

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

OPINION 2001-03

TO: Fire Chief Debra H. Amesqua

FROM: Eunice Gibson, City Attorney

RE: **Promotional Standards as a Subject for Bargaining**

ISSUE

You have asked for legal advice regarding the promotion process for the newly created Fire Department position of Paramedic II. I understand the Common Council approved the creation of this position as a promoted position. The Fire Department is now in the process of establishing the elements of a testing process and other aspects of the promotional procedures for the position. You ask what components of such a process would be considered permissive subjects of bargaining and what components would be considered mandatory subjects of bargaining. I have been advised a particular concern of the Department is to ensure that the Fire Chief retains the ability to determine and assess the non-technical minimum qualifications for the position, such as leadership, good judgment, ability to mentor others, etc.

BRIEF ANSWER

Procedures which establish minimum qualifications for a position or which determine the manner in which such qualifications are measured or weighted are permissive subjects of bargaining. Selection criteria or procedures used to choose who will be promoted among qualified employees is a mandatory subject of bargaining.

DISCUSSION

Under the Wisconsin Municipal Employment Relations Statute, an employer is required to bargain collectively. As defined under the law in Sec. 111.70(1)(a), Stats.,

Collective bargaining means the performance of the mutual obligation of a municipal employer . . . and the representatives of its municipal employees in a collective bargaining unit, to meet and confer . . . with respect to wages, hours and conditions of employment . . . The municipal employer shall not be required to bargain on subjects reserved to management and direction of the governmental unit except insofar as the manner of exercise of such functions affects wages, hours and conditions of employment

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When interpreting ' 111.70(1)(a), Stats., the Wisconsin Supreme Court has concluded that collective bargaining is required over matters primarily related to wages, hours and conditions of employment but not over matters primarily related to "formulation of basic policy" or the "exercise of municipal powers and responsibilities in promoting the health, safety, and welfare for its citizens." City of Brookfield v. WERC, 87 Wis. 2d 819, 829 (1979).

The Wisconsin Employment Relations Commission (WERC) has consistently held that the determination of the minimum qualifications necessary¹ for a position is a permissive subject of bargaining. However, the criteria used to determine which *qualified* employee will receive a promotion are mandatory subjects of bargaining. City of Waukesha, Dec. No. 17830 (WERC, 5/80). A determination of minimum qualifications for a position has been held to primarily relate to formulation of basic policy and the exercise of municipal power to promote the public welfare; choosing the criteria to select among qualified candidates is seen as primarily relating to conditions of employment. Id.

WERC's widely used standard for determining whether a change to promotional procedures is a mandatory or permissive subject of bargaining depends on whether the proposed change addresses the *minimum qualifications* of a job or the *selection criteria* used to choose from among qualified candidates. The rule may be stated succinctly as follows:

A proposal that establishes minimum qualifications for bargaining unit positions is a permissive subject of bargaining. WERC has held that proposals dictating *the manner in which qualifications will be measured* are also permissive subjects of bargaining. See City of Glendale, Dec. No. 27907 (WERC, 1/94).

The criteria used to determine which qualified employee will receive a promotion are mandatory subjects of bargaining. Such criteria may include provisions relating to seniority as well as posting requirements. City of Waukesha, supra.

¹ The right of an employer to unilaterally establish qualifications is limited to those qualifications necessary to perform the job. City of Glendale, Dec. No. 27907 (WERC, 1/94).

Thus, the issue of whether an employer must bargain a promotional requirement turns on the question of whether it establishes *minimum qualifications* or *selection criteria*. WERC has no bright-line test to resolve this question, but the following cases help illuminate the parameters of its decisions:

- § A proposal involving minimum service requirements (e.g., 3 years) for promotional candidates is a *permissive* subject of bargaining because it intrudes on the employer's right to determine minimum qualifications necessary to perform the jobs in question. Milwaukee Police Ass'n, Dec. No. 27997 (WERC, 3/94); City of Glendale, Dec. No. 27907 (WERC, 1/94); City of Waukesha, Dec. No. 17830 (WERC, 5/80).
- § Proposals that dictate the manner in which qualifications will be measured (e.g., percentage weights attached to written examination, oral interview and department records) are *permissive* subjects of bargaining because they relate to the employer's right to determine necessary minimum qualifications for a position. City of Waukesha, Dec. No. 17830 (WERC, 5/80); City of Glendale, Dec. No. 27907 (WERC, 1/94).
- § A proposal requiring the City to give an oral interview and specifying how many people shall give the interview is a *permissive* subject of bargaining because it goes to the management's right to determine if a written or oral interview is necessary, as well as which and how many management officials would conduct the interview. City of Waukesha, Dec. No. 17830 (WERC, 5/80).
- § The weight given to seniority among qualified applicants in determining who should be promoted, is a *mandatory* subject of bargaining. City of Waukesha, Dec. No. 17830 (WERC, 5/80). City of Green Bay, Dec. Nos. 12352-B, 12402-B (WERC, 1/75); Oconto County Courthouse Employees, Local 778-A, Dec. No. 12973-A (WERC, 3/75).

In City of Waukesha, the City filed a petition with the WERC seeking a declaratory ruling with respect to four proposals contained in a tentative final offer, submitted by Local 407, International Ass'n of Firefighters, in municipal interest arbitration. Among the contested proposals was a proposal relating to promotional procedures. The proposal dictated that when an authorized vacancy exists, the city shall fill the vacancy and administer a written examination and an oral interview for position applicants. It further specified under what conditions an oral interview would be given and how much weight would be given to the written exam, oral interview and department record. Finally, the proposal included a minimum service requirement and stated that applicants would be selected by the highest score achieved from the qualified list.

The WERC held that the section of the proposal requiring the City to fill all vacancies was a permissive subject of bargaining because it relates to the formulation or management of public policy. It held that the weight to be given to seniority among qualified applicants in determining who should be promoted, is a mandatory subject of bargaining. All of the remaining provisions were held to be permissive subjects of bargaining because they are part of the City's right to establish necessary minimum qualifications for a position.

In a related case, the Wisconsin Court of Appeals addressed the question of whether an employer was required to bargain a proposal requiring it to omit from teacher application forms and oral interview procedures any references to, among other things, race, creed, national origin, sex, age, and marital status. Blackhawk Teachers' Federation Local 2308 v. Wisconsin Employment Relations Commission, 109 Wis. 2d 415 (Ct. App. 1982). The court affirmed the WERC's holding that although the creation of such data could arguably relate to working conditions, such relation would be slight when compared to the effect on the employer's management functions of conducting interviews and constructing job applications. Id. at 435. The court held that the provision did not primarily relate to wages, hours, and working conditions and therefore was a permissive subject of bargaining. Id.

In sum, case law indicates that the City need not negotiate elements of the Fire Department's Paramedic II promotional process to the extent that the elements are designed to set minimum qualifications for promotional candidates and/or to assess whether those qualifications are met, including the testing procedures used (written, oral . . .) and the weight given to each component. Only if the changes would set new mechanisms for selection among already qualified candidates, would the proposal necessitate collective bargaining. The Waukesha decision explains this distinction very well and I have attached a copy of this decision for your information.

Eunice Gibson
City Attorney

CAPTION: Establishing a selection process for a promotional position may involve both mandatory and permissive subjects of bargaining. Minimum qualifications for a promotional position are permissive subjects of bargaining; selection criteria to choose among qualified candidates are mandatory subjects of bargaining.