deductible payment would be capped at \$250 for single coverage and \$500 for family coverage. A Commission majority determined that the proposal was prohibited by the language quoted above. *Eau Claire County*, Dec. No. 33662 (WERC, 2/12). The Court of Appeal reversed the Commission's decision. *WPPA v. WERC*, 2013 WI App. 145, 352 Wis.2d 218. Pivotal to the Court of Appeals' decision was its view that "plan design" encompassed the decision to include a deductible in a plan but not the

decision of who was going to pay the deductible. Following that decision, in 2013 Act 20, the Legislature adopted the current statutory language. In *City of Monona*, Dec. No. 36748 (WERC, 11/16), the Commission held that 2013 Act 20 had the effect of “overruling” the Court of Appeals’ decision in WPPA.

The Commission has issued several decisions interpreting the current statutory language.

In *City of Milwaukee*, Dec. No. 35042 (WERC, 6/14), the Commission (then consisting only of Commissioners Scott and Pasch) ruled that bargaining was prohibited over a proposal that required the employer to provide two health insurance plans to employees. The Commission therein stated:

the employee premium contribution was the only health insurance item subject to collective bargaining with public safety employees.

and

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.

Id. at 5.

In *City of Monona, supra*, the Commission ruled that bargaining was prohibited over a proposal that provided payments to employees who opted out of coverage by the employer provided health insurance plan. One portion of the Commission’s rationale noted that the proposal impermissibly presumed that the employer was obligated to even provide a health insurance plan.

As made clear by the language of Wis. Stat. § 111.70(4)(mc) 6. Stats. and acknowledged by the Association, the City has total discretion to determine what benefits are available to public safety employees covered by a City health insurance plan. As logically flowing from that discretion and consistent with a part of the rationale in the *City of Monona* decision, the Commission is persuaded that the statute gives the City discretion to determine whether it will even have a health insurance plan for public safety employees. Thus, any Association bargaining proposal over the “employee premium contribution” must be framed in the context of that City discretion if it is to be a mandatory subject of bargaining primarily related to wages.

The Disputed Proposals

Turning to the specific proposals at issue here, the first disputed Association bargaining proposal states:

Medical Coverage: Full-time employee shall be eligible for Employer health insurance following acceptance into the plan. In accordance with the first sentence of this paragraph, every member of the unit shall be provided during the life of this contract with medical and hospitalization insurance under the self-funded City of

Racine Health Insurance Plan beginning with the first day of the month following employment. The Employer shall define a notional health insurance premium.

The City contends that this proposal is a prohibited subject of bargaining because it presumes the existence of an insurance plan and establishes who will be covered by any health insurance plan the City chooses to establish. The City asserts that the issue of who will be covered goes to the heart of the “design” of the plan. The Association counters by arguing that the “premium contribution” portion of the statutory language must include the issue of which bargaining unit employees will pay the premium that the parties bargain. The Association argues that a statutory interpretation which gives the City unilateral control over who is covered by a City provided insurance plan makes bargaining over the premium contribution meaningless and thus must be rejected under applicable laws of statutory interpretation.

The Association more generally points to the absence of litigation across the State since the passage of Act 20 as evidence that the City’s litigation position is incorrect. It further argues that if the City’s litigation position is found to be correct, the Commission will be negatively impacting hundreds of collective bargaining agreements and acting contrary to the interest of maintaining labor peace.

As argued by the City, the Commission concludes that the absence of prior litigation is irrelevant to the legal determination of what policy choice the Legislature made when it passed Act 20. The Commission further notes that adoption of the City’s litigation position does not preclude the City (or any other municipal employer) from unilaterally continuing to provide the same insurance benefits identified in a collective bargaining agreement.

As to the specifics of this proposal, the Commission concludes that the City’s position is correct. This proposal is a prohibited subject of bargaining because it mandates the existence of a City health insurance plan. Further, when the word “design” is given its ordinary meaning, it encompasses the choice of who will be covered by a City provided plan as well as what benefits the plan will provide. Once that decision is made and if public safety employees represented by the Association are covered by the plan, then bargaining can occur as to what the employee premium contribution will be. Contrary to the Association’s argument, bargaining does not become meaningless. While this result can seem “absurd and unreasonable” when contrasted with the bargaining rights that existed pre-Acts 32 and 20, it is not “absurd and unreasonable” in the context of the Commission’s statutory interpretation of Wis. Stat. § 111.70(4)(mc) 6.

The next disputed proposal provides:

Plan specification booklets of the health insurance program will be provided to all eligible employees upon request from the Human Resources Department; a Summary Plan Description will be on-line in the Human Resources Department page on CORI. All employees who retired after January 1, 1996 shall be subject to placement within the insurance program established for active bargaining unit employees.

The first portion of the proposal presumes the existence of a health insurance plan and thus is a prohibited subject of bargaining. The last sentence creates a City insurance obligation both as

to those employees who retire during the term of the next contract the City and the Association will bargain and to those employees who retired under previous contracts.

