

CHAPTER 111

EMPLOYMENT RELATIONS

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SUBCHAPTER I

EMPLOYMENT PEACE

Cross Reference: See also ERC, Wis. adm. code.

111.01 Declaration of policy. The public policy of the state as to employment relations and collective bargaining, in the furtherance of which this subchapter is enacted, is declared to be as follows:

(1) It recognizes that there are 3 major interests involved, namely: the public, the employee and the employer. These 3 interests are to a considerable extent interrelated. It is the policy of the state to protect and promote each of these interests with due regard to the situation and to the rights of the others.

(2) Industrial peace, regular and adequate income for the employee, and uninterrupted production of goods and services are promotive of all of these interests. They are largely dependent upon the maintenance of fair, friendly, and mutually satisfactory employment relations and the availability of suitable machinery for the peaceful adjustment of whatever controversies may arise. It is recognized that certain employers, including farmers, farmer cooperatives, and unincorporated farmer cooperative associations, in addition to their general employer problems, face special problems arising from perishable commodities and seasonal production which require adequate consideration. It is also recog-

nized that whatever may be the rights of disputants with respect to each other in any controversy regarding employment relations, they should not be permitted, in the conduct of their controversy, to intrude directly into the primary rights of 3rd parties to earn a livelihood, transact business, and engage in the ordinary affairs of life by any lawful means and free from molestation, interference, restraint, or coercion.

(3) Negotiations of terms and conditions of work should result from voluntary agreement between employer and employee. For the purpose of such negotiation an employee has the right, if the employee desires, to associate with others in organizing and bargaining collectively through representatives of the employee's own choosing, without intimidation or coercion from any source.

(4) It is the policy of the state, in order to preserve and promote the interests of the public, the employee, and the employer alike, to establish standards of fair conduct in employment relations and to provide a convenient, expeditious and impartial tribunal by which these interests may have their respective rights and obligations adjudicated. While limiting individual and group rights of aggression and defense, the state substitutes processes of justice for the more primitive methods of trial by combat.

History: 1985 a. 30 s. 42; 1993 a. 492; 1997 a. 253; 2005 a. 253, 441; 2007 a. 96.

A labor agreement offering special parking privileges to county employees in a county ramp did not violate this section. *Dane Co. v. McManus*, 55 Wis. 2d 413, 198 N.W.2d 667 (1972).

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This section does not create substantive rights for employees. *Ward v. Frito–Lay, Inc.* 95 Wis. 2d 372, 290 N.W.2d 536 (Ct. App. 1980).

The application of the open meetings law to the duties of WERC is discussed. 68 Atty. Gen. 171.

111.02 Definitions. When used in this subchapter:

(1) The term “all–union agreement” shall mean an agreement between an employer other than the University of Wisconsin Hospitals and Clinics Authority and the representative of the employer’s employees in a collective bargaining unit whereby all or any of the employees in such unit are required to be members of a single labor organization.

(2) “Collective bargaining” is the negotiating by an employer and a majority of the employer’s employees in a collective bargaining unit, or their representatives, concerning representation or terms and conditions of employment of such employees, except as provided under ss. 111.05 (5) and 111.17 (2), in a mutually genuine effort to reach an agreement with reference to the subject under negotiation.

(3) “Collective bargaining unit” means all of the employees of one employer, employed within the state, except as provided in s. 111.05 (5) and except that where a majority of the employees engaged in a single craft, division, department or plant have voted by secret ballot as provided in s. 111.05 (2) to constitute such group a separate bargaining unit they shall be so considered, but, in appropriate cases, and to aid in the more efficient administration of ss. 111.01 to 111.19, the commission may find, where agreeable to all parties affected in any way thereby, an industry, trade or business comprising more than one employer in an association in any geographical area to be a “collective bargaining unit”. A collective bargaining unit thus established by the commission shall be subject to all rights by termination or modification given by ss. 111.01 to 111.19 in reference to collective bargaining units otherwise established under ss. 111.01 to 111.19. Two or more collective bargaining units may bargain collectively through the same representative where a majority of the employees in each separate unit have voted by secret ballot as provided in s. 111.05 (2) so to do.

(4) “Commission” means the employment relations commission.

(5) The term “election” shall mean a proceeding in which the employees in a collective bargaining unit cast a secret ballot for collective bargaining representatives or for any other purpose specified in this subchapter and shall include elections conducted by the commission, or, unless the context clearly indicates otherwise, by any tribunal having competent jurisdiction or whose jurisdiction was accepted by the parties.

(6) (a) “Employee” shall include any person, other than an independent contractor, working for another for hire in the state of Wisconsin in a nonconfidential, nonmanagerial, nonexecutive and nonsupervisory capacity, and shall not be limited to the employees of a particular employer unless the context clearly indicates otherwise.

(b) “Employee” shall include any individual whose work has ceased solely as a consequence of or in connection with any current labor dispute or because of any unfair labor practice on the part of an employer and who has not:

1. Refused or failed to return to work upon the final disposition of a labor dispute or a charge of an unfair labor practice by a tribunal having competent jurisdiction of the same or whose jurisdiction was accepted by the employee or the employee’s representative;
2. Been found to have committed or to have been a party to any unfair labor practice hereunder;
3. Obtained regular and substantially equivalent employment elsewhere; or
4. Been absent from his or her employment for a substantial period of time during which reasonable expectancy of settlement has ceased (except by an employer’s unlawful refusal to bargain) and whose place has been filled by another engaged in the regular

manner for an indefinite or protracted period and not merely for the duration of a strike or lockout.

(c) “Employee” shall not include any individual employed in the domestic service of a family or person at the person’s home or any individual employed by his or her parent or spouse or any employee who is subject to the federal railway labor act.

(7) The term “employer” means a person who engages the services of an employee, and includes any person acting on behalf of an employer within the scope of his or her authority, express or implied, but shall not include the state or any political subdivision thereof, or any labor organization or anyone acting in behalf of such organization other than when it is acting as an employer in fact. For purposes of this subsection, a person who engages the services of an employee includes the University of Wisconsin Hospitals and Clinics Authority and a local cultural arts district created under subch. V of ch. 229.

(7m) “Fair–share agreement” means an agreement between the University of Wisconsin Hospitals and Clinics Authority and a labor organization representing employees of that authority under which all of the employees in a collective bargaining unit are required to pay their proportionate share of the cost of the collective bargaining process and contract administration measured by the amount of dues uniformly required of all members.

(8) The term “jurisdictional strike” shall mean a strike growing out of a dispute between 2 or more employees or representatives of employees as to the appropriate unit for collective bargaining, or as to which representative is entitled to act as collective bargaining representative, or as to whether employees represented by one or the other representative are entitled to perform particular work.

(9) The term “labor dispute” means any controversy between an employer and the majority of the employer’s employees in a collective bargaining unit concerning the right or process or details of collective bargaining or the designation of representatives. Any organization with which either the employer or such majority is affiliated may be considered a party to the labor dispute.

(9m) “Maintenance of membership agreement” means an agreement between the University of Wisconsin Hospitals and Clinics Authority and a labor organization representing employees of that authority which requires that all of the employees whose dues are being deducted from earnings under s. 20.921 (1) or 111.06 (1) (i) at the time the agreement takes effect shall continue to have dues deducted for the duration of the agreement and that dues shall be deducted from the earnings of all employees who are hired on or after the effective date of the agreement.

(10) The term “person” includes one or more individuals, partnerships, associations, corporations, limited liability companies, legal representatives, trustees or receivers.

(10m) “Referendum” means a proceeding conducted by the commission in which employees of the University of Wisconsin Hospitals and Clinics Authority in a collective bargaining unit may cast a secret ballot on the question of directing the labor organization and the employer to enter into a fair–share or maintenance of membership agreement or to terminate such an agreement.

(11) The term “representative” includes any person chosen by an employee to represent the employee.

(12) The term “secondary boycott” shall include combining or conspiring to cause or threaten to cause injury to a person with whom no labor dispute exists in order to bring that person, against that person’s will, into a concerted plan to coerce or inflict damage upon another, whether by:

- (a) Withholding patronage, labor or other beneficial business intercourse;
- (b) Picketing;
- (c) Refusing to handle, install, use or work on particular materials, equipment or supplies; or
- (d) Any other unlawful means.

(13) The term “unfair labor practice” means any unfair labor practice as defined in s. 111.06.

History: 1979 c. 89; 1983 a. 189; 1993 a. 112, 492; 1995 a. 27, 225; 1999 a. 65, 83.

111.04 Rights of employees. Employees shall 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; and such employees shall also have the right to refrain from any or all of such activities.

111.05 Representatives and elections. (1) Representatives chosen for the purposes of collective bargaining by a majority of the employees voting in a collective bargaining unit shall be the exclusive representatives of all of the employees in such unit for the purposes of collective bargaining, provided that any individual employee or any minority group of employees in any collective bargaining unit shall have the right at any time to present grievances to their employer in person or through representatives of their own choosing, and the employer shall confer with them in relation thereto.

(2) Except as provided in sub. (5), whenever a question arises concerning the determination of a collective bargaining unit as defined in s. 111.02 (3), it shall be determined by secret ballot, and the commission, upon request, shall cause the ballot to be taken in such manner as to show separately the wishes of the employees in any craft, division, department or plant as to the determination of the collective bargaining unit.

(3) Whenever a question arises concerning the representation of employees in a collective bargaining unit the commission shall determine the representatives thereof by taking a secret ballot of employees and certifying in writing the results thereof to the interested parties and to their employer or employers. There shall be included on any ballot for the election of representatives the names of all persons submitted by an employee or group of employees participating in the election, except that the commission may, in its discretion, exclude from the ballot a person who, at the time of the election, stands deprived of the person’s rights under this subchapter by reason of a prior adjudication of the person’s having engaged in an unfair labor practice. The ballot shall be so prepared as to permit of a vote against representation by anyone named on the ballot. The commission’s certification of the results of any election shall be conclusive as to the findings included therein unless reviewed in the same manner as provided by s. 111.07 (8) for review of orders of the commission.

(3g) Notwithstanding subs. (3) and (4), if on June 30, 1997, there is a representative recognized or certified to represent any of the units specified in s. 111.825 (1) (f) 1., 5. or 9., that representative shall become the representative of the employees in the corresponding collective bargaining units specified in sub. (5) (a) 1. to 3., without the necessity of filing a petition or conducting an election, subject to the right of any person to file a petition under this section on or after October 1, 1998.

(3m) Whenever an election has been conducted pursuant to sub. (3) in which the name of more than one proposed representative appears on the ballot and results in no conclusion, the commission may, in its discretion, if requested by any party to the proceeding within 30 days from the date of the certification of the results of such election, conduct a runoff election. In such runoff election, the commission may drop from the ballot the name of the representative that received the least number of votes at the original election, or the privilege of voting against any representative when the least number of votes cast at the first election was against representation by any named representative.

(4) Questions concerning the determination of collective bargaining units or representation of employees may be raised by petition of any employee or the employee’s employer, or the representative of either of them. Where it appears by the petition that any emergency exists requiring prompt action, the commission

shall act on the petition immediately and hold the election requested within such time as will meet the requirements of the emergency presented. The fact that one election has been held does not prevent the holding of another election among the same group of employees, provided that it appears to the commission that sufficient reason for another election exists.

(5) (a) Collective bargaining units for representation of the employees of the University of Wisconsin Hospitals and Clinics Authority shall include one unit for employees engaged in each of the following functions:

1. Fiscal and staff services.
2. Patient care.
3. Science.

(b) Collective bargaining units for representation of the employees of the University of Wisconsin Hospitals and Clinics Authority who are engaged in a function not specified in par. (a) shall be determined in the manner provided in this section. The creation of any collective bargaining unit for such employees is subject to approval of the commission. The commission shall not permit fragmentation of such collective bargaining units or creation of any such collective bargaining unit that is too small to provide adequate representation of employees. In approving such collective bargaining units, the commission shall give primary consideration to the authority’s needs to fulfill its statutory missions.

(6) If a single representative is recognized or certified to represent more than one of the collective bargaining units specified in sub. (5), that representative and the employer may jointly agree to combine the collective bargaining units, subject to the right of the employees in any of the collective bargaining units that were combined to petition for an election under subs. (3) and (3g). Any agreement under this subsection is effective upon written notice of the agreement by the parties to the commission and terminates upon written notice of termination by the parties to the commission or upon decertification of the representative entering into the agreement as representative of one of the combined collective bargaining units, whichever occurs first.

History: 1983 a. 189 s. 329 (4); 1993 a. 492; 1995 a. 27; 1999 a. 83.

Cross Reference: See also chs. ERC 3, 7, and 17, Wis. adm. code.

111.06 What are unfair labor practices. (1) It shall be an unfair labor practice for an employer individually or in concert with others:

(a) To interfere with, restrain or coerce the employer’s employees in the exercise of the rights guaranteed in s. 111.04.

(b) To initiate, create, dominate or interfere with the formation or administration of any labor organization or contribute financial support to it, provided that an employer shall not be prohibited from reimbursing employees at their prevailing wage rate for the time spent conferring with the employer, nor from cooperating with representatives of at least a majority of the employer’s employees in a collective bargaining unit, at their request, by permitting employee organizational activities on company premises or the use of company property facilities where such activities or use create no additional expense to the company, provided, however, that it shall not be an unfair labor practice for an employer to become a member of the same labor organization of which the employer’s employees are members, when the employer and the employer’s employees work at the same trade.

(c) 1. To encourage or discourage membership in any labor organization, employee agency, committee, association or representation plan by discrimination in regard to hiring, tenure or other terms or conditions of employment except in a collective bargaining unit where an all-union, fair-share or maintenance of membership agreement is in effect. An employer is not prohibited from entering into an all-union agreement with the voluntarily recognized representative of the employees in a collective bargaining unit, where at least a majority of such employees voting have voted affirmatively, by secret ballot, in favor of such all-union agreement in a referendum conducted by the commission, except

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that where the bargaining representative has been certified by either the commission or the national labor relations board as the result of a representation election, no referendum is required to authorize the entry into such an all–union agreement. Such authorization of an all–union agreement shall be deemed to continue thereafter, subject to the right of either party to the all–union agreement to petition the commission to conduct a new referendum on the subject. Upon receipt of such petition, the commission shall determine whether there is reasonable ground to believe that the employees concerned have changed their attitude toward the all–union agreement and upon so finding the commission shall conduct a referendum. If the continuance of the all–union agreement is supported on any such referendum by a vote at least equal to that provided in this subdivision for its initial authorization, it may be continued in force thereafter, subject to the right to petition for a further vote by the procedure set forth in this subdivision. If the continuance of the all–union agreement is not thus supported on any such referendum, it is deemed terminated at the termination of the contract of which it is then a part or at the end of one year from the date of the announcement by the commission of the result of the referendum, whichever is earlier. The commission shall declare any all–union agreement terminated whenever it finds that the labor organization involved has unreasonably refused to receive as a member any employee of such employer, and each such all–union agreement shall be made subject to this duty of the commission. Any person interested may come before the commission as provided in s. 111.07 and ask the performance of this duty. Any all–union agreement in effect on October 4, 1975, made in accordance with the law in effect at the time it is made is valid.

2. It is not a violation of this subchapter for an employer engaged primarily in the building and construction industry where the employees of such employer in a collective bargaining unit usually perform their duties on building and construction sites, to negotiate, execute and enforce an all–union agreement with a labor organization which has not been subjected to a referendum vote as provided in this subchapter.

3. It is not a violation of this subchapter for an employer engaged in the truck transportation of freight in the motor freight industry as a common or contract carrier of property as defined in s. 194.01 (1) and (2) to negotiate, execute and enforce an all–union agreement with a labor organization representing employees in a multi–state bargaining unit which has not been subjected to a referendum vote as provided in this subchapter; except that an election shall be held if a petition requesting such election is signed by 30% of the employees affected.

4. It is not a violation of this subchapter for an orchestra or band leader engaged to provide live musical entertainment to enter into or comply with a policy, practice or contract in which all of the musicians must be members of a labor organization as a condition of hire or employment without such policy, practice or contract being subject to a referendum vote as provided in this subchapter.

Cross Reference: See also ch. ERC 4, Wis. adm. code.

(d) To refuse to bargain collectively with the representative of a majority of the employer’s employees in any collective bargaining unit with respect to representation or terms and conditions of employment, except as provided under ss. 111.05 (5) and 111.17 (2); provided, however, that where an employer files with the commission a petition requesting a determination as to majority representation, the employer shall not be deemed to have refused to bargain until an election has been held and the result thereof has been certified to the employer by the commission.

(e) To bargain collectively with the representatives of less than a majority of the employer’s employees in a collective bargaining unit, or to enter into an all–union agreement except in the manner provided in par. (c).

(f) To violate the terms of a collective bargaining agreement, including an agreement to accept an arbitration award.

(g) To refuse or fail to recognize or accept as conclusive of any issue in any controversy as to employment relations the final determination, after appeal, if any, of any tribunal having competent jurisdiction of the same or whose jurisdiction the employer accepted.

(h) To discharge or otherwise discriminate against an employee because the employee has filed charges or given information or testimony in good faith under the provisions of this subchapter.

(i) To deduct labor organization dues or assessments from an employee’s earnings, unless the employer has been presented with an individual order therefor, signed by the employee personally, and terminable at the end of any year of its life by the employee giving at least thirty days’ written notice of such termination unless there is an all–union, fair–share or maintenance of membership agreement in effect. The employer shall give notice to the labor organization of receipt of such notice of termination.

(j) To employ any person to spy upon employees or their representatives respecting their exercise of any right created or approved by this subchapter.

(k) To make, circulate or cause to be circulated a blacklist as described in s. 134.02.

(L) To commit any crime or misdemeanor in connection with any controversy as to employment relations.

(m) To fail to give the notice of intention to engage in a lockout provided in s. 111.115 (2).

(2) It shall be an unfair labor practice for an employee individually or in concert with others:

(a) To coerce or intimidate an employee in the enjoyment of the employee’s legal rights, including those guaranteed in s. 111.04, or to intimidate the employee’s family, picket the employee’s domicile, or injure the person or property of the employee or the employee’s family.

(b) To coerce, intimidate or induce any employer to interfere with any of the employer’s employees in the enjoyment of their legal rights, including those guaranteed in s. 111.04, or to engage in any practice with regard to the employer’s employees which would constitute an unfair labor practice if undertaken by the employer on the employer’s own initiative.

(c) To violate the terms of a collective bargaining agreement, including an agreement to accept an arbitration award.

(d) To refuse or fail to recognize or accept as conclusive of any issue in any controversy as to employment relations the final determination, after appeal, if any, of any tribunal having competent jurisdiction of the same or whose jurisdiction the employees or their representatives accepted.

(e) To cooperate in engaging in, promoting or inducing picketing that does not constitute an exercise of constitutionally guaranteed free speech, boycotting or any other overt concomitant of a strike unless a majority in a collective bargaining unit of the employees of an employer against whom such acts are primarily directed have voted by secret ballot to call a strike.

(f) To hinder or prevent, by mass picketing, threats, intimidation, force or coercion of any kind the pursuit of any lawful work or employment, or to obstruct or interfere with entrance to or egress from any place of employment, or to obstruct or interfere with free and uninterrupted use of public roads, streets, highways, railways, airports, or other ways of travel or conveyance.

(g) To engage in a secondary boycott; or to hinder or prevent, by threats, intimidation, force, coercion or sabotage, the obtaining, use or disposition of materials, equipment or services; or to combine or conspire to hinder or prevent, by any means whatsoever, the obtaining, use or disposition of materials, equipment or services, provided, however, that nothing herein shall prevent sympathetic strikes in support of those in similar occupations working for other employers in the same craft.

(h) To take unauthorized possession of property of the employer or to engage in any concerted effort to interfere with production except by leaving the premises in an orderly manner for the purpose of going on strike.

(i) To fail to give the notice of intention to engage in a strike provided in s. 111.115 (2) or (3).

(j) To commit any crime or misdemeanor in connection with any controversy as to employment relations.

(L) To engage in, promote or induce a jurisdictional strike.

(m) To coerce or intimidate an employer working at the same trade of the employer's employees to induce the employer to become a member of the labor organization of which they are members, permissible pursuant to s. 111.06 (1) (b).

(3) It shall be an unfair labor practice for any person to do or cause to be done on behalf of or in the interest of employers or employees, or in connection with or to influence the outcome of any controversy as to employment relations any act prohibited by subs. (1) and (2).

History: 1971 c. 245; 1973 c. 320; 1975 c. 74, 199; 1983 a. 189 s. 329 (29); 1993 a. 492; 1995 a. 27, 225; 1999 a. 83.

Cross Reference: See also ch. ERC 2, Wis. adm. code.

A company is not required to bargain over a decision to use equipment that eliminates jobs, but it is required to bargain over the effects of the decision on the rights of the employees to severance pay, seniority, and related issues. *Libby, McNeill & Libby v. WERC*, 48 Wis. 2d 272, 179 N.W.2d 805 (1970).

Federal law has preempted the question of whether a union rule imposing a fine for exceeding production ceilings constitutes an unfair labor practice. *UAW, Local 283 v. Scofield*, 50 Wis. 2d 117, 183 N.W.2d 103 (1971).

The failure to exhaust the available grievance remedies by an employee who was allegedly discharged in violation of the contract precluded recourse to the courts absent a wrongful refusal by the union to process the employee's grievance. *Mahnke v. WERC*, 66 Wis. 2d 524, 225 N.W.2d 617 (1975).

WERC is authorized by s. 111.06 (1) (L) to determine whether conduct in violation of criminal law has occurred. Such authorization is not a delegation of judicial power in violation of Art. VII, s. 2 nor does the procedure violate Art. I, s. 8. *Layton School of Art & Design v. WERC*, 82 Wis. 2d 324, 262 N.W.2d 218 (1978).

State jurisdiction was preempted when a secondary boycott violated the federal act. *Clarkin v. Dingeldein*, 107 Wis. 2d 373, 320 N.W.2d 40 (Ct. App. 1982).

Federal preemption of labor relations is discussed. *Machinists v. WERC*, 427 U.S. 132.

Duty to bargain over decision to mechanize operations. *Boivin*, 55 MLR 179.

Duty to bargain basic business decisions prior to implementation. 1971 WLR 1250.

111.07 Prevention of unfair labor practices. (1) Any controversy concerning unfair labor practices may be submitted to the commission in the manner and with the effect provided in this subchapter, but nothing herein shall prevent the pursuit of legal or equitable relief in courts of competent jurisdiction.

(2) (a) Upon the filing with the commission by any party in interest of a complaint in writing, on a form provided by the commission, charging any person with having engaged in any specific unfair labor practice, it shall mail a copy of such complaint to all other parties in interest. Any other person claiming interest in the dispute or controversy, as an employer, an employee, or their representative, shall be made a party upon application. The commission may bring in additional parties by service of a copy of the complaint. Only one such complaint shall issue against a person with respect to a single controversy, but any such complaint may be amended in the discretion of the commission at any time prior to the issuance of a final order based thereon. The person or persons so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the notice of hearing. The commission shall fix a time for the hearing on such complaint, which will be not less than 10 nor more than 40 days after the filing of such complaint, and notice shall be given to each party interested by service on the party personally or by mailing a copy thereof to the party at the party's last-known post-office address at least 10 days before such hearing. In case a party in interest is located without the state and has no known post-office address within this state, a copy of the complaint and copies of all notices shall be filed with the department of financial institutions and shall also be sent by registered mail to the last-known post-office address of such party. Such filing and mailing shall constitute sufficient service with the same force and effect as if

served upon the party located within this state. Such hearing may be adjourned from time to time in the discretion of the commission and hearings may be held at such places as the commission shall designate.

(b) 1. The commission shall have the power to issue subpoenas and administer oaths. Depositions may be taken in the manner prescribed by s. 103.005 (13) (c). No person may be excused from attending and testifying or from producing books, records, correspondence, documents or other evidence in obedience to the subpoena of the commission on the ground that the testimony or evidence required of him or her may tend to incriminate him or her or subject him or her to a penalty or forfeiture under the laws of the state of Wisconsin; but no individual may be prosecuted or subjected to any penalty or forfeiture for or on account of testifying or producing evidence, documentary or otherwise, before the commission in obedience to a subpoena issued by it; provided, that an individual so testifying shall not be exempt from prosecution and punishment for perjury committed in so testifying.

2. The immunity provided under subd. 1. is subject to the restrictions under s. 972.085.

(c) Any person who shall willfully and unlawfully fail or neglect to appear or testify or to produce books, papers and records as required, shall, upon application to a circuit court, be ordered to appear before the commission, there to testify or produce evidence if so ordered, and failure to obey such order of the court may be punished by the court as a contempt thereof.

(d) Each witness who appears before the commission by its order or subpoena at the request of the commission on its own motion shall receive for his or her attendance the fees and mileage provided for witnesses in civil cases in courts of record, which shall be audited and paid by the state in the same manner as other expenses are audited and paid, upon the presentation of properly verified vouchers approved by the chairperson of the commission and charged to the appropriation under s. 20.425 (1) (a). Each witness who appears before the commission as a result of an order or subpoena issued by the commission at the request of a party shall receive for his or her attendance the fees and mileage as provided for witnesses in civil cases in courts of record, which shall be paid by the party requesting the order or subpoena in advance of the time set in the order or subpoena for attendance.

(3) A full and complete record shall be kept of all proceedings had before the commission, and all testimony and proceedings shall be taken down by the reporter appointed by the commission. Any such proceedings shall be governed by the rules of evidence prevailing in courts of equity and the party on whom the burden of proof rests shall be required to sustain such burden by a clear and satisfactory preponderance of the evidence.

(4) Within 60 days after hearing all testimony and arguments of the parties the commission shall make and file its findings of fact upon all of the issues involved in the controversy, and its order, which shall state its determination as to the rights of the parties. Pending the final determination by it of any controversy before it the commission may, after hearing, make interlocutory findings and orders which may be enforced in the same manner as final orders. Final orders may dismiss the charges or require the person complained of to cease and desist from the unfair labor practices found to have been committed, suspend the person's rights, immunities, privileges or remedies granted or afforded by this subchapter for not more than one year, and require the person to take such affirmative action, including reinstatement of employees with or without pay, as the commission deems proper. Any order may further require the person to make reports from time to time showing the extent to which the person has complied with the order.

(5) The commission may authorize a commissioner or examiner to make findings and orders. Any party in interest who is dissatisfied with the findings or order of a commissioner or examiner may file a written petition with the commission as a body to review the findings or order. If no petition is filed within 20 days from the date that a copy of the findings or order of the

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commissioner or examiner was mailed to the last-known address of the parties in interest, such findings or order shall be considered the findings or order of the commission as a body unless set aside, reversed or modified by such commissioner or examiner within such time. If the findings or order are set aside by the commissioner or examiner the status shall be the same as prior to the findings or order set aside. If the findings or order are reversed or modified by the commissioner or examiner the time for filing petition with the commission shall run from the time that notice of such reversal or modification is mailed to the last-known address of the parties in interest. Within 45 days after the filing of such petition with the commission, the commission shall either affirm, reverse, set aside or modify such findings or order, in whole or in part, or direct the taking of additional testimony. Such action shall be based on a review of the evidence submitted. If the commission is satisfied that a party in interest has been prejudiced because of exceptional delay in the receipt of a copy of any findings or order it may extend the time another 20 days for filing a petition with the commission.

(6) The commission shall have the power to remove or transfer the proceedings pending before a commissioner or examiner. It may also, on its own motion, set aside, modify or change any order, findings or award, whether made by an individual commissioner, an examiner, or by the commission as a body, at any time within 20 days from the date thereof if it shall discover any mistake therein, or upon the grounds of newly discovered evidence.

(7) If any person fails or neglects to obey an order of the commission while the same is in effect the commission may petition the circuit court of the county wherein such person resides or usually transacts business for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court its record in the proceedings, including all documents and papers on file in the matter, the pleadings and testimony upon which such order was entered, and the findings and order of the commission. Upon such filing the commission shall cause notice thereof to be served upon such person by mailing a copy to the last-known post-office address, and thereupon the court shall have jurisdiction of the proceedings and of the question determined therein. Said action may thereupon be brought on for hearing before said court upon such record by the commission serving 10 days' written notice upon the respondent; subject, however, to provisions of law for a change of the place of trial or the calling in of another judge. Upon such hearing the court may confirm, modify, or set aside the order of the commission and enter an appropriate decree. No objection that has not been urged before the commission shall be considered by the court unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of fact made by the commission, if supported by credible and competent evidence in the record, shall be conclusive. The court may, in its discretion, grant leave to adduce additional evidence where such evidence appears to be material and reasonable cause is shown for failure to have adduced such evidence in the hearing before the commission. The commission may modify its findings as to facts, or make new findings by reason of such additional evidence, and it shall file such modified or new findings with the same effect as its original findings and shall file its recommendations, if any, for the modification or setting aside of its original order. The court's judgment and decree shall be final except that the same shall be subject to review by the court of appeals in the same manner as provided in s. 102.25.

(8) The order of the commission shall also be subject to review under ch. 227.

(10) Commencement of proceedings under sub. (7) shall, unless otherwise specifically ordered by the court, operate as a stay of the commission's order.

(11) Petitions filed under this section shall have preference over any civil cause of a different nature pending in the circuit court, shall be heard expeditiously, and the circuit courts shall always be deemed open for the trial thereof.

(12) A substantial compliance with the procedure of this subchapter shall be sufficient to give effect to the orders of the commission, and they shall not be declared inoperative, illegal, or void for any omission of a technical nature in respect thereto.

(13) A transcribed copy of the evidence and proceedings or any part thereof on any hearing taken by the stenographer appointed by the commission, being certified by such stenographer to be a true and correct transcript, carefully compared by the stenographer with the stenographer's original notes, and to be a correct statement of such evidence and proceedings, shall be received in evidence with the same effect as if such reporter were present and testified to the fact so certified.

(14) The right of any person to proceed under this section shall not extend beyond one year from the date of the specific act or unfair labor practice alleged.

History: 1971 c. 228 s. 44; 1973 c. 90; 1977 c. 42; 1977 c. 187 ss. 60m, 134; 1977 c. 273; 1989 a. 122; 1993 a. 492; 1995 a. 27, 225.

Cross Reference: See also ch. ERC 2, Wis. adm. code.

WERC's limiting of "parties in interest" to those engaged in a controversy as to employment relations and defining such controversies as involving an employer and employees, or a union representing the employees or seeking to represent them, was reasonable. *Chauffeurs, Teamsters & Helpers v. WERC*, 51 Wis. 2d 391, 187 N.W.2d 364 (1971).

Since the NLRB has no jurisdiction to require collective bargaining with a one-employee unit, WERC may do so. *WERC v. Atlantic Richfield Co.* 52 Wis. 2d 126, 187 N.W.2d 805 (1971).

The grant of authority to WERC by s. 111.70 (4) (a), to prevent the commission of prohibited labor practices incorporates the provisions of s. 111.07 (4) for procedural and substantive remedial purposes. *WERC v. City of Evansville*, 69 Wis. 2d 140, 230 N.W.2d 688 (1975).

Sub. (8) provides that WERC orders may be reviewed under sub. (7) or under ch. 227 procedure. *WERC v. Teamsters Local No. 563*, 75 Wis. 2d 602, 250 N.W.2d 696 (1977). Overturned on other grounds. *City of Madison v. Madison Professional Police Officers Association*, 144 Wis. 2d 576, 425 N.W.2d 8 (1988).

111.075 Fair-share and maintenance of membership agreements. (1)

(a) No fair-share or maintenance of membership agreement may become effective unless authorized by a referendum. The commission shall order a referendum whenever it receives a petition supported by proof that at least 30% of the employees in a collective bargaining unit desire that a fair-share or maintenance of membership agreement be entered into between the employer and a labor organization. A petition may specify that a referendum is requested on a maintenance of membership agreement only, in which case the ballot shall be limited to that question.

(b) For a fair-share agreement to be authorized, at least two-thirds of the eligible employees voting in a referendum shall vote in favor of the agreement. For a maintenance of membership agreement to be authorized, at least a majority of the eligible employees voting in a referendum shall vote in favor of the agreement. In a referendum on a fair-share agreement, if less than two-thirds but more than one-half of the eligible employees vote in favor of the agreement, a maintenance of membership agreement is authorized.

(c) If a fair-share or maintenance of membership agreement is authorized in a referendum, the employer shall enter into such an agreement with the labor organization named on the ballot in the referendum. Each fair-share or maintenance of membership agreement shall contain a provision requiring the employer to deduct the amount of dues as certified by the labor organization from the earnings of the employees affected by the agreement and to pay the amount so deducted to the labor organization. Unless the parties agree to an earlier date, the agreement shall take effect 60 days after certification by the commission that the referendum vote authorized the agreement. The employer shall be held harmless against any claims, demands, suits and other forms of liability made by employees or local labor organizations which may arise for actions taken by the employer in compliance with this section. All such lawful claims, demands, suits and other forms of liability are the responsibility of the labor organization entering into the agreement.

(d) Under each fair-share or maintenance of membership agreement, an employee who has religious convictions against dues payments to a labor organization based on teachings or tenets

of a church or religious body of which he or she is a member shall, on request to the labor organization, have his or her dues paid to a charity mutually agreed upon by the employee and the labor organization. Any dispute concerning this paragraph may be submitted to the commission for adjudication.

