

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

Date: September 8, 2016

MEMORANDUM

TO: Brad Wirtz, Human Resources Director

FROM: Patricia Lauten, Deputy City Attorney

RE: Matters Within The Duties Of The Committee On Employee Relations

You asked for a legal opinion regarding whether or not outstanding items from a meet and confer process between the City and the Employee Associations (EAs) (items where there is no agreement) can be placed on the Agenda for the Committee on Employee Relations (CER) and discussed by the CER.

As will be discussed in greater detail below, the remaining outstanding items are beyond the scope of the CER's duties. Because they are beyond the scope of the CER's duties, they should not be placed on the Agenda since the CER has no jurisdiction to act on them.

The Committee On Employee Relations (CER)

The CER was created as a result of two plus years of discussions between City representatives and representatives of the newly created EAs to fashion a new employment relationship in the aftermath of Act 10 and Act 32. The resulting employee handbooks as well as the creation of the CER were based on a consensus reached between the City and the EAs. The scope of the duties of the CER, as well as what matters may come before the CER for action, are a product of those discussions and agreements. The scope of duties of the CER is outlined in §33.10 MGO :

(4) Duties. It shall be the function of the Committee to make recommendations on ordinances, or resolutions, the Employee Benefits Handbook for General Municipal Employees and portions of the Professional and Supervisory Handbook that apply to Compensation Group 23 (collectively "Handbooks") pertaining to rates of pay (excluding base wages as that term is defined in Wis. Stat. § 111.70(4)(mb) as may be amended from time to time and

the initial placement of the employee in the salary range), hours of work and conditions of employment affecting the City and its employees, including matters pertaining to:

- (a) Improving the delivery of City services;
- (b) Problems that arise in the workplace which are not covered by the general municipal employee grievance and arbitration procedure (Sec. 3.53(9), MGO) or City of Madison Personnel Rules;
- (c) Rates of pay other than base wages or the initial salary placement;
- (d) Proposed changes to employee benefits;
- (e) Proposed changes, whether by ordinance or resolution, Handbooks or any other means, related to pay (other than base wages or the initial salary placement), hours of work and conditions of employment, including the amount of any general salary increase;
- (f) Changes to the Handbooks. Any changes to the Handbooks shall be made only after approval by this Committee and the Common Council.
- (g) Matters referred to it by the Common Council.

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(6) The Committee shall take up no matter, nor propose any ordinance, personnel rule or work rule that interferes, in any way, with the rights of represented general municipal employees to bargain over base wages nor shall the Committee take up any matter, nor propose any ordinance, personnel rule or work rule that interferes with the management rights of the City to operate and manage its affairs in keeping with its responsibility and the powers or authority which the City retains by law or custom unless specifically designated as a duty of the Committee in sub. (4) above.

Section 33.10 limits the CER to acting only on those matters within its scope and authority and largely to matters involving wages, hours of work and conditions of employment (working conditions). As a general matter, I conclude that none of the EAs proposals cited in this legal opinion relate to wages, hours of work or conditions of employment.

Meet and Confer Process

As part of the post Act 10 and Act 32 agreements, the City Human Resources Office of Labor Relations meets with the employee compensation group representatives on an annual basis for the purpose of addressing issues, concerns or ideas related to wages, benefits and the Employee Benefits Handbook for Municipal Employees. Initial presentations by the parties are made each spring and from there the parties meet and confer in the months of May, June, July and August. Matters of concern are brought forward with the expectation that the matters will be reduced to writing, presented for the City's consideration, and possible action, for the upcoming budget year no later than June 15.

EAs may request that unresolved matters be placed on the agenda of the next available meeting of the CER, no later than the end of September, for discussion and possible resolution. The City and the EAs may exchange position papers one week before appearing before the CER. The CER will issue a decision on all unresolved matters prior to the publication of the Mayor's final operating budget.

While any party may propose issues or areas of concern and discussions may be had on those areas, it is only the matters under which the CER has jurisdiction that can be brought forth before the CER and resolved by the CER. It is entirely possible that a matter may be discussed which is outside the CER's jurisdiction. Just because the City is willing to listen to the EAs concerns and engage in discussion and possibly resolution does not mean that the matter is automatically within the jurisdiction of the CER.

Outstanding Matters – Jurisdiction Of CER

The EAs brought forth 18 issues of concern for discussion. Agreements were reached on a majority of items but there are five (5) remaining issues that are the subject of this legal opinion. For ease of reference I will note the number of each item as it corresponds to the numbers the EAs used in their requests.

1. Discipline during PIP (1)

The Association is suggesting that employee discipline be suspended while the employee is on a performance improvement plan (PIP). The right of the City to take disciplinary action including the right to demote, discipline, suspend or terminate is a long standing recognized management right. Regardless of whether or not an employee is on a PIP, if that employee commits an infraction of policy, procedure, or rules that employee is subject to discipline for the infraction.