Consistent with the decision of the United States Supreme Court in *Pittsburg Plate Glass*, 404 U.S. 157 (1971) the Commission has long held that municipal employers have no duty to bargain over insurance benefits for employees who have already retired inasmuch as those individuals are no longer bargaining unit employees. *See City of Milwaukee*, Dec. No. 19091 (WERC, 10/81); *Green County*, Dec. No. 21144 (WERC, 11/83). In those same pre-Sec. 111.70(4)(mc) 6. decisions, the Commission concluded that proposals providing insurance benefits for bargaining unit employees who retire during the term of a contract are mandatory subjects of bargaining as deferred compensation for their current employment.

As is apparent from the prior paragraph, the City continues to have no duty to bargain over the issue of insurance benefits available to those employees who retired under prior collective bargaining agreements. As to employees who may retire under the terms of the agreement the City and the Association will bargain, the Commission concludes that the language of Wis. Stat. 111.70(4)(mc) 6., has eliminated the right to bargain insurance coverage as part of deferred compensation. If current employees have lost the right to bargain over whether the City will even offer insurance benefits as current compensation while they are employed, it logically follows that the Association is prohibited from bargaining over such benefits as part of deferred compensation if an employee retires during the term of the next contract.

The next disputed provision states:

The Employer will continue to pay Medicare B and provide City health insurance and retirees will be required to enroll in Medicare B. Employees hired on, or after, 1/1/10 will not be eligible for Medicare B payments by the Employer. Employees hired on, or after, 1/1/10 will not be allowed to remain in the City of Racine's health insurance plan upon reaching the age of Medicare eligibility or federal retirement age, whichever occurs later.

This contract proposal has several components. As to retirees hired prior to 1/1/2010, the City is obligated to provide City health insurance and pay Medicare B premiums. For retirees hired on or after 1/1/2010, they are entitled to continue receive City health insurance until a specified time.

Aside from the obligation to make Medicare Part B payments for current employees who retire during the term of this contract, the City has no duty to bargain. To the extent this proposal addresses employees who have already retired, it is not a mandatory subject of bargaining under long standing labor law precedent discussed earlier herein. To the extent the proposal covers current employees who may retire during the term of the next bargained contract, it is a prohibited subject of bargaining under the terms of Wis. Stat. § 111.70(4)(mc) 6. because it mandates the existence of a health insurance plan and specifies who would be covered by any such plan.

However, as part of deferred compensation for employees who retire during the term of this contract, there is a duty to bargain over City payment of Medicare B premiums. Medicare B is not a "health care coverage plan" provided by the City and thus falls outside the scope of Wis. Stat. § 111.70(4)(mc)6. The City's argument to the contrary incorrectly assumes that Wis. Stat. §

111.70(4)(mc) 6. defines the only matters that can be bargained as opposed to establishing an exclusion from all the wage, hour and condition of employment matters that continue to be mandatory subjects of bargaining for public safety employee unions.¹

The next disputed proposal provides:

Retired and Disabled Employees: All employees who retire on or after January 1, 2001 shall be subject to placement within the insurance program established for active bargaining unit employees.

This proposal covers both employees who have retired under prior agreements (thus not a mandatory subject of bargaining even prior to Act 20) and those who may retire during the term of the next agreement. Consistent with the rationale already expressed as to other disputed provisions, this proposal is a prohibited subject of bargaining under Sec. 111.70(4)(mc) 6, Stats. because it presumes the existence of a City insurance plan and who would be eligible for coverage under the plan.

The next disputed proposal states:

Medical-Hospital Insurance for Retired Employees: The City shall pay the premiums on surgical, hospital and major medical insurance for any police officer who is forced to retire by virtue of duty incurred injury or disease and for any police officer who retires at age fifty -two (52) and effective January 1, 1999, age fifty (50) or over with twenty (20) years or more of continuous service immediately preceding retirement. In addition, in the event of duty incurred death, or death of the retiree, the City shall pay the premiums on surgical, hospital, and major medical insurance for the surviving spouse and dependent family members of the deceased officer until such time as the surviving spouse remarries.

This proposal covers both employees who have retired under prior agreements (thus not a mandatory subject of bargaining even prior to Act 20) and those who may retire during the term of the next agreement. Consistent with the rationale already expressed as to other disputed provisions, this proposal is a prohibited subject of bargaining under Wis. Stat. § 111.70(4)(mc) 6., because it presumes the existence of a City insurance plan, what benefits would be provided under any plan, and who would be eligible for coverage under the plan.

The next disputed proposal states:

Medical-Hospital Insurance for Disabled Employees: Those police officers retiring because of disability and having (11) or more years of continuous service with the City immediately preceding such retirement shall have the privilege of continuing under the City's regular medical hospital insurance plan on condition, however, that they pay the full cost of such insurance coverage. The City shall pay the premiums on surgical, hospital and major medical insurance for the employee,

¹ Arbitrator Raleigh Jones opined that payment of Medicare B premiums is a prohibited subject of bargaining in a January 2021 arbitration award involving the City and a different union. The Commission disagrees for the reasons stated herein.

spouse and/or dependent survivors of any employee who dies or becomes disabled by virtue of a non-duty related injury or disease, provided that the employee has at least fifteen (15) years of continuous service with the Department. This privilege shall terminate upon the remarriage of the spouse and/or upon the dependent survivors reaching the age of twenty-five (25) years.

