CITY OF MADISON
CITY ATTORNEY'S OFFICE
Room 401, CCB
266-4511

OPINION 2002-01

January 3, 2002

MEMORANDUM

TO: Fire Chief Debra H. Amesqua, Madison Fire Department

FROM: Eunice Gibson, City Attorney

SUBJECT: General Order 15

You have asked the opinion of the City Attorney concerning whether the substance of General Order 15 which you issued earlier this year must be bargained with the union. A copy of your order is attached as Exhibit 1. It reads as follows:

> GENERAL ORDER NO. 15
>
> TO THE OFFICERS AND MEMBERS
> CITY OF MADISON FIRE DEPARTMENT
>
> Subject: Operating While Intoxicated
>
> Following the recent change in state law (1997 Wis. Act 84, Wis. Act 9 1999), and given the City of Madison Fire Department's ongoing concern for the safe and efficient operations of the department; effective June 1, 2001, any employee who is convicted of an OWI may be subject to discipline under the rules and regulations of the City of Madison Fire Department.

Immediately after you issued the General Order, the Mayor directed you to rescind it and you complied. The Mayor's directive is attached as Exhibit 2. It appears that the Mayor made this decision based on her belief that the order "clearly does modify the terms and conditions of employment of all officers and members of the City of Madison Fire Department . . ." and thus, in her view, must be bargained with the union.

Under Sec. 111.70(3)(a)4., Wis. Stats., it is a prohibited practice for a municipal employer to "refuse to bargain collectively with a representative" of its employees with respect to a subject for

which the employer is under a duty to bargain. Madison Teachers Inc. v. WERC, 218 Wis. 2d 75, 79, 580 N.W.2d 375 (Ct. App. 1998).

It is my opinion that the Department policy set forth above does not have to be bargained with the union. I have two reasons for this opinion: First, I do not believe the order modifies firefighters' working conditions at all, because existing rules already require compliance with laws and ordinances. Second, I believe the City's management right to protect the health and safety of the public outweighs employees' interests in terms and conditions of their employment.

I. THE ORDER DOES NOT MODIFY WORKING CONDITIONS.

Two of the Fire Department's existing rules require Fire Department personnel to obey all laws:

> Rule 18: Members shall be efficient and capable in the service and must not neglect their duty. They shall hold themselves in readiness, at all times, to answer the calls and obey the orders of their superior officers. They shall treat their superiors with respect . . . . They shall conform to the rules and regulations of the Department, observe the laws and ordinances, and render their services to the city with zeal, courage and discretion and fidelity. (Emphasis added.)
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> * * * *
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> Rule 39: Members must conform to and promptly and cheerfully obey all laws, ordinances, rules, regulations, and orders, whether general, special or verbal, when emanating from due authority.
>
> Section 346.63(1), Wis. Stats., provides:
>
> 346.63 Operating under influence of intoxicant or other drug. (1) No person may drive or operate a motor vehicle while:
>
> (a) Under the influence of an intoxicant, a controlled substance, a controlled substance analog or any combination of an intoxicant, a controlled substance and a controlled substance analog, under the influence of any other drug to a degree which renders him or her incapable of safely driving, or under the combined influence of an intoxicant and any other drug to a degree which renders him or her incapable of safely driving; or
>
> (b) The person has a prohibited alcohol concentration.
>
> * * * *

Violation of this statute is commonly referred to as "DWI" or "OWI." The term "OWI" in Chief Amesqua's General Order No. 15 refers to this violation.

In Greer v. Amesqua, 212 F.3d 358, 369, 2000 WL 558642 (7th Cir. 2000), the U.S. Court of Appeals for the 7th Circuit held that rules 18 and 39 (set forth above) satisfy due process requirements in that they give fair warning to Fire Department employees of the conduct that is expected of them.

Thus, while General Order No. 15 serves the function of calling special attention to the prohibition against drunk driving, it does not create a new work rule. It merely emphasizes work rules that have existed in the Fire Department for many years. The failure of the City to previously exercise a right does not serve to waive the future exercise of that right. Local 311 v. City of Madison, Wisconsin Employment Relations Commission Decision No. 27757-B, October 14, 1994. Since General Order 15 does not change existing work rules, it does not change terms and conditions of employment and thus there is no requirement to bargain it.

In Madison Teachers, Inc. v. WERC, 218 Wis. 2d 75, 90, 91, 580 N.W.2d 375 (Ct. App. 1998), MTI challenged a high school principal's directive that teachers spend a portion of their allotted planning time in making phone calls to parents. The Wisconsin Employment Relations Commission (WERC) decided that, since work hours were not increased, the directive had no effect on the teachers' working conditions. The WERC held:

> " . . . teachers were not asked to do the phone calls in addition to their core assignment but in lieu thereof as part of the Core assignment. Thus, there was no new duty but simply which responsibility should be done when and this has no impact on wages, hours, or conditions of employment." 218 Wis. 2d at 90, 91.

The Court of Appeals upheld this finding . 218 Wis. 2d at 90.

Likewise, the Fire Chief's directive has no impact on wages, hours, and working conditions because an "OWI" conviction, a conviction of a violation of a statute or ordinance, would violate Rules 18 and 39. The duty to avoid such violations is not a new duty. Just as the teachers were required to make the phone calls during time that they were already required to be working, so the Fire Department personnel are reminded of rules that they are already required to obey.