(2) (a) Once authorized, a fair–share or maintenance of membership agreement shall continue in effect, subject to the right of the employer or labor organization concerned to petition the commission to conduct a new referendum. Such petition must be supported by proof that at least 30% of the employees in the collective bargaining unit desire that the fair–share or maintenance of membership agreement be discontinued. Upon so finding, the commission shall conduct a new referendum. If the continuance of the fair–share or maintenance of membership agreement is approved in the referendum by at least the percentage of eligible voting employees required for its initial authorization, it shall be continued in effect, subject to the right of the employer or labor organization to later initiate a further vote following the procedure prescribed in this subsection. If the continuation of the agreement is not supported in any referendum, it is deemed terminated at the termination of the collective bargaining agreement, or one year from the date of the certification of the result of the referendum, whichever is earlier.

(b) The commission shall declare any fair–share or maintenance of membership agreement suspended upon such conditions and for such time as the commission decides whenever it finds that the labor organization involved has refused on the basis of race, color, sexual orientation or creed to receive as a member any employee in the collective bargaining unit involved, and the agreement shall be made subject to the findings and orders of the commission. Any of the parties to the agreement, or any employee covered thereby, may come before the commission, as provided in s. 111.07, and petition the commission to make such a finding.

(3) A stipulation for a referendum executed by an employer and a labor organization may not be filed until after the representation election has been held and the results certified.

(4) The commission may, under rules adopted for that purpose, appoint as its agent an official of the University of Wisconsin Hospitals and Clinics Authority to conduct the referenda provided for in this section.

(5) Notwithstanding sub. (1), if on July 1, 1997, there is a fair–share or maintenance of membership agreement in effect in any of the collective bargaining units specified in s. 111.825 (1) (f) 1., 5. or 9., that fair–share or maintenance of membership agreement shall apply to the corresponding collective bargaining unit under s. 111.05 (5) (a) 1. to 3. without the necessity of filing a petition or conducting a referendum, subject to the right of the employees in each collective bargaining unit to file a petition requesting a referendum under sub. (2) (a).

(6) This section applies only in collective bargaining units comprised of employees of the University of Wisconsin Hospitals and Clinics Authority.

History: 1995 a. 27.

Cross Reference: See also chs. ERC 8, Wis. adm. code.

The constitutional requirements of a union's collection of agency fees under a fair–share agreement include: 1) an adequate explanation of the basis of the fee; 2) a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker; and 3) an escrow for the amounts reasonably in dispute. *Browne v. WERC*, 169 Wis. 2d 79, 485 N.W.2d 376 (1992).

To be chargeable to nonunion, public sector employees under a fair share agreement, union activities must: 1) be germane to collective bargaining activity; 2) be justified by the government's vital policy interest in labor peace and avoiding "free riders;" and 3) not significantly add to the burdening of free speech that is inherent in an agency or union shop. *Browne v. WERC*, 169 Wis. 2d 79, 485 N.W.2d 376 (1992).

111.08 Financial reports to employees. Every person acting as the representative of employees for collective bargaining shall keep an adequate record of its financial transactions and shall present annually to each member within 60 days after the end of its fiscal year a detailed written financial report thereof in the form of a balance sheet and an operating statement. In the event of failure of compliance with this section, any member may petition the

commission for an order compelling such compliance. An order of the commission on such petition shall be enforceable in the same manner as other orders of the commission under this subchapter.

111.09 Rules, orders, transcripts, training programs and fees. (1) The commission may adopt reasonable and proper rules and regulations relative to the exercise of its powers and authority and proper rules to govern its proceedings and to regulate the conduct of all elections and hearings. The commission shall, upon request, provide a transcript of a proceeding to any party to the proceeding for a fee, established by rule, by the commission at a uniform rate per page. All transcript fees shall be credited to the appropriation account under s. 20.425 (1) (i).

(2) The commission shall assess and collect a filing fee for filing a complaint alleging that an unfair labor practice has been committed under s. 111.06. The commission shall assess and collect a filing fee for filing a request that the commission act as an arbitrator to resolve a dispute involving the interpretation or application of a collective bargaining agreement under s. 111.10. The commission shall assess and collect a filing fee for filing a request that the commission act as a mediator under s. 111.11. The commission shall assess and collect a filing fee for filing a request that the commission initiate arbitration under s. 111.10. For the performance of commission actions under ss. 111.10 and 111.11, the commission shall require that the parties to the dispute equally share in the payment of the fee and, for the performance of commission actions involving a complaint alleging that an unfair labor practice has been committed under s. 111.06, the commission shall require that the party filing the complaint pay the entire fee. If any party has paid a filing fee requesting the commission to act as a mediator for a labor dispute and the parties do not enter into a voluntary settlement of the labor dispute, the commission may not subsequently assess or collect a filing fee to initiate arbitration to resolve the same labor dispute. If any request for the performance of commission actions concerns issues arising as a result of more than one unrelated event or occurrence, each such separate event or occurrence shall be treated as a separate request. The commission shall promulgate rules establishing a schedule of filing fees to be paid under this subsection. Fees required to be paid under this subsection shall be paid at the time of filing the complaint or the request for mediation or arbitration. A complaint or request for mediation or arbitration is not filed until the date such fee or fees are paid. Fees collected under this subsection shall be credited to the appropriation account under s. 20.425 (1) (i).

(3) The commission may provide training programs to individuals and organizations on private sector collective bargaining, and on areas of management and labor cooperation directly or indirectly affecting private sector collective bargaining, and may charge a reasonable fee for participation in the programs.

Cross Reference: See also ch. ERC 50, Wis. adm. code.

History: 1973 c. 90; 1981 c. 20; 1983 a. 27; 1991 a. 39; 1995 a. 27; 2003 a. 33.

Cross Reference: See also ch. ERC 2, Wis. adm. code.

111.10 Arbitration. Parties to a dispute pertaining to the meaning or application of the terms of a written collective bargaining agreement may agree in writing to have the commission serve as arbitrator. Parties to a labor dispute may agree in writing to have the commission act or name arbitrators in all or any part of such dispute, and thereupon the commission shall have the power so to act. The commission shall appoint as arbitrators only competent, impartial and disinterested persons. Proceedings in any such arbitration shall be as provided in ch. 788.

History: 1979 c. 32 s. 92 (15); 1995 a. 27.

Cross Reference: See also ch. ERC 5, Wis. adm. code.

A grievance was arbitrable under the "discharge and nonrenewal" clause of a bargaining agreement when the contract offered by the board was signed by the teacher after deleting the title "probationary contract" and the board did not accept this counteroffer or offer the teacher a 2nd contract. *Joint School District No. 10, City of Jefferson v. Jefferson Education Association*, 78 Wis. 2d 94, 253 N.W.2d 536 (1977).

WERC's power to participate in dispute settlement arbitration is liberally construed. Thus, when parties to a collective bargaining agreement select an arbitra-

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tor from a list provided by WERC, this section applies. *Layton School of Art & Design v. WERC*, 82 Wis. 2d 324, 262 N.W.2d 218 (1978).

Municipal labor arbitration is within the scope of ch. 788. *Milwaukee District Council 48 v. Milwaukee Sewerage Commission*, 107 Wis. 2d 590, 321 N.W.2d 309 (Ct. App. 1982).

The res judicata standard of confirmed arbitration awards in Wisconsin. 1987 WLR 895.

111.11 Mediation. The commission may appoint any competent, impartial, disinterested person to act as mediator in any labor dispute either upon its own initiative or upon the request of one of the parties to the dispute. It shall be the function of such mediator to bring the parties together voluntarily under such favorable auspices as will tend to effectuate settlement of the dispute, but neither the mediator nor the commission shall have any power of compulsion in mediation proceedings. The commission shall provide necessary expenses for such mediators as it may appoint, order reasonable compensation not exceeding \$10 per day for each such mediator, and prescribe reasonable rules of procedure for such mediators.

History: 1995 a. 27, 225.

Cross Reference: See also ch. ERC 6, Wis. adm. code.

111.115 Notice of certain proposed lockouts or strikes.

(1) In this subsection:

(a) “Lockout” means the barring of one or more employees from their employment in an establishment by an employer as a part of a labor dispute, which is not directly subsequent to a strike or other job action of a labor organization or group of employees of the employer, or which continues or occurs after the termination of a strike or other job action of a labor organization or group of employees of the employer.

(b) “Strike” includes any concerted stoppage of work by employees, and any concerted slowdown or other concerted interruption of operations or services by employees, or any concerted refusal of employees to work or perform their usual duties as employees, for the purpose of enforcing demands upon an employer.

(2) If no collective bargaining agreement is in effect between the University of Wisconsin Hospitals and Clinics Authority and the recognized or certified representative of employees of that authority in a collective bargaining unit, the employer shall not engage in a lockout affecting employees in that collective bargaining unit without first giving 10 days’ written notice to the representative of its intention to engage in a lockout, and the representative shall not engage in a strike without first giving 10 days’ written notice to the employer of its intention to engage in a strike.

(3) Where the exercise of the right to strike by employees of any employer engaged in the state of Wisconsin in the production, harvesting or initial off-farm processing of any farm or dairy product produced in this state would tend to cause the destruction or serious deterioration of such product, the employees shall give to the commission at least 10 days’ notice of their intention to strike and the commission shall immediately notify the employer of the receipt of such notice. Upon receipt of such notice, the commission shall take immediate steps to effect mediation, if possible. In the event of the failure of the efforts to mediate, the commission shall endeavor to induce the parties to arbitrate the controversy.

History: 1995 a. 27, ss. 3789b, 3789bc; 1999 a. 83.

111.12 Duties of the attorney general and district attorneys. Upon the request of the commission, the attorney general or the district attorney of the county in which a proceeding is brought before the circuit court for the purpose of enforcing or reviewing an order of the commission shall appear and act as counsel for the commission in such proceeding and in any proceeding to review the action of the circuit court affirming, modifying or reversing such order.

111.14 Penalty. Any person who shall willfully assault, resist, prevent, impede or interfere with any member of the commission or any of its agents or agencies in the performance of duties pursuant to this subchapter shall be punished by a fine of not more

than \$500 or by imprisonment in the county jail for not more than one year, or both.

111.15 Construction of subchapter I. Except as specifically provided in this subchapter, nothing therein shall be construed so as to interfere with or impede or diminish in any way the right to strike or the right of individuals to work; nor shall anything in this subchapter be so construed as to invade unlawfully the right to freedom of speech. Nothing in this subchapter shall be so construed or applied as to deprive any employee of any unemployment benefit which the employee might otherwise be entitled to receive under ch. 108.

History: 1993 a. 492.

111.17 Conflict of provisions; effect. Wherever the application of the provisions of other statutes or laws conflict with the application of the provisions of this subchapter, this subchapter shall prevail, except that:

(1) In any situation where the provisions of this subchapter cannot be validly enforced the provisions of such other statutes or laws shall apply.

(2) All fringe benefits authorized or required to be provided by the University of Wisconsin Hospitals and Clinics Authority to its employees under ch. 40 shall be governed exclusively by ch. 40, except that where any provision of ch. 40 specifically permits a collective bargaining agreement under this subchapter to govern the eligibility for or the application, cost or terms of a fringe benefit under ch. 40, or provides that the eligibility for or the application, cost or terms of a fringe benefit under ch. 40 shall be governed by a collective bargaining agreement under this subchapter, a collective bargaining agreement may contain a provision so governing and such a provision supersedes any provision of ch. 40 with respect to the employees to whom the agreement applies. The employer is prohibited from engaging in collective bargaining concerning any matter governed exclusively by ch. 40 under this subsection.

History: 1995 a. 27.

111.18 Limit on payment to health care institutions.

(1) In this section:

(a) “Health care institution” includes hospitals, psychiatric hospitals, tuberculosis hospitals, nursing homes, kidney disease treatment centers, free-standing hemodialysis units, ambulatory surgical facilities, health maintenance organizations, limited service health organizations, preferred provider plans, community-based residential facilities that are certified as medical assistance providers under s. 49.45 (16) or that otherwise meet the requirements for certification, home health agencies and other comparable facilities. “Health care institution” does not include facilities operated solely as part of the practice of an independent practitioner, partnership, unincorporated medical group or service corporation as defined in s. 180.1901 (2).

(b) “Proportional share” means the annual revenue of a health care institution received in the form of medical assistance reimbursement or public employee insurance from the state, divided by the total annual revenue of the health care institution.

(2) (a) 1. Any health care institution found by the national labor relations board to have committed an unfair labor practice under 29 USC 158 or found by the employment relations commission to have committed a prohibited practice under s. 111.70 (3) that includes payment to any person for services rendered with respect to concerted activity engaged in by its employees for purposes of collective bargaining shall return to the state a proportional share of the amount paid to the person for the activity that constituted the unfair labor practice.

2. Any group of employees of a health care institution subject to subd. 1. may commence an action in circuit court to enforce the provisions of this subsection.

3. Reasonable costs and attorney fees incurred in enforcing a return of funds to the state under this section may be awarded to successful plaintiffs.

(b) Paragraph (a) does not apply to:

1. Attorney fees for services rendered after the union is certified as a collective bargaining agent under this chapter or under the national labor relations act, 29 USC 151 to 169.

2. Attorney fees for services at an administrative agency or court proceeding or in preparation for the proceeding.

3. Salary paid to a full-time employee of a health care institution's personnel department.

History: 1981 c. 361; 1983 a. 27; 1985 a. 29; 1989 a. 303.

111.19 Title of subchapter I. This subchapter may be cited as the "Employment Peace Act".

SUBCHAPTER II

FAIR EMPLOYMENT

Cross Reference: See also ch. DWD 218, Wis. adm. code.

111.31 Declaration of policy. (1) The legislature finds that the practice of unfair discrimination in employment against properly qualified individuals by reason of their age, race, creed, color, disability, marital status, sex, national origin, ancestry, sexual orientation, arrest record, conviction record, military service, or use or nonuse of lawful products off the employer's premises during nonworking hours substantially and adversely affects the general welfare of the state. Employers, labor organizations, employment agencies, and licensing agencies that deny employment opportunities and discriminate in employment against properly qualified individuals solely because of their age, race, creed, color, disability, marital status, sex, national origin, ancestry, sexual orientation, arrest record, conviction record, military service, or use or nonuse of lawful products off the employer's premises during nonworking hours deprive those individuals of the earnings that are necessary to maintain a just and decent standard of living.

(2) It is the intent of the legislature to protect by law the rights of all individuals to obtain gainful employment and to enjoy privileges free from employment discrimination because of age, race, creed, color, disability, marital status, sex, national origin, ancestry, sexual orientation, arrest record, conviction record, military service, or use or nonuse of lawful products off the employer's premises during nonworking hours, and to encourage the full, nondiscriminatory utilization of the productive resources of the state to the benefit of the state, the family, and all the people of the state. It is the intent of the legislature in promulgating this subchapter to encourage employers to evaluate an employee or applicant for employment based upon the employee's or applicant's individual qualifications rather than upon a particular class to which the individual may belong.

(3) In the interpretation and application of this subchapter, and otherwise, it is declared to be the public policy of the state to encourage and foster to the fullest extent practicable the employment of all properly qualified individuals regardless of age, race, creed, color, disability, marital status, sex, national origin, ancestry, sexual orientation, arrest record, conviction record, military service, or use or nonuse of lawful products off the employer's premises during nonworking hours. Nothing in this subsection requires an affirmative action program to correct an imbalance in the work force. This subchapter shall be liberally construed for the accomplishment of this purpose.

(4) The practice of requiring employees or prospective employees to submit to a test administered by means of a lie detector, as defined in s. 111.37 (1) (b), is unfair, the practice of requesting employees and prospective employees to submit to such a test without providing safeguards for the test subjects is unfair, and the use of improper tests and testing procedures causes injury to the employees and prospective employees.

(5) The legislature finds that the prohibition of discrimination on the basis of creed under s. 111.337 is a matter of statewide con-

cern, requiring uniform enforcement at state, county and municipal levels.

History: 1977 c. 125; 1979 c. 319; 1981 c. 112, 334, 391; 1987 a. 63; 1991 a. 289, 310, 315; 1997 a. 112; 2007 a. 159.

The department is not limited to finding sex discrimination only when a 14th amendment equal protection violation can also be found. Wisconsin Telephone Co. v. DILHR, 68 Wis. 2d 345, 228 N.W.2d 649 (1975).

The Wisconsin fair employment act (WEFA), subch. II, ch. 111, is more direct and positive in prohibiting sex discrimination in employment than is the basic constitutional guarantee of equal protection of the laws; enforcement of the law is not limited by the "rational basis" or "reasonableness" tests employed in 14th amendment cases. Ray—O—Vac v. DILHR, 70 Wis. 2d 919, 236 N.W.2d 209 (1975).

Section 118.20 is not the exclusive remedy of a wronged teacher; it is supplementary to the remedy under WFEA. The general provisions of s. 893.80 are superseded by the specific authority of the act. Kurtz v. City of Waukesha, 91 Wis. 2d 103, 280 N.W.2d 757 (1979).

An employee who was not handicapped, but perceived by the employer to be so, was entitled to protection under WEFA Dairy Equipment Co. v. DILHR, 95 Wis. 2d 319, 290 N.W.2d 330 (1980).

WEFA provides the exclusive remedy for retaliatory discrimination. Bourque v. Wausau Hospital Center, 145 Wis. 2d 589, 427 N.W.2d 433 (Ct. App. 1988).

WEFA does not apply to national guard personnel decisions; federal law prevents the state from regulating personnel criteria of the national guard. Hazelton v. Personnel Commission, 178 Wis. 2d 776, 505 N.W.2d 793 (Ct. App. 1993).

The exclusive remedy provision in s. 102.03 (2) does not bar a complainant whose claim is covered by the workers compensation act from pursuing an employment discrimination claim under WFEA. Byers v. LIRC, 208 Wis. 2d 388, 561 N.W.2d 678 (1997), 95–2490.

This act protects all employees, including prospective and de facto employees. 67 Atty. Gen. 169.

State courts have concurrent jurisdiction over federal Title VII civil rights actions. Yellow Freight System v. Donnelly, 494 U.S. 820, 108 L. Ed. 2d 834 (1990).

The federal Employee Retirement Income Security Act (ERISA) does not preempt state fair employment laws prohibiting discriminatory exclusion of pregnancy benefits in disability plans. Bucyrus—Erie Company v. DILHR, 599 F.2d 205 (1979).

No private right of action exists under this subchapter. Busse v. Gelco Exp. Corp., 678 F. Supp. 1398 (E. D. Wis. 1988).

The Wisconsin fair employment act and the 1982 amendments. Rice. WBB Aug. 1982.

Wisconsin's fair employment act: coverage, procedures, substance, remedies. 1975 WLR 696.

Perceived handicap under WFEA. 1988 WLR 639 (1988).

111.32 Definitions. When used in this subchapter:

(1) "Arrest record" includes, but is not limited to, information indicating that an individual has been questioned, apprehended, taken into custody or detention, held for investigation, arrested, charged with, indicted or tried for any felony, misdemeanor or other offense pursuant to any law enforcement or military authority.

(2) "Commission" means the labor and industry review commission.

(3) "Conviction record" includes, but is not limited to, information indicating that an individual has been convicted of any felony, misdemeanor or other offense, has been adjudicated delinquent, has been less than honorably discharged, or has been placed on probation, fined, imprisoned, placed on extended supervision or paroled pursuant to any law enforcement or military authority.

(3m) "Creed" means a system of religious beliefs, including moral or ethical beliefs about right and wrong, that are sincerely held with the strength of traditional religious views.

(4) "Department" means the department of workforce development.

(5) "Employee" does not include any individual employed by his or her parents, spouse or child.

(6) (a) "Employer" means the state and each agency of the state and, except as provided in par. (b), any other person engaging in any activity, enterprise or business employing at least one individual. In this subsection, "agency" means an office, department, independent agency, authority, institution, association, society or other body in state government created or authorized to be created by the constitution or any law, including the legislature and the courts.

(b) "Employer" does not include a social club or fraternal society under ch. 188 with respect to a particular job for which the club or society seeks to employ or employs a member, if the particular job is advertised only within the membership.

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(7) “Employment agency” means any person, including this state, who regularly undertakes to procure employees or opportunities for employment for any other person.

(7m) “Genetic testing” means a test of a person’s genes, gene products or chromosomes, for abnormalities or deficiencies, including carrier status, that are linked to physical or mental disorders or impairments, or that indicate a susceptibility to illness, disease, impairment or other disorders, whether physical or mental, or that demonstrate genetic or chromosomal damage due to environmental factors.

(8) “Individual with a disability” means an individual who:

(a) Has a physical or mental impairment which makes achievement unusually difficult or limits the capacity to work;

(b) Has a record of such an impairment; or

(c) Is perceived as having such an impairment.

(9) “Labor organization” means:

(a) Any organization, agency or employee representation committee, group, association or plan in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours or other terms or conditions of employment; or

(b) Any conference, general committee, joint or system board or joint council which is subordinate to a national or international committee, group, association or plan under par. (a).

(10) “License” means the whole or any part of any permit, certificate, approval, registration, charter or similar form of permission required by a state or local unit of government for the undertaking, practice or continuation of any occupation or profession.

(11) “Licensing agency” means any board, commission, committee, department, examining board, affiliated credentialing board or officer, except a judicial officer, in the state or any city, village, town, county or local government authorized to grant, deny, renew, revoke, suspend, annul, withdraw or amend any license.

(12) “Marital status” means the status of being married, single, divorced, separated or widowed.

(12g) “Military service” means service in the U.S. armed forces, the state defense force, the national guard of any state, or any other reserve component of the U.S. armed forces.

(12m) “Religious association” means an organization, whether or not organized under ch. 187, which operates under a creed.

(13) “Sexual harassment” means unwelcome sexual advances, unwelcome requests for sexual favors, unwelcome physical contact of a sexual nature or unwelcome verbal or physical conduct of a sexual nature. “Sexual harassment” includes conduct directed by a person at another person of the same or opposite gender. “Unwelcome verbal or physical conduct of a sexual nature” includes but is not limited to the deliberate, repeated making of unsolicited gestures or comments of a sexual nature; the deliberate, repeated display of offensive sexually graphic materials which is not necessary for business purposes; or deliberate verbal or physical conduct of a sexual nature, whether or not repeated, that is sufficiently severe to interfere substantially with an employee’s work performance or to create an intimidating, hostile or offensive work environment.

(13m) “Sexual orientation” means having a preference for heterosexuality, homosexuality or bisexuality, having a history of such a preference or being identified with such a preference.

(13r) “Unfair genetic testing” means any test or testing procedure that violates s. 111.372.

(14) “Unfair honesty testing” means any test or testing procedure which violates s. 111.37.

History: 1975 c. 31, 94, 275, 421; 1977 c. 29, 125, 196, 286; 1979 c. 319, 357; 1981 c. 96 s. 67; 1981 c. 112, 334, 391; 1983 a. 36; 1987 a. 149; 1991 a. 117; 1993 a. 107, 427; 1995 a. 27 s. 9130 (4); 1997 a. 3, 112, 283; 2007 a. 159.

The summary discharge, after 2 weeks of satisfactory employment, of a person with a history of asthma violated the fair employment act in that it constituted a dis-

crimatory practice against the claimant based on handicap. *Chicago, Milwaukee, St. Paul & Pacific Railroad Co. v. DILHR*, 62 Wis. 2d 392, 215 N.W.2d 443 (1974).

Singling out disabilities associated with pregnancy for less favorable treatment in a benefit plan designed to relieve the economic burden of physical incapacity constituted discrimination on the basis of sex, as pregnancy is undisputedly sex-linked. *Ray—Vac v. DILHR*, 70 Wis. 2d 919, 236 N.W.2d 209 (1975).

“Creed,” as used in sub. (5) (a) [now sub. (3m)], means a system of religious beliefs, not political beliefs. *Augustine v. Anti—Defamation League of B’nai B’rith*, 75 Wis. 2d 207, 249 N.W.2d 547 (1977).

Wisconsin law forbidding pregnancy benefits discrimination was not preempted when an employer negotiated, under the National Labor Relations Act, a welfare benefit plan, under the Employee Retirement Income Security Act. *Goodyear Tire & Rubber Co. v. DILHR*, 87 Wis. 2d 56, 273 N.W.2d 786 (Ct. App. 1978).

The Fair Employment Act (WFEA), subch. II of ch. 111, was not preempted by federal legislation. Sub. (5) (f), which excepts persons who are physically unable to perform a job from protection, includes a “future hazards” exception for employees who because of their physical condition will be a hazard to themselves or others. *Chicago & North Western Railroad v. LIRC*, 91 Wis. 2d 462, 283 N.W.2d 603 (Ct. App. 1979).

The inclusion of pregnancy-related benefits within a disability benefit plan does not violate the federal Equal Pay Act. *Kimberly—Clark Corp. v. LIRC*, 95 Wis. 2d 558, 291 N.W.2d 584 (Ct. App. 1980).

An individual may be found to be handicapped under WFEA although no actual impairment is found. It is sufficient to find that the employer perceived that the individual is handicapped; discrimination may be found when the perceived handicap is the sole basis of a hiring decision. *La Crosse Police Commission v. LIRC*, 139 Wis. 2d 740, 407 N.W.2d 510 (1987).

Common-law torts recognized before the adoption of WFEA, if properly pled, are not barred by the act although the complained of act may fit a definition of discriminatory behavior under WFEA. A battery claim was not precluded by WFEA, although the sub. (13) definition of “sexual harassment” is broad enough to include battery, when the tort was pled as an unlawful touching, not a discriminatory act. *Becker v. Automatic Garage Door Co.* 156 Wis. 2d 409, 456 N.W.2d 888 (Ct. App. 1990).

The standard to determine whether a person is an “employee” under Title VII of the Civil Rights Act is applicable to WFEA cases. A determination of “employee” status in a Title VII action precludes redetermination in a WFEA action. *Moore v. LIRC*, 175 Wis. 2d 561, 499 N.W.2d 288 (Ct. App. 1993).

Barring spouses who are both public employees from each electing family medical coverage is excepted from the prohibition against discrimination based on marital status under ch. 111. *Motola v. LIRC*, 219 Wis. 2d 588, 580 N.W.2d 297 (1998), 97–0896.

Unwelcome physical contact of a sexual nature and unwelcome verbal conduct or physical conduct of a sexual nature may constitute sexual harassment, even when they do not create a hostile work environment. *Jim Walter Color Separations v. LIRC*, 226 Wis. 2d 334, 595 N.W.2d 68 (Ct. App. 1999), 98–2360.

A person claiming a disability under sub. (8) must demonstrate an actual or perceived impairment that makes, or is perceived as making, achievement unusually difficult or limits the capacity to work. An impairment is a real or perceived lessening or deterioration or damage to a normal bodily function or bodily condition, or the absence of such bodily function or condition. “Achievement” is not as to a particular job, but as to a substantial limitation on life’s normal functions or a major life activity. “Limits the capacity to work” refers to the specific job at issue. *Hutchinson Technology, Inc. v. LIRC*, 2004 WI 90, 273 Wis. 2d 394, 682 N.W.2d 343, 02–3328.

LIRC properly interpreted sub. (8) to require a claimant to demonstrate a permanent impairment. To demonstrate that a disability exists, the complainant must present competent evidence of a medical diagnosis regarding the alleged impairment. An employer’s decision to grant requests for light-duty work, rather than terminating employment for refusing to perform regular job duties, is not proof of a perceived disability under sub. (8) (c). *Erickson v. Labor and Industry Review Commission*, 2005 WI App 208, 287 Wis. 2d 204, 704 N.W.2d 398, 04–3237.

Chicago, Milwaukee, St. Paul & Pacific Railroad Co. v. DILHR, 62 Wis. 2d 392, does not hold that a diagnosis of asthma alone establishes a disability. *Doepke—Kline v. Labor and Industry Review Commission*, 2005 WI App 209, 287 Wis. 2d 337, 704 N.W.2d 605, 05–0106.

A licensing agency may request information from an applicant regarding conviction records under sub. (5) (h) [now sub. (3)]. 67 Atty. Gen. 327.

Expanding Employer Liability for Sexual Harassment Under the Wisconsin Fair Employment Act. *Jim Walter Color Separations v. Labor & Industry Review Commission*. Edgar. 2000 WLR 885.

111.321 Prohibited bases of discrimination. Subject to ss. 111.33 to 111.36, no employer, labor organization, employment agency, licensing agency, or other person may engage in any act of employment discrimination as specified in s. 111.322 against any individual on the basis of age, race, creed, color, disability, marital status, sex, national origin, ancestry, arrest record, conviction record, military service, or use or nonuse of lawful products off the employer’s premises during nonworking hours.

History: 1981 c. 334; 1987 a. 63; 1991 a. 310; 1997 a. 112; 2007 a. 159.

NOTE: See 111.36 for definition of sex discrimination.

The denial of a homosexual employee’s request for family coverage for herself and her companion did not violate equal protection or the s. 111.321 prohibition of discrimination on the basis of marital status, sexual orientation, or gender. *Phillips v. Wisconsin Personnel Commission*, 167 Wis. 2d 205, 482 N.W.2d 121 (Ct. App. 1992).

A bargaining agreement requiring married employees with spouses covered by comparable employer-provided health insurance to elect coverage under one policy or the other violated this section. *Braatz v. LIRC*, 174 Wis. 2d 286, 496 N.W.2d 597 (1993).

The exclusive remedy provision in s. 102.03 (2) does not bar a complainant whose claim is covered by the workers compensation act from pursuing an employment discrimination claim under the fair employment act, subch. II, ch. 111. *Byers v. LIRC*, 208 Wis. 2d 388, 561 N.W.2d 678 (1997), 95–2490.

A *prima facie* case of discrimination triggers a burden of production against an employer, but unless the employer remains silent in the face of the *prima facie* case, the complainant continues to bear the burden of proof on the ultimate issue of discrimination. *Currie v. DILHR*, 210 Wis. 2d 380, 565 N.W.2d 253 (Ct. App. 1997), 96–1720.

Unwelcome physical contact of a sexual nature and unwelcome verbal conduct or physical conduct of a sexual nature may constitute sexual harassment, even when they do not create a hostile work environment. *Jim Walter Color Separations v. LIRC*, 226 Wis. 2d 334, 595 N.W.2d 68 (Ct. App. 1999), 98–2360.

It was reasonable for LIRC to interpret the prohibition against marital status discrimination as protecting the status of being married in general rather than the status of being married to a particular person. *Bammert v. LIRC*, 2000 WI App 28, 232 Wis. 2d 365, 606 N.W.2d 620, 99–1271.

The department of workforce development has statutory authority to receive and investigate a firefighter's employment discrimination claim that is tied directly to the charges sustained and disciplinary sanctions imposed by a police and fire commission under s. 62.13 (5), to which claim preclusion is no bar. *City of Madison v. DWD*, 2002 WI App 199, 257 Wis. 2d 348, 651 N.W.2d 292, 01–1910.

The police and fire commission has exclusive statutory authority under s. 62.13 (5) to review disciplinary actions against firefighters. Any claim that a disciplinary termination is discriminatory under ch. 111 must be raised before the PFC. DWD may not take jurisdiction over a ch. 111 complaint arising out of a decision of a PFC to terminate a firefighter. *City of Madison v. DWD*, 2003 WI 76, 262 Wis. 2d 652, 664 N.W.2d 584, 01–1910.

A person other than an employer, labor organization, or licensing agency can violate subch. II of ch. 111, if it engages in discriminatory conduct that has a sufficient nexus with the denial or restriction of some individual's employment opportunity. A trucking company who leased its trucks and drivers from another company that hired the drivers and had the power to reject drivers approved by the leasing company, was an "other person" subject to this section. *Szleszinski v. Labor & Industry Review Commission*, 2005 WI App 229, 287 Wis. 2d 775, 706 N.W.2d 345, 04–3033. Affirmed on other grounds. 2007 WI 106, 304 Wis. 2d 258, 736 N.W.2d 111, 04–3033.

Licensing boards do not have authority to enact general regulations that would allow them to suspend, deny, or revoke the license of a person who has a communicable disease. Licensing boards do have authority on a case-by-case basis to suspend, deny, or revoke the license of a person who poses a direct threat to the health and safety of other persons or who is unable to perform duties of the licensed activity. 77 Att. Gen. 223.

A person suffering from a contagious disease may be handicapped under the federal Rehabilitation Act of 1973. *School Board of Nassau County v. Arline*, 480 U.S. 273 (1987).

The Wisdom of the Wisconsin Fair Employment Act's Ban of Employment Discrimination on the Basis of Conviction Records. *Hruz*, 85 MLR 779 (2002).

Some "Hardship": Defending a Disability Discrimination Suit Under the Wisconsin Fair Employment Act. *Hansch*, 89 MLR 821 (2005).

Expanding Employer Liability for Sexual Harassment Under the Wisconsin Fair Employment Act: *Jim Walter Color Separations v. Labor & Industry Review Commission*. *Edgar*, 2000 WLR 885.

Expanding the Notion of "Equal Coverage": The Wisconsin Fair Employment Act Requires Contraceptive Coverage for All Employer-Sponsored Prescription Drug Plans. *Mason*, 2005 WLR 913.

Race, Crime, and Getting a Job. *Pager*, 2005 WLR 617.