Consistent with the rationale already expressed as to other disputed provisions, this proposal is a prohibited subject of bargaining under Wis. Stat. § 111.70(4)(mc) 6. The proposal presumes the existence of a City insurance plan, what benefits would be offered and who would be eligible for coverage.

The next disputed proposal provides:

Retired and Disabled Employees: Employees retiring on January 1, 2006 through December 31, 2006 will be required to contribute 5% of the monthly premium for the coverage selected by the employee, to a maximum monthly amount of \$30 for single coverage and \$60 for family coverage. Any employee retiring on January 1, 2007, through December 31, 2009 will be required to contribute 5% of the monthly premium for coverage selected by the employee, to a maximum of monthly amount of \$40 for the single coverage and \$70 for family coverage. However, any employee retiring on or after 1/1/10 shall be required to pay the premium contribution for insurance in effect at the time of the employee's retirement.

This proposal covers both employees who have retired under prior agreements (thus not a mandatory subject of bargaining even prior to Act 20) and those who may retire during the term of the next agreement. Consistent with the rationale already expressed as to other disputed provisions, this proposal is a prohibited subject of bargaining under Sec. 111.70(4)(mc) 6, Stats. to the extent it presumes the existence of a City insurance plan, what benefits would be provided under any plan, and who would be eligible for coverage under the plan.

The next disputed proposal states:

Substitution of Insurance Coverage Provided by Other Employer: Any retired police officer covered under the provisions of Paragraph A or B of this section taking employment with any other employer providing medical hospital insurance coverage equivalent to the City's insurance plan shall be taken off the City's coverage while so employed, on condition, however, that such individual shall be immediately reinstated under the City's plan upon notice that his/her employment with such subsequent employer has been terminated.

This proposal covers both employees who have retired under prior agreements (thus not a mandatory subject of bargaining even prior to Act 20) and those who may retire during the term of the next agreement. Consistent with the rationale already expressed as to other disputed provisions, this proposal is a prohibited subject of bargaining under Wis. Stat. § 111.70(4)(mc) 6. because it presumes the existence of a City insurance plan, what benefits would be provided under any plan, and who would be eligible for coverage under the plan.

The next disputed proposal provides:

Spouses and Dependent Survivors: Spouses and dependent survivors of employees not covered under the provisions of Section 3.a., above, may continue under the City's medical and hospitalization insurance program in accordance with the terms and conditions of that insurance plan provided that the spouse and/or dependent survivors pay the premium for said coverage. This privilege shall terminate upon the remarriage of the spouse and/or the dependent survivors reaching the age of twenty-five (25) years.

Consistent with the rationale already expressed as to other disputed provisions, this proposal is a prohibited subject of bargaining under Wis. Stat. § 111.70(4)(mc) 6. The proposal presumes the existence of a City insurance plan, what benefits would be offered and who would be eligible for coverage.

The next disputed proposal provides:

Employees may establish a Flexible Spending Account with voluntary employee contributions to a maximum of \$2,550 per year and \$500 per year for dependent care.

The City argues that establishment of a Flexible Spending Account is a prohibited subject of bargaining because use of the Account funds is directly related to and determined by what insurance benefits the City chooses to offer-a benefits decision that even the Association agrees is a prohibited subject of bargaining. The City also points out that a different City public safety employee union has conceded that the same proposal is a prohibited subject of bargaining. The Association contends that a Flexible Spending Account is a mandatory subject of bargaining.

Because the record in this matter is not currently sufficient to allow for a definitive determination, the Commission is currently unable to reach a conclusion.

The last disputed proposal states:

The City and the Association agree to the creation of a Healthcare Reimbursement Account/WEBA with the details to be determined in a Memorandum of Agreement developed by the parties.

In *City of Marinette*, Dec. No. 34096 (WERC, 4/13), the Commission ruled that a Health Reimbursement Account was a prohibited subject of bargaining under the pre-Act 20 version of Wis. Stat. § 111.70(4)(mc) 6. The current language of the post-Act 20 statute does not provide any basis for reaching a different conclusion. However, the Association asserts that its proposal is functionally different than the proposal before the Commission in Marinette. Because the record in this matter is not currently sufficient to allow for a definitive determination, the Commission is currently unable to reach a conclusion.

In summary, all of the disputed proposals are prohibited subjects of bargaining with the exception of a portion of the Medicare B proposal and the two proposals as to which the Commission is unable to reach a definitive conclusion.

Issued at the City of Madison, Wisconsin, this 6th day of July, 2022.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James J. Daley, Chairman