

## CHAPTER 111

## EMPLOYMENT RELATIONS

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## SUBCHAPTER I

## EMPLOYMENT PEACE

**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 three major interests involved, namely: That of the public, the employe, and the employer. These three 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 employe, 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 and farmer cooperatives, in addition to their general employer problems, face special problems arising from perishable commodities and seasonal production which require adequate consideration. It is also recognized 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

third 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 employe. For the purpose of such negotiation an employe has the right, if he desires, to associate with others in organizing and bargaining collectively through representatives of his 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 employe, 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.

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

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

Application of open meeting law to duties of WERC 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 and the representative of his

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 his employees in a collective bargaining unit (or their representatives) concerning representation or terms and conditions of employment of such employees 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 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) The term "employee" shall include any person, other than an independent contractor, working for another for hire in the state of Wisconsin in a nonexecutive or nonsupervisory capacity, and shall not be limited to the employees of a particular employer unless the context clearly indicates otherwise; and 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 a) who has not 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 his representative, b) who has not been found to have committed or to have been a party to any unfair labor practice hereunder, c) who has not obtained regular and substantially equivalent employment elsewhere, or d) who has not been absent from his 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; but shall not include any individual employed in the domestic service of a family or person at his home or any individual employed by his 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 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.

(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 his 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.

(10) The term "person" includes one or more individuals, partnerships, associations, corporations, legal representatives, trustees or receivers.

(11) The term "representative" includes any person chosen by an employee to represent him.

(12) The term "secondary boycott" shall include combining or conspiring to cause or threaten to cause injury to one with whom no labor dispute exists, 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) by any other unlawful means, in order to bring him against his will into a concerted plan to coerce or inflict damage upon another.

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

History: 1979 c. 89; 1983 a. 189.

**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) 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 one who, at the time of the election, stands deprived of his rights under this subchapter by reason of a prior adjudication of his 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.

(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 employe or his 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 upon said petition forthwith 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 shall not prevent the holding of another election among the same group of employes, provided that it appears to the commission that sufficient reason therefor exists.

History: 1983 a. 189 s. 329 (4).

**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 his employes 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 employes at their prevailing wage rate for the time spent conferring with him, nor from co-operating with representatives of at least a majority of his employes in a collective bargaining unit, at their request, by permitting employe 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 his employes are members, when he and they work at the same trade.

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

(d) To refuse to bargain collectively with the representative of a majority of his employes in any collective bargaining unit; provided, however, that where an employer files with the commission a petition requesting a determination as to majority representation, he shall not be deemed to have refused to bargain until an election has been held and the result thereof has been certified to him by the commission.

(e) To bargain collectively with the representatives of less than a majority of his employes 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 employe because he 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 employe's earnings, unless the employer has been presented with an individual order therefor, signed by the employe personally, and terminable at the end of any year of its life by the employe giving at least thirty days' written notice of such termination.

(j) To employ any person to spy upon employes 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.

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

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

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

(e) To co-operate in engaging in, promoting or inducing picketing (not constituting 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 employes 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 strike provided in s. 111.11.

(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 his employes to induce him 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 employes, 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). A company is not required to bargain over a decision to use equipment which eliminates jobs, but it is required to bargain over the effects of the decision on the rights of the employes to severance pay, seniority, etc. *Libby, McNeill & Libby v. Wisconsin E. R. Comm.* 48 W (2d) 272, 179 NW (2d) 805.

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 W (2d) 117, 183 NW (2d) 103.

The failure of an employe who was allegedly discharged in violation of the contract to exhaust the available procedure precludes recourse to the courts absent a wrongful refusal by the union to process the grievance. *Mahnke v. WERC*, 66 W (2d) 524, 225 NW (2d) 617.

See note to Art. VII, sec. 2, citing *Layton School of Art & Design v. WERC*, 82 W (2d) 324, 262 NW (2d) 218.

State jurisdiction was preempted where secondary boycott violated federal act. *Clarkin v. Dingeldein*, 107 W (2d) 373, 320 NW (2d) 40 (Ct. App. 1982).

Federal preemption of labor relations discussed. *Machinists v. WERC*, 427 US 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 employe, 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 him personally or by mailing a copy thereof to him at his 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 in the

office of the secretary of state 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) The commission shall have the power to issue subpoenas and administer oaths. Depositions may be taken in the manner prescribed by s. 101.02 (14) (c). No person shall 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 may tend to incriminate him or subject him to a penalty or forfeiture under the laws of the state of Wisconsin; but no individual shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may testify or produce 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.

(c) Any person who shall wilfully 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 his rights, immunities, privileges or remedies granted or afforded by this subchapter for

not more than one year, and require him to take such affirmative action, including reinstatement of employes with or without pay, as the commission deems proper. Any order may further require such person to make reports from time to time showing the extent to which he 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 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 him with his 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.

Policy of WERC sustained which limits "parties in interest" those engaged in a controversy as to employment relations and defining such controversies as involving an employer and his employes or a union representing the employes or seeking to represent them. *Chauffeurs, Teamsters & Helpers v. WERC*, 51 W (2d) 391, 187 NW (2d) 364.

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

The grant of authority to the WERC by 111.70 (4) (a), to prevent the commission of prohibited labor practices incorporates the provisions of 111.07 (4) not merely for procedural purposes—but for substantive remedial purposes as well. *WERC v. Evansville*, 69 W (2d) 140, 230 NW (2d) 688.

Sub (8) provides that WERC orders may be reviewed under (7) or under ch. 227 procedure. *WERC v. Teamsters Local No. 563*, 75 W (2d) 602, 250 NW (2d) 696.