Family Responsibility Discrimination: Making Room at Work for Family Demands. *Finerty*, Wis. Law. Nov. 2007.

111.322 Discriminatory actions prohibited. Subject to ss. 111.33 to 111.36, it is an act of employment discrimination to do any of the following:

(1) To refuse to hire, employ, admit or license any individual, to bar or terminate from employment or labor organization membership any individual, or to discriminate against any individual in promotion, compensation or in terms, conditions or privileges of employment or labor organization membership because of any basis enumerated in s. 111.321.

(2) To print or circulate or cause to be printed or circulated any statement, advertisement or publication, or to use any form of application for employment or to make any inquiry in connection with prospective employment, which implies or expresses any limitation, specification or discrimination with respect to an individual or any intent to make such limitation, specification or discrimination because of any basis enumerated in s. 111.321.

(2m) To discharge or otherwise discriminate against any individual because of any of the following:

(a) The individual files a complaint or attempts to enforce any right under s. 103.02, 103.10, 103.13, 103.28, 103.32, 103.455, 103.50, 104.12, 109.03, 109.07, 109.075 or 146.997 or ss. 101.58 to 101.599 or 103.64 to 103.82.

(b) The individual testifies or assists in any action or proceeding held under or to enforce any right under s. 103.02, 103.10,

103.13, 103.28, 103.32, 103.455, 103.50, 104.12, 109.03, 109.07, 109.075 or 146.997 or ss. 101.58 to 101.599 or 103.64 to 103.82.

(c) The individual files a complaint or attempts to enforce a right under s. 66.0903, 103.49 or 229.8275 or testifies or assists in any action or proceeding under s. 66.0903, 103.49 or 229.8275.

(d) The individual's employer believes that the individual engaged or may engage in any activity described in pars. (a) to (c).

(3) To discharge or otherwise discriminate against any individual because he or she has opposed any discriminatory practice under this subchapter or because he or she has made a complaint, testified or assisted in any proceeding under this subchapter.

History: 1981 c. 334; 1989 a. 228, 359; 1997 a. 237; 1999 a. 150 s. 672; 1999 a. 167, 176.

Actions under subs. (1) and (2) do not involve wholly different elements of proof. Sub. (1) involves actual discrimination; the violation of sub. (2) is not in adopting a discriminatory policy, but rather the publication of it. The remaining elements are the same for both subsections. Sub. (2) is not limited to advertising for employees, it also applies to the printing of policies that affect existing employees. *Racine Unified School District v. LIRC*, 164 Wis. 2d 567, 476 N.W.2d 707 (Ct. App. 1991).

An unlawful practice occurs when an impermissible motivating factor enters into an employment decision, but if the employer can demonstrate that it would have taken the same action in the absence of the impermissible factor, the complainant may not be awarded monetary damages or reinstatement. *Hoell v. LIRC*, 186 Wis. 2d 603, 522 N.W.2d 234 (Ct. App. 1994).

The state is prevented from enforcing discrimination laws against religious associations when the employment at issue serves a ministerial or ecclesiastical function. While it must be given considerable weight, a religious association's designation of a position as ministerial or ecclesiastical does not control its status. *Jocz v. LIRC*, 196 Wis. 2d 273, 538 N.W.2d 588 (Ct. App. 1995), 93–3042.

The exclusive remedy provision in s. 102.03 (2) does not bar a complainant whose claim is covered by the workers compensation act from pursuing an employment discrimination claim under the fair employment act, subch. II, of ch. 111. *Byers v. LIRC*, 208 Wis. 2d 388, 561 N.W.2d 678 (1997), 95–2490.

A *prima facie* case of discrimination triggers a burden of production against an employer, but unless the employer remains silent in the face of the *prima facie* case, the complainant continues to bear the burden of proof on the ultimate issue of discrimination. *Currie v. DILHR*, 210 Wis. 2d 380, 565 N.W.2d 253 (Ct. App. 1997), 96–1720.

A *prima facie* case for a violation of this section requires that the complainant: 1) was a member of a protected class; 2) was discharged; 3) was qualified for the position; and 4) was either replaced by someone not in the protected class or that others not in the protected class were treated more favorably. *Knight v. LIRC*, 220 Wis. 2d 137, 582 N.W.2d 448 (Ct. App. 1998), 97–1606.

In applying the "ministerial exception," adopted in *Jocz*, the "primary duties" test is a useful guide to determine whether a position is ministerial. As a general rule, if the employee's primary duties consist of teaching, spreading the faith, church governance, supervision of a religious order, or supervision or participation in religious ritual and worship, the employee should be considered ministerial. However, it is not an exclusive test. *Coulee Catholic Schools v. Labor & Industry Review Commission*, 2008 WI App 68, ___ Wis. 2d ___, ___ N.W.2d ___, 07–0496.

The ministerial exception adopted in *Jocz* overrides enforcement of discrimination claims only when the position is quintessentially religious, as such a position presents the prospect of making an inroad on religious liberty that is too substantial to be permissible. A general exemption for teachers in religious schools would be more expansive than warranted when considered in light of the magnitude of the state's interest in the enforcement of antidiscrimination laws. *Coulee Catholic Schools v. Labor & Industry Review Commission*, 2008 WI App 68, ___ Wis. 2d ___, ___ N.W.2d ___, 07–0496.

Some "Hardship": Defending a Disability Discrimination Suit Under the Wisconsin Fair Employment Act. *Hansch*, 89 MLR 821 (2005).

Discrimination in advertising. *Abramson*, WBB March, 1985.

Employer Liability for Employment References. *Mac Kelly*, Wis. Law. May, 2008.

111.325 Unlawful to discriminate. It is unlawful for any employer, labor organization, licensing agency or person to discriminate against any employee or any applicant for employment or licensing.

111.33 Age; exceptions and special cases. (1) The prohibition against employment discrimination on the basis of age applies only to discrimination against an individual who is age 40 or over.

(2) Notwithstanding sub. (1) and s. 111.322, it is not employment discrimination because of age to do any of the following:

(a) To terminate the employment of any employee physically or otherwise unable to perform his or her duties.

(b) To implement the provisions of any retirement plan or system of any employer if the retirement plan or system is not a subterfuge to evade the purposes of this subchapter. No plan or system may excuse the failure to hire, or require or permit the

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involuntary retirement of, any individual under sub. (1) because of that individual's age.

(d) To apply varying insurance coverage according to an employee's age.

(e) To exercise an age distinction with respect to hiring an individual to a position in which the knowledge and experience to be gained is required for future advancement to a managerial or executive position.

(f) To exercise an age distinction with respect to employment in which the employee is exposed to physical danger or hazard, including, without limitation because of enumeration, certain employment in law enforcement or fire fighting.

(g) To exercise an age distinction under s. 343.12 (2) (a) and (3).

History: 1981 c. 334; 1983 a. 391, 538.

Sub. (2) (f) exempts the hiring of fire fighters from being the subject of age discrimination suits. A fire department need not show that it openly and consistently discriminated on the basis of age to be exempt under sub. (2) (f). *Johnson v. LIRC*, 200 Wis. 2d 715, 547 N.W.2d 783 (Ct. App. 1996), 95–2346.

An employee is physically unable to perform a job under sub. (2) if that employee is performing the job with a physical accommodation. *Harrison v. LIRC*, 211 Wis. 2d 681, 565 N.W.2d 572 (Ct. App. 1997), 96–1795.

A city charged under the federal Age Discrimination in Employment Act had the burden of establishing that a mandatory retirement age of 55 for law enforcement personnel was a bona fide occupational qualification. *Equal Employment Opportunity Commission v. City of Janesville*, 630 F.2d 1254 (1980).

The federal Employment Retirement Income Security Act preempts sub. (2) (b) to the extent that it applies to employee benefit plans covered by it. *Waukesha Engine Division v. DILHR*, 619 F. Supp. 1310 (1985).

111.335 Arrest or conviction record; exceptions and special cases. (1)

(a) Employment discrimination because of arrest record includes, but is not limited to, requesting an applicant, employee, member, licensee or any other individual, on an application form or otherwise, to supply information regarding any arrest record of the individual except a record of a pending charge, except that it is not employment discrimination to request such information when employment depends on the bondability of the individual under a standard fidelity bond or when an equivalent bond is required by state or federal law, administrative regulation or established business practice of the employer and the individual may not be bondable due to an arrest record.

(b) Notwithstanding s. 111.322, it is not employment discrimination because of arrest record to refuse to employ or license, or to suspend from employment or licensing, any individual who is subject to a pending criminal charge if the circumstances of the charge substantially relate to the circumstances of the particular job or licensed activity.

(c) Notwithstanding s. 111.322, it is not employment discrimination because of conviction record to refuse to employ or license, or to bar or terminate from employment or licensing, any individual who:

1. Has been convicted of any felony, misdemeanor or other offense the circumstances of which substantially relate to the circumstances of the particular job or licensed activity; or

2. Is not bondable under a standard fidelity bond or an equivalent bond where such bondability is required by state or federal law, administrative regulation or established business practice of the employer.

(cg) 1. Notwithstanding s. 111.322, it is not employment discrimination because of conviction record to deny or refuse to renew a license or permit under s. 440.26 to a person who has been convicted of a felony and has not been pardoned for that felony.

2. Notwithstanding s. 111.322, it is not employment discrimination because of conviction record to revoke a license or permit under s. 440.26 (6) (b) if the person holding the license or permit has been convicted of a felony and has not been pardoned for that felony.

3. Notwithstanding s. 111.322, it is not employment discrimination because of conviction record to refuse to employ a person in a business licensed under s. 440.26 or as an employee specified in s. 440.26 (5) (b) if the person has been convicted of a felony and has not been pardoned for that felony.

(cm) Notwithstanding s. 111.322, it is not employment discrimination because of conviction record to refuse to employ as an installer of burglar alarms a person who has been convicted of a felony and has not been pardoned.

(cs) Notwithstanding s. 111.322, it is not employment discrimination because of conviction record to revoke, suspend or refuse to renew a license or permit under ch. 125 if the person holding or applying for the license or permit has been convicted of one or more of the following:

1. Manufacturing, distributing or delivering a controlled substance or controlled substance analog under s. 961.41 (1).

2. Possessing, with intent to manufacture, distribute or deliver, a controlled substance or controlled substance analog under s. 961.41 (1m).

3. Possessing, with intent to manufacture, distribute or deliver, or manufacturing, distributing or delivering a controlled substance or controlled substance analog under a federal law that is substantially similar to s. 961.41 (1) or (1m).

4. Possessing, with intent to manufacture, distribute or deliver, or manufacturing, distributing or delivering a controlled substance or controlled substance analog under the law of another state that is substantially similar to s. 961.41 (1) or (1m).

5. Possessing any of the materials listed in s. 961.65 with intent to manufacture methamphetamine under that section or under a federal law or a law of another state that is substantially similar to s. 961.65.

(cv) Notwithstanding s. 111.322, it is not employment discrimination because of conviction record to refuse to employ in a position in the classified service or in a position described in s. 230.08 (2) (k) a person who has been convicted under 50 USC, Appendix, section 462 for refusing to register with the selective service system and who has not been pardoned.

History: 1981 c. 334; 1991 a. 216; 1993 a. 98; 1995 a. 448, 461; 1997 a. 112; 2001 a. 16; 2003 a. 33; 2005 a. 14.

A rule adopted under s. 165.85 properly barred a nonpardoned felon from holding a police job. *Law Enforcement Standards Board v. Lyndon Station*, 101 Wis. 2d 472, 305 N.W.2d 89 (1981).

A conviction for armed robbery in and of itself constituted circumstances substantially related to a school bus driver's licensure. *Gibson v. Transportation Commission*, 106 Wis. 2d 22, 315 N.W.2d 346 (1982).

An employer's inquiry is limited to general facts in determining whether the "circumstances of the offense" relate to the job. It is not the details of the criminal activity that are important, but rather the circumstances that foster criminal activity, such as opportunity for criminal behavior, reaction to responsibility, and character traits of the person. *County of Milwaukee v. LIRC*, 139 Wis. 2d 805, 407 N.W.2d 908 (1987).

There is no requirement that an employer take affirmative steps to accommodate individuals convicted of felonies. *Knight v. LIRC*, 220 Wis. 2d 137, 582 N.W.2d 448 (Ct. App. 1998), 97–1606.

When evaluating an individual for the position of reserve officer, a sheriff's department may consider information in its possession concerning the individual's juvenile record, subject to prohibitions against arrest record and conviction record discrimination contained in the WFEA. 79 Atty. Gen. 89.

Race, Crime, and Getting a Job. Pager. 2005 WLR 617.

Discrimination in employment on the basis of arrest or conviction record. *Mukamel*. WBB Sept. 1983.

111.337 Creed; exceptions and special cases. (1)

Employment discrimination because of creed includes, but is not limited to, refusing to reasonably accommodate an employee's or prospective employee's religious observance or practice unless the employer can demonstrate that the accommodation would pose an undue hardship on the employer's program, enterprise or business.

(2) Notwithstanding s. 111.322, it is not employment discrimination because of creed:

(a) For a religious association not organized for private profit or an organization or corporation which is primarily owned or controlled by such a religious association to give preference to an applicant or employee who is a member of the same or a similar religious denomination.

(am) For a religious association not organized for private profit or an organization or corporation which is primarily owned or controlled by such a religious association to give preference to an applicant or employee who adheres to the religious association's creed, if the job description demonstrates that the position is

clearly related to the religious teachings and beliefs of the religious association.

(b) For a fraternal as defined in s. 614.01 (1) (a) to give preference to an employee or applicant who is a member or is eligible for membership in the fraternal, with respect to hiring to or promotion to the position of officer, administrator or salesperson.

(3) No county, city, village or town may adopt any provision concerning employment discrimination because of creed that prohibits activity allowed under this section.

History: 1981 c. 334; 1983 a. 189 s. 329 (25); 1987 a. 149.

Sub. (2) does not allow religious organizations to engage in prohibited forms of discrimination. *Sacred Heart School Board v. LIRC*, 157 Wis. 2d 638, 460 N.W.2d 430 (Ct. App. 1990).

A union violated Title VII of the federal Civil Rights Act by causing an employer to fire an employee because of the employee's refusal, on religious grounds, to pay union dues. *Nottelson v. Smith Steel Workers D.A.L.U.* 19806, 643 F. 2d 445 (1981).

The supreme court redefines employer's role in religious accommodation. *Soeka*. WBB July 1987.

111.34 Disability; exceptions and special cases.

(1) Employment discrimination because of disability includes, but is not limited to:

(a) Contributing a lesser amount to the fringe benefits, including life or disability insurance coverage, of any employee because of the employee's disability; or

(b) Refusing to reasonably accommodate an employee's or prospective employee's disability unless the employer can demonstrate that the accommodation would pose a hardship on the employer's program, enterprise or business.

(2) (a) Notwithstanding s. 111.322, it is not employment discrimination because of disability to refuse to hire, employ, admit or license any individual, to bar or terminate from employment, membership or licensure any individual, or to discriminate against any individual in promotion, compensation or in terms, conditions or privileges of employment if the disability is reasonably related to the individual's ability to adequately undertake the job-related responsibilities of that individual's employment, membership or licensure.

(b) In evaluating whether an individual with a disability can adequately undertake the job-related responsibilities of a particular job, membership or licensed activity, the present and future safety of the individual, of the individual's coworkers and, if applicable, of the general public may be considered. However, this evaluation shall be made on an individual case-by-case basis and may not be made by a general rule which prohibits the employment or licensure of individuals with disabilities in general or a particular class of individuals with disabilities.

(c) If the employment, membership or licensure involves a special duty of care for the safety of the general public, including but not limited to employment with a common carrier, this special duty of care may be considered in evaluating whether the employee or applicant can adequately undertake the job-related responsibilities of a particular job, membership or licensed activity. However, this evaluation shall be made on an individual case-by-case basis and may not be made by a general rule which prohibits the employment or licensure of individuals with disabilities in general or a particular class of individuals with disabilities.

History: 1981 c. 334; 1997 a. 112.

The utilization of federal regulations as a hiring standard, although not applicable to the employing taxi company, demonstrated a rational relationship to the safety obligations imposed on the employer, and its use was not the result of an arbitrary belief lacking in objective reason or rationale. *Boynton Cab Co. v. DILHR*, 96 Wis. 2d 396, 291 N.W.2d 850 (1980).

An employee handicapped by alcoholism was properly discharged under s. 111.32 (5) (f), 1973 Stats., (a predecessor to this section) for inability to efficiently perform job duties. *Squires v. LIRC*, 97 Wis. 2d 648, 294 N.W.2d 48 (Ct. App. 1980).

Small stature is not a handicap. *American Motors Corp. v. LIRC*, 114 Wis. 2d 288, 338 N.W.2d 518 (Ct. App. 1983); *aff'd*, 119 Wis. 2d 706, 350 N.W.2d 120 (1984).

Physical standards for school bus operators established under s. 343.12 (2) (g) are not exempt from the requirements of sub. (2) (b). *Bothum v. Department of Transportation*, 134 Wis. 2d 378, 396 N.W.2d 785 (Ct. App. 1986).

The duty to reasonably accommodate under sub. (1) (b) is to be broadly interpreted and may involve the transfer of an individual from one job to another. What is reasonable will depend on the facts of the case. *McMullen v. LIRC*, 148 Wis. 2d 270, 434 N.W.2d 270 (Ct. App. 1986).

To avail itself of the defense under sub. (2) that an ostensibly safety-based employment restriction is job-related, an employer bears the burden of proving to a reasonable probability that the restriction is necessary to prevent harm to the employee or others. *Racine Unified School District v. LIRC*, 164 Wis. 2d 567, 476 N.W.2d 707 (Ct. App. 1991).

Temporary forbearance of work rules while determining whether an employee's medical problem is treatable may be a reasonable accommodation under sub. (1) (b). The purpose of reasonable accommodation is to enable employees to adequately undertake job-related responsibilities. *Target Stores v. LIRC*, 217 Wis. 2d 1, 576 N.W.2d 545 (Ct. App. 1998), 97-1253. See also *Stoughton Trailers, Inc. v. LIRC*, 2007 WI 105, 303 Wis. 2d 514, 735 N.W.2d 477, 04-1550.

Whether an employee's mental illness caused him to react angrily and commit the act of insubordination that led to the termination of his employment was sufficiently complex and technical that expert testimony was required. *Wal-Mart Stores, Inc. v. LIRC*, 2000 WI App 272, 240 Wis. 2d 209, 621 N.W.2d 633, 99-2632.

A complainant must show that he or she is handicapped and that the employer took one of the prohibited actions based on that handicap. The employer then has a burden of proving a defense. Sub. (1) (b) does not require an employer to make a reasonable accommodation if the accommodation will impose a hardship on the employer, but if the employer is not able to demonstrate that the accommodation would pose a hardship there is a violation. *Crystal Lake Cheese Factory v. LIRC*, 2003 WI 106, 264 Wis. 2d 200, 664 N.W.2d 651, 02-0815.

A reasonable accommodation is not limited to that which would allow the employee to perform adequately all of his or her job duties. A change in job duties may be a reasonable accommodation in a given circumstance. *Crystal Lake Cheese Factory v. LIRC*, 2003 WI 106, 264 Wis. 2d 200, 664 N.W.2d 651, 02-0815.

An interstate commercial driver need not seek a determination of medical qualification from the federal department of transportation (DOT) prior to filing a disability discrimination claim under this chapter. When medical and physical qualifications to be an interstate driver are material to a claim, and a dispute arises concerning those qualifications that cannot be resolved by facial application of DOT regulations, the dispute should be resolved by the DOT under its dispute resolution procedure. The employer must seek a determination of medical and physical qualification from the DOT if the employer intends to offer a defense that the driver was not qualified for medical reasons. *Szleszinski v. Labor & Industry Review Commission*, 2007 WI 106, 304 Wis. 2d 258, 736 N.W.2d 111, 04-3033.

A person suffering from a contagious disease may be handicapped under the federal Rehabilitation Act of 1973. *School Board of Nassau County v. Arline*, 480 U.S. 273 (1987).

Crystal Lake Cheese Factory v. Labor and Industry Review Commission: A reasonable Turn Under the Wisconsin Fair Employment Act. Haas. 2004 WLR 1535.

Hidden handicaps: Protection of alcoholics, drug addicts, and the mentally ill against employment discrimination under the rehabilitation act of 1973 and the Wisconsin fair employment act. 1983 WLR 725.

Disability Law in Wisconsin Workplaces. Vergeront & Cochrane. Wis. Law. Oct. 2004.

ADA and WEFA: Differing Disability Protections. Backer & Mishlove. Wis. Law. Oct. 2004.

111.345 Marital status; exceptions and special cases.

Notwithstanding s. 111.322, it is not employment discrimination because of marital status to prohibit an individual from directly supervising or being directly supervised by his or her spouse.

History: 1981 c. 334.

A work rule intended to limit extramarital affairs among coemployees was not discrimination because of marital status. *Federated Rural Electric Insurance v. Kessler*, 131 Wis. 2d 189, 388 N.W.2d 553 (1986).

111.35 Use or nonuse of lawful products; exceptions and special cases. (1)

(a) Notwithstanding s. 111.322, it is not employment discrimination because of use of a lawful product off the employer's premises during nonworking hours for a nonprofit corporation that, as one of its primary purposes or objectives, discourages the general public from using a lawful product to refuse to hire or employ an individual, to suspend or terminate the employment of an individual, or to discriminate against an individual in promotion, in compensation or in terms, conditions or privileges of employment, because that individual uses off the employer's premises during nonworking hours a lawful product that the nonprofit corporation discourages the general public from using.

(b) Notwithstanding s. 111.322, it is not employment discrimination because of nonuse of a lawful product off the employer's premises during nonworking hours for a nonprofit corporation that, as one of its primary purposes or objectives, encourages the general public to use a lawful product to refuse to hire or employ an individual, to suspend or terminate the employment of an individual, or to discriminate against an individual in promotion, in compensation or in terms, conditions or privileges of employment, because that individual does not use off the employer's premises during nonworking hours a lawful product that the nonprofit corporation encourages the general public to use.

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(2) Notwithstanding s. 111.322, it is not employment discrimination because of use or nonuse of a lawful product off the employer's premises during nonworking hours for an employer, labor organization, employment agency, licensing agency or other person to refuse to hire, employ, admit, or license an individual, to bar, suspend or terminate an individual from employment, membership or licensure, or to discriminate against an individual in promotion, in compensation or in terms, conditions or privileges of employment or labor organization membership if the individual's use or nonuse of a lawful product off the employer's premises during nonworking hours does any of the following:

(a) Impairs the individual's ability to undertake adequately the job-related responsibilities of that individual's employment, membership or licensure.

(b) Creates a conflict of interest, or the appearance of a conflict of interest, with the job-related responsibilities of that individual's employment, membership or licensure.

(c) Conflicts with a bona fide occupational qualification that is reasonably related to the job-related responsibilities of that individual's employment, membership or licensure.

(d) Constitutes a violation of s. 254.92 (2).

(e) Conflicts with any federal or state statute, rule or regulation.

(3) (a) Notwithstanding s. 111.322, it is not employment discrimination because of use of a lawful product off the employer's premises during nonworking hours for an employer, labor organization, employment agency, licensing agency or other person to offer a policy or plan of life, health or disability insurance coverage under which the type of coverage or the price of coverage for an individual who uses a lawful product off the employer's premises during nonworking hours differs from the type of coverage or the price of coverage provided for an individual who does not use that lawful product, if all of the following conditions apply:

1. The difference between the premium rates charged to an individual who uses that lawful product and the premium rates charged to an individual who does not use that lawful product reflects the cost of providing the coverage to the individual who uses that lawful product.

2. The employer, labor organization, employment agency, licensing agency or other person that offers the coverage provides each individual who is charged a different premium rate based on that individual's use of a lawful product off the employer's premises during nonworking hours with a written statement specifying the premium rate differential used by the insurance carrier.

(b) Notwithstanding s. 111.322, it is not employment discrimination because of nonuse of a lawful product off the employer's premises during nonworking hours for an employer, labor organization, employment agency, licensing agency or other person to offer a policy or plan of life, health or disability insurance coverage under which the type of coverage or the price of coverage for an individual who does not use a lawful product off the employer's premises during nonworking hours differs from the type of coverage or the price of coverage provided for an individual who uses that lawful product, if all of the following conditions apply:

1. The difference between the premium rates charged to an individual who does not use that lawful product and the premium rates charged to an individual who uses that lawful product reflects the cost of providing the coverage to the individual who does not use that lawful product.

2. The employer, labor organization, employment agency, licensing agency or other person that offers the coverage provides each individual who is charged a different premium rate based on that individual's nonuse of a lawful product off the employer's premises during nonworking hours with a written statement specifying the premium rate differential used by the insurance carrier.

(4) Notwithstanding s. 111.322, it is not employment discrimination because of use of a lawful product off the employer's premises during nonworking hours to refuse to employ an applicant if the applicant's use of a lawful product consists of smoking

tobacco and the employment is as a fire fighter covered under s. 891.45 or 891.455.

History: 1991 a. 310; 1995 a. 352; 1997 a. 173; 1999 a. 9.

111.355 Military service; exceptions and special cases. (1) Employment discrimination because of military service includes an employer, labor organization, licensing agency, employment agency, or other person refusing to hire, employ, admit, or license an individual, barring or terminating an individual from employment, membership, or licensure, or discriminating against an individual in promotion, in compensation, or in the terms, conditions, or privileges of employment because the individual is or applies to be a member of the U.S. armed forces, the state defense force, the national guard of any state, or any reserve component of the U.S. armed forces or because the individual performs, has performed, applies to perform, or has an obligation to perform military service.

(2) Notwithstanding s. 111.322, it is not employment discrimination because of military service for an employer, licensing agency, employment agency, or other person to refuse to hire, employ, or license an individual or to bar or terminate an individual from employment or licensure because the individual has been discharged from military service under a bad conduct, dishonorable, or other than honorable discharge, or under an entry-level separation, and the circumstances of the discharge or separation substantially relate to the circumstances of the particular job or licensed activity.

History: 2007 a. 159.

111.36 Sex, sexual orientation; exceptions and special cases. (1) Employment discrimination because of sex includes, but is not limited to, any of the following actions by any employer, labor organization, employment agency, licensing agency or other person:

(a) Discriminating against any individual in promotion, compensation paid for equal or substantially similar work, or in terms, conditions or privileges of employment or licensing on the basis of sex where sex is not a bona fide occupational qualification.

(b) Engaging in sexual harassment; or implicitly or explicitly making or permitting acquiescence in or submission to sexual harassment a term or condition of employment; or making or permitting acquiescence in, submission to or rejection of sexual harassment the basis or any part of the basis for any employment decision affecting an employee, other than an employment decision that is disciplinary action against an employee for engaging in sexual harassment in violation of this paragraph; or permitting sexual harassment to have the purpose or effect of substantially interfering with an employee's work performance or of creating an intimidating, hostile or offensive work environment. Under this paragraph, substantial interference with an employee's work performance or creation of an intimidating, hostile or offensive work environment is established when the conduct is such that a reasonable person under the same circumstances as the employee would consider the conduct sufficiently severe or pervasive to interfere substantially with the person's work performance or to create an intimidating, hostile or offensive work environment.

(br) Engaging in harassment that consists of unwelcome verbal or physical conduct directed at another individual because of that individual's gender, other than the conduct described in par. (b), and that has the purpose or effect of creating an intimidating, hostile or offensive work environment or has the purpose or effect of substantially interfering with that individual's work performance. Under this paragraph, substantial interference with an employee's work performance or creation of an intimidating, hostile or offensive work environment is established when the conduct is such that a reasonable person under the same circumstances as the employee would consider the conduct sufficiently severe or pervasive to interfere substantially with the person's work performance or to create an intimidating, hostile or offensive work environment.

(c) Discriminating against any woman on the basis of pregnancy, childbirth, maternity leave or related medical conditions by engaging in any of the actions prohibited under s. 111.322, including, but not limited to, actions concerning fringe benefit programs covering illnesses and disability.

(d) 1. For any employer, labor organization, licensing agency or employment agency or other person to refuse to hire, employ, admit or license, or to bar or terminate from employment, membership or licensure any individual, or to discriminate against an individual in promotion, compensation or in terms, conditions or privileges of employment because of the individual's sexual orientation; or

2. For any employer, labor organization, licensing agency or employment agency or other person to discharge or otherwise discriminate against any person because he or she has opposed any discriminatory practices under this paragraph or because he or she has made a complaint, testified or assisted in any proceeding under this paragraph.

(2) For the purposes of this subchapter, sex is a bona fide occupational qualification if all of the members of one sex are physically incapable of performing the essential duties required by a job, or if the essence of the employer's business operation would be undermined if employees were not hired exclusively from one sex.

(3) For purposes of sexual harassment claims under sub. (1) (b), an employer, labor organization, employment agency or licensing agency is presumed liable for an act of sexual harassment by that employer, labor organization, employment agency or licensing agency or by any of its employees or members, if the act occurs while the complaining employee is at his or her place of employment or is performing duties relating to his or her employment, if the complaining employee informs the employer, labor organization, employment agency or licensing agency of the act, and if the employer, labor organization, employment agency or licensing agency fails to take appropriate action within a reasonable time.

History: 1981 c. 334 ss. 7m, 22; 1981 c. 391; 1993 a. 427.

Federal law may be looked to in interpreting sub. (1) (b) and (br). Under federal law "hostile environment" sexual harassment is actionable if it is sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment. *Kannenberg v. LIRC*, 213 Wis. 2d 373, 571 N.W.2d 165 (Ct. App. 1997), 97–0224.

The exclusion of contraceptives from an employer or college or university sponsored benefits program that otherwise provides prescription drug coverage violates Wisconsin law prohibiting sex discrimination in employment and in higher education, ss. 111.31 to 111.395, 36.12, and 38.23. OAG 1–04.

Emotional distress injury due to on–the–job sexual harassment was exclusively compensable under s.102.03. *Zabkovic v. West Bend Co., Division of Dart Industries, Inc.* 789 F. 2d 540 (1986).

Expanding the Notion of "Equal Coverage": The Wisconsin Fair Employment Act Requires Contraceptive Coverage for All Employer–Sponsored Prescription Drug Plans. *Mason*. 2005 WLR 913.

Sexual harassment. *Gibson*, WBB March, 1981.

111.37 Use of honesty testing devices in employment situations. (1) DEFINITIONS. In this section:

(a) "Employer", notwithstanding s. 111.32 (6), means any person acting directly or indirectly in the interest of an employer in relation to an employee or prospective employee. "Employer", notwithstanding s. 111.32 (6), does not include the federal government.

(b) "Lie detector" means a polygraph, deceptograph, voice stress analyzer, psychological stress evaluator or other similar device, whether mechanical or electrical, that is used, or the results of which are used, to render a diagnostic opinion about the honesty or dishonesty of an individual.

(c) "Polygraph" means an instrument that fulfills all of the following requirements:

1. Records continuously, visually, permanently and simultaneously any changes in cardiovascular, respiratory and electrodermal patterns as minimum instrumentation standards.

2. Is used, or the results of which are used, to render a diagnostic opinion about the honesty or dishonesty of an individual.

(2) PROHIBITIONS ON LIE DETECTOR USE. Except as provided in subs. (5) and (6), no employer may do any of the following:

(a) Directly or indirectly require, request, suggest or cause an employee or prospective employee to take or submit to a lie detector test.

(b) Use, accept, refer to or inquire about the results of a lie detector test of an employee or prospective employee.

(c) Discharge, discipline, discriminate against or deny employment or promotion to, or threaten to take any such action against, any of the following:

1. An employee or prospective employee who refuses, declines or fails to take or submit to a lie detector test.

2. An employee or prospective employee on the basis of the results of a lie detector test.

(d) Discharge, discipline, discriminate against or deny employment or promotion to, or threaten to take any such action against, an employee or prospective employee for any of the following reasons:

1. The employee or prospective employee has filed a complaint or instituted or caused to be instituted a proceeding under this section.

2. The employee or prospective employee has testified or is about to testify in a proceeding under this section.

3. The employee or prospective employee, on behalf of that employee, prospective employee or another person, has exercised any right under this section.

(3) NOTICE OF PROTECTION. The department shall prepare and distribute a notice setting forth excerpts from, or summaries of, the pertinent provisions of this section. Each employer that administers lie detector tests, or that has lie detector tests administered, to its employees shall post and maintain that notice in conspicuous places on its premises where notices to employees and applicants for employment are customarily posted.

(4) DEPARTMENT'S DUTIES AND POWERS. (a) The department shall do all of the following:

1. Promulgate rules that are necessary under this section.

2. Cooperate with regional, local and other agencies and cooperate with, and furnish technical assistance to, employment agencies other than this state, employers and labor organizations to aid in enforcing this section.

3. Make investigations and inspections and require the keeping of records necessary for the administration of this section.

(b) For the purpose of any hearing or investigation under this section, the department may issue subpoenas.

(5) EXEMPTIONS. (a) Except as provided in sub. (6), this section does not prohibit an employer from requesting an employee to submit to a polygraph test if all of the following conditions apply:

1. The test is administered in connection with an ongoing investigation involving economic loss or injury to the employer's business, including theft, embezzlement, misappropriation and unlawful industrial espionage or sabotage.

