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

INTERNATIONAL ASSOCIATION OF FIREFIGHTERS,
LOCAL 321, AFL-CIO

Case ID: 53.0030
Case Type: DR_M

DECISION NO. 39447

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.

Christopher McGillis, Attorney, MacGillis Wiemer, LLC, 11040 W. Bluemound Road, Suite 100, Wauwatosa, Wisconsin and Sara L. Faulman and Hillary D. LeBeau, Attorneys, McGillivary Steele Elkin LLP, 1101 Vermont Ave, N.W., Ste. 1000, Washington D.C. appearing on behalf of the International Association of Firefighters, Local 321, AFL-CIO.

FINDINGS OF FACT, CONCLUSION 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 International Association of Firefighters, Local 321, AFL-CIO over certain Local 321 proposals. The City, contrary to Local 321, contends that the proposals are prohibited subjects of bargaining.

Local 321 filed a response to the petition on April 26, 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. International Association of Firefighters, Local 321, AFL-CIO, herein the Union, 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 Union as to whether the underlined portions of the following insurance-related proposals are mandatory or prohibited subjects of bargaining:

ARTICLE XIV-INSURANCE AND PEER FITNESS TRAINER PROGRAM

1. Medical Coverage: Full-time employees shall be eligible for City paid health insurance following acceptance into the plan by the carrier. The Employer shall define a notional health insurance premium. Employees shall be required to contribute 10% of the monthly notional premium as a premium share for Plan 06A or 5% of the monthly notional premium share for Plan 07A, as approved by the Racine Common Council. 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 retiree will be required to enroll in Medicare B. Employees hired on, or after, 1/1/07 will not be eligible for Medicare B payments by the Employer. Employees hired on, or after, 1/1/07 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.

However, any employee retiring on or after 1/1/07 shall be required to pay the premium contribution for insurance in effect at the time of the employee's retirement.

…

4. Continued Insurance: The City shall pay the premiums on surgical, hospital, and major medical insurance for any Firefighter who is forced to retire by virtue of duty incurred injury or disease, and for any Firefighter who retires at age fifty-two (52) or over with twenty (20) years or more of continuous service immediately preceding retirement. In the event that a Retired Firefighter who is entitled to insurance benefits under the provision of this Section 3 dies leaving dependent survivors, those survivors shall be entitled to health insurance under the provisions of this Section 3 until such time as single dependents exceed the age for dependent coverage under the terms of the City's health insurance policy or until the widow/widower of the deceased Firefighter shall remarry, obtain other health insurance coverage, or be covered under Medicare or Medicaid health insurance , whichever event first occurs.

The City shall pay the premiums on surgical, hospital and major medical insurance of the employee, widow/widower and/or dependent survivors of any Firefighter who dies or become disabled by virtue of a non-duty related injury or illness

provided that the Firefighter has at least fifteen (15) years of continuous service with the Department. This privilege shall terminate upon the remarriage of the widow/widower and/or upon the dependent survivors reaching the age of twenty-five (25) years.

Eligible retirees as of January 1, 1996 shall not be transferred into the Partnership Health Care Plan as described in Section 1 unless said employee exercises the option to transfer out of the Blue Cross/Blue Shield Series 2000 equivalent. This option must be exercised by January 1, 1996 and no retiree may transfer into the MEI comprehensive plan after that date.

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

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

CONCLUSION OF LAW

1. As to the underlined proposals set forth above in the Findings of Fact, said proposals are all prohibited subjects of bargaining within 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 International Association of Firefighters, Local 321, AFL-CIO.

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

DECLARATORY RULING

The City of Racine is prohibited from bargaining with the International Association of Firefighters, Local 321, AFL-CIO as to all of the disputed proposals referenced in Conclusion of Law 1 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 International Association of Firefighters, Local 321, AFL-CIO.

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

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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James J. Daley, Chairman

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSION 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 Union 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.
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> *Id. at 5.*

In *City of Monona*, Dec. No. 36748 (WERC, 11/16) 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 sentence of the Union's bargaining proposal states:

> Medical Coverage: Full-time employees shall be eligible for City paid health insurance following acceptance into the plan by the carrier.