**111.08 Financial reports to employes.** Every person acting as the representative of employes 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 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 prescribed by the commission at a uniform rate of not less than 60 cents per page. All transcript fees shall be deposited into the general fund, except that fees collected in excess of 60 cents per page for any transcript produced by a reporter who is not employed by the commission shall be deposited under the appropriation in s. 20.425 (1) (g).

(2) The commission shall assess and collect a filing fee of \$25 from the party or parties 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 of \$25 from the party or parties 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. If such a 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. Fees required to be paid under this subsection shall be paid at the time of filing the complaint or the request for arbitration. A complaint or request for arbitration is not filed until the date such fee or fees are paid. Fees collected under this subsection shall be deposited as general purpose revenue—earned.

**History:** 1973 c. 90; 1981 c. 20; 1983 a. 27.

**111.10 Arbitration.** 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).

See note to 298.10, citing *Jt. School Dist. No. 10 v. Jefferson Ed. Assn.* 78 W (2d) 94, 253 NW (2d) 536.

WERC's power to participate in dispute settlement arbitration is liberally construed. Thus, where parties to collective bargaining agreement select arbitrator from list provided by WERC, this section applies. *Layton School of Art & Design v. WERC*, 82 W (2d) 324, 262 NW (2d) 218.

See note to 788.01, citing *District Council 48 v. Sewerage Comm.* 107 W (2d) 590, 321 NW (2d) 309 (Ct. App. 1982).

**111.11 Mediation.** (1) 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.

(2) Where the exercise of the right to strike by employes of any employer engaged in the state of Wisconsin in the production, harvesting or initial processing (the latter after leaving the farm) of any farm or dairy product produced in this state would tend to cause the destruction or serious deterioration of such product, the employes 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.

**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 wilfully 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. And nothing in this subchapter shall be so construed or applied as to deprive any employe of any unemployment benefit which he might otherwise be entitled to receive under ch. 108.

**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, provided that in any situation where the provisions of this subchapter cannot be validly enforced the provisions of such other statutes or laws shall apply.

**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. 180.99.

(b) "Proportional share" means the annual revenue of a health care institution received in the form of medical assistance reimbursement or public employe 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 employes 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 employes 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 employe of a health care institution's personnel department.

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

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

## SUBCHAPTER II

### FAIR EMPLOYMENT

**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, handicap, marital status, sex, national origin, ancestry, sexual orientation, arrest record or conviction record substantially and adversely affects the general welfare of the state. Employers, labor organizations, employment agencies and licensing agencies which deny employment opportunities and discriminate in employment against properly qualified individuals solely because of their age, race, creed, color, handicap, marital status, sex, national origin, ancestry, sexual orientation, arrest record or conviction record deprive those individuals of the earnings which 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, handicap, marital status, sex, national origin, ancestry, sexual orientation, arrest record or conviction record, 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 employe or applicant for employment based upon the employe'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, handicap, marital status, sex, national origin, ancestry, sexual orientation, arrest record or conviction record. 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 employes or prospective employes to submit to honesty tests without providing safeguards for the test subjects is unfair, and the use of improper tests and testing procedures causes injury to the employes and prospective employes.

(5) The legislature finds that the prohibition of discrimination on the basis of creed under s. 111.337 is a matter of statewide concern, requiring uniform enforcement at state, county and municipal levels.

**History:** 1977 c. 125; 1979 c. 319; 1981 c. 112, 334, 391.  
Summary discharge after 2 weeks of satisfactory employment of persons with history of asthma violated the fair employment act in that it constituted a

discriminatory practice against the claimant based on handicap. *Chicago, M., St. P. & P. RR. Co. v. ILHR Dept. 62 W (2d) 392, 215 NW (2d) 443.*

The department is not limited to finding sex discrimination only where a 14th amendment equal protection violation could also be found. *Wisconsin Telephone Co. v. ILHR Dept. 68 W (2d) 345, 228 NW (2d) 649.*

The Wisconsin Fair Employment Act is more direct and positive in prohibiting sex discrimination in employment than is the basic constitutional guarantee of equal protection of the laws, and enforcement of the law is not limited by the "rational basis" or "reasonableness" test employed in 14th amendment cases. *Ray-O-Vac v. ILHR Dept. 70 W (2d) 919, 236 NW (2d) 209.*

Section 118.20 is not exclusive remedy of wronged teacher; it is supplementary to remedy under fair employment act. General provisions of 893.80 are superseded by specific authority of act. *Kurtz v. City of Waukesha, 91 W (2d) 103, 280 NW (2d) 757 (1979).*

Where employe was not handicapped but employer perceived employe to be handicapped, employe was entitled to protection under this subchapter. *Dairy Equipment Co. v. DILHR, 95 W (2d) 319, 290 NW (2d) 330 (1980).*

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

Employee Retirement Income Security Act 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).*

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.

### 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 or paroled pursuant to any law enforcement or military authority.

(4) "Department" means the department of industry, labor and human relations.

(5) "Employe" 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.

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

(8) "Handicapped individual" 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 employe representation committee, group, association or plan in which employes 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 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.

(13) "Sexual harassment" means unwelcome sexual advances, unwelcome physical contact of a sexual nature or unwelcome verbal or physical conduct of a sexual nature. "Unwelcome verbal or physical conduct of a sexual nature" includes but is not limited to the deliberate, repeated making of unsolicited gestures or comments, or the deliberate, repeated display of offensive sexually graphic materials which is not necessary for business purposes.

(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.

(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.