2. The employee had access to the property that is the subject of the investigation under subd. 1.

3. The employer has a reasonable suspicion that the employee was involved in the incident or activity under investigation.

4. The employer executes a statement, provided to the examinee before the test, that sets forth with particularity the specific incident or activity being investigated and the basis for testing particular employees; that is signed by a person, other than a polygraph examiner, authorized legally to bind the employer; that is retained by the employer for at least 3 years; and that identifies the specific economic loss or injury to the business of the employer, indicates that the employee had access to the property that is the subject of the investigation and describes the basis of the employer's reasonable suspicion that the employee was involved in the incident or activity under investigation.

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(b) Except as provided in sub. (6), this section does not prohibit an employer from administering polygraph tests, or from having polygraph tests administered, on a prospective employee who, if hired, would perform the employer's primary business purpose if the employer's primary business purpose is providing security personnel, armored car personnel or personnel engaged in the design, installation and maintenance of security alarm systems and if the employer protects any of the following:

1. Facilities, materials or operations that have a significant impact on the public health, safety or welfare of this state or the national security of the United States, including facilities engaged in the production, transmission or distribution of electric or nuclear power; public water supply facilities; shipments or storage of radioactive or other toxic waste materials; and public transportation.

2. Currency, negotiable securities, precious commodities or instruments and proprietary information.

(bm) Except as provided in sub. (6), this section does not prohibit a Wisconsin law enforcement agency from administering a polygraph test, or from having a polygraph test administered, on a prospective employee.

(c) Except as provided in sub. (6), this section does not prohibit an employer that is authorized to manufacture, distribute or dispense a controlled substance included in schedule I, II, III, IV or V under ch. 961 from administering a polygraph test, or from having a polygraph test administered, if the test is administered to a prospective employee who would have direct access to the manufacture, storage, distribution or sale of the controlled substance or to a current employee if the test is administered in connection with an ongoing investigation of criminal or other misconduct that involves, or potentially involves, loss or injury to the manufacture, distribution or dispensing of the controlled substance by that employer and the employee had access to the person or property that is the subject of the investigation.

(6) RESTRICTIONS ON USE OF EXEMPTIONS. (a) The exemption under sub. (5) (a) does not apply if an employee is discharged, disciplined, denied employment or promotion or otherwise discriminated against on the basis of an analysis of a polygraph test chart or a refusal to take a polygraph test without additional supporting evidence. The evidence required by sub. (5) (a) may serve as additional supporting evidence.

(b) The exemptions under sub. (5) (b) to (c) do not apply if an analysis of a polygraph test chart is used, or a refusal to take a polygraph test is used, as the sole basis upon which an adverse employment action described in par. (a) is taken against an employee or prospective employee.

(c) The exemptions under sub. (5) (a) to (c) do not apply unless all of the following requirements are fulfilled:

1. Throughout all phases of the test the examinee is permitted to end the test at any time; the examinee is not asked questions in a manner that degrades, or needlessly intrudes on, the examinee; the examinee is not asked any question about religious beliefs or affiliations, political beliefs or affiliations, sexual behavior, beliefs or opinions on racial matters, or about beliefs, affiliations, opinions, or lawful activities regarding unions or labor organizations; and the examiner does not conduct the test if there is sufficient written evidence provided by a physician that the examinee is suffering from a medical or psychological condition or undergoing treatment that might cause abnormal responses during the testing.

2. Before the test is administered the prospective examinee is provided with reasonable oral and written notice of the date, time and location of the test, and of the examinee's right to obtain and consult with legal counsel or an employee representative before each phase of the test; is informed orally and in writing of the nature and characteristics of the tests and of the instruments involved; is informed orally and in writing whether or not the testing area contains a 2-way mirror, a camera or any other device through which the test can be observed; is informed orally and in

writing whether or not any device other than the polygraph, including any device for recording or monitoring the test, will be used; is informed orally and in writing that the employer or the examinee may, after so informing the examinee, make a recording of the test; is read and signs a written notice informing the examinee that the examinee cannot be required to take the test as a condition of employment, that any statement made during the test may constitute additional supporting evidence for the purposes of an adverse employment action under par. (a), of the limitations on the use of a polygraph test under this subsection, of the legal rights and remedies available to the examinee under this section and ss. 905.065 and 942.06, of the legal rights and remedies available to the examinee if the polygraph test is not conducted in accordance with this section and of the legal rights and remedies of the employer under this section; is provided an opportunity to review all questions to be asked during the test; and is informed of the right to end the test at any time.

3. The examiner does not ask the examinee any question during the test that was not presented in writing for review to the examinee before the test.

4. Before any adverse employment action, the employer interviews the examinee on the basis of the results of the test; provides the examinee written copies of any opinion or conclusion rendered as a result of the test, the questions asked during the test and the corresponding charted responses; and offers the examinee the opportunity to explain any questionable responses or to retake the examination or both. If the subsequent responses or the reexamination clarify any questionable response, the results of the initial tests shall not be reported further and shall be removed, corrected or clarified in the employee's personnel records under s. 103.13 (4).

5. The examiner does not conduct and complete more than 5 polygraph tests on any day and does not conduct any polygraph test that lasts for less than 90 minutes.

6. The test is administered at a reasonable time and location.

(d) The exemptions under sub. (5) (a) to (c) do not apply unless the individual who conducts the polygraph test satisfies all of the following requirements:

1. Maintains at least a \$50,000 bond or an equivalent amount of professional liability coverage.

2. Renders no opinion or conclusion about the test unless it is in writing and based solely on an analysis of polygraph test charts, does not contain information other than admissions, information, case facts and interpretation of the charts relevant to the purpose and stated objectives of the test, and does not include any recommendation concerning the employment of the examinee.

3. Maintains all opinions, reports, charts, written questions, lists and other records relating to the test for at least 3 years after administration of the test.

(7) DISCLOSURE OF INFORMATION. No person other than the examinee may disclose information obtained during a polygraph test, except that a polygraph examiner may disclose information acquired from a polygraph test to the examinee or any other person specifically designated in writing by the examinee.

(8) ENFORCEMENT PROVISIONS. (a) In addition to the rights, remedies and procedures under ss. 111.375 and 111.39, any employer who violates this section may be required to forfeit not more than \$10,000.

(b) The rights, remedies and procedures provided by this section may not be waived by contract or otherwise, unless that waiver is part of a written settlement agreed to and signed by the parties to an action or complaint under this section.

History: 1979 c. 319; 1981 c. 334 ss. 12, 24; Stats. 1981 s. 111.37; 1991 a. 289; 1995 a. 314, 448; 1997 a. 35.

111.371 Local ordinance; collective bargaining agreements. Section 111.37 does not do any of the following:

(1) Prevent a county, city, village or town from adopting an ordinance that prohibits honesty testing, restricts the use of hon-

esty testing to a greater extent than s. 111.37 or provides employees with more rights and remedies with respect to honesty testing than are provided under s. 111.37.

(2) Supersede, preempt or prohibit provisions of a collective bargaining agreement that prohibit honesty testing, restrict the use of honesty testing to a greater extent than s. 111.37 or provide employees with more rights and remedies with respect to honesty testing than are provided under s. 111.37.

History: 1991 a. 289, 315.

111.372 Use of genetic testing in employment situations. (1) No employer, labor organization, employment agency or licensing agency may directly or indirectly:

(a) Solicit, require or administer a genetic test to any person as a condition of employment, labor organization membership or licensure.

(b) Affect the terms, conditions or privileges of employment, labor organization membership or licensure or terminate the employment, labor organization membership or licensure of any person who obtains a genetic test.

(2) Except as provided in sub. (4), no person may sell to or interpret for an employer, labor organization, employment agency or licensing agency a genetic test of an employee, labor organization member or licensee or of a prospective employee, labor organization member or licensee.

(3) Any agreement between an employer, labor organization, employment agency or licensing agency and another person offering employment, labor organization membership, licensure or any pay or benefit to that person in return for taking a genetic test is prohibited.

(4) This section does not prohibit the genetic testing of an employee who requests a genetic test and who provides written and informed consent to taking a genetic test for any of the following purposes:

(a) Investigating a worker's compensation claim under ch. 102.

(b) Determining the employee's susceptibility or level of exposure to potentially toxic chemicals or potentially toxic substances in the workplace, if the employer does not terminate the employee, or take any other action that adversely affects any term, condition or privilege of the employee's employment, as a result of the genetic test.

History: 1991 a. 117.

The New Genetic World and the Law. *Derse*. Wis. Law. April 2001.

111.375 Department to administer. (1) This subchapter shall be administered by the department. The department may make, amend and rescind such rules as are necessary to carry out this subchapter. The department or the commission may, by such agents or agencies as it designates, conduct in any part of this state any proceeding, hearing, investigation or inquiry necessary to the performance of its functions. The department shall preserve the anonymity of any employee who is the aggrieved party in a complaint of discrimination in promotion, compensation or terms and conditions of employment, of unfair honesty testing or of unfair genetic testing against his or her present employer until a determination as to probable cause has been made, unless the department determines that the anonymity will substantially impede the investigation.

(2) This subchapter applies to each agency of the state.

History: 1975 c. 94; 1977 c. 29, 196; 1979 c. 221, 319, 355; 1981 c. 334 s. 13; Stats. 1981 s. 111.375; 1991 a. 117; 2003 a. 33.

Cross Reference: See also ch. DWD 218, Wis. adm. code.

Administrative remedies available under the fair employment act, subch. II of ch. 111, are the exclusive remedies for violations. The act does not provide a remedy for emotional distress resulting from discriminatory firing. *Bachand v. Connecticut General Life Insurance Co.* 101 Wis. 2d 617, 305 N.W.2d 149 (Ct. App. 1981).

111.38 Investigation and study of discrimination. Except as provided under s. 111.375 (2), the department shall:

(1) Investigate the existence, character, causes and extent of discrimination in this state and the extent to which the same is susceptible of elimination.

(2) Study the best and most practicable ways of eliminating any discrimination found to exist, and formulate plans for the elimination thereof by education or other practicable means.

(3) Publish and disseminate reports embodying its findings and the results of its investigations and studies relating to discrimination and ways and means of reducing or eliminating it.

(4) Confer, cooperate with and furnish technical assistance to employers, labor unions, educational institutions and other public or private agencies in formulating programs, educational and otherwise, for the elimination of discrimination.

(5) Make specific and detailed recommendations to the interested parties as to the methods of eliminating discrimination.

(6) Transmit to the legislature from time to time recommendations for any legislation which may be deemed desirable in the light of the department's findings as to the existence, character and causes of any discrimination.

History: 1977 c. 196; 1981 c. 334 ss. 18, 25 (2); Stats. 1981 s. 111.38.

111.39 Powers and duties of department. Except as provided under s. 111.375 (2), the department shall have the following powers and duties in carrying out this subchapter:

(1) The department may receive and investigate a complaint charging discrimination, discriminatory practices, unfair honesty testing or unfair genetic testing in a particular case if the complaint is filed with the department no more than 300 days after the alleged discrimination, unfair honesty testing or unfair genetic testing occurred. The department may give publicity to its findings in the case.

(2) In carrying out this subchapter the department and its duly authorized agents are empowered to hold hearings, subpoena witnesses, take testimony and make investigations in the manner provided in s. 103.005. The department or its duly authorized agents may privilege witnesses testifying before them under the provisions of this subchapter against self-incrimination.

(3) The department shall dismiss a complaint if the person filing the complaint fails to respond within 20 days to any correspondence from the department concerning the complaint and if the correspondence is sent by certified mail to the last-known address of the person.

(4) (a) The department shall employ such examiners as are necessary to hear and decide complaints of discrimination and to assist in the effective administration of this subchapter. The examiners may make findings and orders under this section.

(b) If the department finds probable cause to believe that any discrimination has been or is being committed, that unfair honesty testing has occurred or is occurring or that unfair genetic testing has occurred or is occurring, it may endeavor to eliminate the practice by conference, conciliation or persuasion. If the department does not eliminate the discrimination, unfair honesty testing or unfair genetic testing, the department shall issue and serve a written notice of hearing, specifying the nature of the discrimination that appears to have been committed or unfair honesty testing or unfair genetic testing that has occurred, and requiring the person named, in this section called the "respondent", to answer the complaint at a hearing before an examiner. The notice shall specify a time of hearing not less than 30 days after service of the complaint, and a place of hearing within either the county of the respondent's residence or the county in which the discrimination, unfair honesty testing or unfair genetic testing appears to have occurred. The testimony at the hearing shall be recorded or taken down by a reporter appointed by the department.

(c) If, after hearing, the examiner finds that the respondent has engaged in discrimination, unfair honesty testing or unfair genetic testing, the examiner shall make written findings and order such action by the respondent as will effectuate the purpose of this sub-

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chapter, with or without back pay. If the examiner awards any payment to an employee because of a violation of s. 111.321 by an individual employed by the employer, under s. 111.32 (6), the employer of that individual is liable for the payment. If the examiner finds a respondent violated s. 111.322 (2m), the examiner shall award compensation in lieu of reinstatement if requested by all parties and may award compensation in lieu of reinstatement if requested by any party. Compensation in lieu of reinstatement for a violation of s. 111.322 (2m) may not be less than 500 times nor more than 1,000 times the hourly wage of the person discriminated against when the violation occurred. Back pay liability may not accrue from a date more than 2 years prior to the filing of a complaint with the department. Interim earnings or amounts earnable with reasonable diligence by the person discriminated against or subjected to unfair honesty testing or unfair genetic testing shall operate to reduce back pay otherwise allowable. Amounts received by the person discriminated against or subject to the unfair honesty testing or unfair genetic testing as unemployment benefits or welfare payments shall not reduce the back pay otherwise allowable, but shall be withheld from the person discriminated against or subject to unfair honesty testing or unfair genetic testing and immediately paid to the unemployment reserve fund or, in the case of a welfare payment, to the welfare agency making the payment.

(d) The department shall serve a certified copy of the findings and order on the respondent, the order to have the same force as other orders of the department and be enforced as provided in s. 103.005. Any person aggrieved by noncompliance with the order may have the order enforced specifically by suit in equity. If the examiner finds that the respondent has not engaged in discrimination, unfair honesty testing or unfair genetic testing as alleged in the complaint, the department shall serve a certified copy of the examiner's findings on the complainant together with an order dismissing the complaint.

(5) (a) Any respondent or complainant who is dissatisfied with the findings and order of the examiner may file a written petition with the department for review by the commission of the findings and order.

(b) If no petition is filed within 21 days from the date that a copy of the findings and order of the examiner is mailed to the last-known address of the respondent the findings and order shall be considered final for purposes of enforcement under sub. (4) (d). If a timely petition is filed, the commission, on review, may either affirm, reverse or modify the findings or order in whole or in part, or set aside the findings and order and remand to the department for further proceedings. Such actions shall be based on a review of the evidence submitted. If the commission is satisfied that a respondent or complainant has been prejudiced because of exceptional delay in the receipt of a copy of any findings and order it may extend the time another 21 days for filing the petition with the department.

(c) On motion, the commission may set aside, modify or change any decision made by the commission, at any time within 28 days from the date thereof if it discovers any mistake therein, or upon the grounds of newly discovered evidence. The commission may on its own motion, for reasons it deems sufficient, set aside any final decision of the commission within one year from the date thereof upon grounds of mistake or newly discovered evidence, and remand the case to the department for further proceedings.

(6) If an order issued under sub. (4) is unenforceable against any labor organization in which membership is a privilege, the employer with whom the labor organization has an all-union shop agreement shall not be held accountable under this chapter when the employer is not responsible for the discrimination, the unfair honesty testing or the unfair genetic testing.

History: 1973 c. 268; 1977 c. 29, 196; 1979 c. 221, 319, 355; 1981 c. 334 ss. 20, 25 (2); Stats. 1981 s. 111.39; 1983 a. 122; 1989 a. 228; 1991 a. 117; 1995 a. 27.

Cross Reference: See also LIRC and ch. DWD 218, Wis. adm. code.

A department order that was broader in scope than the nature of the discrimination set forth in the notice of hearing was overbroad. *Chicago, Milwaukee, St. Paul & Pacific Railroad Co. v. DILHR*, 62 Wis. 2d 392, 215 N.W.2d 443 (1972).

An employer found to have discriminated against a female employee with respect to required length of pregnancy leave and applicable employee benefits was denied adequate notice of the leave benefits issue prior to hearing as required by s. 111.36 (3) (a) [now s. 111.39 (4) (b)] and s. 227.09, 1971 stats., because: 1) the notice received by the employer merely charged "an act of discrimination due to sex;" 2) the complaint specified the discriminatory act as the refusal to rehire the employee as soon as she was able to return to work; 3) DILHR characterized the complaint as involving only length of the required leave; and 4) the discriminatory aspects of the required pregnancy leave and applicable benefits constituted separate legal issues. *Wisconsin Telephone Co. v. DILHR*, 68 Wis. 2d 345, 228 N.W.2d 649 (1975).

A court should not use ch. 227 or s. 752.35 to circumvent the policy under s. 111.36 (3m) (c) [now s. 111.39 (5) (c)] that proceedings before the commission are not to be reopened more than one year after entry of a final decision. *Chicago & North Western Railroad v. LIRC*, 91 Wis. 2d 462, 283 N.W.2d 603 (Ct. App. 1979).

A valid offer of reinstatement terminates the accrual of back pay. The commission erred in finding an employer's offer to be sufficient. Prejudgment interest should be awarded on back pay. *Anderson v. LIRC*, 111 Wis. 2d 245, 330 N.W.2d 594 (1983).

Sub. (1) is a statute of limitations. As such it is an affirmative defense that may be waived. *Milwaukee Co. v. LIRC*, 113 Wis. 2d 199, 335 N.W.2d 412 (Ct. App. 1983).

Under s. 111.36 (3) (b) [now s. 111.39 (4) (c)] the department may award attorney fees to a prevailing complainant. *Watkins v. LIRC*, 117 Wis. 2d 753, 345 N.W.2d 482 (1984).

Under sub. (1), "filing" does not occur until the complaint is received by the department, and when discrimination "occurred" in termination cases is the date of the date of notice of termination. *Hilmes v. DILHR*, 147 Wis. 2d 48, 433 N.W.2d 251 (Ct. App. 1988).

The personnel commission may not award costs and attorney fees for discovery motions filed against the state under the fair employment act. *DOT v. Personnel Commission*, 176 Wis. 2d 731, 500 N.W.2d 664 (1993).

Victims of discrimination in the work place who voluntarily quit a position must show constructive discharge to recover back pay and reinstatement. *Marten Transport, Ltd. v. DILHR*, 176 Wis. 2d 1012, 501 N.W.2d 391 (1993).

Evidence of acts occurring outside of the sub. (1) 300-day statute of limitations period may be admitted as proof of a state of mind for acts during a relevant time. *Abbyland Processing v. LIRC*, 206 Wis. 2d 309, 557 N.W.2d 419 (Ct. App. 1996), 96-1119.

What constitutes reasonable diligence under sub. (4) (c) is to be determined from all the facts of a case. *U. S. Paper Converters, Inc. v. LIRC*, 208 Wis. 2d 523, 561 N.W.2d 756 (Ct. App. 1997), 96-2055.

A proposed rule that would prohibit departmental employees from making public any information obtained under s. 111.36 [now s. 111.39] prior to the time an adjudicatory hearing takes place, if used as a blanket to prohibit persons from inspecting or copying public papers and records, would be in violation of s. 19.21. The open meetings law [now ss. 19.81 to 19.98] is discussed. 60 Atty. Gen. 43.

The department may proceed in a matter despite a settlement between the parties if the agreement does not eliminate the discrimination. The department may approve a settlement between the parties that does not provide full back pay if the agreement will eliminate the unlawful practice or act. 66 Atty. Gen. 28.

Under Title VII of the Civil Rights Act, to establish constructive discharge, the plaintiff must show that an abusive working environment became so intolerable that resignation qualified as a fitting response. Unless the plaintiff quits in reasonable response to an employer-sanctioned adverse action officially changing his or her employment status, an employer may defend against a claim by showing that: 1) it had installed an accessible and effective policy for reporting and resolving sexual harassment complaints; and 2) the plaintiff unreasonably failed to use that preventive or remedial apparatus. *Pennsylvania State Police v. Suders*, 542 U.S. 129, 159 L. Ed 2d 204, 124 S. Ct. 2342 (2004).

111.395 Judicial review. Findings and orders of the commission under this subchapter are subject to review under ch. 227. Orders of the commission shall have the same force as orders of the department under chs. 103 to 106 and may be enforced as provided in s. 103.005 (11) and (12) or specifically by a suit in equity. In any enforcement action the merits of any order of the commission are not subject to judicial review. Upon such review, or in any enforcement action, the department of justice shall represent the commission.

History: 1977 c. 29, 418; 1981 c. 334 s. 23; Stats. 1981 s. 111.395; 1995 a. 27.

SUBCHAPTER III

PUBLIC UTILITIES

111.50 Declaration of policy. It is hereby declared to be the public policy of this state that it is necessary and essential in the public interest to facilitate the prompt, peaceful and just settlement of labor disputes between public utility employers and their employees which cause or threaten to cause an interruption in the supply of an essential public utility service to the citizens of this state and to that end to encourage the making and maintaining of agreements concerning wages, hours and other conditions of

employment through collective bargaining between public utility employers and their employees, and to provide settlement procedures for labor disputes between public utility employers and their employees in cases where the collective bargaining process has reached an impasse and stalemate and as a result thereof the parties are unable to effect such settlement and which labor disputes, if not settled, are likely to cause interruption of the supply of an essential public utility service. The interruption of public utility service results in damage and injury to the public wholly apart from the effect upon the parties immediately concerned and creates an emergency justifying action which adequately protects the general welfare.

The application of the open meetings law to duties of WERC is discussed. 68 Atty. Gen. 171.

111.51 Definitions. When used in this subchapter:

(1) “Arbitrators” refers to the arbitrators provided for in this subchapter.

(2) “Collective bargaining” means collective bargaining of or similar to the kind provided for by subch. I.

(3) “Commission” means the employment relations commission.

(4) “Essential service” means furnishing water, light, heat, gas, electric power, public passenger transportation or communication, or any one or more of them, to the public in this state.

(5) (a) “Public utility employer” means any employer, other than the state or any political subdivision thereof, engaged in the business of furnishing water, light, heat, gas, electric power, public passenger transportation or communication, or any one or more of them, to the public in this state; and shall be considered to include a rural electrification cooperative association engaged in the business of furnishing any one or more of such services or utilities to its members in this state.

(b) Nothing in this subsection shall be interpreted or construed to mean that rural electrification cooperative associations are brought under or made subject to ch. 196 or other laws creating, governing or controlling public utilities, it being the intent of the legislature to specifically exclude rural electrification cooperative associations from the provisions of such laws.

(c) This subchapter does not apply to railroads nor railroad employees.

History: 1983 a. 189; 1995 a. 225.

111.52 Settlement of labor disputes through collective bargaining and arbitration. It shall be the duty of public utility employers and their employees in public utility operations to exert every reasonable effort to settle labor disputes by the making of agreements through collective bargaining between the parties, and by maintaining the agreements when made, and to prevent, if possible, the collective bargaining process from reaching a state of impasse and stalemate.

111.53 Appointment of conciliators and arbitrators. Within 30 days after July 25, 1947, the commission shall appoint a panel of persons to serve as conciliators or arbitrators under this subchapter. No person shall serve as a conciliator and arbitrator in the same dispute. Each person appointed to said panels shall be a resident of this state, possessing, in the judgment of the commission, the requisite experience and judgment to qualify such person capably and fairly to deal with labor dispute problems. All such appointments shall be made without a consideration of the political affiliations of the appointee. Each appointee shall take an oath to perform honestly and to the best of the appointee’s ability the duties of conciliator or arbitrator, as the case may be. Any appointee may be removed by the commission at any time or may resign his or her position at any time by notice in writing to the commission. Any vacancy in the panels shall be filled by the commission within 30 days after such vacancy occurs. Such conciliators and arbitrators shall be paid reasonable compensation for services and for necessary expenses, in an amount to be fixed by the commission, such compensation and expenses to be paid out of the

appropriation made to the commission by s. 20.425 upon such authorizations as the commission may prescribe.

History: 1993 a. 492.

111.54 Conciliation. If in any case of a labor dispute between a public utility employer and its employees, the collective bargaining process reaches an impasse and stalemate, with the result that the employer and the employees are unable to effect a settlement thereof, then either party to the dispute may petition the commission to appoint a conciliator from the panel, provided for by s. 111.53. Upon the filing of such petition, the commission shall consider the same, and if in its opinion, the collective bargaining process, notwithstanding good faith efforts on the part of both sides to such dispute, has reached an impasse and stalemate and such dispute, if not settled, will cause or is likely to cause the interruption of an essential service, the commission shall appoint a conciliator from the panel to attempt to effect the settlement of such dispute. The conciliator so named shall expeditiously meet with the disputing parties and shall exert every reasonable effort to effect a prompt settlement of the dispute.

111.55 Conciliator unable to effect settlement; appointment of arbitrators. If a conciliator named under s.

111.54 is unable to effect a settlement of a labor dispute between a public utility employer and its employees within a 15-day period after the conciliator’s appointment, the conciliator shall report that fact to the commission. The commission, if it believes that a continuation of the dispute will cause or is likely to cause the interruption of an essential service, shall submit to the parties the names of either 3 or 5 persons from the panel provided for in s. 111.53. Each party shall alternately strike one name from such list of persons. The person or persons left on the list shall be appointed by the commission as the arbitrator or arbitrators to hear and determine such dispute.

History: 1993 a. 492; 1995 a. 225.

111.56 Existing state of affairs to be maintained. During the pendency of proceedings under this subchapter existing wages, hours, and conditions of employment shall not be changed by action of either party without the consent of the other.

History: 1979 c. 110 s. 60 (9).

111.57 Arbitrator to hold hearings. (1) The arbitrator shall promptly hold hearings and shall have the power to administer oaths and compel the attendance of witnesses and the furnishing by the parties of such information as may be necessary to a determination of the issue or issues in dispute. Both parties to the dispute shall have the opportunity to be present at the hearing, both personally and by counsel, and to present such oral and documentary evidence as the arbitrator shall deem relevant to the issue or issues in controversy.

(2) It shall be the duty of the arbitrator to make written findings of fact, and to promulgate a written decision and order, upon the issue or issues presented in each case. In making such findings the arbitrator shall consider only the evidence in the record. When a valid contract is in effect defining the rights, duties and liabilities of the parties with respect to any matter in dispute, the arbitrators shall have power only to determine the proper interpretation and application of contract provisions which are involved.

(3) (a) If there is no contract between the parties, or if there is a contract but the parties have begun negotiations looking to a new contract or amendment of the existing contract, and wage rates or other conditions of employment under the proposed new or amended contract are in dispute, the factors, among others, to be given weight by the arbitrator in arriving at decision, shall include all of the following:

1. A comparison of wage rates or other conditions of employment of the utility in question with prevailing wage rates or other conditions of employment in the local operating area involved.

2. A comparison of wage rates or other working conditions with wage rates or other working conditions maintained for the same or similar work of workers exhibiting like or similar skills

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under the same or similar working conditions in the local operating area involved.

3. The value of the service to the consumer in the local operating area involved.

4. The overall compensation presently received by the employees, having regard not only to wages for time actually worked but also to wages for time not worked, including, without limiting the generality of the foregoing, vacation, holidays, and other excused time, and all benefits received, including insurance and pensions, medical and hospitalization benefits, and the continuity and stability of employment enjoyed by the employees.

(d) In addition to considering the factors under par. (a), if a public utility employer has more than one plant or office and some or all of the employer's plants or offices are found by the arbitrator to be located in separate areas with different characteristics, consideration shall be given to the establishment of separate wage rates or a schedule of wage rates and separate conditions of employment for plants and offices in different areas.

(e) The enumeration of factors under pars. (a) and (d) shall not be construed as precluding the arbitrator from taking into consideration other factors not confined to the local labor market area that are normally or traditionally taken into consideration in the determination of wages, hours, and working conditions through voluntary collective bargaining or arbitration between the parties.

History: 1999 a. 83; 2001 a. 103.

111.58 Standards for arbitration. The arbitrator shall not make any award which would infringe upon the right of the employer to manage the employer's business or which would interfere with the internal affairs of the union.

History: 1993 a. 492.

111.59 Filing order with clerk of circuit court; period effective; retroactivity. (1) In this section, "order" means the findings, decision and order of the arbitrator.

(2) The arbitrator shall hand down his or her order within 30 days after his or her appointment; except that the parties may agree to extend, or the commission may for good cause extend the period for not to exceed an additional 30 days. If the arbitrators do not agree, then the decision of the majority shall constitute the order in the case. The arbitrator shall furnish to each of the parties and to the public service commission a copy of the order. A certified copy thereof shall be filed in the office of the clerk of the circuit court of the county wherein the dispute arose or where the majority of the employees involved in the dispute resides.

(3) Unless the order is reversed upon a petition for review filed pursuant to s. 111.60, the order, together with any other agreements that the parties may themselves have reached, shall become binding upon, and shall control the relationship between the parties from the date on which the order is filed with the clerk of the circuit court, as provided in sub. (2). The order shall continue effective for one year from that date, but the order may be changed by mutual consent or agreement of the parties. No order of the arbitrators relating to wages or rates of pay shall be retroactive to a date before the date of the termination of any contract which may have existed between the parties, or, if there was no prior contract, to a date before the day on which the demands involved in the dispute were presented to the other party. The question whether or not new contract provisions or amendments to an existing contract are retroactive to the terminating date of a present contract, amendments or part thereof, shall be matter for collective bargaining or decision by the arbitrator.

History: 1993 a. 492; 1995 a. 225.

111.60 Judicial review of order of arbitrator. (1) Either party to the dispute may, within 15 days from the date such order is filed with the clerk of the court, petition the court for a review of such order on the ground that:

(a) The parties were not given reasonable opportunity to be heard;

(b) The arbitrator exceeded the arbitrator's powers;

(c) The order is not supported by the evidence; or

(d) The order was procured by fraud, collusion or other unlawful means.

(2) A summons to the other party to the dispute shall be issued as provided by law in other civil cases; and either party shall have the same rights to a change of venue from the county, or to a change of judge, as provided by law in other civil cases.

(3) The judge of the circuit court shall review the order solely upon the grounds for review hereinabove set forth and shall affirm, reverse, modify or remand such order to the arbitrator as to any issue or issues for such further action as the circumstances require.

History: 1993 a. 492.

111.61 Commission to establish rules. The commission shall establish appropriate rules and regulations to govern the conduct of conciliation and arbitration proceedings under this subchapter.

111.62 Strikes, work stoppages, slowdowns, lockouts, unlawful; penalty. It shall be unlawful for any group of employees of a public utility employer acting in concert to call a strike or to go out on strike, or to cause any work stoppage or slowdown which would cause an interruption of an essential service; it also shall be unlawful for any public utility employer to lock out the employer's employees when such action would cause an interruption of essential service; and it shall be unlawful for any person or persons to instigate, to induce, to conspire with, or to encourage any other person or persons to engage in any strike or lockout or slowdown or work stoppage which would cause an interruption of an essential service. Any violation of this section by any member of a group of employees acting in concert or by any employer or by any officer of an employer acting for such employer, or by any other individual, shall constitute a misdemeanor.

History: 1993 a. 492.

111.63 Enforcement. The commission shall enforce compliance with this subchapter and to that end may file an action in the circuit court of the county in which any violation of this subchapter occurs to restrain and enjoin the violation and to compel the performance of the duties imposed by this subchapter. In any action described in this section, ss. 103.505 to 103.61 do not apply.

History: 1997 a. 253.

111.64 Construction. (1) Nothing in this subchapter shall be construed to require any individual employee to render labor or service without the employee's consent, or to make illegal the quitting of the employee's labor or service or the withdrawal from the employee's place of employment unless done in concert or agreement with others. No court shall have power to issue any process to compel an individual employee to render labor or service or to remain at the employee's place of employment without the employee's consent. It is the intent of this subchapter only to forbid employees of a public utility employer to engage in a strike or to engage in a work slowdown or stoppage in concert, and to forbid a public utility employer to lock out the employer's employees, where such acts would cause an interruption of essential service.

(2) All laws and parts of laws in conflict herewith are to the extent of such conflict concerning the subject matter dealt with in this subchapter supplanted by the provisions of this subchapter.

History: 1993 a. 492.

SUBCHAPTER IV

MUNICIPAL EMPLOYMENT RELATIONS

Cross Reference: See also chs. ERC 10, 11, 12, 13, 14, 15, 16, 17, 18, and 19, Wis. adm. code.

111.70 Municipal employment. (1) DEFINITIONS. As used in this subchapter:

(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, and with respect to a requirement of the municipal employer for a municipal employee to perform law enforcement and fire fighting services under s. 61.66, except as provided in sub. (4) (m) and s. 40.81 (3) and except that a municipal employer shall not meet and confer with respect to any proposal to diminish or abridge the rights guaranteed to municipal employees under ch. 164. The duty to bargain, however, does not compel either party to agree to a proposal or require the making of a concession. Collective bargaining includes the reduction of any agreement reached to a written and signed document. 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 the wages, hours and conditions of employment of the municipal employees in a collective bargaining unit. In creating this subchapter the legislature recognizes that the municipal employer must exercise its powers and responsibilities to act for the government and good order of the jurisdiction which it serves, its commercial benefit and the health, safety and welfare of the public to assure orderly operations and functions within its jurisdiction, subject to those rights secured to municipal employees by the constitutions of this state and of the United States and by this subchapter.