Subsection 6 of §33.10 MGO states that the "Committee shall take up no matter . . . that interferes with the management rights of the City to operate and manage its affairs in keeping with its responsibility and the powers or authority which the City retains by law or custom unless specifically designated as a duty of the Committee in sub. (4) above." Discipline is a management right. If the employee has a grievable matter related to discipline then they would follow the grievance and arbitration procedure set forth in the City of Madison Personnel Rules. The CER is also precluded under §33.10(4)(b) from taking up any matters covered by the City's grievance and arbitration procedures.

Based on the foregoing, I conclude the CER does not have jurisdiction to take up this issue and, therefore, this issue should not be placed on the CER agenda.

2. Increase period to grieve discipline (3)

This issue is similar to the issue above in that it involves discipline which is a management right. The City has already agreed to an expedited grievance procedure for issues related to discipline and discharge. Based on my analysis above, I conclude that if the final issue relates to discipline and the City's grievance and discipline process, those matters are outside the jurisdiction of the CER based on the same sections of §33.10 MGO cited above and this issue should not be placed on the CER agenda.

3. Healthcare Exploration Committee (7)

The EAs would like a healthcare exploration committee consisting of the City, the County and the MMSD. While §33.10(4)(d) allows the Committee to take up issues relating to the City's "proposed changes to employee benefits," the City is not proposing a healthcare exploration committee and is not currently proposing any changes to employee benefits for the 2017 operating budget. Accordingly, I conclude that this issue is outside the scope of the jurisdiction of the CER and it should not be placed on the CER agenda.

4. Include Association In Requests For Additional Applicants (15)

This EA request is to "include the relevant Association in the request and documentation of reasons where an Appointing Authority requests additional applicants pursuant to Personnel Rule 5.D.2." However, Personnel Rule 5.D.2 refers to Examination Results. The City has interpreted the EA request to relate to Personnel Rule 5.G.2 which states:

If the Appointing Authority believes none of the referred candidates are appropriate for appointment, s/he shall document the reason(s) s/he believes the candidates are not appropriate and submit this documentation to the Human Resources Director along with a request that additional names be referred. The Human Resources Director, in consultation with the employee/association representative, where applicable, may refuse to refer additional candidates if s/he determines this provision is being used to circumvent the merit principal or conflicts with applicable law.

On December 2, 2014, the Common Council adopted updated Personnel Rules with changes that were discussed with the EAs in conjunction with the new employee handbooks. At that time, HR Services Manager Mike Lipski provided a summary of the changes. In the summary, Lipski wrote:

In G.2., if the HR Director refuses to refer additional names upon request of the Appointing Authority, after the initial candidates are rejected, the HR Director will consult with employee representatives as to the reason, if it is a position that would be filled by a General Municipal Employee.

Like discipline, the right to hire is a longstanding recognized management right. As discussed above, sub. (6) prevents the CER from taking up matters that interfere with the management rights of the City. In addition, the City's Civil Service process is enumerated in the Madison General Ordinances and the City's Personnel Rules. The Personnel Rules must be approved by the Common Council. The City's current Personnel Rules were approved by the Common Council in September, 2015. The CER can only take up matters that are delegated to it under §33.10(4), MGO. This does not include the Personnel Rules.

Based on the foregoing, I conclude that this issue is outside the scope of the jurisdiction of the CER and it should not be placed on the CER agenda.

5. Dedicated Benefit Person (17)

The EAs would like the City to designate an individual from Human Resources as a dedicated benefits person who would assist employees when they have questions about insurance coverage, filing claims, etc. The City Human Resources Department already has individuals who can answer general questions about employee benefits. However, employees have different insurance providers and those individual insurance providers have different rules and regulations for coverage. Each insurance provider provides a customer service number an employee can call for information specific to their individual needs and claims.

As with some of the other issues on this list, the right to hire, direct the work and assign the work of the work force is an employer's management right. The CER is prevented from taking up any matter that would interfere with this right. While sub. (4)(d) allows the CER to take up proposed changes to employee benefits, there is no proposed change to any benefit. What is being proposed is that the City designate a current employee and dedicate them to benefits (primarily insurance) or hire someone to perform this role. The proposal goes right to the City's right to hire, direct and assign the work force. Finally, while the EAs may argue that this would fall under sub. (4)(a), "improving the delivery of City services" a dedicated benefits person only benefits employees; it does not benefit the public. When we talk about the delivery of City services we are talking about delivering services to the public.

Accordingly, based on the foregoing, I conclude that this issue is outside the scope of the jurisdiction of the CER and it should not be placed on the CER agenda.