The word "handicap", although not statutorily defined in (5), includes such diseases as asthma, which make achievement unusually difficult. *Chicago, M., St. P. & P. R. Co. v. ILHR Dept. 62 W (2d) 392, 215 NW (2d) 443.*

The differing treatment of pregnancy disability is not based upon a difference in type of disability, as contended by the employer, rather than upon the sex of the employe, since pregnancy is undisputedly sex-linked, and to isolate disabilities associated with pregnancy for less favorable treatment in a benefit plan designed to relieve the economic burden of physical incapacity constitutes discrimination by sex. *Ray-O-Vac v. ILHR Dept. 70 W (2d) 919, 236 NW (2d) 209.*

Term "creed", as used in (5) (a), means a system of religious beliefs, not political beliefs. *Augustine v. Anti-Defamation Lg. B'nai B'rith, 75 W (2d) 207, 249 NW (2d) 547.*

Where employer negotiated, under National Labor Relations Act, a welfare benefit plan, under Employee Retirement Income Security Act, neither federal act preempted Wisconsin's sex discrimination law forbidding pregnancy benefits discrimination. *Goodyear Tire & Rubber Co. v. DILHR, 87 W (2d) 56, 273 NW (2d) 786 (Ct. App. 1978).*

Fair Employment Act was not preempted by federal legislation. "Future hazards" exception discussed. *Chicago & N.W.R.R. v. Labor & Ind. Rev. Comm. 91 W (2d) 462, 283 NW (2d) 603 (Ct. App. 1979).*

Inclusion of pregnancy-related benefits within disability benefit plan does not violate Equal Pay Act. *Kimberly-Clark Corp. v. Labor & Ind. Rev. Comm. 95 W (2d) 558, 291 NW (2d) 584 (Ct. App. 1980).*

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

See note to 66.054, citing 68 Atty. Gen. 202.

**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, handicap, marital status, sex, national origin, ancestry, arrest record or conviction record.

History: 1981 c. 334.

NOTE: See 111.36 for definition of sex discrimination.

**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.

(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.

Discrimination in advertising. Abramson, WBB March, 1985.

**111.325 Unlawful to discriminate.** It is unlawful for any employer, labor organization, licensing agency or person to discriminate against any employe 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 employe 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 involuntary retirement of, any individual under sub. (1) because of that individual's age.

(d) To apply varying insurance coverage according to an employe'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 employe 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.

City charged under federal age discrimination act had burden of establishing that age 55 mandatory retirement was BFOQ for law enforcement personnel. Equal Emp. Opp. Com'm. v. City of Janesville, 630 F (2d) 1254 (1980).

ERISA preempts (2) (b) to extent it applies to employe benefit plans covered by ERISA. Waukesha Engine Div. v. Dept. of Industry, 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, employe, 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 employ-

ment 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.

(d) In this subsection, "equivalent bond" includes, but is not limited to, a bond issued for an ex-offender under 29 USC 871 (c) in effect on August 4, 1981.

**History:** 1981 c. 334.

See note to 165.85, citing Law Enforce. Stds. Bd. v. Lyndon Station, 101 W (2d) 472, 305 NW (2d) 89 (1981).

See note to 108.04, citing Miller Brewing Co. v. DILHR, 103 W (2d) 496, 308 NW (2d) 922 (Ct. App. 1981).

Conviction for armed robbery in and of itself constituted circumstances substantially related to school bus driver's licensure. Gibson v. Transp. Comm. 106 W (2d) 22, 315 NW (2d) 346 (1982).

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 employe's or prospective employe'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 employe who is a member of the same or a similar religious denomination, in hiring or promotion to an instructional or policy-making position, including but not limited to the position of chaplain or counselor.

(b) For a fraternal as defined in s. 614.01 (1) (a) to give preference to an employe 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).

Union violated title VII of civil rights act by causing employer to fire employe because of employe's refusal on religious grounds to pay union dues. Nottelson v. Smith Steel Wkrs. D.A.L.U. 19806, 643 F (2d) 445 (1981).

**111.34 Handicap; exceptions and special cases. (1)** Employment discrimination because of handicap includes, but is not limited to:

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

(b) Refusing to reasonably accommodate an employee's or prospective employee's handicap 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 handicap 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 handicap 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 a handicapped individual 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 co-workers 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 handicapped individuals in general or a particular class of handicapped individuals.

(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 employe 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 handicapped individuals in general or a particular class of handicapped individuals.

**History:** 1981 c. 334.

Cab company met burden of proof under 111.32 (5) (f), 1973 Stats., to establish that refusal to hire one-armed cab driver on basis of federal regulations was not discrimination. *Boynton Cab Co. v. DILHR*, 96 W (2d) 396, 291 NW (2d) 850 (1980).

Employe handicapped by alcoholism was properly discharged under 111.32 (5) (f), 1973 Stats., for inability to efficiently perform job duties on 3 occasions. *Squires v. Labor & Industry Review Comm.* 97 W (2d) 648, 294 NW (2d) 48 (Ct. App. 1980).

Exception to handicap discrimination under 111.32 (5) (f), 1973 stats., discussed. *Samens v. LIRC*, 117 W (2d) 646, 345 NW (2d) 432 (1984).

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

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.

#### 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.

#### 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 the basis or any part of the basis for any employment decision

affecting an employe; or permitting sexual harassment to substantially interfere with an employe's work performance or to create an intimidating, hostile or offensive work environment. Under this paragraph, 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 employes or members, if the act occurs while the complaining employe is at his or her place of employment or is performing duties relating to his or her employment, if the complaining employe 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.

(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 employes were not hired exclusively from one sex.

**History:** 1981 c. 334 ss. 7m, 22; 1981 c. 391

See note to 53.41, citing 70 Atty. Gen. 202.