(b) “Collective bargaining unit” means a unit consisting of municipal employees who are school district professional employees or of municipal employees who are not school district professional employees that is determined by the commission to be appropriate for the purpose of collective bargaining.

(c) “Commission” means the employment relations commission.

(d) “Craft employee” means a skilled journeyman craftsman, including the skilled journeyman craftsman’s apprentices and helpers, but shall not include employees not in direct line of progression in the craft.

(dm) “Economic issue” means salaries, overtime pay, sick leave, payments in lieu of sick leave usage, vacations, clothing allowances in excess of the actual cost of clothing, length-of-service credit, continuing education credit, shift premium pay, longevity pay, extra duty pay, performance bonuses, health insurance, life insurance, dental insurance, disability insurance, vision insurance, long-term care insurance, worker’s compensation and unemployment insurance, social security benefits, vacation pay, holiday pay, lead worker pay, temporary assignment pay, retirement contributions, supplemental retirement benefits, severance or other separation pay, hazardous duty pay, certification or license payment, limitations on layoffs that create a new or increased financial liability on the employer and contracting or subcontracting of work that would otherwise be performed by municipal employees in the collective bargaining unit with which there is a labor dispute.

(e) “Election” means a proceeding conducted by the commission in which the employees in a collective bargaining unit cast a secret ballot for collective bargaining representatives, or for any other purpose specified in this subchapter.

(f) “Fair-share agreement” means an agreement between a municipal employer and a labor organization under which all or any of the employees in the collective bargaining unit are required to pay their proportionate share of the cost of the collective bargaining process and contract administration measured by the amount of dues uniformly required of all members. Such an agreement shall contain a provision requiring the employer to deduct the amount of dues as certified by the labor organization from the earnings of the employees affected by said agreement and to pay the amount so deducted to the labor organization.

(fm) “Fringe benefit savings” means the amount, if any, by which 1.7% of the total compensation and fringe benefit costs for all municipal employees in a collective bargaining unit for any 12-month period covered by a proposed collective bargaining agreement exceeds the increased cost required to maintain the percentage contribution by the municipal employer to the municipal employees’ existing fringe benefit costs and to maintain all fringe benefits provided to the municipal employees, as determined under sub. (4) (cm) 8s.

(g) “Labor dispute” means any controversy concerning wages, hours and conditions of employment, or concerning the representation of persons in negotiating, maintaining, changing or seeking to arrange wages, hours and conditions of employment.

(h) “Labor organization” means any employee organization in which employees participate and which exists for the purpose, in whole or in part, of engaging in collective bargaining with municipal employers concerning grievances, labor disputes, wages, hours or conditions of employment.

(i) “Municipal employee” means any individual employed by a municipal employer other than an independent contractor, supervisor, or confidential, managerial or executive employee.

(j) “Municipal employer” means any city, county, village, town, metropolitan sewerage district, school district, long-term care district, or any other political subdivision of the state, or instrumentality of one or more political subdivisions of the state, that engages the services of an employee and includes any person acting on behalf of a municipal employer within the scope of the person’s authority, express or implied, but specifically does not include a local cultural arts district created under subch. V of ch. 229.

(k) “Person” means one or more individuals, labor organizations, associations, corporations or legal representatives.

(L) “Professional employee” means:

1. Any employee engaged in work:

a. Predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical or physical work;

b. Involving the consistent exercise of discretion and judgment in its performance;

c. Of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time;

d. Requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher education or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual or physical process; or

2. Any employee who:

a. Has completed the courses of specialized intellectual instruction and study described in subd. 1. d.;

b. Is performing related work under the supervision of a professional person to qualify to become a professional employee as defined in subd. 1.

(m) “Prohibited practice” means any practice prohibited under this subchapter.

(n) “Referendum” means a proceeding conducted by the commission in which employees in a collective bargaining unit may cast a secret ballot on the question of authorizing a labor organization and the employer to continue a fair-share agreement. Unless a majority of the eligible employees vote in favor of the fair-share agreement, it shall be deemed terminated and that portion of the collective bargaining agreement deemed null and void.

(nc) 1. “Qualified economic offer” means an offer made to a labor organization by a municipal employer that includes all of the following, except as provided in subd. 2.:

a. A proposal to maintain the percentage contribution by the municipal employer to the municipal employees’ existing fringe benefit costs as determined under sub. (4) (cm) 8s., and to main-

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tain all fringe benefits provided to the municipal employees in a collective bargaining unit, as such contributions and benefits existed on the 90th day prior to expiration of any previous collective bargaining agreement between the parties, or the 90th day prior to commencement of negotiations if there is no previous collective bargaining agreement between the parties.

b. In any collective bargaining unit in which the municipal employee positions were on August 12, 1993, assigned to salary ranges with steps that determine the levels of progression within each salary range during a 12-month period, a proposal to provide for a salary increase of at least one full step for each 12-month period covered by the proposed collective bargaining agreement, beginning with the expiration date of any previous collective bargaining agreement, for each municipal employee who is eligible for a within range salary increase, unless the increased cost of providing such a salary increase, as determined under sub. (4) (cm) 8s., exceeds 2.1% of the total compensation and fringe benefit costs for all municipal employees in the collective bargaining unit for any 12-month period covered by the proposed collective bargaining agreement plus any fringe benefit savings, or unless the increased cost required to maintain the percentage contribution by the municipal employer to the municipal employees' existing fringe benefit costs and to maintain all fringe benefits provided to the municipal employees, as determined under sub. (4) (cm) 8s., in addition to the increased cost of providing such a salary increase, exceeds 3.8% of the total compensation and fringe benefit costs for all municipal employees in the collective bargaining unit for any 12-month period covered by the proposed collective bargaining agreement, in which case the offer shall include provision for a salary increase for each such municipal employee in an amount at least equivalent to that portion of a step for each such 12-month period that can be funded after the increased cost in excess of 2.1% of the total compensation and fringe benefit costs for all municipal employees in the collective bargaining unit plus any fringe benefit savings is subtracted, or in an amount equivalent to that portion of a step for each such 12-month period that can be funded from the amount that remains, if any, after the increased cost of such maintenance exceeding 1.7% of the total compensation and fringe benefit costs for all municipal employees in the collective bargaining unit for each 12-month period is subtracted on a prorated basis, whichever is the lower amount.

c. A proposal to provide for an average salary increase for each 12-month period covered by the proposed collective bargaining agreement, beginning with the expiration date of any previous collective bargaining agreement, for the municipal employees in the collective bargaining unit at least equivalent to an average cost of 2.1% of the total compensation and fringe benefit costs for all municipal employees in the collective bargaining unit for each 12-month period covered by the proposed collective bargaining agreement plus any fringe benefit savings, beginning with the expiration date of any previous collective bargaining agreement, including that percentage required to provide for any step increase, as determined under sub. (4) (cm) 8s., unless the increased cost of providing such a salary increase, as determined under sub. (4) (cm) 8s., exceeds 2.1% of the total compensation and fringe benefit costs for all municipal employees in the collective bargaining unit for any 12-month period covered by the proposed collective bargaining agreement plus any fringe benefit savings, or unless the increased cost required to maintain the percentage contribution by the municipal employer to the municipal employees' existing fringe benefit costs and to maintain all fringe benefits provided to the municipal employees, as determined under sub. (4) (cm) 8s., in addition to the increased cost of providing such a salary increase, exceeds 3.8% of the total compensation and fringe benefit costs for all municipal employees in the collective bargaining unit for any 12-month period covered by the collective bargaining agreement, in which case the offer shall include provision for a salary increase for each such period for the municipal employees covered by the agreement at least equivalent to an average of that percentage, if any, for each such period of the pro-

rated portion of 2.1% of the total compensation and fringe benefit costs for all municipal employees in the collective bargaining unit plus any fringe benefit savings that remains, if any, after the increased cost of such maintenance exceeding 1.7% of the total compensation and fringe benefit costs for all municipal employees in the collective bargaining unit for each 12-month period and the cost of a salary increase of at least one full step for each municipal employee in the collective bargaining unit who is eligible for a within range salary increase for each 12-month period is subtracted from that total cost.

2. "Qualified economic offer" may include a proposal to provide for an average salary decrease for any 12-month period covered by a proposed collective bargaining agreement, beginning with the expiration date of any previous collective bargaining agreement, for the municipal employees covered by the agreement, in an amount equivalent to the average percentage increased cost of maintenance of the percentage contribution by the municipal employer to the municipal employees' existing fringe benefit costs, as determined under sub. (4) (cm) 8s., and the average percentage increased cost of maintenance of all fringe benefits provided to the municipal employees represented by a labor organization, as such costs and benefits existed on the 90th day prior to commencement of negotiations, exceeding 3.8% of the total compensation and fringe benefit costs for all municipal employees in the collective bargaining unit required for maintenance of those contributions and benefits for that 12-month period if the increased cost of maintenance of those costs and benefits exceeds 3.8% of the total compensation and fringe benefit costs for all municipal employees in the collective bargaining unit for that 12-month period.

(ne) "School district professional employee" means a municipal employee who is a professional employee and who is employed to perform services for a school district.

(nm) "Strike" includes any strike or other concerted stoppage of work by municipal employees, and any concerted slowdown or other concerted interruption of operations or services by municipal employees, or any concerted refusal to work or perform their usual duties as municipal employees, for the purpose of enforcing demands upon a municipal employer. Such conduct by municipal employees which is not authorized or condoned by a labor organization constitutes a "strike", but does not subject such labor organization to the penalties under this subchapter. This paragraph does not apply to collective bargaining units composed of municipal employees who are engaged in law enforcement or fire fighting functions.

(o) "Supervisor" means:

1. As to other than municipal and county fire fighters, any individual who has authority, in the interest of the municipal employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline other employees, or to adjust their grievances or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

2. As to fire fighters employed by municipalities with more than one fire station, the term "supervisor" shall include all officers above the rank of the highest ranking officer at each single station. In municipalities where there is but one fire station, the term "supervisor" shall include only the chief and the officer in rank immediately below the chief. No other fire fighter shall be included under the term "supervisor" for the purposes of this subchapter.

(2) RIGHTS OF MUNICIPAL EMPLOYEES. Municipal employees shall 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, and such employees shall have the right to refrain from any and all such activities except that employees

may be required to pay dues in the manner provided in a fair–share agreement. Such fair–share agreement shall be subject to the right of the municipal employer or a labor organization to petition the commission to conduct a referendum. Such petition must be supported by proof that at least 30% of the employees in the collective bargaining unit desire that the fair–share agreement be terminated. Upon so finding, the commission shall conduct a referendum. If the continuation of the agreement is not supported by at least the majority of the eligible employees, it shall be deemed terminated. The commission shall declare any fair–share agreement suspended upon such conditions and for such time as the commission decides whenever it finds that the labor organization involved has refused on the basis of race, color, sexual orientation, creed or sex to receive as a member any employee of the municipal employer in the bargaining unit involved, and such agreement shall be made subject to this duty of the commission. Any of the parties to such agreement or any municipal employee covered thereby may come before the commission, as provided in s. 111.07, and ask the performance of this duty.

Cross Reference: See also ch. ERC 15, Wis. adm. code.

(3) PROHIBITED PRACTICES AND THEIR PREVENTION. (a) It is a prohibited practice for a municipal employer individually or in concert with others:

1. To interfere with, restrain or coerce municipal employees in the exercise of their rights guaranteed in sub. (2).

2. To initiate, create, dominate or interfere with the formation or administration of any labor organization or contribute financial support to it, but the municipal employer is not prohibited from reimbursing its employees at their prevailing wage rate for the time spent conferring with the employees, officers or agents.

3. To encourage or discourage a membership in any labor organization by discrimination in regard to hiring, tenure, or other terms or conditions of employment; but the prohibition shall not apply to a fair–share agreement.

4. To refuse to bargain collectively with a representative of a majority of its employees in an appropriate collective bargaining unit. Such refusal shall include action by the employer to issue or seek to obtain contracts, including those provided for by statute, with individuals in the collective bargaining unit while collective bargaining, mediation or fact–finding concerning the terms and conditions of a new collective bargaining agreement is in progress, unless such individual contracts contain express language providing that the contract is subject to amendment by a subsequent collective bargaining agreement. Where the employer has a good faith doubt as to whether a labor organization claiming the support of a majority of its employees in an appropriate bargaining unit does in fact have that support, it may file with the commission a petition requesting an election to that claim. An employer shall not be deemed to have refused to bargain until an election has been held and the results thereof certified to the employer by the commission. The violation shall include, though not be limited thereby, to the refusal to execute a collective bargaining agreement previously agreed upon. The term of any collective bargaining agreement shall not exceed 3 years.

5. To violate any collective bargaining agreement previously agreed upon by the parties with respect to wages, hours and conditions of employment affecting municipal employees, including an agreement to arbitrate questions arising as to the meaning or application of the terms of a collective bargaining agreement or to accept the terms of such arbitration award, where previously the parties have agreed to accept such award as final and binding upon them.

6. To deduct labor organization dues from an employee’s or supervisor’s earnings, unless the municipal employer has been presented with an individual order therefor, signed by the municipal employee personally, and terminable by at least the end of any year of its life or earlier by the municipal employee giving at least 30 days’ written notice of such termination to the municipal

employer and to the representative organization, except where there is a fair–share agreement in effect.

7. To refuse or otherwise fail to implement an arbitration decision lawfully made under sub. (4) (cm).

(b) It is a prohibited practice for a municipal employee, individually or in concert with others:

1. To coerce or intimidate a municipal employee in the enjoyment of the employee’s legal rights, including those guaranteed in sub. (2).

2. To coerce, intimidate or induce any officer or agent of a municipal employer to interfere with any of its employees in the enjoyment of their legal rights, including those guaranteed in sub. (2), or to engage in any practice with regard to its employees which would constitute a prohibited practice if undertaken by the officer or agent on the officer’s or agent’s own initiative.

3. To refuse to bargain collectively with the duly authorized officer or agent of a municipal employer, provided it is the recognized or certified exclusive collective bargaining representative of employees in an appropriate collective bargaining unit. Such refusal to bargain shall include, but not be limited to, the refusal to execute a collective bargaining agreement previously agreed upon.

4. To violate any collective bargaining agreement previously agreed upon by the parties with respect to wages, hours and conditions of employment affecting municipal employees, including an agreement to arbitrate questions arising as to the meaning or application of the terms of a collective bargaining agreement or to accept the terms of such arbitration award, where previously the parties have agreed to accept such awards as final and binding upon them.

5. To coerce or intimidate an independent contractor, supervisor, confidential, managerial or executive employee, officer or agent of the municipal employer, to induce the person to become a member of the labor organization of which employees are members.

6. To refuse or otherwise fail to implement an arbitration decision lawfully made under sub. (4) (cm).

(c) It is a prohibited practice for any person to do or cause to be done on behalf of or in the interest of municipal employers or municipal employees, or in connection with or to influence the outcome of any controversy as to employment relations, any act prohibited by par. (a) or (b).

Cross Reference: See also ch. ERC 12, Wis. adm. code.

(4) POWERS OF THE COMMISSION. The commission shall be governed by the following provisions relating to bargaining in municipal employment in addition to other powers and duties provided in this subchapter:

(a) *Prevention of prohibited practices.* Section 111.07 shall govern procedure in all cases involving prohibited practices under this subchapter except that wherever the term “unfair labor practices” appears in s. 111.07 the term “prohibited practices” shall be substituted.

(b) *Failure to bargain.* Whenever a dispute arises between a municipal employer and a union of its employees concerning the duty to bargain on any subject, the dispute shall be resolved by the commission on petition for a declaratory ruling. The decision of the commission shall be issued within 15 days of submission and shall have the effect of an order issued under s. 111.07. The filing of a petition under this paragraph shall not prevent the inclusion of the same allegations in a complaint involving prohibited practices in which it is alleged that the failure to bargain on the subjects of the declaratory ruling is part of a series of acts or pattern of conduct prohibited by this subchapter.

Cross Reference: See also chs. ERC 18 and 19, Wis. adm. code.

(c) *Methods for peaceful settlement of disputes; law enforcement and fire fighting personnel.* 1. ‘Mediation.’ The commission may function as a mediator in labor disputes. Such mediation

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may be carried on by a person designated to act by the commission upon request of one or both of the parties or upon initiation of the commission. The function of the mediator shall be to encourage voluntary settlement by the parties but no mediator shall have the power of compulsion.

Cross Reference: See also ch. ERC 13, Wis. adm. code.

2. ‘Arbitration.’ a. Parties to a dispute pertaining to the meaning or application of the terms of a written collective bargaining agreement may agree in writing to have the commission or any other appropriate agency serve as arbitrator or may designate any other competent, impartial and disinterested person to so serve.

b. A collective bargaining agreement may, notwithstanding s. 62.13 (5), contain dispute resolution procedures, including arbitration, that address the suspension, reduction in rank, suspension and reduction in rank, or removal of such personnel. If the procedures include arbitration, the arbitration hearing shall be public and the decision of the arbitrator shall be issued within 180 days of the conclusion of the hearing.

Cross Reference: See also ch. ERC 16, Wis. adm. code.

3. ‘Fact-finding.’ If a dispute has not been settled after a reasonable period of negotiation and after the settlement procedures, if any, established by the parties have been exhausted, and the parties are deadlocked with respect to any dispute between them arising in the collective bargaining process, either party, or the parties jointly, may petition the commission, in writing, to initiate fact-finding, as provided hereafter, and to make recommendations to resolve the deadlock.

a. Upon receipt of a petition to initiate fact-finding, the commission shall make an investigation with or without a formal hearing, to determine whether a deadlock in fact exists. After its investigation the commission shall certify the results thereof. If the commission decides that fact-finding should be initiated, it shall appoint a qualified, disinterested person or 3-member panel, when jointly requested by the parties, to function as a fact finder.

b. The fact finder may establish dates and place of hearings which shall be where feasible, and shall conduct the hearings pursuant to rules established by the commission. Upon request, the commission shall issue subpoenas for hearings conducted by the fact finder. The fact finder may administer oaths. Upon completion of the hearing, the fact finder shall make written findings of fact and recommendations for solution of the dispute and shall cause the same to be served on the parties and the commission. Cost of fact-finding proceedings shall be divided equally between the parties. At the time the fact finder submits a statement of his or her costs to the parties, the fact finder shall submit a copy thereof to the commission at its Madison office.

c. Nothing herein shall be construed as prohibiting any fact finder from endeavoring to mediate the dispute, in which the fact finder is involved, at any time prior to the issuance of the fact finder’s recommendations.

d. Within 30 days of the receipt of the fact finder’s recommendations, or within the time period mutually agreed upon by the parties, each party shall advise the other, in writing as to its acceptance or rejection, in whole or in part, of the fact finder’s recommendations and, at the same time, transmit a copy of such notice to the commission at its Madison office.

Cross Reference: See also chs. ERC 14 and 40, Wis. adm. code.

4. ‘Applicability.’ This paragraph applies only to municipal employees who are engaged in law enforcement or fire fighting functions.

(cm) *Methods for peaceful settlement of disputes; other personnel.* 1. ‘Notice of commencement of contract negotiations.’ For the purpose of advising the commission of the commencement of contract negotiations, whenever either party requests the other to reopen negotiations under a binding collective bargaining agreement, or the parties otherwise commence negotiations if no such agreement exists, the party requesting negotiations shall immediately notify the commission in writing. Upon failure of the requesting party to provide such notice, the other party may so notify the commission. The notice shall specify the expiration

date of the existing collective bargaining agreement, if any, and shall set forth any additional information the commission may require on a form provided by the commission.

2. ‘Presentation of initial proposals; open meetings.’ The meetings between parties to a collective bargaining agreement or proposed collective bargaining agreement under this subchapter which are held for the purpose of presenting initial bargaining proposals, along with supporting rationale, shall be open to the public. Each party shall submit its initial bargaining proposals to the other party in writing. Failure to comply with this subdivision is not cause to invalidate a collective bargaining agreement under this subchapter.

3. ‘Mediation.’ The commission or its designee shall function as mediator in labor disputes involving municipal employees upon request of one or both of the parties, or upon initiation of the commission. The function of the mediator shall be to encourage voluntary settlement by the parties. No mediator has the power of compulsion.

Cross Reference: See also ch. ERC 13, Wis. adm. code.

4. ‘Grievance arbitration.’ Parties to a dispute pertaining to the meaning or application of the terms of a written collective bargaining agreement may agree in writing to have the commission or any other appropriate agency serve as arbitrator or may designate any other competent, impartial and disinterested person to so serve.

Cross Reference: See also ch. ERC 16, Wis. adm. code.

5. ‘Voluntary impasse resolution procedures.’ In addition to the other impasse resolution procedures provided in this paragraph, a municipal employer and labor organization may at any time, as a permissive subject of bargaining, agree in writing to a dispute settlement procedure, including authorization for a strike by municipal employees or binding interest arbitration, which is acceptable to the parties for resolving an impasse over terms of any collective bargaining agreement under this subchapter. A copy of such agreement shall be filed by the parties with the commission. If the parties agree to any form of binding interest arbitration, the arbitrator shall give weight to the factors enumerated under subs. 7., 7g. and 7r.

5s. ‘Issues subject to arbitration.’ In a collective bargaining unit consisting of school district professional employees, the municipal employer or the labor organization may petition the commission to determine whether the municipal employer has submitted a qualified economic offer. The commission shall appoint an investigator for that purpose. If the investigator finds that the municipal employer has submitted a qualified economic offer, the investigator shall determine whether a deadlock exists between the parties with respect to all economic issues. If the municipal employer submits a qualified economic offer applicable to any period beginning on or after July 1, 1993, no economic issues are subject to interest arbitration under subd. 6. for that period, except that only the impact of contracting out or subcontracting work that would otherwise be performed by municipal employees in the collective bargaining unit is subject to interest arbitration under subd. 6. In such a collective bargaining unit, economic issues concerning the wages, hours or conditions of employment of the school district professional employees in the unit for any period prior to July 1, 1993, are subject to interest arbitration under subd. 6. for that period. In such a collective bargaining unit, noneconomic issues applicable to any period on or after July 1, 1993, are subject to interest arbitration after the parties have reached agreement and stipulate to agreement on all economic issues concerning the wages, hours or conditions of employment of the school district professional employees in the unit for that period. In such a collective bargaining unit, if the commission’s investigator finds that the municipal employer has submitted a qualified economic offer and that a deadlock exists between the parties with respect to all economic issues, the municipal employer may implement the qualified economic offer. On the 90th day prior to expiration of the period included within the qualified economic offer, if no agreement exists on that day, the

parties are deemed to have stipulated to the inclusion in a new or revised collective bargaining agreement of all provisions of any predecessor collective bargaining agreement concerning economic issues, or of all provisions of any existing collective bargaining agreement concerning economic issues if the parties have reopened negotiations under an existing agreement, as modified by the terms of the qualified economic offer and as otherwise modified by the parties. In such a collective bargaining unit, on and after that 90th day, a municipal employer that refuses to bargain collectively with respect to the terms of that stipulation, applicable to the 90-day period prior to expiration of the period included within the qualified economic offer, does not violate sub. (3) (a) 4. Any such unilateral implementation after August 11, 1993, during the 90-day period prior to expiration of the period included within a qualified economic offer, operates as a full, final and complete settlement of all economic issues between the parties for the period included within the qualified economic offer. The failure of a labor organization to recognize the validity of such a lawful qualified economic offer does not affect the obligation of the municipal employer to submit economic issues to arbitration under subd. 6.

6. 'Interest arbitration.' a. If in any collective bargaining unit a dispute relating to one or more issues, qualifying for interest arbitration under subd. 5s. in a collective bargaining unit to which subd. 5s. applies, has not been settled after a reasonable period of negotiation and after mediation by the commission under subd. 3. and other settlement procedures, if any, established by the parties have been exhausted, and the parties are deadlocked with respect to any dispute between them over wages, hours and conditions of employment to be included in a new collective bargaining agreement, either party, or the parties jointly, may petition the commission, in writing, to initiate compulsory, final and binding arbitration, as provided in this paragraph. At the time the petition is filed, the petitioning party shall submit in writing to the other party and the commission its preliminary final offer containing its latest proposals on all issues in dispute. Within 14 calendar days after the date of that submission, the other party shall submit in writing its preliminary final offer on all disputed issues to the petitioning party and the commission. If a petition is filed jointly, both parties shall exchange their preliminary final offers in writing and submit copies to the commission at the time the petition is filed.

am. Upon receipt of a petition to initiate arbitration, the commission shall make an investigation, with or without a formal hearing, to determine whether arbitration should be commenced. If in determining whether an impasse exists the commission finds that the procedures set forth in this paragraph have not been complied with and such compliance would tend to result in a settlement, it may order such compliance before ordering arbitration. The validity of any arbitration award or collective bargaining agreement shall not be affected by failure to comply with such procedures. Prior to the close of the investigation each party shall submit in writing to the commission its single final offer containing its final proposals on all issues in dispute that are subject to interest arbitration under this subdivision or under subd. 5s. in collective bargaining units to which subd. 5s. applies. If a party fails to submit a single, ultimate final offer, the commission shall close the investigation based on the last written position of the party. The municipal employer may not submit a qualified economic offer under subd. 5s. after the close of the investigation. Such final offers may include only mandatory subjects of bargaining, except that a permissive subject of bargaining may be included by a party if the other party does not object and shall then be treated as a mandatory subject. No later than such time, the parties shall also submit to the commission a stipulation, in writing, with respect to all matters which are agreed upon for inclusion in the new or amended collective bargaining agreement. The commission, after receiving a report from its investigator and determining that arbitration should be commenced, shall issue an order requiring arbitration and immediately submit to the parties a list of 7 arbitrators. Upon receipt of such list, the parties shall alternately strike names

until a single name is left, who shall be appointed as arbitrator. The petitioning party shall notify the commission in writing of the identity of the arbitrator selected. Upon receipt of such notice, the commission shall formally appoint the arbitrator and submit to him or her the final offers of the parties. The final offers shall be considered public documents and shall be available from the commission. In lieu of a single arbitrator and upon request of both parties, the commission shall appoint a tripartite arbitration panel consisting of one member selected by each of the parties and a neutral person designated by the commission who shall serve as a chairperson. An arbitration panel has the same powers and duties as provided in this section for any other appointed arbitrator, and all arbitration decisions by such panel shall be determined by majority vote. In lieu of selection of the arbitrator by the parties and upon request of both parties, the commission shall establish a procedure for randomly selecting names of arbitrators. Under the procedure, the commission shall submit a list of 7 arbitrators to the parties. Each party shall strike one name from the list. From the remaining 5 names, the commission shall randomly appoint an arbitrator. Unless both parties to an arbitration proceeding otherwise agree in writing, every individual whose name is submitted by the commission for appointment as an arbitrator shall be a resident of this state at the time of submission and every individual who is designated as an arbitration panel chairperson shall be a resident of this state at the time of designation.

b. The arbitrator shall, within 10 days of his or her appointment, establish a date and place for the conduct of the arbitration hearing. Upon petition of at least 5 citizens of the jurisdiction served by the municipal employer, filed within 10 days after the date on which the arbitrator is appointed, the arbitrator shall hold a public hearing in the jurisdiction for the purpose of providing the opportunity to both parties to explain or present supporting arguments for their positions and to members of the public to offer their comments and suggestions. The final offers of the parties, as transmitted by the commission to the arbitrator, shall serve as the basis for continued negotiations, if any, between the parties with respect to the issues in dispute. At any time prior to the arbitration hearing, either party, with the consent of the other party, may modify its final offer in writing.

c. Prior to the arbitration hearing, either party may, within a time limit established by the arbitrator, withdraw its final offer and mutually agreed upon modifications thereof, if any, and shall immediately provide written notice of such withdrawal to the other party, the arbitrator and the commission. If both parties withdraw their final offers and mutually agreed upon modifications, the labor organization, after giving 10 days' written advance notice to the municipal employer and the commission, may strike. Unless both parties withdraw their final offers and mutually agreed upon modifications, the final offer of neither party shall be deemed withdrawn and the arbitrator shall proceed to resolve the dispute by final and binding arbitration as provided in this paragraph.

d. Before issuing his or her arbitration decision, the arbitrator shall, on his or her own motion or at the request of either party, conduct a meeting open to the public for the purpose of providing the opportunity to both parties to explain or present supporting arguments for their complete offer on all matters to be covered by the proposed agreement. The arbitrator shall adopt without further modification the final offer of one of the parties on all disputed issues submitted under subd. 6. am., except those items that the commission determines not to be mandatory subjects of bargaining and those items which have not been treated as mandatory subjects by the parties, and including any prior modifications of such offer mutually agreed upon by the parties under subd. 6. b., which decision shall be final and binding on both parties and shall be incorporated into a written collective bargaining agreement. The arbitrator shall serve a copy of his or her decision on both parties and the commission.

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e. Arbitration proceedings shall not be interrupted or terminated by reason of any prohibited practice complaint filed by either party at any time.

f. The costs of arbitration shall be divided equally between the parties. The arbitrator shall submit a statement of his or her costs to both parties and to the commission.

g. If a question arises as to whether any proposal made in negotiations by either party is a mandatory, permissive or prohibited subject of bargaining, the commission shall determine the issue pursuant to par. (b). If either party to the dispute petitions the commission for a declaratory ruling under par. (b), the proceedings under subd. 6. c. and d. shall be delayed until the commission renders a decision in the matter, but not during any appeal of the commission order. The arbitrator's award shall be made in accordance with the commission's ruling, subject to automatic amendment by any subsequent court reversal thereof.

7. 'Factor given greatest weight.' In making any decision under the arbitration procedures authorized by this paragraph, the arbitrator or arbitration panel shall consider and shall give the greatest weight to any state law or directive lawfully issued by a state legislative or administrative officer, body or agency which places limitations on expenditures that may be made or revenues that may be collected by a municipal employer. The arbitrator or arbitration panel shall give an accounting of the consideration of this factor in the arbitrator's or panel's decision.

7g. 'Factor given greater weight.' In making any decision under the arbitration procedures authorized by this paragraph, the arbitrator or arbitration panel shall consider and shall give greater weight to economic conditions in the jurisdiction of the municipal employer than to any of the factors specified in subd. 7r.

7r. 'Other factors considered.' In making any decision under the arbitration procedures authorized by this paragraph, the arbitrator or arbitration panel shall also give weight to the following factors:

- a. The lawful authority of the municipal employer.
- b. Stipulations of the parties.
- c. The interests and welfare of the public and the financial ability of the unit of government to meet the costs of any proposed settlement.
- d. Comparison of wages, hours and conditions of employment of the municipal employees involved in the arbitration proceedings with the wages, hours and conditions of employment of other employees performing similar services.
- e. Comparison of the wages, hours and conditions of employment of the municipal employees involved in the arbitration proceedings with the wages, hours and conditions of employment of other employees generally in public employment in the same community and in comparable communities.
- f. Comparison of the wages, hours and conditions of employment of the municipal employees involved in the arbitration proceedings with the wages, hours and conditions of employment of other employees in private employment in the same community and in comparable communities.
- g. The average consumer prices for goods and services, commonly known as the cost of living.
- h. The overall compensation presently received by the municipal employees, including direct wage compensation, vacation, holidays and excused time, insurance and pensions, medical and hospitalization benefits, the continuity and stability of employment, and all other benefits received.
- i. Changes in any of the foregoing circumstances during the pendency of the arbitration proceedings.
- j. Such other factors, not confined to the foregoing, which are normally or traditionally taken into consideration in the determination of wages, hours and conditions of employment through voluntary collective bargaining, mediation, fact-finding, arbitration or otherwise between the parties, in the public service or in private employment.

8. 'Rule making.' The commission shall adopt rules for the conduct of all arbitration proceedings under subd. 6., including, but not limited to, rules for:

- a. The appointment of tripartite arbitration panels when requested by the parties.
- b. The expeditious rendering of arbitration decisions, such as waivers of briefs and transcripts.
- c. The removal of individuals who have repeatedly failed to issue timely decisions from the commission's list of qualified arbitrators.
- d. Proceedings for the enforcement of arbitration decisions.

8m. 'Term of agreement; reopening of negotiations.' a. Except for the initial collective bargaining agreement between the parties and except as the parties otherwise agree, every collective bargaining agreement covering municipal employees subject to this paragraph other than school district professional employees shall be for a term of 2 years. No collective bargaining agreement for any collective bargaining unit consisting of municipal employees subject to this paragraph other than school district professional employees shall be for a term exceeding 3 years.

b. Except for the initial collective bargaining agreement between the parties, every collective bargaining agreement covering municipal employees who are school district professional employees shall be for a term of 2 years expiring on June 30 of the odd-numbered year. An initial collective bargaining agreement between parties covering municipal employees who are school district professional employees shall be for a term ending on June 30 following the effective date of the agreement, if that date is in an odd-numbered year, or otherwise on June 30 of the following year.

c. No arbitration award may contain a provision for reopening of negotiations during the term of a collective bargaining agreement, unless both parties agree to such a provision. The requirement for agreement by both parties does not apply to a provision for reopening of negotiations with respect to any portion of an agreement that is declared invalid by a court or administrative agency or rendered invalid by the enactment of a law or promulgation of a federal regulation.