II. GENERAL ORDER 15 IS PRIMARILY RELATED TO PUBLIC SAFETY AND FIRE DEPARTMENT MANAGEMENT.

Even if General Order No. 15 did affect the working conditions of firefighters, it would still not be a mandatory subject of bargaining under Wisconsin law.

Wisconsin courts have adopted a "primarily related" standard to determine whether a given proposal is primarily related to wages, hours, and conditions of employment, or to management of the City. Brown County v. WERC, 138 Wis. 2d 254, 261, 405 N.W.2d 752, 755 (Ct. App. 1987). If the employee's legitimate interest in wages, hours and conditions of employment outweighs the employer's concerns about the restriction on managerial prerogatives or public policy, the proposal

is a mandatory subject of bargaining. However, where the management of the City or the formulation of public policy predominates, the matter is a permissive subject of bargaining. Id.

In this case the City's managerial prerogative and the interests of the citizens in public safety would outweigh the employee's interest in wages, hours and conditions of employment.

In City of Brookfield v. WERC, 87 Wis. 2d 819 (1979), 275 N.W. 2d 723 the court was asked to decide whether economically motivated layoffs of firefighters was a mandatory subject of bargaining. The court held that the issue was a matter primarily related to the exercise of municipal powers and responsibilities. The court stated: "In municipal employment relations the bargaining table is not the appropriate forum for the formulation or management of public policy." Id. at 832

Courts in other jurisdictions have more clearly delineated the contours of the managerial prerogative. In Corpus Christi Fire Fighters Ass'n v. City of Corpus Christi, 10 S.W.3d 723 (Tex. Ct. App. 2000), the city firefighters association claimed that the city violated their collective bargaining agreement by unilaterally implementing changes in procedural rules relating to the driving records of firefighters. The changes provided that employees would accrue points (eventually leading to discipline) not only for on-duty accidents, but also for off-duty accidents, seatbelt violations, and moving violations. Further, a conviction or probation stemming from a "driving while intoxicated" charge would result in an immediate driving suspension for six months. A second conviction would result in permanent suspension of an employee's driving privileges.

Applying a similar balancing test to that used in Wisconsin, the court held that the revised rules have a greater impact on the City's management prerogatives than on the employee's conditions of employment and thus do not constitute a mandatory subject of bargaining.

> The City has a right to implement rules or policies that help to promote public safety, and as a matter of policy, public safety should not be a mandatory subject of bargaining. Unlike a private employee, the performance of a public employee, such as a fire fighter or police officer directly affects the welfare of public citizens, and the Association should not be given an unlimited right to demand collective bargaining on issues which have a potentially strong effect on public safety. 10 SW 3rd at 729.

See also Fraternal Order of Police, Miami Lodge 20 v. City of Miami, 609 So.2d 31 (Fla. 1992) (city's concerns for public safety and protection outweighed employee's concern for conditions of employment, making drug testing requirement a permissive subject of bargaining); Law Enforcement Labor Services, Inc. v. County of Hennepin, 449 N.W.2d 725 (Minn. 1990) (unilateral implementation of a revised personnel grooming policy was not a mandatory subject of bargaining as the policy involved a matter of inherent managerial policy despite "some impact" on working conditions; policy was designed to foster and enhance the respect and confidence of the public and to establish a departmental public image of professionalism).

III. **BARGAINING THE IMPACT.**

Because there is a logical relation between the impact of a management policy and the working conditions of unit employees, the impact of a policy is generally held to be mandatorily bargainable. City of Brookfield v. WERC, 87 Wis.2d at 833; Blackhawk Teachers' Fed'n Local 2308 v. WERC, 109 Wis.2d 415, 424 (Ct. App. 1982). When bargaining over the policy itself, the parties confer about whether the proposal should be adopted and what it should say; when bargaining over the *impact* of a policy, the parties discuss the application of the policy adopted, the procedures to be used in its implementation, and the appropriate arrangements for employees adversely affected by changes in the policy. School Dist. of Drummond v. WERC, 121 Wis. 2d 126, 140 (1984).

To the extent that the "impact" of the Fire Chief's order involves discipline of employees, that bargaining has already taken place and the result is expressed in the collective bargaining agreement. Article V, Paragraph D. of the agreement provides that management may take disciplinary action against employees for just cause. Under Sec. 62.13(5), Wis. Stats., the Board of Police and Fire Commissioners has exclusive authority to decide, in a contested case, whether there is "just cause" for discipline.

In City of Janesville v. WERC, 193 Wis.2d 492, 511, 535 N.W.2d 34 (Ct. App. 1995), the court held that a proposal giving a suspended subordinate the right to arbitrate his suspension rather than seek a hearing before the PFC was a prohibited subject of bargaining because it is in irreconcilable conflict with sec. 62.13(5), Wis. Stats.

Thus, the City has already bargained the impact of General Order 15 to the extent it is permitted to do so. In addition, the parties have acknowledged and agreed in Article 9., Paragraph Q.2. of their collective bargaining agreement that arbitration is not to apply where Sec. 62.13, Wis. Stats. is applicable.

If you have any questions concerning this opinion, please contact Assistant City Attorney Carolyn S. Hogg of my staff.

Eunice Gibson
City Attorney

CAPTION: There was no requirement of collective bargaining when the Fire Chief notified subordinates that an OWI conviction may result in discipline.

cc: Mayor
City Clerk
Fire Chief