See note to 120.03, citing *Zabkowicz v. West Bend Co., Div. Dart Industries*, 789 F (2d) 540 (1986).

Sexual harassment *Gibson, WBB March*, 1981.

#### 111.37 Use of honesty testing devices in employment situations.

(1) (a) Except as provided in par. (b), no employer or agent of an employer may directly or indirectly solicit, require or administer a polygraph, voice stress analysis, psychological stress evaluator or any other similar test purporting to test the honesty of any employe or prospective employe. No person may sell to or interpret for an employer or agent of an employer a test that he or she knows has been solicited or required by an employer or agent of an employer to test the honesty of an employe or prospective employe. If an employe requests a test purporting to test the employe's honesty, any employer or agent administering the test shall inform the employe that taking the test is voluntary.

(b) This subsection does not apply to the use of an instrument or device for the purpose of verifying truthfulness or detecting deception, or assisting in the reporting of a diagnostic opinion as to either of these, which, at a minimum, is capable of recording visually, permanently and simultaneously indications of a person's cardiovascular pattern and changes therein and a person's respiratory pattern and changes therein.

(2) Any agreement by an employer or agent of the employer and an employe or prospective employe offering employment or any pay or job benefit to an employe or

prospective employe in return for taking a test permitted under sub. (1) (b) is void.

(3) (a) If an employer or agent of an employer gives an employe or prospective employe a permitted test, the employer or agent shall follow the procedure under this subsection.

(b) The employer or agent shall inform the test subject, in writing and orally, of all rights which the subject has under this section and ss. 905.065 and 942.06. The employer or agent shall not proceed further with the test until the subject has provided written consent to take the test. The employer or agent shall conduct an interview prior to the test in which he or she discusses any questions to be asked of the subject.

(c) If a person is given a permitted test under par. (a), each question shall be directly related to the person's performance or conduct in past or present employment, shall be designed to establish a known false response for comparison purposes or shall be used to verify the truthfulness of answers on a written employment application. The employer or agent shall not ask any question during the test regarding the subject's sexual practices, religious affiliation or beliefs, marital relationship, political affiliation or beliefs or labor union activities.

(d) The employer or agent shall inform the subject of the results of the test and offer the subject 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 test question shall not be reported further.

(4) No employer may take any disciplinary action against or make a decision on hiring or firing an employe or prospective employe based on the results of a permitted test, unless the employer has relevant evidence or information, obtained independently from the permitted test, which tends to support the test results, or based on the refusal of the employe to take the test.

(5) Every act by a labor organization, employer, employment agency, licensing agency or other person performed in violation of this section is an act of "unfair honesty testing" and is prohibited.

History: 1979 c. 319; 1981 c. 334 ss. 12, 24.

**111.375 Department to administer.** (1) Except as provided under sub. (2), 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 employe who is the aggrieved party in a complaint of discrimination in promotion, compensation or terms and conditions of employment or of unfair honesty 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 except that complaints of discrimination or unfair honesty testing against the agency as an employer shall be filed with and processed by the personnel commission under s. 230.45 (1) (b). Decisions of the personnel commission are subject to review under ch. 227.

History: 1975 c. 94; 1977 c. 29, 196; 1979 c. 221, 319, 355; 1981 c. 334 s. 13. Administrative remedy under Fair Employment Act was exclusive remedy for lost wages. Act does not provide remedy for emotional distress resulting from discriminatory firing. *Bachand v. Connecticut Gen. Life Ins. Co.* 101 W (2d) 617, 305 NW (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, co-operate 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).

**111.381 Study of unfair honesty testing.** The department shall study the problems of honesty testing, the scientific advancements in devices purporting to test honesty and the interests of both employers and employes in honesty testing. The department may make recommendations to the legislature which are reasonable in light of the department's findings.

History: 1979 c. 319; 1981 c. 334 s. 19.

**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 or discriminatory practices or unfair honesty testing in a particular case if the complaint is filed with the department no more than 300 days after the alleged discrimination or unfair honesty 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 ch. 101. 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 or unfair honesty 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 or unfair honesty testing, the department shall issue and serve a written notice of hearing, specifying the nature of the

discrimination which appears to have been committed or unfair honesty testing which 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 or unfair honesty 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 or unfair honesty testing, the examiner shall make written findings and order such action by the respondent as will effectuate the purpose of this subchapter, 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. 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 shall operate to reduce back pay otherwise allowable. Amounts received by the person discriminated against or subject to the unfair honesty 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 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 ch. 101. Any person aggrieved by non-compliance 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 or unfair honesty 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 or unfair honesty testing.

**History:** 1973 c. 268; 1977 c. 29, 196; 1979 c. 221, 319, 355; 1981 c. 334 ss. 20, 25 (2); 1983 a. 122.

The department's order was overbroad in that it exceeded the nature of the discrimination set forth in the notice of hearing. *Chicago, M., St. P. & P. RR. Co. v. ILHR Dept.* 62 W (2d) 392, 215 NW (2d) 443.

Although 111.36 (3) (b), 1969 stats., [now 111.39 (4) (c)] became effective subsequent to discrimination against the plaintiff, it and the language of 111.31, 1969 stats., indicate a legislative design to prevent the loss of wages resulting from employment discrimination, hence plaintiff's complaint seeking back pay states a cause of action. *Yanta v. Montgomery Ward & Co., Inc.* 66 W (2d) 53, 224 NW (2d) 389.