8p. 'Professional school employee salaries.' In every collective bargaining unit covering municipal employees who are school district professional employees in which the municipal employee positions were, on July 29, 1995, assigned to salary ranges with steps that determine the levels of progression within each salary range, unless the parties otherwise agree, no new or modified collective bargaining agreement may contain any provision altering the salary range structure, the number of steps or the requirements for attaining a step or assignment of a position to a salary range, except that if the cost of funding the attainment of a step is greater than the amount required for the municipal employer to submit a qualified economic offer, the agreement may contain a provision altering the requirements for attaining a step to no greater extent than is required for the municipal employer to submit a qualified economic offer at the minimum possible cost to the municipal employer.

8s. 'Forms for determining costs.' The commission shall prescribe forms for calculating the total increased cost to the municipal employer of compensation and fringe benefits provided to school district professional employees. The cost shall be determined based upon the total cost of compensation and fringe benefits provided to school district professional employees who are represented by a labor organization on the 90th day before expiration of any previous collective bargaining agreement between the parties, or who were so represented if the effective date is retroactive, or the 90th day prior to commencement of negotiations if there is no previous collective bargaining agreement between the parties, without regard to any change in the number, rank or qualifications of the school district professional employees. For purposes of such determinations, any cost increase that is incurred on any day other than the beginning of the 12-month period com-

mencing with the effective date of the agreement or any succeeding 12-month period commencing on the anniversary of that effective date shall be calculated as if the cost increase were incurred as of the beginning of the 12-month period beginning on the effective date or anniversary of the effective date in which the cost increase is incurred. In each collective bargaining unit to which subd. 5s. applies, the municipal employer shall transmit to the commission and the labor organization a completed form for calculating the total increased cost to the municipal employer of compensation and fringe benefits provided to the school district professional employees covered by the agreement as soon as possible after the effective date of the agreement.

9. 'Application.' a. Chapter 788 does not apply to arbitration proceedings under this paragraph.

b. This paragraph does not apply to labor disputes involving municipal employees who are engaged in law enforcement or fire fighting functions.

Cross Reference: See also chs. ERC 32 and 33, Wis. adm. code.

(cn) *Term of professional school employee agreements.* Except for the initial collective bargaining agreement between the parties, every collective bargaining agreement covering municipal employees who are school district professional employees shall be for a term of 2 years expiring on June 30 of the odd-numbered year. An initial collective bargaining agreement between parties covering municipal employees who are school district professional employees shall be for a term ending on June 30 following the effective date of the agreement, if that date is in an odd-numbered year, or otherwise on June 30 of the following year.

(d) *Selection of representatives and determination of appropriate units for collective bargaining.* 1. A representative chosen for the purposes of collective bargaining by a majority of the municipal employees voting in a collective bargaining unit shall be the exclusive representative of all employees in the unit for the purpose of collective bargaining. Any individual employee, or any minority group of employees in any collective bargaining unit, shall have the right to present grievances to the municipal employer in person or through representatives of their own choosing, and the municipal employer shall confer with said employee in relation thereto, if the majority representative has been afforded the opportunity to be present at the conferences. Any adjustment resulting from these conferences shall not be inconsistent with the conditions of employment established by the majority representative and the municipal employer.

2. a. The commission shall determine the appropriate collective bargaining unit for the purpose of collective bargaining and shall whenever possible, unless otherwise required under this subchapter, avoid fragmentation by maintaining as few collective bargaining units as practicable in keeping with the size of the total municipal work force. In making such a determination, the commission may decide whether, in a particular case, the municipal employees in the same or several departments, divisions, institutions, crafts, professions or other occupational groupings constitute a collective bargaining unit. Before making its determination, the commission may provide an opportunity for the municipal employees concerned to determine, by secret ballot, whether or not they desire to be established as a separate collective bargaining unit. The commission shall not decide, however, that any group of municipal employees constitutes an appropriate collective bargaining unit if the group includes both municipal employees who are school district professional employees and municipal employees who are not school district professional employees. The commission shall not decide that any other group of municipal employees constitutes an appropriate collective bargaining unit if the group includes both professional employees and nonprofessional employees, unless a majority of the professional employees vote for inclusion in the unit. The commission shall not decide that any group of municipal employees constitutes an appropriate collective bargaining unit if the group includes both craft employees and noncraft employees unless a majority of the craft employees vote for inclusion in the unit. The commission shall place the

professional employees who are assigned to perform any services at a charter school, as defined in s. 115.001 (1), in a separate collective bargaining unit from a unit that includes any other professional employees whenever at least 30% of those professional employees request an election to be held to determine that issue and a majority of the professional employees at the charter school who cast votes in the election decide to be represented in a separate collective bargaining unit. Any vote taken under this subsection shall be by secret ballot.

b. Any election held under subd. 2. a. shall be conducted by secret ballot taken in such a manner as to show separately the wishes of the employees voting as to the unit they prefer.

c. A collective bargaining unit shall be subject to termination or modification as provided in this subchapter.

d. Nothing in this section shall be construed as prohibiting 2 or more collective bargaining units from bargaining collectively through the same representative.

3. Whenever, in a particular case, a question arises concerning representation or appropriate unit, calling for a vote, the commission shall certify the results in writing to the municipal employer and the labor organization involved and to any other interested parties. Any ballot used in a representation proceeding shall include the names of all persons having an interest in representing or the results. The ballot should be so designed as to permit a vote against representation by any candidate named on the ballot. The findings of the commission, on which a certification is based, shall be conclusive unless reviewed as provided by s. 111.07 (8).

4. Whenever the result of an election conducted pursuant to subd. 3. is inconclusive, the commission, on request of any party to the proceeding, may conduct a runoff election. Any such request must be made within 30 days from the date of certification. In a runoff election the commission may drop from the ballot the name of the candidate or choice receiving the least number of votes.

5. Questions as to representation may be raised by petition of the municipal employer or any municipal employee or any representative thereof. Where it appears by the petition that a situation exists requiring prompt action so as to prevent or terminate an emergency, the commission shall act upon the petition forthwith. The fact that an election has been held shall not prevent the holding of another election among the same group of employees, if it appears to the commission that sufficient reason for another election exists.

Cross Reference: See also ch. ERC 11, Wis. adm. code.

(jm) *Binding arbitration, first class cities.* This paragraph shall apply only to members of a police department employed by cities of the 1st class. If the representative of members of the police department, as determined under par. (d), and representatives of the city reach an impasse on the terms of the agreement, the dispute shall be resolved in the following manner:

1. Either the representative of the members of the police department or the representative of the city may petition the commission for appointment of an arbitrator to determine the terms of the agreement relating to the wages, hours and working conditions of the members of the police department and other matters subject to arbitration under subd. 4.

2. The commission shall conduct a hearing on the petition, and upon a determination that the parties have reached an impasse on matters relating to wages, hours and conditions of employment or other matters subject to arbitration under subd. 4. on which there is no mutual agreement, the commission shall appoint an arbitrator to determine those terms of the agreement on which there is no mutual agreement. The commission may appoint any person it deems qualified, except that the arbitrator may not be a resident of the city which is party to the dispute.

3. Within 14 days of the arbitrator's appointment, the arbitrator shall conduct a hearing to determine the terms of the agreement relating to wages, hours and working conditions and other matters subject to arbitration under subd. 4. The arbitrator may subpoena

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witnesses at the request of either party or on the arbitrator's own motion. All testimony shall be given under oath. The arbitrator shall take judicial notice of all economic and social data presented by the parties which is relevant to the wages, hours and working conditions of the police department members or other matters subject to arbitration under subd. 4. The other party shall have an opportunity to examine and respond to such data. The rules of evidence applicable to a contested case, as defined in s. 227.01 (3), shall apply to the hearing before the arbitrator.

4. In determining those terms of the agreement on which there is no mutual agreement and on which the parties have negotiated to impasse, as determined by the commission, the arbitrator, without restriction because of enumeration, shall have the power to:

a. Set all items of compensation, including base wages, longevity pay, health, accident and disability insurance programs, pension programs, including amount of pension, relative contributions, and all eligibility conditions, the terms and conditions of overtime compensation and compensatory time, vacation pay, and vacation eligibility, sickness pay amounts, and sickness pay eligibility, life insurance, uniform allowances and any other similar item of compensation.

b. Determine regular hours of work, what activities shall constitute overtime work and all standards and criteria for the assignment and scheduling of work.

c. Determine a seniority system, and how seniority shall affect wages, hours and working conditions.

d. Determine a promotional program.

e. Determine criteria for merit increases in compensation and the procedures for applying such criteria.

f. Determine all work rules affecting the members of the police department, except those work rules created by law.

g. Establish any educational program for the members of the police department deemed appropriate, together with a mechanism for financing the program.

h. Establish a system for resolving all disputes under the agreement, including final and binding 3rd-party arbitration.

i. Determine the duration of the agreement and the members of the department to which it shall apply.

j. Establish a system for administration of the collective bargaining agreement between the parties by an employee of the police department who is not directly accountable to the chief of police or the board of fire and police commissioners in matters relating to that administration.

k. Establish a system for conducting interrogations of members of the police department that is limited to the hours between 7 a.m. and 5 p.m. on working days, as defined in s. 227.01 (14), if the interrogations could lead to disciplinary action, demotion, or dismissal, but one that does not apply if the interrogation is part of a criminal investigation.

5. In determining the proper compensation to be received by members of the department under subd. 4., the arbitrator shall utilize:

a. The most recently published U.S. bureau of labor statistics "Standards of Living Budgets for Urban Families, Moderate and Higher Level", as a guideline to determine the compensation necessary for members to enjoy a standard of living commensurate with their needs, abilities and responsibilities; and

b. Increases in the cost of living as measured by the average annual increases in the U.S. bureau of labor statistics "Consumer Price Index" since the last adjustment in compensation for those members.

6. In determining all noncompensatory working conditions and relationships under subd. 4., including methods for resolving disputes under the labor agreement, the arbitrator shall consider the patterns of employee-employer relationships generally prevailing between technical and professional employees and their employers in both the private and public sectors of the economy where those relationships have been established by a labor agree-

ment between the representative of those employees and their employer.

7. All subjects described in subd. 4. shall be negotiable between the representative of the members of the police department and the city.

8. Within 30 days after the close of the hearing, the arbitrator shall issue a written decision determining the terms of the agreement between the parties which were not the subject of mutual agreement and on which the parties negotiated in good faith to impasse, as determined by the commission, and which were the subject of the hearing under this paragraph. The arbitrator shall state reasons for each determination. Each proposition or fact accepted by the arbitrator must be established by a preponderance of the evidence.

9. Subject to subs. 11. and 12., within 14 days of the arbitrator's decision, the parties shall reduce to writing the total agreement composed of those items mutually agreed to between the parties and the determinations of the arbitrator. The document shall be signed by the arbitrator and the parties, unless either party seeks judicial review of the determination pursuant to subd. 11.

10. All costs of the arbitration hearing, including the arbitrator's fee, shall be borne equally by the parties.

11. Within 60 days of the arbitrator's decision, either party may petition the circuit court for Milwaukee County to set aside or enforce the arbitrator's decision. If the decision was within the subject matter jurisdiction of the arbitrator as set forth in subd. 4., the court must enforce the decision, unless the court finds by a clear preponderance of the evidence that the decision was procured by fraud, bribery or collusion. The court may not review the sufficiency of the evidence supporting the arbitrator's determination of the terms of the agreement.

12. Within 30 days of a final court judgment, the parties shall reduce the agreement to writing and with the arbitrator execute the agreement pursuant to subd. 9.

13. Subsequent to the filing of a petition before the commission pursuant to subd. 1. and prior to the execution of an agreement pursuant to subd. 9., neither party may unilaterally alter any term of the wages, hours and working conditions of the members of the police department or any other matter subject to arbitration under subd. 4.

Cross Reference: See also ch. ERC 31, Wis. adm. code.

(L) *Strikes prohibited.* Except as authorized under par. (cm) 5. and 6. c., nothing contained in this subchapter constitutes a grant of the right to strike by any municipal employee or labor organization, and such strikes are hereby expressly prohibited. Paragraph (cm) does not authorize any strike after an injunction has been issued against such strike under sub. (7m).

(m) *Prohibited subjects of bargaining; school district municipal employers.* In a school district, the municipal employer is prohibited from bargaining collectively with respect to:

1. Reassignment of municipal employees who perform services for a board of school directors under ch. 119, with or without regard to seniority, as a result of a decision of the board of school directors to contract with an individual or group to operate a school as a charter school, as defined in s. 115.001 (1), or to convert a school to a charter school, or the impact of any such reassignment on the wages, hours or conditions of employment of the municipal employees who perform those services.

2. Reassignment of municipal employees who perform services for a board of school directors, with or without regard to seniority, as a result of the decision of the board to close or reopen a school under s. 119.18 (23), or the impact of any such reassignment on the wages, hours or conditions of employment of the municipal employees who perform those services.

4. Any decision of a board of school directors to contract with a school or agency to provide educational programs under s. 119.235, or the impact of any such decision on the wages, hours

or conditions of employment of the municipal employees who perform services for the board.

6. Solicitation of sealed bids for the provision of group health care benefits for school district professional employees as provided in s. 120.12 (24).

(mc) *Prohibited subjects of bargaining.* The municipal employer is prohibited from bargaining collectively with respect to:

1. The prohibition of access to arbitration as an alternative to the procedures in s. 62.13 (5).
2. The reduction of standards in s. 62.13 (5) (em) 1. to 7.
3. The payment of compensation in a way that is inconsistent with s. 62.13 (5) (h).

(5) **PROCEDURES.** Municipal employers, jointly or individually, may employ a qualified person to discharge the duties of labor negotiator and to represent such municipal employers, jointly or individually, in conferences and negotiations under this section. In cities of the 1st, 2nd or 3rd class any member of the city council, including the mayor, who resigns therefrom may, during the term for which the member is elected, be eligible to the position of labor negotiator under this subsection, which position during said term has been created by or the selection to which is vested in such city council, and s. 66.0501 (2) shall be deemed inapplicable thereto.

(6) **DECLARATION OF POLICY.** The public policy of the state as to labor disputes arising in municipal employment is to encourage voluntary settlement through the procedures of collective bargaining. Accordingly, it is in the public interest that municipal employees so desiring be given an opportunity to bargain collectively with the municipal employer through a labor organization or other representative of the employees' own choice. If such procedures fail, the parties should have available to them a fair, speedy, effective and, above all, peaceful procedure for settlement as provided in this subchapter.

(7) **PENALTY FOR STRIKER.** (a) Whoever violates sub. (4) (L) after an injunction against such a strike has been issued shall be fined \$10. After the injunction has been issued, any employee who is absent from work because of purported illness shall be presumed to be on strike unless the illness is verified by a written report from a physician to the employer. Each day of continued violation constitutes a separate offense. The court shall order that any fine imposed under this subsection be paid by means of a salary deduction at a rate to be determined by the court.

(b) This subsection applies only to municipal employees who are engaged in law enforcement or fire fighting functions.

(7m) **INJUNCTIVE RELIEF; PENALTIES; CIVIL LIABILITY.** (a) *Injunction; prohibited strike.* At any time after the commencement of a strike which is prohibited under sub. (4) (L), the municipal employer or any citizen directly affected by such strike may petition the circuit court for an injunction to immediately terminate the strike. If the court determines that the strike is prohibited under sub. (4) (L), it shall issue an order immediately enjoining the strike, and in addition shall impose the penalties provided in par. (c).

(b) *Injunction; threat to public health or safety.* At any time after a labor organization gives advance notice of a strike under sub. (4) (cm) which is expressly authorized under sub. (4) (cm), the municipal employer or any citizen directly affected by such strike may petition the circuit court to enjoin the strike. If the court finds that the strike poses an imminent threat to the public health or safety, the court shall, within 48 hours after the receipt of the petition but after notice to the parties and after holding a hearing, issue an order immediately enjoining the strike, and in addition shall order the parties to submit a new final offer on all disputed issues to the commission for final and binding arbitration as provided in sub. (4) (cm). The commission, upon receipt of the final offers of the parties, shall transmit them to the arbitrator or a successor designated by the commission. The arbitrator shall omit

preliminary steps and shall commence immediately to arbitrate the dispute.

(c) *Penalties.* 1. 'Labor organizations.' a. Any labor organization which violates sub. (4) (L) shall be penalized by the suspension of any dues check-off agreement and fair-share agreement between the municipal employer and such labor organization for a period of one year. At the end of the period of suspension, any such agreement shall be reinstated unless the labor organization is no longer authorized to represent the municipal employees covered by such dues check-off or fair-share agreement or the agreement is no longer in effect.

b. Any labor organization which violates sub. (4) (L) after an injunction has been issued shall be required to forfeit \$2 per member per day, but not more than \$10,000 per day. Each day of continued violation constitutes a separate offense.

2. 'Individuals.' Any individual who violates sub. (4) (L) after an injunction against a strike has been issued shall be fined \$10. Each day of continued violation constitutes a separate offense. After the injunction has been issued, any municipal employee who is absent from work because of purported illness is presumed to be on strike unless the illness is verified by a written report from a physician to the municipal employer. The court shall order that any fine imposed under this subdivision be paid by means of a salary deduction at a rate to be determined by the court.

3. 'Strike in violation of award.' Any person who authorizes or otherwise participates in a strike after the issuance of any final and binding arbitration award or decision under sub. (4) (cm) and prior to the end of the term of the agreement which the award or decision amends or creates shall forfeit not less than \$15. Each day of continued violation constitutes a separate offense.

4. 'Contempt of court.' The penalties provided in this paragraph do not preclude the imposition by the court of any penalty for contempt provided by law.

(d) *Compensation forfeited.* No municipal employee may be paid wages or salaries by the municipal employer for the period during which he or she engages in any strike.

(e) *Civil liability.* Any party refusing to include an arbitration award or decision under sub. (4) (cm) in a written collective bargaining agreement or failing to implement the award or decision, unless good cause is shown, shall be liable for attorney fees, interest on delayed monetary benefits, and other costs incurred in any action by the nonoffending party to enforce the award or decision.

(f) *Application.* This subsection does not apply to strikes involving municipal employees who are engaged in law enforcement or fire fighting functions.

(8) **SUPERVISORY UNITS.** (a) This section, except subs. (1) (nm), (4) (cm) and (7m), applies to law enforcement supervisors employed by a 1st class city. This section, except subs. (1) (nm), (4) (cm) and (jm) and (7m), applies to law enforcement supervisors employed by a county having a population of 500,000 or more. For purposes of such application, the term "municipal employee" includes such a supervisor.

(b) This subchapter does not preclude law enforcement supervisors employed by municipal employers other than 1st class cities and counties having a population of 500,000 or more or fire fighting supervisors from organizing in separate units of supervisors for the purpose of negotiating with their municipal employers.

Cross Reference: See also ch. ERC 11, Wis. adm. code.

(c) The commission shall by rule establish procedures for certification of such units of supervisors and the levels of supervisors to be included in the units. Supervisors may not be members of the same bargaining unit of which their subordinates are members. The commission may require that the representative of any supervisory unit shall be an organization that is a separate local entity from the representative of the nonsupervisory municipal employees, but such requirement does not prevent affiliation by a supervisory representative with the same parent state or national orga-

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nization as the nonsupervisory municipal employee representative.

(9) POWERS OF CHIEF OF POLICE. Nothing in s. 62.50 grants the chief of police in cities of the 1st class any authority which diminishes or in any other manner affects the rights of municipal employees who are members of a police department employed by a city of the 1st class under this section or under any collective bargaining agreement which is entered into between a city of the 1st class and a labor organization representing the members of its police department.

History: 1971 c. 124, 246, 247, 307, 336; 1973 c. 64, 65; 1977 c. 178, 186, 272, 442, 449; 1979 c. 32 s. 92 (15); 1981 c. 20, 112, 187; 1983 a. 189, 192; 1985 a. 29; 1985 a. 182 s. 57; 1985 a. 318; 1987 a. 153, 399; 1991 a. 136; 1993 a. 16, 429, 492; 1995 a. 27, 225, 289; 1997 a. 27, 237; 1999 a. 9, 65; 1999 a. 150 s. 672; 2001 a. 16; 2005 a. 253; 2007 a. 20.

A collective bargaining provision that releases only teacher members of a majority union from in-service days to attend, with pay, a state convention of the union is discriminatory, but the school board can deny compensation to minority union members who attend a regional convention of their union, if the board does so in good faith. *Ashland Board of Education v. WERC*, 52 Wis. 2d 625, 191 N.W.2d 242 (1971).

A school district may discharge teachers who engage in a strike. There is a meaningful distinction between governmental employees and nongovernmental employees. The strike ban imposed on public employees is based upon a valid classification and the legislation creating it is not an unconstitutional denial of equal protection. *Hortonville Education Association v. Joint School District No. 1*, 66 Wis. 2d 469, 225 N.W.2d 658. Reversed on other grounds. 426 U.S. 482, 49L. Ed 2d 1 (1976).

A letter sent to city employees by the mayor and council members during a representation election campaign that coercively and erroneously warned employees that all fringe benefits would cease if union representation were accepted was a prohibited labor practice under sub. (3) (a) 1.; “benign generalities” contained elsewhere in the letter were insufficient to overcome its specific threats. A 2nd letter, which predicted a relative loss in benefits and freedom of action, cited the cost of union dues, and emphasized wage rates and fringe benefits, also constituted a prohibited labor practice. An employer may not camouflage threats under the guise of predictions, and the statements in context were intended as threats and accepted as such by the employees. *WERC v. City of Evansville*, 69 Wis. 2d 140, 230 N.W.2d 688 (1975).

Although employees seeking to enforce the terms of a collective bargaining agreement are bound by the remedial provisions therein, the plaintiffs were not required to exhaust contractual remedies prior to filing their action in court. *Browne v. Milwaukee Board of School Directors*, 69 Wis. 2d 169, 230 N.W.2d 704 (1975).

The board of education of a city school district was a proper party and had the capacity to maintain an action to enjoin a strike by district teachers. *Wisconsin Rapids Joint School District No. 1 v. Wisconsin Rapids Education Association*, 70 Wis. 2d 292, 234 N.W.2d 289 (1975).

The fine under sub. (7) applicable to employees violating an injunction against a strike by municipal employees, to be paid by salary deduction, is inapplicable to a labor association composed of such employees. *Kenosha Unified School District No. 1 v. Kenosha Education Association*, 70 Wis. 2d 325, 234 N.W.2d 311 (1975).

Managerial employees are those who participate in the formulation, determination, and implementation of management policy or possess effective authority to commit the employer’s resources. *City of Milwaukee v. WERC*, 71 Wis. 2d 709, 239 N.W.2d 63 (1976).

A WERC order under sub. (4) (d) 2. a. determining the voting unit and directing that an election be held was not reviewable under ch. 227. *City of West Allis v. WERC*, 72 Wis. 2d 268, 240 N.W.2d 416 (1976).

Mandatory subjects of collective bargaining under sub. (1) (d) [now sub. (1) (a)] between teachers’ associations and school boards are: 1) those primarily related to wages, hours, and conditions of employment; and 2) the impact of the establishment of educational policies affecting wages, hours, and conditions of employment. *Beloit Education Association v. WERC*, 73 Wis. 2d 43, 242 N.W.2d 231 (1976).

A grievance was arbitrable under the “discharge and nonrenewal” clause of a bargaining agreement when the contract offered by the board was signed by the teacher after deleting the title “probationary contract” and the board did not accept this counteroffer or offer the teacher a 2nd contract. *Jefferson Jt. School District No. 10 v. Jefferson Education Association*, 78 Wis. 2d 94, 253 N.W.2d 536 (1977).

Collective bargaining is required regarding decisions primarily related to wages, hours, and conditions of employment, but not is not required for decisions primarily related to the formulation or management of public policy. *Unified School District No. 1 of Racine County v. WERC*, 81 Wis. 2d 89, 259 N.W.2d 724 (1977).

A labor contract under s. 111.70 may limit the scope of the police chief’s discretion under s. 62.13 (4) (a). *Glendale Professional Policemen’s Association v. Glendale*, 83 Wis. 2d 90, 264 N.W.2d 594 (1978).

In applying the doctrine of primary jurisdiction, the trial court did not abuse its discretion by transferring a case involving a prohibited practice under sub. (3) (a) 1. to the commission after all constitutional issues had been resolved. *Browne v. Milwaukee Board of School Directors*, 83 Wis. 2d 316, 265 N.W.2d 559 (1978).

Under sub. (3) (a) 6., a municipal employer may deduct union dues from the paycheck of a minority union member. *Milwaukee Federation of Teachers, Local No. 252 v. WERC*, 83 Wis. 2d 588, 266 N.W.2d 314 (1978).

The layoff of public employees due to budget cuts was not a mandatory subject of bargaining. *City of Brookfield v. WERC*, 87 Wis. 2d 819, 275 N.W.2d 723 (1979).

The question of primary jurisdiction arises only when an agency and a court have jurisdiction over the subject of a matter of dispute. The decision for the court is whether it should exercise its discretion to retain the case. *McEwen v. Pierce County*, 90 Wis. 2d 256, 279 N.W.2d 469 (1979).

Under sub. (3) (a) 6., the fair-share provision of a successor collective bargaining agreement was applied retroactively to a hiatus between agreements. *Berns v. WERC*, 94 Wis. 2d 214, 287 N.W.2d 829 (Ct. App. 1979); affirmed. 99 Wis. 2d 252, 299 N.W.2d 248 (1980).

Arbitrators appointed pursuant to the grievance procedure contained in a collective bargaining agreement properly held a *de novo* factual hearing to determine whether just cause existed for the school board to terminate a teacher. *Fortney v. School District of West Salem*, 108 Wis. 2d 167, 321 N.W.2d 255 (1982).

Mediation-arbitration under s. 111.70 (4) (cm) is a constitutional delegation of legislative authority. *Milwaukee County v. District Council 48*, 109 Wis. 2d 14, 325 N.W.2d 350 (Ct. App. 1982).

A contract provision stating that a teacher speaking or writing as a citizen shall be free from administrative and school censorship and discipline was primarily related to employment conditions, and was a mandatory subject of bargaining. *Blackhawk Teachers’ Federation v. WERC*, 109 Wis. 2d 415, 326 N.W.2d 247 (Ct. App. 1982).

Sub. (4) (jm) is constitutional. *Brennan v. WERC*, 112 Wis. 2d 38, 331 N.W.2d 667 (Ct. App. 1983).

WERC did not abuse its discretion by finding no community of interest between professional teachers and student interns. Unit fragmentation under d. 111.70 (4) (d) 2. a. is discussed. *Arrowhead United Teachers v. WERC*, 116 Wis. 2d 580, 342 N.W.2d 709 (1984).

A school board’s anti-nepotism policy was a mandatory subject of bargaining. *School District of Drummond v. WERC*, 121 Wis. 2d 126, 358 N.W.2d 285 (1984).

Because school supervisors are not subject to this section, a fair-share deduction from the paychecks of nonunion supervisors was not authorized. *Perry v. Milwaukee Board of School Directors*, 131 Wis. 2d 380, 388 N.W.2d 638 (Ct. App. 1986).

A provision in a union’s constitution requiring a local to forfeit its treasury upon a vote of disaffiliation was void as against public policy. *Wells v. Waukesha Marine Bank*, 135 Wis. 2d 519, 401 N.W.2d 18 (Ct. App. 1986).

The defense of “good cause” under s. 111.70 (7m) (e) is available to an employer that fails to implement an arbitration award of retroactive wages within 31 days pursuant to s. 109.03 (1). *Employees Local 1901 v. Brown County*, 146 Wis. 2d 728, 432 N.W.2d 571 (1988).

The 3-year limitation under sub. (3) (a) 4. on the term of agreements does not limit the scope of deferred compensation proposals. *City of Brookfield v. WERC*, 153 Wis. 2d 238, 450 N.W.2d 495 (Ct. App. 1989).

The interest arbitration provisions in sub. (4) (cm) 6. apply during the negotiation of wages, hours, and conditions of employment for positions newly accreted to a bargaining unit. *Wausau School District Maintenance Union v. WERC*, 157 Wis. 2d 315, 459 N.W.2d 861 (Ct. App. 1990).

A county’s decision to sell a health care center was not a mandatory subject of bargaining. *Local 2236, AFSCME, AFL-CIO v. WERC*, 157 Wis. 2d 708, 461 N.W.2d 286 (Ct. App. 1990).

Whether a subject is a mandatory, permissive, or prohibited subject of bargaining, including finding a particular contract provision constitutionally prohibited, is for the determination of WERC. *Milwaukee Board of School Directors v. WERC*, 163 Wis. 2d 739, 472 N.W.2d 553 (Ct. App. 1991).

“Arbitration decision” in sub. (3) (a) 7. encompasses all items incorporated into a resultant collective bargaining agreement, including those not in dispute. The failure to implement an “arbitration decision” arises when an employer fails to incorporate specific terms of the award into the resultant agreement or to give retroactive effect to economic items in a retroactive contract. *Sauk County v. WERC*, 165 Wis. 2d 406, 477 N.W.2d 267 (1991).

Whether payments under an arbitration award are due from the entry of the award depends on the overall circumstances. *Kenosha Fire Fighters v. City of Kenosha*, 168 Wis. 2d 658, 484 N.W.2d 152 (1992).

A sheriff’s assignment of a deputy to an undercover drug investigation falls within the constitutionally protected powers of the sheriff and could not be limited by a collective bargaining agreement. *Manitowoc Co. v. Local 986B*, 168 Wis. 2d 819, 484 N.W.2d 534 (1992). See also *Washington County v. Deputy Sheriff’s Association*, 192 Wis. 2d 728, 531 N.W.2d 468 (Ct. App. 1995).

The constitutional requirements of a union’s collection of agency fees under a fair-share agreement include: 1) an adequate explanation of the basis of the fee; 2) a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker; and 3) an escrow for the amounts reasonably in dispute. *Browne v. WERC*, 169 Wis. 2d 79, 485 N.W.2d 376 (1992).

To be chargeable to nonunion, public sector employees under a fair share agreement, union activities must: 1) be germane to collective bargaining activity; 2) be justified by the government’s vital policy interest in labor peace and avoiding “free riders;” and 3) not significantly add to the burdening of free speech that is inherent in an agency or union shop. *Browne v. WERC*, 169 Wis. 2d 79, 485 N.W.2d 376 (1992).

No bright-line test exists for determining whether a register in probate, probate register, or probate commissioner is subject to s. 111.70 and eligible for union membership. Factors to be considered include budget and administrative duties assigned to that person. *Manitowoc County v. Local 986A*, 170 Wis. 2d 692, 489 N.W.2d 722 (Ct. App. 1992). See also *Iowa County v. Iowa County Courthouse*, 166 Wis. 2d 614, 480 N.W.2d 499 (1992).

When a collective bargaining agreement could cover a dispute and there is no provision that specifically excludes the dispute, the agreement’s grievance and arbitration provisions apply. *Racine Education Association v. Racine Unified School District*, 176 Wis. 2d 273, N.W.2d (Ct. App. 1993).

Making pension contributions for jailers equal in amount to those for its protective occupation participants (POPS) under s. 40.02 (48) does not require reclassification of the jailers as POPS, is allowed under s. 40.05 (2) (g) 1., and is a mandatory subject of bargaining under sub. (1) (a). *County of LaCrosse v. WERC*, 180 Wis. 2d 100, 508 N.W.2d 9 (1993).

A school board’s unilateral change in rules governing the use of sick leave after the expiration of a collective bargaining agreement changed the status quo and was impermissible. A “zipper” clause in the expired agreement providing that the agreement superceded all previous agreements did not prevent the examination of past practice in determining the status quo. *St. Croix Falls School District v. WERC*, 186 Wis. 2d 671, 522 N.W.2d 507 (Ct. App. 1994).

The status quo to be maintained during negotiations is dynamic. When history shows changes in compensation upon employee attainment of specified experience levels, the employer is required to continue the practice during negotiations. *Jefferson County v. WERC*, 187 Wis. 2d 646, 523 N.W.2d 172 (Ct. App. 1994).

A proposal to make the suspension of a police officer subject to arbitration, rather than review under s. 62.13, is not a mandatory subject of bargaining and is in irreconcilable conflict with s. 62.13. *City of Janesville v. WERC*, 193 Wis. 2d 492, 535 N.W.2d 34 (Ct. App. 1995).

The sheriff's power to appoint, dismiss, or demote a deputy is not constitutionally protected and may be limited by a collective bargaining agreement not in conflict with the statutes. *Heitkemper v. Wirsing*, 194 Wis. 2d 182, 533 N.W.2d 770 (1995). See also *Brown County Sheriff Dept. v. Employees Association*, 194 Wis. 2d 266, 533 N.W.2d 766 (1995).

The phrase "consisting of school district professional employees" in sub. (4) (cm) 5s. means consisting exclusively of school district professional employees. *Madison Teachers, Inc. v. Madison Metropolitan School District*, 197 Wis. 2d 731, 541 N.W.2d 786 (Ct. App. 1995), 93–3323.