The City contends that this proposal is a prohibited subject of bargaining because the issue of who will covered by any City health insurance plan goes to the heart of the "design" of the plan. The Union asserts that a statutory interpretation that gives the City unilateral control over who is covered by a City provided insurance plan is "harsh and unreasonable" and thus must be rejected under applicable laws of statutory interpretation

The Commission concludes that the City's position is correct. When the word "design" is given its ordinary meaning, it encompasses the choice of who will be covered by the plan as well as what benefits the plan will provide. Once that decision is made, then bargaining can occur as to what the employee premium contribution will be. While this result can seem "harsh and unreasonable" when contrasted with the bargaining rights that existed pre-Acts 32 and 20, it is not "harsh and unreasonable" in the context of statutory interruption.

The next disputed sentence states:

The Employer shall define a national health insurance premium.

This sentence references the City's need to establish a total premium for the plan it chooses to establish. Bargaining would then occur over what portion of that premium an employee would pay. The City contends that this contractual language is a prohibited subject of bargaining because it does not define what the employee premium contribution would be. The Commission agrees.

The next disputed sentence provides:

All employees who retired after January 1, 1996 shall be subject to placement within the insurance program established for active bargaining unit employees.

This sentence creates a City obligation both as to employees who retire during the term of the contract the City and the Union will bargain and to those who retired under previous contracts.

Consistent with the decision on the United States Supreme Court in Pittsburg Plate Glass, 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 Union 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 while they are employed, it logically follows that the Union is prohibited from bargaining over such benefits as part of deferred compensation once they retire.

The next disputed provision states:

> The Employer will continue to pay Medicare B and provide City health insurance and retiree will be required to enroll in Medicare B. Employees hired on, or after, 1/1/07 will not be eligible for Medicare B payments by the Employer. Employees hired on, or after, 1/1/07 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. However, any employee retiring on or after 1/1/07 shall be required to pay the premium contribution for insurance in effect at the time of the employee's retirement.

This contract proposal has several components. As to retirees hired prior to 1/1/2007, the City is obligated to provide City health insurance and pay Medicare B premiums. For retirees hired on or after 1/1/2007, they are entitled to continue receive City health insurance at a specified premium level until the later of "Medicare eligibility or federal retirement age."

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 terms of the contract, mandates the existence of a health insurance plan and who would be covered by any such plan, it is a prohibited subject of bargaining under the terms of Sec. 111.70(4)(mc) 6. Stats., 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 Sec. 111.70(4)(mc)6., Stats. The City argument to the contrary incorrectly assumes that Sec. 111.70(4)(mc) 6., Stats., 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 mandatory subjects of bargaining for public safety employee unions.[1]

The next disputed proposal provides:

> 6. Continued Insurance: The City shall pay the premiums on surgical, hospital, and major medical insurance for any Firefighter who is forced to retire by virtue of duty incurred injury or disease, and for any Firefighter who retires at age fifty-two (52) or over with twenty (20) years or more of continuous service immediately preceding retirement. In the event that a retired Firefighter who is entitled to insurance benefits under the provision of this Section 3 dies leaving dependent survivors, those survivors shall be entitled to health insurance under the provisions of this Section 3 until such time as single dependents exceed the age for dependent coverage under the terms of the City's health insurance policy or until the widow/widower of the

[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 the Union. The Commission disagrees for the reasons stated herein.

> deceased Firefighter shall remarry, obtain other health insurance coverage, or be covered under Medicare or Medicaid health insurance, whichever event first occurs.

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. The proposal presumes the existence of a City insurance plan, what benefits would be offered and who would be eligible for coverage.

In summary, all of the disputed proposals are prohibited subjects of bargaining except for the proposal obligating the City to pay Medicare Part B premiums for employees who retire during the term of the next agreement between the parties.

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

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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James J. Daley, Chairman