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

Section 111.36 (3m) (c), 1977 stats., [now 111.39 (5) (c)] shows policy against opening Fair Employment proceedings more than one year after commission's final order; court should not use ch. 227 or 752.35 to circumvent that policy. *Chicago & N.W.R.R. v. Labor & Ind. Rev. Comm.* 91 W (2d) 462, 283 NW (2d) 603 (Ct. App. 1979).

Valid offer of reinstatement terminates accrual of back pay. Commission erred in finding employer's offer to be sufficient. Prejudgment interest of 7% awarded on back pay. *Anderson v. Labor & Industry Rev. Comm.* 111 W (2d) 245, 330 NW (2d) 594 (1983).

Sub. (1) is statute of limitations and, as such, may be waived as affirmative defense. *Milwaukee Co. v. Labor & Ind. Rev. Comm.* 113 W (2d) 199, 335 NW (2d) 412 (Ct. App. 1983).

Under 111.36 (3) (b), 1975 stats., [now 111.39 (4) (c)] department may award attorney's fees to prevailing complainant. *Watkins v. LIRC*, 117 W (2d) 753, 345 NW (2d) 482 (1984).

Proposed rule which would prohibit departmental employees from making public any information obtained under 111.36, 1969 stats., [now 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 19.21. Open meeting statute, 66.77, discussed. 60 Atty. Gen. 43.

Department may proceed in matter despite settlement between the parties. Discrimination can be eliminated without full back pay. 66 Atty. Gen. 28.

**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 ch. 101 and may be enforced as provided in s. 101.02 (12) and (13) 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.

### 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.

Application of open meeting law to duties of WERC 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) "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 deemed 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. Nothing in this subsection shall be interpreted or construed to mean that rural electrification cooperative associations are hereby 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. This subchapter does not apply to railroads nor railroad employees.

History: 1983 a. 189.

**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 his 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 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 compen-

sation 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.

**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 the conciliator so named is unable to effect a settlement of such dispute within a 15-day period after his appointment, he shall report such fact to the commission; and 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.

**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) Where there is no contract between the parties, or where 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:

(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;

(b) 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 under the same or similar working conditions in the local operating area involved;

(c) The value of the service to the consumer in the local operating area involved;

(d) Where a public utility employer has more than one plant or office and some or all of such plurality of 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 schedule of wage rates and separate conditions of employment for plants and offices in different areas;

(e) The overall compensation presently received by the employes, 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 employes. The foregoing enumeration of factors shall not be construed as precluding the arbitrator from taking into consideration other factors not confined to the local labor market area which 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.

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

**111.59 Filing order with clerk of circuit court; period effective; retroactivity.** The arbitrator shall hand down his findings, decision and order (hereinafter referred to as the order) within 30 days after his 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 employes involved in the dispute resides. Unless such order is reversed upon a petition for review filed pursuant to s. 111.60, such order, together with such agreements as the parties may themselves have reached, shall become binding upon, and shall control the relationship between the parties from the date such order is filed with the clerk of the circuit court, as aforesaid, and shall continue effective for one year from that date, but such 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 such 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.

**111.60 Judicial review of order of arbitrator.** 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 (1) that the parties were not given reasonable opportunity to be heard, or (2) that the arbitrator exceeded his powers, or (3) that the order is not supported by the evidence, or (4) that the order was procured by fraud, collusion, or other unlawful means. 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. 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.

**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 employes 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 his employes 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 employes 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.

**111.63 Enforcement.** The commission shall have the responsibility for enforcement of compliance with the provisions of this subchapter and to that end may file an action in the circuit court of the county in which any such violation occurs to restrain and enjoin such violation and to compel the performance of the duties imposed by this subchapter. In any such action the provisions of ss. 103.51 to 103.62 shall not apply.

**111.64 Construction. (1)** Nothing in this subchapter shall be construed to require any individual employe to render labor or service without his consent, or to make illegal the quitting of his labor or service or the withdrawal from his place of employment unless done in concert or agreement with others. No court shall have power to issue any process to compel an individual employe to render labor or service or to remain at his place of employment without his consent. It is the intent of this subchapter only to forbid employes 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 his employes, 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.

## SUBCHAPTER IV

## MUNICIPAL EMPLOYMENT RELATIONS

**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 representatives of its employes, to meet and confer at reasonable times, in good faith, with respect to wages, hours and conditions of employment, except as provided in s. 40.81 (3), 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. The 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 employes. In creating this subchapter the legislature recognizes that the public employer must exercise its powers and responsibilities to act for the government and good order of the municipality, 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 public employes by the constitutions of this state and of the United States and by this subchapter.

(b) "Collective bargaining unit" means the unit determined by the commission to be appropriate for the purpose of collective bargaining.

(c) "Commission" means the employment relations commission.

(d) "Craft employe" means a skilled journeyman craftsman, including his apprentices and helpers, but shall not include employes not in direct line of progression in the craft.

(e) "Election" means a proceeding conducted by the commission in which the employes 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 employes 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 employes affected by said agreement and to pay the amount so deducted to the labor organization.

(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 employe organization in which employes 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 employe" means any individual employed by a municipal employer other than an independent contractor, supervisor, or confidential, managerial or executive employe.

(j) "Municipal employer" means any city, county, village, town, metropolitan sewerage district, school district, or any

other political subdivision of the state which engages the services of an employe and includes any person acting on behalf of a municipal employer within the scope of his authority, express or implied.

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

(L) "Professional employe" means:

1. Any employe 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 employe 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 himself to become a professional employe 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 employes 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 employes 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.

(nm) "Strike" includes any strike or other concerted stoppage of work by municipal employes, and any concerted slowdown or other concerted interruption of operations or services by municipal employes, or any concerted refusal to work or perform their usual duties as municipal employes, for the purpose of enforcing demands upon a municipal employer. Such conduct by municipal employes 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 law enforcement or fire fighting personnel.