Sub. (4) (d) deals with the rights of an employee or minority group of employees to participate in collective bargaining, and not with the rights of an employee to proceed directly against an employer for a breach of the collective bargaining agreement. *Gray v. Marinette County*, 200 Wis. 2d 426, 546 N.W.2d 553 (Ct. App. 1996), 95–1906.

A school board's implementation of year-round school programs was primarily related to educational policy, not hours and wages, and was not a mandatory subject of bargaining. *Racine Education Association v. WERC*, 214 Wis. 2d 353, 571 N.W.2d 887 (Ct. App. 1997), 97–0306.

The negotiation for wages, hours, and terms of employment for a position created during the term of a collective bargaining agreement, which will apply to the new position, is a new agreement for that position within sub. (4) (cm) 6., subject to arbitration. *Local 60 v. WERC*, 217 Wis. 2d 602, 579 N.W.2d 59 (Ct. App. 1997), 97–1877.

If an employee agrees to waive any federal statutory right, that is an agreement between the employee and the employer and is not a collective bargaining agreement. As such, it is not a violation of a collective bargaining agreement for an employee to refuse to sign such a waiver in a settlement, and WERC cannot order the employee to sign the agreement. *Thomsen v. WERC*, 2000 WI App 90, 234 Wis. 2d 494, 610 N.W.2d 155, 99–1730.

The existence of a qualified economic offer (QEO) under sub. (1) (nc) is fundamentally distinct from the QEO's implementation and numerical calculations. A QEO is made when an employer submits an offer to maintain fringe benefits and minimum salary increases consistent with sub. (1) (nc). Once a QEO is made, any issues concerning the calculation of fringe benefit costs and salaries may still be addressed but will not render a QEO invalid. *Racine Education Association v. WERC*, 2000 WI App 149, 238 Wis. 2d 33, 616 N.W.2d 504, 99–0765.

Subs. (1) (nc) 1. b. and c. and (4) (cm) 8p. are in conflict. The use of "at least" in sub. (1) (nc) 1. b. and c. sets a minimum threshold for salary increases while sub. (4) (cm) 8p. states that any modification in a salary schedule can only occur at a minimum cost to the employer. Sub. (4) (cm) 8p. prevails as the latest expression of legislative will. *Racine Education Association v. WERC*, 2000 WI App 149, 238 Wis. 2d 33, 616 N.W.2d 504, 99–0765.

The 2-year contract requirement in sub. (4) (cn) did not prohibit the consideration of successive 2-year contracts in a single vote. *Hoffman v. WERC*, 2001 WI App 87, 243 Wis. 2d 1, 625 N.W.2d 906, 00–1368.

WERC's determinations that teacher preparation periods are not a mandatory subject of bargaining and that permissive subjects of bargaining are not to be included within "fringe benefits" under sub. (1) (nc) are adopted. As such, a change in preparation time did not result in the school district failing to meet the requirements for a qualified economic offer and subject the matter to arbitration under sub. (4m) (cm) 5s. *Dodgeland Education Association v. WERC*, 2002 WI 22, 250 Wis. 2d 357, 639 N.W.2d 733, 00–0277.

It was reasonable to conclude that an employee of a school district with access to computer files containing information regarding collective bargaining but who had never been directed to open or read those files and who was trusted not to read those files was not a confidential employee under sub. (1) (i). *Mineral Point Unified School District v. WERC*, 2002 WI App 48, 251 Wis. 2d 325, 641 N.W.2d 701, 01–1247.

It was reasonable for WERC to conclude: 1) sub. (4) (d) 2. a. addresses all determinations of appropriate bargaining units and is not limited to the initial certification of a bargaining unit; and 2) if craft employees in an existing craft and non-craft bargaining unit file a severance petition and if the craft employees at issue have never voted among themselves for inclusion in the mixed unit, the craft employees are entitled to a separate vote on the issue. *City of Marshfield v. WERC*, 2002 WI App 68, 252 Wis. 2d 656, 643 N.W.2d 122, 01–0855.

Under the facts of the case, WERC did not err in ruling that the school board could not bar teachers posting in certain areas of their classrooms signs that stated "Fair Contract NOW!" and "Do the Right Thing!" produced by the teacher's union in support of its contact negotiations with the school as such action constituted "lawful concerted activity" within the protection of sub. (2) and not political advocacy. *Milwaukee Board of School Directors v. Wisconsin Employment Relations Commission*, 2008 WI App 125, ___ Wis. 2d ___, ___ N.W.2d ___, 07–0840.

A municipal employer may agree to pay the employees' portion of retirement contributions to the state fund. 59 Atty. Gen. 186.

A county ordinance implementing a collective bargaining agreement providing for the payment to county employees, upon their leaving government employment, compensation for accumulated sick leave earned both before and after the effective date of the ordinance is valid. 59 Atty. Gen. 209.

School boards have authority to contract with teachers to provide for an increment or sum in addition to the regular salary in return for the teacher choosing an early retirement option. 63 Atty. Gen. 16.

The attorney general declines to render an opinion on what is subject to collective bargaining in view of a preferred legislative intent that, under sub. (4) (b), such questions be resolved by WERC through the declaratory judgment procedure, subject to judicial review. 63 Atty. Gen. 590.

The Milwaukee school board is authorized by s. 111.70 to contract for a retirement system supplementary to the one under subch. II of ch. 42, 1979 stats. 67 Atty. Gen. 153.

The application of the open meetings law to the duties of WERC is discussed. 68 Atty. Gen. 171.

A board of education may not prevent a nonunion teacher from speaking on a bargaining issue at an open meeting. *Madison School District, v. WERC*, 429 U.S. 167 (1976).

A teacher's alleged *de facto* tenure is not a protected property interest. Liberty interests are discussed. *Stevens v. Jt. School Dist. No. 1, Rusk County 429 F. Supp.* 477 (1977).

WERC and trial courts have concurrent jurisdiction over alleged violations of this section. *Aleman v. Milwaukee County*, 35 F. Supp. 2d 710 (1999).

The crisis of the 70's—who will manage municipal government? Mulcahy, 54 MLR 315.

Municipal personnel problems and solutions. Mulcahy, 56 MLR 529.

Right to strike and compulsory arbitration: panacea or placebo? Coughlin, Rader, 58 MLR 205.

Wisconsin's municipal labor law: A need for change. Mulcahy and Ruesch, 64 MLR 103 (1980).

Final offer interest arbitration in Wisconsin: Legislative history, participant attitudes, future trends. Clune and Hyde, 64 MLR 455 (1981).

Public sector collective bargaining. Anderson, 1973 WLR 986.

Impartial decisionmaker—authority of school board to dismiss striking teachers. 1977 WLR 521.

Final offer mediation—arbitration and the limited right to strike: Wisconsin's new municipal employment bargaining law. 1979 WLR 167.

Union security in the public sector: Defining political expenditures related to collective bargaining. 1980 WLR 134.

Fact-finding in public employment disputes. Marshall, 43 WBB, No. 6.

111.71 General provisions. (1) The commission may adopt reasonable rules relative to the exercise of its powers and authority and proper rules to govern its proceedings and to regulate the conduct of all elections and hearings. The commission shall, upon request, provide a transcript of a proceeding to any party to the proceeding for a fee, established by rule, by the commission at a uniform rate per page. All transcript fees shall be credited to the appropriation account under s. 20.425 (1) (i).

(2) The commission shall assess and collect a filing fee for filing a complaint alleging that a prohibited practice has been committed under s. 111.70 (3). The commission shall assess and collect a filing fee for filing a request that the commission act as an arbitrator to resolve a dispute involving the interpretation or application of a collective bargaining agreement under s. 111.70 (4) (c) 2. or (cm) 4. The commission shall assess and collect a filing fee for filing a request that the commission initiate fact-finding under s. 111.70 (4) (c) 3. The commission shall assess and collect a filing fee for filing a request that the commission act as a mediator under s. 111.70 (4) (c) 1. or (cm) 3. The commission shall assess and collect a filing fee for filing a request that the commission initiate compulsory, final and binding arbitration under s. 111.70 (4) (cm) 6. or (jm) or 111.77 (3). For the performance of commission actions under ss. 111.70 (4) (c) 1., 2. and 3., (cm) 3., 4. and 6. and (jm) and 111.77 (3), the commission shall require that the parties to the dispute equally share in the payment of the fee and, for the performance of commission actions involving a complaint alleging that a prohibited practice has been committed under s. 111.70 (3), the commission shall require that the party filing the complaint pay the entire fee. If any party has paid a filing fee requesting the commission to act as a mediator for a labor dispute and the parties do not enter into a voluntary settlement of the dispute, the commission may not subsequently assess or collect a filing fee to initiate fact-finding or arbitration to resolve the same labor dispute. If any request for the performance of commission actions concerns issues arising as a result of more than one unrelated event or occurrence, each such separate event or occurrence shall be treated as a separate request. The commission shall promulgate rules establishing a schedule of filing fees to be paid under this subsection. Fees required to be paid under this subsection shall be paid at the time of filing the complaint or the request for fact-finding, mediation or arbitration. A complaint or request for fact-finding, mediation or arbitration is not filed until the date such fee or fees are paid, except that the failure of the respondent party to pay the filing fee for having the commission initiate compulsory, final and binding arbitration under s. 111.70 (4) (cm) 6. or (jm) or 111.77 (3) shall not prohibit the commission from initiating such arbitration. The commission may initiate collection proceedings against the respondent party for the payment of the

111.71 EMPLOYMENT RELATIONS

filing fee. Fees collected under this subsection shall be credited to the appropriation account under s. 20.425 (1) (i).

(4) The commission shall collect on a systematic basis information on the operation of the arbitration law under s. 111.70 (4) (cm). The commission shall report on the operation of the law to the legislature on an annual basis. The report shall be submitted to the chief clerk of each house of the legislature for distribution to the legislature under s. 13.172 (2).

(5) The commission shall, on a regular basis, provide training programs to prepare individuals for service as arbitrators or arbitration panel members under s. 111.70 (4) (cm). The commission shall engage in appropriate promotional and recruitment efforts to encourage participation in the training programs by individuals throughout the state, including at least 10 residents of each congressional district. The commission may also provide training programs to individuals and organizations on other aspects of collective bargaining, including on areas of management and labor cooperation directly or indirectly affecting collective bargaining. The commission may charge a reasonable fee for participation in the programs.

Cross Reference: See also ch. ERC 50, Wis. adm. code.

(6) This subchapter may be cited as “Municipal Employment Relations Act”.

History: 1971 c. 124; 1973 c. 90; 1981 c. 20; 1983 a. 27; 1985 a. 318; 1991 a. 39; 1993 a. 16; 1995 a. 27, 216; 2003 a. 33.

111.77 Settlement of disputes in collective bargaining units composed of law enforcement personnel and fire fighters.

In fire departments and city and county law enforcement agencies municipal employers and employees have the duty to bargain collectively in good faith including the duty to refrain from strikes or lockouts and to comply with the procedures set forth below:

(1) If a contract is in effect, the duty to bargain collectively means that a party to such contract shall not terminate or modify such contract unless the party desiring such termination or modification:

(a) Serves written notice upon the other party to the contract of the proposed termination or modification 180 days prior to the expiration date thereof or, if the contract contains no expiration date, 60 days prior to the time it is proposed to make such termination or modification. This paragraph shall not apply to negotiations initiated or occurring in 1971.

(b) Offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications.

(c) Notifies the commission within 90 days after the notice provided for in par. (a) of the existence of a dispute.

(d) Continues in full force and effect without resorting to strike or lockout all terms and conditions of the existing contract for a period of 60 days after such notice is given or until the expiration date of the contract, whichever occurs later.

(e) Participates in mediation sessions by the commission or its representatives if specifically requested to do so by the commission.

(f) Participates in procedures, including binding arbitration, agreed to between the parties.

(2) If there has never been a contract in effect, the union shall notify the commission within 30 days after the first demand upon the employer of the existence of a dispute provided no agreement is reached by that time, and in such case sub. (1) (b), (e) and (f) shall apply.

(3) Where the parties have no procedures for disposition of a dispute and an impasse has been reached, either party may petition the commission to initiate compulsory, final and binding arbitration of the dispute. If in determining whether an impasse has been reached the commission finds that any of the procedures set forth in sub. (1) have not been complied with and that compliance

would tend to result in a settlement, it may require such compliance as a prerequisite to ordering arbitration. If after such procedures have been complied with or the commission has determined that compliance would not be productive of a settlement and the commission determines that an impasse has been reached, it shall issue an order requiring arbitration. The commission shall in connection with the order for arbitration submit a panel of 5 arbitrators from which the parties may alternately strike names until a single name is left, who shall be appointed by the commission as arbitrator, whose expenses shall be shared equally between the parties. Arbitration proceedings under this section shall not be interrupted or terminated by reason of any prohibited practice charge filed by either party at any time.

(4) There shall be 2 alternative forms of arbitration:

(a) *Form 1.* The arbitrator shall have the power to determine all issues in dispute involving wages, hours and conditions of employment.

(b) *Form 2.* The commission shall appoint an investigator to determine the nature of the impasse. The commission’s investigator shall advise the commission in writing, transmitting copies of such advice to the parties of each issue which is known to be in dispute. Such advice shall also set forth the final offer of each party as it is known to the investigator at the time that the investigation is closed. Neither party may amend its final offer thereafter, except with the written agreement of the other party. The arbitrator shall select the final offer of one of the parties and shall issue an award incorporating that offer without modification.

(5) The proceedings shall be pursuant to form 2 unless the parties shall agree prior to the hearing that form 1 shall control.

(6) In reaching a decision the arbitrator shall give weight to the following factors:

(a) The lawful authority of the employer.

(b) Stipulations of the parties.

(c) The interests and welfare of the public and the financial ability of the unit of government to meet these costs.

(d) Comparison of the wages, hours and conditions of employment of the employees involved in the arbitration proceeding with the wages, hours and conditions of employment of other employees performing similar services and with other employees generally:

1. In public employment in comparable communities.

2. In private employment in comparable communities.

(e) The average consumer prices for goods and services, commonly known as the cost of living.

(f) The overall compensation presently received by the employees, including direct wage compensation, vacation, holidays and excused time, insurance and pensions, medical and hospitalization benefits, the continuity and stability of employment, and all other benefits received.

(g) Changes in any of the foregoing circumstances during the pendency of the arbitration proceedings.

(h) Such other factors, not confined to the foregoing, which are normally or traditionally taken into consideration in the determination of wages, hours and conditions of employment through voluntary collective bargaining, mediation, fact-finding, arbitration or otherwise between the parties, in the public service or in private employment.

(7) Proceedings, except as specifically provided in this section, shall be governed by ch. 788.

(8) (a) This section applies to law enforcement supervisors employed by a county having a population of 500,000 or more. For purposes of such application, the term “municipal employee” includes such a supervisor.

(b) This section shall not apply to members of a police department employed by a 1st class city nor to any city, village or town having a population of less than 2,500.

(9) Section 111.70 (4) (c) 3. and (cm) shall not apply to employments covered by this section.

History: 1971 c. 247, 307; 1973 c. 64; 1975 c. 259; 1977 c. 178; 1979 c. 32 s. 92 (15); 1989 a. 258; 1991 a. 136; 1993 a. 16; 1995 a. 27.

Cross Reference: See also ch. ERC 30, Wis. adm. code.

Arbitration under sub. (4) (b), which requires the arbitrator to select the final offer of one of the parties and then issue an award incorporating that offer “without modification,” does not preclude restatement or alteration of the offer to comprise a proper, final arbitration award finally disposing of the controversy. *Manitowoc v. Manitowoc Police Dept.* 70 Wis. 2d 1006, 236 N.W.2d 231 (1975).

Under the common law an arbitrator need not render an account of the reasons for his or her award, nor is a written decision required by ch. 298 [now ch. 788], although the arbitrator must weigh the criteria suggested by (6). *Manitowoc v. Manitowoc Police Dept.* 70 Wis. 2d 1006, 236 N.W.2d 231 (1975).

Sub. (4) (b) permits amendment of a final offer after an arbitration petition is filed but before an investigation is closed, even if the amendment includes proposals that were not negotiated before the filing of the petition. *City of Sheboygan v. WERC*, 125 Wis. 2d 1, 370 N.W.2d 800 (Ct. App. 1985).

The holding of *Manitowoc* on what constitutes “without modification” is discussed. *La Crosse Professional Police Association v. City of LaCrosse*, 212 Wis. 2d 90, 568 N.W.2d 20 (Ct. App. 1997), 96–2741.

Right to strike and compulsory arbitration: panacea or placebo? Coughlin, Rader, 58 MLR 205.

SUBCHAPTER V

STATE EMPLOYMENT LABOR RELATIONS

Cross Reference: See also chs. ERC 20, 21, 22, 23, 24, 25, 26, 27, and 28, Wis. adm. code.

111.80 Declaration of policy. The public policy of the state as to labor relations and collective bargaining in state employment, in the furtherance of which this subchapter is enacted, is as follows:

(1) It recognizes that there are 3 major interests involved: that of the public, that of the employee and that of the employer. These 3 interests are to a considerable extent interrelated. It is the policy of this state to protect and promote each of these interests with due regard to the situation and to the rights of the others.

(2) Orderly and constructive employment relations for employees and the efficient administration of state government are promotive of all these interests. They are largely dependent upon the maintenance of fair, friendly and mutually satisfactory employee management relations in state employment, and the availability of suitable machinery for fair and peaceful adjustment of whatever controversies may arise. It is recognized that whatever may be the rights of disputants with respect to each other in any controversy regarding state employment relations, neither party has any right to engage in acts or practices which jeopardize the public safety and interest and interfere with the effective conduct of public business.

(3) Where permitted under this subchapter, negotiations of terms and conditions of state employment should result from voluntary agreement between the state and its agents as employer, and its employees. For that purpose an employee may, if the employee desires, associate with others in organizing and in bargaining collectively through representatives of the employee’s own choosing without intimidations or coercion from any source.

(4) It is the policy of this state, in order to preserve and promote the interests of the public, the employee and the employer alike, to encourage the practices and procedures of collective bargaining in state employment subject to the requirements of the public service and related laws, rules and policies governing state employment, by establishing standards of fair conduct in state employment relations and by providing a convenient, expeditious and impartial tribunal in which these interests may have their respective rights determined.

History: 1971 c. 270; 1977 c. 196; 1993 a. 492; 1995 a. 27.

This subchapter does not prohibit a retroactive contract effective date. *Department of Administration v. WERC*, 90 Wis. 2d 426, 280 N.W.2d 150 (1979).

Application of open meeting law to duties of WERC discussed. 68 Atty. Gen. 171. Collective negotiations in higher education; a symposium. 1971 WLR 1.

Public sector collective bargaining. Anderson, 1973 WLR 986.

The appropriate scope of bargaining in the public sector: The continuing controversy and the Wisconsin experience. Weisberger. 1977 WLR 685.

111.81 Definitions. In this subchapter:

(1) “Collective bargaining” means the performance of the mutual obligation of the state as an employer, by its officers and agents, and the representatives of its employees, to meet and confer at reasonable times, in good faith, with respect to the subjects of bargaining provided in s. 111.91 (1) with the intention of reaching an agreement, or to resolve questions arising under such an agreement. The duty to bargain, however, does not compel either party to agree to a proposal or require the making of a concession. Collective bargaining includes the reduction of any agreement reached to a written and signed document.

(2) “Collective bargaining unit” means a unit established under s. 111.825.

(3) “Commission” means the employment relations commission.

(4) “Craft employee” means a skilled journeyman craftsman, including the skilled journeyman craftsman’s apprentices and helpers, but shall not include employees not in direct line of progression in the craft.

(6) “Election” means a proceeding conducted by the commission in which the employees in a collective bargaining unit cast a secret ballot for collective bargaining representatives, or for any other purpose specified in this subchapter.

(7) “Employee” includes:

(a) Any state employee in the classified service of the state, as defined in s. 230.08, except limited term employees, sessional employees, project employees, supervisors, management employees and individuals who are privy to confidential matters affecting the employer–employee relationship, as well as all employees of the commission.

(b) Program, project or teaching assistants employed by the University of Wisconsin System, except supervisors, management employees and individuals who are privy to confidential matters affecting the employer–employee relationship.

(c) Assistant district attorneys, except supervisors, management employees and individuals who are privy to confidential matters affecting the employer–employee relationship.

(e) Attorneys employed in the office of the state public defender, except supervisors, management employees or individuals who are privy to confidential matters affecting the employer–employee relationship.

(f) Instructional staff employed by the board of regents of the University of Wisconsin System who provide services for a charter school established by contract under s. 118.40 (2r) (cm).

(8) “Employer” means the state of Wisconsin.

(9) “Fair–share agreement” means an agreement between the employer and a labor organization representing employees or supervisors specified in s. 111.825 (5) under which all of the employees or supervisors in a collective bargaining unit are required to pay their proportionate share of the cost of the collective bargaining process and contract administration measured by the amount of dues uniformly required of all members.

(9m) “Instructional staff” has the meaning given in rules promulgated by the department of public instruction under s. 121.02 (1) (a) 2.

(10) “Joint committee on employment relations” means the legislative committee created under s. 13.111.

(11) “Labor dispute” means any controversy with respect to the subjects of bargaining provided in this subchapter.

(12) “Labor organization” means any employee organization whose purpose is to represent employees in collective bargaining with the employer, or its agents, on matters pertaining to terms and conditions of employment; but the term shall not include any organization:

(a) Which advocates the overthrow of the constitutional form of government in the United States; or

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(b) Which discriminates with regard to the terms or conditions of membership because of race, color, creed, sex, age, sexual orientation or national origin.

(12m) “Maintenance of membership agreement” means an agreement between the employer and a labor organization representing employees or supervisors specified in s. 111.825 (5) which requires that all of the employees or supervisors whose dues are being deducted from earnings under s. 20.921 (1) or 111.84 (1) (f) at the time the agreement takes effect shall continue to have dues deducted for the duration of the agreement and that dues shall be deducted from the earnings of all employees or supervisors who are hired on or after the effective date of the agreement.

(13) “Management” includes those personnel engaged predominantly in executive and managerial functions, including such officials as division administrators, bureau directors, institutional heads and employees exercising similar functions and responsibilities as determined by the commission.

(14) “Office” means the office of state employment relations.

(15) “Professional employee” means:

(a) Any employee in the classified service who is engaged in work:

1. Predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical or physical work;

2. Involving the consistent exercise of discretion and judgment in its performance;

3. Of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time;

4. Requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual or physical processes; or

(b) Any employee in the classified service who:

1. Has completed the courses of specialized intellectual instruction and study described in par. (a) 4.; and

2. Is performing related work under the supervision of a professional person to qualify to become a professional employee as defined in par. (a).

(15m) “Program assistant” or “project assistant” means a graduate student enrolled in the University of Wisconsin System who is assigned to conduct research, training, administrative responsibilities or other academic or academic support projects or programs, except regular preparation of instructional materials for courses or manual or clerical assignments, under the supervision of a member of the faculty or academic staff, as defined in s. 36.05 (1) or (8), primarily for the benefit of the university, faculty or academic staff supervisor or a granting agency. “Project assistant” or “program assistant” does not include a graduate student who does work which is primarily for the benefit of the student’s own learning and research and which is independent or self-directed.

(16) “Referendum” means a proceeding conducted by the commission in which employees, or supervisors specified in s. 111.825 (5), in a collective bargaining unit may cast a secret ballot on the question of directing the labor organization and the employer to enter into a fair-share or maintenance of membership agreement or to terminate such an agreement.

(17) “Representative” includes any person chosen by an employee to represent the employee.

(18) “Strike” includes any strike or other concerted stoppage of work by employees, and any concerted slowdown or other concerted interruption of operations or services by employees, or any concerted refusal to work or perform their usual duties as employees of the state.

(19) “Supervisor” means any individual whose principal work is different from that of the individual’s subordinates and who has authority, in the interest of the employer, to hire, transfer,

suspend, layoff, recall, promote, discharge, assign, reward or discipline employees, or to adjust their grievances, or to authoritatively recommend such action, if the individual’s exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

(19m) “Teaching assistant” means a graduate student enrolled in the University of Wisconsin System who is regularly assigned teaching and related responsibilities, other than manual or clerical responsibilities, under the supervision of a member of the faculty as defined in s. 36.05 (8).

(20) “Unfair labor practice” means any unfair labor practice specified in s. 111.84.

History: 1971 c. 270; 1975 c. 238; 1977 c. 196; 1981 c. 112; 1983 a. 160, 189, 538; 1985 a. 29, 42; 1989 a. 31; 1993 a. 492; 1995 a. 27, 324; 1997 a. 35; 2001 a. 16; 2003 a. 33 ss. 1987m, 1988m, 9160.

111.815 Duties of state. (1) In the furtherance of this subchapter, the state shall be considered as a single employer and employment relations policies and practices throughout the state service shall be as consistent as practicable. The office shall negotiate and administer collective bargaining agreements. To coordinate the employer position in the negotiation of agreements, the office shall maintain close liaison with the legislature relative to the negotiation of agreements and the fiscal ramifications of those agreements. Except with respect to the collective bargaining units specified in s. 111.825 (1m) and (2) (f), the office is responsible for the employer functions of the executive branch under this subchapter, and shall coordinate its collective bargaining activities with operating state agencies on matters of agency concern. The legislative branch shall act upon those portions of tentative agreements negotiated by the office that require legislative action. With respect to the collective bargaining units specified in s. 111.825 (1m), the University of Wisconsin Hospitals and Clinics Board is responsible for the employer functions under this subchapter. With respect to the collective bargaining unit specified in s. 111.825 (2) (f), the governing board of the charter school established by contract under s. 118.40 (2r) (cm) is responsible for the employer functions under this subchapter.

(2) In the furtherance of the policy under s. 111.80 (4), the director of the office shall, together with the appointing authorities or their representatives, represent the state in its responsibility as an employer under this subchapter except with respect to negotiations in the collective bargaining units specified in s. 111.825 (1m) and (2) (f). The director of the office shall establish and maintain, wherever practicable, consistent employment relations policies and practices throughout the state service.

(3) With regard to collective bargaining activities involving employees who are assistant district attorneys, the director of the office shall maintain close liaison with the secretary of administration.

History: 1977 c. 196; 1983 a. 27 s. 2200 (15); 1985 a. 42; 1989 a. 31; 1995 a. 27; 2001 a. 16, 104; 2003 a. 33.

111.82 Rights of employees. Employees shall 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 under this subchapter, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection. Employees shall also have the right to refrain from any or all of such activities.

History: 1971 c. 270; 1995 a. 27.

111.825 Collective bargaining units. (1) It is the legislative intent that in order to foster meaningful collective bargaining, units must be structured in such a way as to avoid excessive fragmentation whenever possible. In accordance with this policy, collective bargaining units for employees in the classified service of the state, except employees in the collective bargaining units specified in sub. (1m), are structured on a statewide basis with one collective bargaining unit for each of the following occupational groups:

(a) Administrative support.

- (b) Blue collar and nonbuilding trades.
- (c) Building trades crafts.
- (cm) Law enforcement.
- (d) Security and public safety.
- (e) Technical.
- (f) Professional:
 1. Fiscal and staff services.
 2. Research, statistics and analysis.
 3. Legal.
 4. Patient treatment.
 5. Patient care.
 6. Social services.
 7. Education.
 8. Engineering.
 9. Science.

(1m) Collective bargaining units for employees in the classified service of the state who are employed by the University of Wisconsin Hospitals and Clinics Board are structured with one collective bargaining unit for each of the following occupational groups:

- (a) Clerical and related.
- (b) Blue collar and nonbuilding trades.
- (c) Building trades crafts.
- (d) Security and public safety.
- (e) Technical.

(2) Collective bargaining units for employees in the unclassified service of the state shall be structured with one collective bargaining unit for each of the following groups:

- (a) The program, project and teaching assistants of the University of Wisconsin–Madison and the University of Wisconsin–Extension.
- (b) The program, project and teaching assistants of the University of Wisconsin–Milwaukee.
- (c) The program, project and teaching assistants of the Universities of Wisconsin–Eau Claire, Green Bay, La Crosse, Oshkosh, Parkside, Platteville, River Falls, Stevens Point, Stout, Superior and Whitewater.
- (d) Assistant district attorneys.
- (e) Attorneys employed in the office of the state public defender.
- (f) Instructional staff employed by the board of regents of the University of Wisconsin System who provide services for a charter school established by contract under s. 118.40 (2r) (cm).

(3) The commission shall assign employees to the appropriate collective bargaining units set forth in subs. (1), (1m) and (2).

(4) Any labor organization may petition for recognition as the exclusive representative of a collective bargaining unit specified in sub. (1), (1m) or (2) in accordance with the election procedures set forth in s. 111.83, provided the petition is accompanied by a 30% showing of interest in the form of signed authorization cards. Each additional labor organization seeking to appear on the ballot shall file petitions within 60 days of the date of filing of the original petition and prove, through signed authorization cards, that at least 10% of the employees in the collective bargaining unit want it to be their representative.

(4m) If a single representative is recognized or certified to represent more than one of the collective bargaining units specified in sub. (1m), that representative and the employer may jointly agree to combine the collective bargaining units, subject to the right of the employees in any of the collective bargaining units that were combined to petition for an election under s. 111.83 (6) and (7). Any agreement under this subsection is effective upon written notice of the agreement by the parties to the commission and terminates upon written notice of termination by the parties to the commission or upon decertification of the representative entering

into the agreement as representative of one of the combined collective bargaining units, whichever occurs first.

(5) Although supervisors are not considered employees for purposes of this subchapter, the commission may consider a petition for a statewide collective bargaining unit of professional supervisors or a statewide unit of nonprofessional supervisors in the classified service, but the representative of supervisors may not be affiliated with any labor organization representing employees. For purposes of this subsection, affiliation does not include membership in a national, state, county or municipal federation of national or international labor organizations. The certified representative of supervisors may not bargain collectively with respect to any matter other than wages and fringe benefits as provided in s. 111.91 (1).

(6) The commission shall only assign an employee of the department of administration, department of transportation or board of regents of the University of Wisconsin System who engages in the detection and prevention of crime, who enforces the laws and who is authorized to make arrests for violations of the laws; an employee of the department of administration, department of transportation or board of regents of the University of Wisconsin System who provides technical law enforcement support to such employees; and an employee of the department of transportation who engages in motor vehicle inspection or operator's license examination to the collective bargaining unit under sub. (1) (cm).

History: 1985 a. 29; 1985 a. 42 ss. 4 to 6, 8, 18; 1985 a. 332; 1987 a. 331; 1989 a. 31; 1995 a. 27, 251, 324; 1997 a. 24; 2001 a. 16; 2005 a. 253.

Cross Reference: See also ch. ERC 27, Wis. adm. code.

111.83 Representatives and elections. (1) Except as provided in sub. (5), a representative chosen for the purposes of collective bargaining by a majority of the employees voting in a collective bargaining unit shall be the exclusive representative of all of the employees in such unit for the purposes of collective bargaining. Any individual employee, or any minority group of employees in any collective bargaining unit, may present grievances to the employer in person, or through representatives of their own choosing, and the employer shall confer with said employee or group of employees in relation thereto if the majority representative has been afforded the opportunity to be present at the conference. Any adjustment resulting from such a conference may not be inconsistent with the conditions of employment established by the majority representative and the employer.

(2) Whenever the commission decides to permit employees to determine for themselves whether they desire to establish themselves as a collective bargaining unit, such determination shall be conducted by secret ballot. In such instances, the commission shall cause the balloting to be conducted so as to show separately the wishes of the employees in the voting group involved as to the determination of the collective bargaining unit.

(3) Whenever a question arises concerning the representation of employees in a collective bargaining unit the commission shall determine the representative thereof by taking a secret ballot of the employees and certifying in writing the results thereof to the interested parties and to the director of the office. There shall be included on any ballot for the election of representatives the names of all labor organizations having an interest in representing the employees participating in the election as indicated in petitions filed with the commission. The name of any existing representative shall be included on the ballot without the necessity of filing a petition. The commission may exclude from the ballot one who, at the time of the election, stands deprived of his or her rights under this subchapter by reason of a prior adjudication of his or her having engaged in an unfair labor practice. The ballot shall be so prepared as to permit a vote against representation by anyone named on the ballot. The commission's certification of the results of any election is conclusive as to the findings included therein unless reviewed under s. 111.07 (8).

(4) Whenever an election has been conducted under sub. (3) in which the name of more than one proposed representative

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appears on the ballot and results in no conclusion, the commission may, if requested by any party to the proceeding within 30 days from the date of the certification of the results of the election, conduct a runoff election. In that runoff election, the commission shall drop from the ballot the name of the representative who received the least number of votes at the original election. The commission shall drop from the ballot the privilege of voting against any representative if the least number of votes cast at the first election was against representation by any named representative.

(5) (a) This subsection applies only to the collective bargaining unit specified in s. 111.825 (2) (c).

(b) Upon filing of a petition with the commission indicating a showing of interest of at least 30% of the employees at an institution who are included within a collective bargaining unit to be represented by a labor organization, the commission shall hold an election in which the employees in that unit at that institution may vote on the question of representation. The labor organization named in any such petition shall be included on the ballot. Within 60 days of the time that an original petition is filed, another petition may be filed with the commission indicating a showing of interest of at least 10% of the employees at the same institution who are included in the same collective bargaining unit to be represented by another labor organization, in which case the name of that labor organization shall be included on the ballot. If more than one original petition is filed within a 30-day period concerning employees in the collective bargaining unit specified in s. 111.825 (2) (c), the results of all elections held pursuant to the petitions shall be announced by the commission at the same time. The ballot shall be prepared in accordance with sub. (3), except as otherwise provided in this subsection.