(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 employes, 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 employes 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 employes shall have the right to refrain from any and all such activities except that employes 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 employes 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 employes, 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 employe 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 employe covered thereby may come before the commission, as provided in s. 111.07, and ask the performance of this duty.

(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 employes 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 or employe organization or contribute financial support to it, but the employer shall not be prohibited from reimbursing its employes at their prevailing wage rate for the time spent conferring with the employes, officers or agents. Supervisors may remain members of the same labor organization of which their subordinates are members, but such supervisor shall not participate in determinations of the collective bargaining policies of such labor organization or resolution of grievances of employes. After January 1, 1974, said supervisors shall not remain members of such organizations.

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 employes 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 employes 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 employes, 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 employe's or supervisor's earnings, unless the municipal employer has been presented with an individual order therefor, signed by the municipal employe personally, and terminable by at least the end of any year of its life or earlier by the municipal employe 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 employe, individually or in concert with others:

1. To coerce or intimidate a municipal employe in the enjoyment of his 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 employes in the enjoyment of their legal rights, including those guaranteed in sub. (2), or to engage in any practice with regard to its employes which would constitute a prohibited practice if undertaken by him on his 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 employes 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 employes, 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 employe, officer or agent of the municipal employer, to induce him to become a member of the labor organization of which employes 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 employes, or in connection with or to influence the outcome of any controversy as to employment relations, any act prohibited by par. (a) or (b).

(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.

(c) *Methods for peaceful settlement of disputes.* 1. *Mediation.* The commission may function as a mediator in labor disputes. Such mediation 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.

2. *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.

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 costs to the parties, he 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 he is involved, at any time prior to the issuance of his 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.

4. *Applicability.* This paragraph applies only to municipal employees who are engaged in law enforcement or fire fighting service.

(cm) *Methods for peaceful settlement of disputes.* 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.

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.

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 subd. 7.

6. *Interest arbitration.* If a dispute 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 of 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.

a. 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 its single final offer containing its final proposals on all issues in dispute to the commission. 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 of 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. a, 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.

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. Factors considered. In making any decision under the arbitration procedures authorized by this paragraph, the arbitrator shall 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 employes involved in the arbitration

proceedings with the wages, hours and conditions of employment of other employes performing similar services.

e. Comparison of the wages, hours and conditions of employment of the municipal employes involved in the arbitration proceedings with the wages, hours and conditions of employment of other employes 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 employes involved in the arbitration proceedings with the wages, hours and conditions of employment of other employes 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 employes, 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. Except for the initial collective bargaining agreement between the parties and except as the parties otherwise agree, collective bargaining agreements covering municipal employes subject to this paragraph shall be for a term of 2 years. No collective bargaining agreement shall be for a term exceeding 3 years. 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.

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

b. This paragraph does not apply to labor disputes involving law enforcement and fire fighting personnel.

(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 employes voting in a collective bargaining unit shall be the exclusive representative of all employes in the unit for the purpose of collective bargaining. Any individual employe, or any minority group of employes 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 employe 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 bargaining unit for the purpose of collective bargaining and shall whenever possible avoid fragmentation by maintaining as few 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 employes in the same or several departments, divisions, institutions, crafts, professions or other occupational groupings constitute a unit. Before making its determination, the commission may provide an opportunity for the employes 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 unit is appropriate if the unit includes both professional employes and nonprofessional employes, unless a majority of the professional employes vote for inclusion in the unit. The commission shall not decide that any unit is appropriate if the unit includes both craft and noncraft employes unless a majority of the craft employes vote for inclusion in the 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 employes 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 employe 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 employes, if it appears to the commission that sufficient reason for another election exists.

(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.

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 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 his appointment, the arbitrator shall conduct a hearing to determine the terms of the agreement relating to wages, hours and working conditions. The arbitrator may subpoena witnesses at the request of either party or on his 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. 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, 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.

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 agreement 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 subds. 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.

(L) *Strikes prohibited; exception.* 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 employe, 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).

(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 including the mayor of the city council who resigns therefrom may, during the term for which he 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. 66.11 (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 employes so desiring be given an opportunity to bargain collectively with the municipal employer through a labor organization or other representative of the employes' 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 employe 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 employes who are engaged in law enforcement or fire fighting service.

**(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 of 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 employes 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 employe 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 employe 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 law enforcement and fire fighting personnel.

**(8) SUPERVISORY UNITS.** This subchapter does not preclude law enforcement or fire fighting supervisors from organizing in separate units of supervisors for purposes of negotiating with their municipal employers. 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. The commission may require that the representative in a supervisory unit shall be an organization that is a separate local entity from the representative of the nonsupervisory municipal employes, but such requirement does not prevent affiliation by a supervisory representative with the same parent state or national organization as the nonsupervisory municipal employe representative. In cities of the 1st class, this section applies to law enforcement supervisors. For such purposes, the term "municipal employe" includes law enforcement supervisors in cities of the 1st class.

**(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 employes 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.

A collective bargaining provision which 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 they do so in good faith. *Bd. of Education v. WERC*, 52 W (2d) 625, 191 NW (2d) 242.

A school district may discharge teachers who engage in a strike. *Hortonville Ed. Assn. v. Jt. Sch. Dist. No. 1*, 66 W (2d) 469, 225 NW (2d) 658.

During the course of a representation election among municipal employes, the municipal employer committed a prohibited labor practice in violation of (3) (a) 1, when a letter to employes signed by the city mayor and aldermen coercively and erroneously warned employes that all fringe benefits would cease if union representation were accepted, and "benign generalities" con-

tained elsewhere in the letter were insufficient to overcome its specific threats. A 2nd letter sent to employees just prior to the representation election predicting a relative loss in benefits if the union were approved, citing the cost of union dues, the possibility of loss of freedom of action, and emphasizing wage rates and fringe benefits, also constituted a prohibited labor practice, since 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. Evansville*, 69 W (2d) 140, 230 NW (2d) 688.

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

The board committed a prohibited labor practice when it allowed a representative of an ad hoc minority teacher group at a regular public meeting to speak concerning a fair-share agreement which was then a subject of negotiation between board and organization. *Madison Jt. Sch. Dist. No. 8 v. WERC*, 69 W (2d) 200, 231 NW (2d) 206.

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. *Joint School v. Wisconsin Rapids Ed. Assn.* 70 W (2d) 292, 234 NW (2d) 289.

Sub (7), providing a \$10 per day fine for whoever violates an injunction against a strike by municipal employees, with the fine to be paid by salary deduction, is inapplicable to a labor association composed of such employees. *Kenosha Unified Sch. Dist. v. Kenosha Ed. Assn.* 70 W (2d) 325, 234 NW (2d) 311.

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

WERC order under (4) (d) 2. a. determining the voting unit and directing an election be held is not reviewable under ch. 227. *West Allis v. WERC*, 72 W (2d) 268, 240 NW (2d) 416.

Mandatory subjects of collective bargaining under (1) (d) between teachers' association and school board discussed. *Beloit Education Assn. v. WERC*, 73 W (2d) 43, 242 NW (2d) 231.

See note to 788.10, citing *Jt. School Dist. No. 10 v. Jefferson Ed. Assn.* 78 W (2d) 94, 253 NW (2d) 536.

Collective bargaining is required regarding decisions primarily related to wages, hours and conditions of employment; it is not mandatory where decision is primarily related to formulation or management of public policy. *Unified S.D. No. 1 of Racine County v. WERC*, 81 W (2d) 89, 259 NW (2d) 724.

See note to 62.13, citing *Glendale Prof. Policemen's Assn. v. Glendale*, 83 W (2d) 90, 264 NW (2d) 594 (1978).

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

Under (3) (a) 6, municipal employer may deduct union dues from paycheck of minority union member. *Milw. Fed. of Teachers, Local No. 252 v. WERC*, 83 W (2d) 588, 266 NW (2d) 314 (1978).

See note to 788.10, citing *Madison Metropolitan School Dist. v. WERC*, 86 W (2d) 249, 272 NW (2d) 314 (Ct. App. 1978).

Lay off of public employees due to budget cut was not a mandatory subject of bargaining. *City of Brookfield v. WERC*, 87 W (2d) 819, 275 NW (2d) 723 (1979).

Primary jurisdiction rule discussed. *McEwen v. Pierce County*, 90 W (2d) 256, 279 NW (2d) 469 (1979).

Under (3) (a) 6, a fair-share provision of successor collective bargaining agreement was applied retroactively to hiatus between agreements. *Berns v. Wisconsin Employment Relations Comm.* 94 W (2d) 214, 287 NW (2d) 829 (Ct. App. 1979); *aff'd*, 99 W (2d) 252, 299 NW (2d) 248 (1980).

Arbitrators appointed pursuant to grievance procedure contained in collective bargaining agreement properly held de novo factual hearing to determine whether just cause existed for school board to terminate teacher. *Arbitration Between West Salem & Fortney*, 108 W (2d) 167, 321 NW (2d) 255 (1982).

See note to Art. IV, sec. 1, citing *Milwaukee County v. District Council 48*, 109 W (2d) 14, 325 NW (2d) 350 (Ct. App. 1982).

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

Sub (4) (jm) is constitutional. *Brennan v. Employment Relations Commission*, 112 W (2d) 38, 331 NW (2d) 667 (Ct. App. 1983).

See note to 227.20, citing *Arrowhead United Teachers v. ERC*, 116 W (2d) 580, 342 NW (2d) 709 (1984).

Board's anti-nepotism policy was mandatory subject of collective bargaining. *School Dist. of Drummond v. ERC*, 121 W (2d) 126, 358 NW (2d) 285 (1984).

By forwarding recommended budget to county board, probate registrar met WERC definition of managerial employee. *Eau Claire County v. WERC*, 122 W (2d) 363, 362 NW (2d) 429 (Ct. App. 1984).

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. 59.07, 59.15, and 111.70 discussed. *Applicability of 39 OAG 314 limited*. 59 Atty. Gen. 209.

See note to 118.21, citing 63 Atty. Gen. 16.

See note to 59.38, citing 63 Atty. Gen. 147.

Attorney general declines to render an opinion on what is subject to collective bargaining in view of a preferred legislative intent that under (4) (b) such questions be resolved through the declaratory judgment procedure before the

Wisconsin employment relations commission subject to judicial review. 63 Atty. Gen. 590.

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. 67 Atty. Gen. 153.

Application of open meeting law to duties of WERC discussed. 68 Atty. Gen. 171.

Board of education may not prevent non-union teacher from speaking of bargaining issue at open meeting. *Madison School Dist. v. Wisconsin Emp. Comm.* 429 US 167.

See note to Art. I, sec. 1, citing *Stevens v. Jt. School Dist. No. 1, Tony, Etc.* 429 F Supp. 477.

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).

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

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.

**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 prescribed by the commission at a uniform rate of not less than 60 cents per page. All transcript fees shall be deposited into the general fund, except that fees collected in excess of 60 cents per page for any transcript produced by a reporter who is not employed by the commission shall be deposited under the appropriation in s. 20.425 (1) (g).