(c) Notwithstanding s. 111.825 (2) (c), the employees at any institution included within the collective bargaining unit at which no petition is filed and no election is held or at which the employees indicate, by a majority of those voting in an election, a desire not to participate in collective bargaining are not considered to be a part of that collective bargaining unit.

(d) If at an election held under par. (b), a majority of the employees voting in the collective bargaining unit at all institutions in which the choice to participate in collective bargaining receives a majority of the votes cast elect to be represented by a single labor organization, that labor organization shall be the exclusive representative for all employees in that collective bargaining unit, except those excluded under par. (c).

(e) If at an election held under par. (b), a majority of the employees voting in the collective bargaining unit at all institutions in which the choice to participate in collective bargaining receives a majority of the votes cast do not elect to be represented by a single labor organization, the commission may hold one or more runoff elections under sub. (4) until one representative receives a majority of the votes cast.

(f) Notwithstanding par. (b), if a labor organization is certified to represent the employees within the collective bargaining unit at one or more institutions, and a petition is filed with the commission indicating a showing of interest by the employees at an institution which is not a part of the unit under par. (c) to be represented by a labor organization, the only question which shall appear on the ballot shall be whether the employees desire to participate in collective bargaining. A petition under this paragraph may only be filed during June in an even-numbered year. If a majority of the employees voting at the institution who are included within the collective bargaining unit vote to participate in collective bargaining, the employees at that institution shall become a part of that collective bargaining unit.

(g) If the collective bargaining unit is represented by a labor organization and a collective bargaining agreement is in effect between that labor organization and the employer, and the employees at an institution who have not voted to become a part of that collective bargaining unit vote to join the unit under par. (f),

such action shall become effective on the day that the succeeding collective bargaining agreement between the representative and the employer takes effect.

(h) If a petition is filed under sub. (6) for the discontinuance of existing representation indicating a showing of interest by 30% of the total number of employees at all institutions at which employees in the collective bargaining unit have voted to become a part of the unit, the commission shall hold an election on that question at all such institutions. If a petition is filed under sub. (6) indicating a showing of interest by 30% of the employees at one or more, but not all, of the institutions at which employees in the collective bargaining unit have voted to become a part of the unit, the commission shall hold an election on that question only at the institution or institutions at which the showing is made. In such an election, the only question appearing on the ballot shall be whether the employees desire to participate in collective bargaining.

(i) If a petition is filed under sub. (6) for a change of existing representation, the commission shall hold an election on the question in accordance with par. (b), except that participation shall be limited to employees at those institutions included in the collective bargaining unit who have previously voted to become a part of the unit. Runoff elections shall be held, as provided in par. (e), when necessary. At any such election, if a majority of the total number of employees included in the collective bargaining unit at all institutions at which employees have voted to become a part of the unit elect not to participate in collective bargaining, regardless of the result of the vote at any single institution, no representative may be certified by the commission to represent the employees at any institution within that collective bargaining unit, unless a new petition and election is held under par. (b). However, if a majority of the total number of employees included in the collective bargaining unit at all institutions at which employees have voted to become a part of the unit elect to participate in collective bargaining, but a majority of the employees at one or more of the institutions elect not to participate in collective bargaining, then only the employees at those institutions electing not to participate shall not be considered a part of that collective bargaining unit.

(6) While a collective bargaining agreement between a labor organization and an employer is in force under this subchapter, a petition for an election in the collective bargaining unit to which the agreement applies may only be filed during October in the calendar year prior to the expiration of that agreement. An election held under that petition may be held only if the petition is supported by proof that at least 30% of the employees in the collective bargaining unit desire a change or discontinuance of existing representation. Within 60 days of the time that an original petition is filed, another petition may be filed supported by proof that at least 10% of the employees in the same collective bargaining unit desire a different representative. If a majority of the employees in the collective bargaining unit vote for a change or discontinuance of representation by any named representative, the decision takes effect upon expiration of any existing collective bargaining agreement between the employer and the existing representative.

(7) Notwithstanding subs. (1), (3) and (6) and s. 111.825 (4), if on July 1, 1997, there is a representative recognized or certified to represent the employees in any of the collective bargaining units specified in s. 111.825 (1) (a) to (e), that representative shall become the representative of the employees in the corresponding collective bargaining units specified in s. 111.825 (1m) (a) to (e), without the necessity of filing a petition or conducting an election, subject to the right of any person to file a petition under this section during October 1998 or at any subsequent time when sub. (6) applies.

History: 1971 c. 270; 1975 c. 238; 1985 a. 42; 1989 a. 336; 1995 a. 27; 2003 a. 33.

Cross Reference: See also ch. ERC 21, Wis. adm. code.

111.84 Unfair labor practices. (1) It is an unfair labor practice for an employer individually or in concert with others:

(a) To interfere with, restrain or coerce employees in the exercise of their rights guaranteed in s. 111.82.

(b) Except as otherwise provided in this paragraph, to initiate, create, dominate or interfere with the formation or administration of any labor or employee organization or contribute financial support to it. Except as provided in ss. 40.02 (22) (e) and 40.23 (1) (f) 4., no change in any law affecting the Wisconsin retirement system under ch. 40 and no action by the employer that is authorized by such a law constitutes a violation of this paragraph unless an applicable collective bargaining agreement specifically prohibits the change or action. No such change or action affects the continuing duty to bargain collectively regarding the Wisconsin retirement system under ch. 40 to the extent required by s. 111.91. It is not an unfair labor practice for the employer to reimburse an employee at his or her prevailing wage rate for the time spent during the employee's regularly scheduled hours conferring with the employer's officers or agents and for attendance at commission or court hearings necessary for the administration of this subchapter. Professional supervisory or craft personnel may maintain membership in professional or craft organizations; however, as members of such organizations they shall be prohibited from those activities related to collective bargaining in which the organizations may engage.

(c) To encourage or discourage membership in any labor organization by discrimination in regard to hiring, tenure or other terms or conditions of employment. This paragraph does not apply to fair-share or maintenance of membership agreements.

(d) To refuse to bargain collectively on matters set forth in s. 111.91 (1) with a representative of a majority of its employees in an appropriate collective bargaining unit. Where the employer has a good faith doubt as to whether a labor organization claiming the support of a majority of its employees in appropriate collective bargaining unit does in fact have that support, it may file with the commission a petition requesting an election as to that claim. It is not deemed to have refused to bargain until an election has been held and the results thereof certified to it by the commission. A violation of this paragraph includes, but is not limited to, the refusal to execute a collective bargaining agreement previously orally agreed upon.

(e) To violate any collective bargaining agreement previously agreed upon by the parties with respect to wages, hours and conditions of employment affecting employees, including an agreement to arbitrate or to accept the terms of an arbitration award, where previously the parties have agreed to accept such award as final and binding upon them.

(f) To deduct labor organization dues from an employee's earnings, unless the employer has been presented with an individual order therefor, signed by the employee personally, and terminable by at least the end of any year of its life or earlier by the employee giving at least 30 but not more than 120 days' written notice of such termination to the employer and to the representative labor organization, except if there is a fair-share or maintenance of membership agreement in effect. The employer shall give notice to the labor organization of receipt of such notice of termination.

(2) It is unfair practice for an employee individually or in concert with others:

(a) To coerce or intimidate an employee in the enjoyment of the employee's legal rights, including those guaranteed under s. 111.82.

(b) To coerce, intimidate or induce any officer or agent of the employer to interfere with any of the employer's employees in the enjoyment of their legal rights including those guaranteed under s. 111.82 or to engage in any practice with regard to its employees which would constitute an unfair labor practice if undertaken by the officer or agent on the officer's or agent's own initiative.

(c) To refuse to bargain collectively on matters set forth in s. 111.91 (1) with the duly authorized officer or agent of the employer which is the recognized or certified exclusive collective

bargaining representative of employees specified in s. 111.81 (7) (a) in an appropriate collective bargaining unit or with the certified exclusive collective bargaining representative of employees specified in s. 111.81 (7) (b) to (f) in an appropriate collective bargaining unit. Such refusal to bargain shall include, but not be limited to, the refusal to execute a collective bargaining agreement previously orally agreed upon.

(d) To violate the provisions of any written agreement with respect to terms and conditions of employment affecting employees, including an agreement to arbitrate or to accept the terms of an arbitration award, where previously the parties have agreed to accept such awards as final and binding upon them.

(e) To engage in, induce or encourage any employees to engage in a strike, or a concerted refusal to work or perform their usual duties as employees.

(f) To coerce or intimidate a supervisory employee, officer or agent of the employer, working at the same trade or profession as the employer's employees, to induce the person to become a member of or act in concert with the labor organization of which the employee is a member.

(3) It is an unfair labor practice for any person to do or cause to be done on behalf of or in the interest of employers or employees, or in connection with or to influence the outcome of any controversy as to employment relations, any act prohibited by subs. (1) and (2).

(4) Any controversy concerning unfair labor practices may be submitted to the commission as provided in s. 111.07, except that the commission shall fix hearing on complaints involving alleged violations of sub. (2) (e) within 3 days after filing of such complaints, and notice shall be given to each party interested by service on the party personally, or by telegram, advising the party of the nature of the complaint and of the date, time and place of hearing thereon. The commission may in its discretion appoint a substitute tribunal to hear unfair labor practice charges by either appointing a 3-member panel or submitting a 7-member panel to the parties and allowing each to strike 2 names. Such panel shall report its finding to the commission for appropriate action.

History: 1971 c. 270; 1973 c. 212; 1983 a. 160; 1985 a. 42; 1989 a. 13, 31; 1991 a. 289; 1993 a. 492; 1995 a. 27; 2001 a. 16.

Cross Reference: See also ch. ERC 22, Wis. adm. code.

The state's termination of an employee, in part because of the employee's participation in union activities, violated the state employment labor relations act (SELRA), subch. V, ch. 111. *State v. WERC*, 122 Wis. 2d 132, 361 N.W.2d 660 (1985).

Unfair labor practices and collective bargaining regarding pensions as to state employees discussed. 64 Atty. Gen. 18.

111.85 Fair-share and maintenance of membership agreements. (1)

(a) No fair-share or maintenance of membership agreement may become effective unless authorized by a referendum. The commission shall order a referendum whenever it receives a petition supported by proof that at least 30% of the employees or supervisors specified in s. 111.825 (5) in a collective bargaining unit desire that a fair-share or maintenance of membership agreement be entered into between the employer and a labor organization. A petition may specify that a referendum is requested on a maintenance of membership agreement only, in which case the ballot shall be limited to that question.

(b) For a fair-share agreement to be authorized, at least two-thirds of the eligible employees or supervisors voting in a referendum shall vote in favor of the agreement. For a maintenance of membership agreement to be authorized, at least a majority of the eligible employees or supervisors voting in a referendum shall vote in favor of the agreement. In a referendum on a fair-share agreement, if less than two-thirds but more than one-half of the eligible employees or supervisors vote in favor of the agreement, a maintenance of membership agreement is authorized.

(c) If a fair-share or maintenance of membership agreement is authorized in a referendum, the employer shall enter into such an agreement with the labor organization named on the ballot in the referendum. Each fair-share or maintenance of membership agreement shall contain a provision requiring the employer to

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deduct the amount of dues as certified by the labor organization from the earnings of the employees or supervisors affected by the agreement and to pay the amount so deducted to the labor organization. Unless the parties agree to an earlier date, the agreement shall take effect 60 days after certification by the commission that the referendum vote authorized the agreement. The employer shall be held harmless against any claims, demands, suits and other forms of liability made by employees or supervisors or local labor organizations which may arise for actions taken by the employer in compliance with this section. All such lawful claims, demands, suits and other forms of liability are the responsibility of the labor organization entering into the agreement.

(d) Under each fair–share or maintenance of membership agreement, an employee or supervisor who has religious convictions against dues payments to a labor organization based on teachings or tenets of a church or religious body of which he or she is a member shall, on request to the labor organization, have his or her dues paid to a charity mutually agreed upon by the employee or supervisor and the labor organization. Any dispute concerning this paragraph may be submitted to the commission for adjudication.

(2) (a) Once authorized, a fair–share or maintenance of membership agreement shall continue in effect, subject to the right of the employer or labor organization concerned to petition the commission to conduct a new referendum. Such petition must be supported by proof that at least 30% of the employees or supervisors in the collective bargaining unit desire that the fair–share or maintenance of membership agreement be discontinued. Upon so finding, the commission shall conduct a new referendum. If the continuance of the fair–share or maintenance of membership agreement is approved in the referendum by at least the percentage of eligible voting employees or supervisors required for its initial authorization, it shall be continued in effect, subject to the right of the employer or labor organization to later initiate a further vote following the procedure prescribed in this subsection. If the continuation of the agreement is not supported in any referendum, it is deemed terminated at the termination of the collective bargaining agreement, or one year from the date of the certification of the result of the referendum, whichever is earlier.

(b) The commission shall declare any fair–share or maintenance of membership agreement suspended upon such conditions and for such time as the commission decides whenever it finds that the labor organization involved has refused on the basis of race, color, sexual orientation or creed to receive as a member any employee or supervisor in the collective bargaining unit involved, and the agreement shall be made subject to the findings and orders of the commission. Any of the parties to the agreement, or any employee or supervisor covered thereby, may come before the commission, as provided in s. 111.07, and petition the commission to make such a finding.

(3) A stipulation for a referendum executed by an employer and a labor organization may not be filed until after the representation election has been held and the results certified.

(4) The commission may, under rules adopted for that purpose, appoint as its agent an official of a state agency whose employees are entitled to vote in a referendum to conduct a referendum provided for herein.

(5) Notwithstanding sub. (1), if on July 1, 1997, there is a fair–share or maintenance of membership agreement in effect in any of the collective bargaining units specified in s. 111.825 (1) (a) to (e), that fair–share or maintenance of membership agreement shall apply to the corresponding collective bargaining unit under s. 111.825 (1m) (a) to (e) without the necessity of filing a petition or conducting a referendum, subject to the right of the employees in each collective bargaining unit to file a petition requesting a referendum under sub. (2) (a).

History: 1971 c. 270; 1981 c. 112; 1983 a. 160; 1985 a. 42; 1995 a. 27.

Cross Reference: See also ch. ERC 26, Wis. adm. code.

The constitutional requirements of a union's collection of agency fees under a fair–share agreement include: 1) an adequate explanation of the basis of the fee; 2) a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker; and 3) an escrow for the amounts reasonably in dispute. *Browne v. WERC*, 169 Wis. 2d 79, 485 N.W.2d 376 (1992).

To be chargeable to nonunion, public sector employees under a fair share agreement, union activities must: 1) be germane to collective bargaining activity; 2) be justified by the government's vital policy interest in labor peace and avoiding "free riders;" and 3) not significantly add to the burdening of free speech that is inherent in an agency or union shop. *Browne v. WERC*, 169 Wis. 2d 79, 485 N.W.2d 376 (1992).

111.86 Grievance arbitration. (1) Parties to the dispute pertaining to the interpretation of a collective bargaining agreement may agree in writing to have the commission or any other appointing state agency serve as arbitrator or may designate any other competent, impartial and disinterested persons to so serve. Such arbitration proceedings shall be governed by ch. 788.

(2) The office shall charge a state department or agency the employer's share of the cost related to grievance arbitration under sub. (1) for any arbitration that involves one or more employees of the state department or agency. Each state department or agency so charged shall pay the amount that the office charges from the appropriation account or accounts used to pay the salary of the grievant. Funds received under this subsection shall be credited to the appropriation account under s. 20.545 (1) (km).

History: 1971 c. 270; 1979 c. 32 s. 92 (15); 1985 a. 42; 1995 a. 27; 2003 a. 33.

Cross Reference: See also ch. ERC 23, Wis. adm. code.

111.87 Mediation. The commission may appoint any competent, impartial, disinterested person to act as mediator in any labor dispute either upon its own initiative or upon the request of one of the parties to the dispute. It is the function of such mediator to bring the parties together voluntarily under such favorable auspices as will tend to effectuate settlement of the dispute, but neither the mediator nor the commission shall have any power of compulsion in mediation proceedings.

History: 1971 c. 270.

Cross Reference: See also ch. ERC 24, Wis. adm. code.

111.88 Fact–finding. (1) If a dispute has not been settled after a reasonable period of negotiation and after the settlement procedures, if any, established by the parties have been exhausted, the representative which has been certified by the commission after an election, or, in the case of a representative of employees specified in s. 111.81 (7) (a), has been duly recognized by the employer, as the exclusive representative of employees in an appropriate collective bargaining unit, and the employer, its officers and agents, after a reasonable period of negotiation, are deadlocked with respect to any dispute between them arising in the collective bargaining process, the parties jointly, may petition the commission, in writing, to initiate fact–finding under this section, and to make recommendations to resolve the deadlock.

(2) Upon receipt of a petition to initiate fact–finding, the commission shall make an investigation with or without a formal hearing, to determine whether a deadlock in fact exists. After its investigation, the commission shall certify the results thereof. If the commission decides that fact–finding should be initiated, it shall appoint a qualified, disinterested person or 3–member panel, when jointly requested by the parties, to function as a fact finder.

(3) The fact finder may establish dates and place of hearings and shall conduct the hearings under rules established by the commission. Upon request, the commission shall issue subpoenas for hearings conducted by the fact finder. The fact finder may administer oaths. Upon completion of the hearing, the fact finder shall make written findings of fact and recommendations for solution of the dispute and shall cause the same to be served on the parties and the commission. In making findings and recommendations, the fact finder shall take into consideration among other pertinent factors the principles vital to the public interest in efficient and economical governmental administration. Cost of fact–finding proceedings shall be divided equally between the parties. At the time the fact finder submits a statement of his or her costs to the

parties, the fact finder shall submit a copy thereof to the commission at its Madison office.

(4) Nothing herein shall be construed as prohibiting any fact finder from endeavoring to mediate the dispute at any time prior to the issuance of the fact finder's recommendations.

(5) Within 30 days of the receipt of the fact finder's recommendations or within such time period mutually agreed upon by the parties, each party shall advise the other, in writing, as to the party's acceptance or rejection, in whole or in part, of the fact finder's recommendations and, at the same time, send a copy of such notification to the commission at its Madison office. Failure to comply with this subsection, by the state employer or employee representative, constitutes a violation of s. 111.84 (1) (d) or (2) (c).

History: 1971 c. 270; 1985 a. 42; 1993 a. 492; 1995 a. 225.

Cross Reference: See also chs. ERC 25 and 40, Wis. adm. code.

111.89 Strike prohibited. (1) Upon establishing that a strike is in progress, the employer may either seek an injunction or file an unfair labor practice charge with the commission under s. 111.84 (2) (e) or both. It is the responsibility of the office to decide whether to seek an injunction or file an unfair labor practice charge. The existence of an administrative remedy does not constitute grounds for denial of injunctive relief.

(2) The occurrence of a strike and the participation therein by an employee do not affect the rights of the employer, in law or in equity, to deal with the strike, including:

(a) The right to impose discipline, including discharge, or suspension without pay, of any employee participating therein;

(b) The right to cancel the reinstatement eligibility of any employee engaging therein; and

(c) The right of the employer to request the imposition of fines, either against the labor organization or the employee engaging therein, or to sue for damages because of such strike activity.

History: 1971 c. 270; 1977 c. 196 s. 130 (9); 1977 c. 273; 1985 a. 42; 1989 a. 336; 1995 a. 27; 2003 a. 33.

111.90 Management rights. Nothing in this subchapter shall interfere with the right of the employer, in accordance with this subchapter to:

(1) Carry out the statutory mandate and goals assigned to a state agency by the most appropriate and efficient methods and means and utilize personnel in the most appropriate and efficient manner possible.

(2) Subject to s. 111.91 (1) (am), manage the employees of a state agency; hire, promote, transfer, assign or retain employees in positions within the agency; and in that regard establish reasonable work rules.

(3) Suspend, demote, discharge or take other appropriate disciplinary action against the employee for just cause; or to lay off employees in the event of lack of work or funds or under conditions where continuation of such work would be inefficient and nonproductive.

History: 1971 c. 270; 1995 a. 27.

111.91 Subjects of bargaining. (1) (a) Except as provided in pars. (b) to (e), matters subject to collective bargaining to the point of impasse are wage rates, consistent with sub. (2), the assignment and reassignment of classifications to pay ranges, determination of an incumbent's pay status resulting from position reallocation or reclassification, and pay adjustments upon temporary assignment of classified employees to duties of a higher classification or downward reallocations of a classified employee's position; fringe benefits consistent with sub. (2); hours and conditions of employment.

(am) In collective bargaining units specified in s. 111.825 (1m), the right of the employer to transfer employees from one position to another position and the right of employees to be transferred from one position to another position is a subject of bargaining.

(b) The employer shall not be required to bargain on management rights under s. 111.90, except that procedures for the adjustment or settlement of grievances or disputes arising out of any type of disciplinary action referred to in s. 111.90 (3) shall be a subject of bargaining.

(c) The employer is prohibited from bargaining on matters contained in sub. (2).

(cm) Except as provided in sub. (2) (g) and (h) and ss. 40.02 (22) (e) and 40.23 (1) (f) 4., all laws governing the Wisconsin retirement system under ch. 40 and all actions of the employer that are authorized under any such law which apply to nonrepresented individuals employed by the state shall apply to similarly situated employees, unless otherwise specifically provided in a collective bargaining agreement that applies to those employees.

(d) Demands relating to retirement and group insurance shall be submitted to the employer at least one year prior to commencement of negotiations.

(e) The employer shall not be required to bargain on matters related to employee occupancy of houses or other lodging provided by the state.

(2) The employer is prohibited from bargaining on:

(a) The mission and goals of state agencies as set forth in the statutes.

(b) Policies, practices and procedures of the civil service merit system relating to:

1. Original appointments and promotions specifically including recruitment, examinations, certification, policies with respect to probationary periods and appointments, but not including transfers between positions allocated to classifications that are assigned to the same pay range or an identical pay range in a different pay schedule, within the same collective bargaining unit or another collective bargaining unit represented by the same labor organization.

2. The job evaluation system specifically including position classification and reclassification, position qualification standards, establishment and abolition of classifications, and allocation and reallocation of positions to classifications; and the determination of an incumbent's status, other than pay status, resulting from position reallocations.

(c) Disciplinary actions and position abandonments governed by s. 230.34 (1) (a), (am) and (ar), except as provided in those paragraphs.

(d) Amendments to this subchapter.

(e) Matters related to grants made by the department of transportation under s. 85.107 (3) (b).

(f) Family leave and medical leave rights below the minimum afforded under s. 103.10. Nothing in this paragraph prohibits the employer from bargaining on rights to family leave or medical leave which are more generous to the employee than the rights provided under s. 103.10.

(g) An increase in benefit adjustment contribution rates under s. 40.05 (2n) (a) 3.

(gm) Reemployment rights of employees under s. 230.32 (7).

(h) The rights of employees to have retirement benefits computed under s. 40.30.

(i) Honesty testing requirements that provide fewer rights and remedies to employees than are provided under s. 111.37.

(j) Creditable service to which s. 40.285 (2) (b) 4. applies.

(k) Compliance with the health benefit plan requirements under ss. 632.746 (1) to (8) and (10), 632.747 and 632.748.

(kc) Compliance with the insurance requirements under s. 631.95.

(km) The definition of earnings under s. 40.02 (22).

(L) The maximum benefit limitations under s. 40.31.

(m) The limitations on contributions under s. 40.32.

111.91 EMPLOYMENT RELATIONS

(n) The provision to employees of the health insurance coverage required under s. 632.895 (11) to (14).

(nm) The requirements related to continuing coverage for a dependent student on a medical leave of absence under s. 632.895 (15).

(o) The requirements related to coverage of and prior authorization for treatment of an emergency medical condition under s. 632.85.

(p) The requirements related to coverage of drugs and devices under s. 632.853.

(q) The requirements related to experimental treatment under s. 632.855.

(r) The requirements under s. 609.10 related to offering a point-of-service option plan.

(s) The requirements related to internal grievance procedures under s. 632.83 and independent review of certain health benefit plan determinations under s. 632.835.

(4) The director of the office, in connection with the development of tentative collective bargaining agreements to be submitted under s. 111.92 (1) (a), shall endeavor to obtain tentative agreements with each recognized or certified labor organization representing employees or supervisors of employees specified in s. 111.81 (7) (a) and with each certified labor organization representing employees specified in s. 111.81 (7) (b) to (e) which do not contain any provision for the payment to any employee of a cumulative or noncumulative amount of compensation in recognition of or based on the period of time an employee has been employed by the state.

History: 1971 c. 270; 1975 c. 39, 224; 1977 c. 196; 1979 c. 221; 1983 a. 27; 1985 a. 42; 1987 a. 27, 287, 331; 1989 a. 13, 31, 323; 1991 a. 269, 289; 1995 a. 27, 289; 1995 a. 302 s. 48; 1997 a. 27, 35, 155, 237; 1999 a. 9, 95, 115, 155; 2001 a. 16, 26; 2003 a. 33; 2007 a. 36.

The effective date of state employees' collective bargaining agreements is a mandatory subject of bargaining. *Department of Administration v. WERC*, 90 Wis. 2d 426, 280 N.W.2d 150 (1979).

Matters that affect the separate interests of bargaining units, such as the interest in not losing work to another unit, are not conditions of employment under sub. (3). Sub. (2) (b) 2., prohibiting bargaining regarding job classification and allocation, will not be overridden by permitting the loss of bargaining unit work on account of a position reallocation to be bargained, grieved, or arbitrated. *WERC v. Wisconsin Building Trades Negotiating Committee*, 2003 WI App 178, 266 Wis. 2d 512, 669 N.W.2d 499, 02–2232.

Unfair labor practices and collective bargaining regarding pensions as to state employees discussed. 64 Atty. Gen. 18.

111.915 Labor proposals. The director of the office shall notify and consult with the joint committee on employment relations, in such form and detail as the committee requests, regarding substantial changes in wages, employee benefits, personnel management, and program policy contract provisions to be included in any contract proposal to be offered to any labor organization by the state or to be agreed to by the state before such proposal is actually offered or accepted.

History: 1977 c. 196; 2003 a. 33.

111.92 Agreements. (1) (a) Any tentative agreement reached between the office, acting for the state, and any labor organization representing a collective bargaining unit specified in s. 111.825 (1) or (2) (a) to (e) shall, after official ratification by the labor organization, be submitted by the office to the joint committee on employment relations, which shall hold a public hearing before determining its approval or disapproval. If the committee approves the tentative agreement, it shall introduce in a bill or companion bills, to be put on the calendar or referred to the appropriate scheduling committee of each house, that portion of the tentative agreement which requires legislative action for implementation, such as salary and wage adjustments, changes in fringe benefits, and any proposed amendments, deletions or additions to existing law. Such bill or companion bills are not subject to ss. 13.093 (1), 13.50 (6) (a) and (b) and 16.47 (2). The committee may, however, submit suitable portions of the tentative agreement to appropriate legislative committees for advisory recommendations on the proposed terms. The committee shall accompany the introduction of such proposed legislation with a message that

informs the legislature of the committee's concurrence with the matters under consideration and which recommends the passage of such legislation without change. If the joint committee on employment relations does not approve the tentative agreement, it shall be returned to the parties for renegotiation. If the legislature does not adopt without change that portion of the tentative agreement introduced by the joint committee on employment relations, the tentative agreement shall be returned to the parties for renegotiation.

(b) Any tentative agreement reached between the University of Wisconsin Hospitals and Clinics Board, acting for the state, and any labor organization representing a collective bargaining unit specified in s. 111.825 (1m) shall, after official ratification by the labor organization, be executed by the parties.

(c) Any tentative agreement reached between the governing board of the charter school established by contract under s. 118.40 (2r) (cm), acting for the state, and any labor organization representing a collective bargaining unit specified in s. 111.825 (2) (f) shall, after official ratification by the labor organization and approval by the chancellor of the University of Wisconsin–Parkside, be executed by the parties.

(2) No portion of any tentative agreement shall become effective separately.

(3) Agreements shall coincide with the fiscal year or biennium.

(4) It is the declared intention under this subchapter that the negotiation of collective bargaining agreements and their approval by the parties should coincide with the overall fiscal planning and processes of the state.

(5) Notwithstanding any other provision of the statutes, all compensation adjustments for employees shall be effective on the beginning date of the pay period nearest the statutory or administrative date.

History: 1971 c. 270; 1977 c. 196 s. 130 (9); 1981 c. 20 s. 2202 (33) (b); 1981 c. 126, 391; 1985 a. 42 s. 29; 1989 a. 336; 1995 a. 27; 2001 a. 16; 2003 a. 33.

Matters within the scope of bargaining under s. 111.91, agreed to by the department of administration and a state employee union, are not effective until submitted as tentative agreements to and approved by the joint committee on employment relations. 67 Atty. Gen. 38.

111.93 Effect of labor organization; status of existing benefits and rights.

(1) If no collective bargaining agreement exists between the employer and a labor organization representing classified employees in a collective bargaining unit for which a representative is recognized or certified, employees in the unit shall retain the right of appeal under s. 230.44.

(2) All civil service and other applicable statutes concerning wages, fringe benefits, hours and conditions of employment apply to employees specified in s. 111.81 (7) (a) who are not included in collective bargaining units for which a representative is recognized or certified and to employees specified in s. 111.81 (7) (b) to (f) who are not included in a collective bargaining unit for which a representative is certified.

(3) Except as provided in ss. 7.33 (4), 40.05, 40.80 (3), 111.91 (1) (cm), 230.35 (2d) and (3) (e) 6., and 230.88 (2) (b), if a collective bargaining agreement exists between the employer and a labor organization representing employees in a collective bargaining unit, the provisions of that agreement shall supersede the provisions of civil service and other applicable statutes, as well as rules and policies of the board of regents of the University of Wisconsin System, related to wages, fringe benefits, hours, and conditions of employment whether or not the matters contained in those statutes, rules, and policies are set forth in the collective bargaining agreement.

History: 1971 c. 270, 336; 1977 c. 196 s. 131; 1981 c. 187; 1983 a. 46, 409; 1985 a. 42; 1989 a. 13, 31; 1999 a. 101, 125; 2001 a. 16, 38.

Matters that affect the separate interests of bargaining units, such as the interest in not losing work to another unit, are not conditions of employment under sub. (3). Sub. (2) (b) 2., prohibiting bargaining regarding job classification and allocation, will not be overridden by permitting the loss of bargaining unit work on account of a position reallocation to be bargained, grieved, or arbitrated. *WERC v. Wisconsin Building Trades Negotiating Committee*, 2003 WI App 178, 266 Wis. 2d 512, 669 N.W.2d 499, 02–2232.

111.94 Rules, transcripts, training programs, fees.

(1) The commission may adopt reasonable and proper rules relative to the exercise of its powers and authority and proper rules to govern its proceedings and to regulate the conduct of all elections and hearings. The commission shall, upon request, provide a transcript of a proceeding to any party to the proceeding for a fee, established by rule, by the commission at a uniform rate per page. All transcript fees shall be credited to the appropriation account under s. 20.425 (1) (i).

(2) The commission shall assess and collect a filing fee for filing a complaint alleging that an unfair labor practice has been committed under s. 111.84. The commission shall assess and collect a filing fee for filing a request that the commission act as an arbitrator to resolve a dispute involving the interpretation or application of a collective bargaining agreement under s. 111.86. The commission shall assess and collect a filing fee for filing a request that the commission initiate fact-finding under s. 111.88. The commission shall assess and collect a filing fee for filing a request that the commission act as a mediator under s. 111.87. For the performance of commission actions under s. 111.86, 111.87 and 111.88, the commission shall require that the parties to the dispute equally share in the payment of the fee and, for the performance of commission actions involving a complaint alleging that an unfair labor practice has been committed under s. 111.84, the

commission shall require that the party filing the complaint pay the entire fee. If any party has paid a filing fee requesting the commission to act as a mediator for a labor dispute and the parties do not enter into a voluntary settlement of the labor dispute, the commission may not subsequently assess or collect a filing fee to initiate fact-finding to resolve the same labor dispute. If any request concerns issues arising as a result of more than one unrelated event or occurrence, each such separate event or occurrence shall be treated as a separate request. The commission shall promulgate rules establishing a schedule of filing fees to be paid under this subsection. Fees required to be paid under this subsection shall be paid at the time of filing the complaint or the request for fact-finding, mediation or arbitration. A complaint or request for fact-finding, mediation or arbitration is not filed until the date such fee or fees are paid. Fees collected under this subsection shall be credited to the appropriation account under s. 20.425 (1) (i).

(3) The commission may provide training programs to individuals and organizations on collective bargaining, including on areas of management and labor cooperation directly or indirectly affecting collective bargaining, and may charge a reasonable fee for participation in the programs.

Cross Reference: See also ch. ERC 50, Wis. adm. code.

History: 1971 c. 270; 1973 c. 90; 1981 c. 20; 1983 a. 27; 1991 a. 39; 1995 a. 27; 2003 a. 33.