**(2)** The commission shall assess and collect a filing fee of \$25 from the party or parties 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 of \$25 from the party or parties 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. If such a 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. Fees required to be paid under this subsection shall be paid at the time of filing the complaint or the request for arbitration. A complaint or request for arbitration is not filed until the date such fee or fees are paid. Fees collected under this subsection shall be deposited as general purpose revenue—earned.

**(3)** The council on municipal collective bargaining shall provide advice to the commission on the operation of this subchapter and may make recommendations relating to the law. The commission may refer to the council for its study and advice any matter having to do with the collective bargaining between municipal employers and municipal employees under this subchapter.

**(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 charge a reasonable fee for participation in the programs.

(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.

**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 employes 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 employes involved in the arbitration proceeding with the wages, hours and conditions of employment of other employes performing similar services and with other employes 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 employes, 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) This section shall not apply to cities having a population of 500,000 or more nor to cities, villages or towns 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).

Arbitration under (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 W (2d) 1006, 236 NW (2d) 231.

Under the common law an arbitrator need not render an account of the reasons for his award, nor is a written decision required by ch. 298, although he must weigh the criteria suggested by (6). *Manitowoc v. Manitowoc Police Dept.* 70 W (2d) 1006, 236 NW (2d) 231.

Sub. (4) (b) permits amendment of final offer after arbitration petition is filed but before investigation is closed even if amendment includes proposals which were not negotiated before filing of petition. *City of Sheboygan v. WERC*, 125 W (2d) 1, 370 NW (2d) 800 (Ct. App. 1985).

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

## SUBCHAPTER V

## STATE EMPLOYMENT LABOR RELATIONS

**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 state employe and that of the state as an 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 state employes 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 employe 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 an employer, and its employes. For that purpose a state employe may, if he desires, associate with others in organizing and in bargaining collectively through representatives of his 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 state employe and the state as an 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.

This subchapter does not prohibit retroactive contract effective date. Department of Administration v. WERC, 90 W (2d) 426, 280 NW (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 employes, 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 employe" means a skilled journeyman craftsman, including his apprentices and helpers, but shall not include employes not in direct line of progression in the craft.

(5) "Department" means the department of employment relations.

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

(7) "Employe" includes:

(a) Any state employe in the classified service of the state, as defined in s. 230.08, except limited term employes, seasonal employes, project employes, supervisors, management employes and individuals who are privy to confidential matters affecting the employer-employe relationship, as well as all employes of the commission.

(b) Program, project or teaching assistants employed by the university of Wisconsin system, except supervisors, management employes and individuals who are privy to confidential matters affecting the employer-employe relationship.

(8) "Employer" means the state of Wisconsin.

(9) "Fair-share agreement" means an agreement between the employer and a labor organization representing employes or supervisors specified in s. 111.825 (5) under which all of the employes 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.

(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 employe organization whose purpose is to represent state employes in collective bargaining with the state, 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

(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 employes or supervisors specified in s. 111.825 (5) which requires that all of the employes 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 employes or supervisors who are hired on or after the effective date of the agreement.

(13) "Management" includes those personnel engaged predominately in executive and managerial functions, including such officials as division administrators, bureau directors, institutional heads and employes exercising similar functions and responsibilities as determined by the commission.

(15) "Professional employe" means:

(a) Any employe 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 employe 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 himself to become a professional employe 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 employes, 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 employe to represent him.

**(18)** "Strike" includes any strike or other concerted stoppage of work by employes, and any concerted slowdown or other concerted interruption of operations or services by employes, or any concerted refusal to work or perform their usual duties as employes of the state.

**(19)** "Supervisor" means any individual whose principal work is different from that of his subordinates and who has authority, in the interest of the employer, to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward or discipline employes, or to adjust their grievances, or to authoritatively recommend such action, if his 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.

**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 department shall negotiate and administer collective bargaining agreements. To coordinate the employer position in the negotiation of agreements, the executive branch shall main-

tain close liaison with the legislature relative to the negotiation of agreements and the fiscal ramifications thereof. The department is responsible for the employer functions of the executive branch under this subchapter, and shall coordinate its collective bargaining activities with operating agencies on matters of agency concern. The legislative branch shall act upon those portions of tentative agreements negotiated by the executive branch which require legislative action.

(2) In the furtherance of the policy under s. 111.80 (4), the secretary of the department shall establish a collective bargaining capability within the department outside of the division of merit recruitment and selection and shall, together with the appointing authorities or their representatives, represent the state in its responsibility as an employer under this subchapter. The secretary of the department shall establish and maintain, wherever practicable, consistent employment relations policies and practices throughout the state service.

**History:** 1977 c. 196; 1983 a. 27 s. 2200 (15); 1985 a. 42.

**111.82 Rights of state employes.** State employes 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. Such employes shall also have the right to refrain from any or all of such activities.

**History:** 1971 c. 270.

**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 employes in the classified service of the state are structured on a statewide basis 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.
- (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.

(2) Collective bargaining units for employes 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.

(3) The commission shall assign employes to the appropriate collective bargaining units set forth in subs. (1) and (2).

(4) Any labor organization may petition for recognition as the exclusive representative of a collective bargaining unit

specified in sub. (1) 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.

(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 defined in s. 111.91 (1).

History: 1985 a. 29; 1985 a. 42 ss. 4 to 6, 8, 18; 1985 a. 332.

**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 employe, or any minority group of employes 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 employe or group of employes 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 employes 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 employes in the voting group involved as to the determination of the collective bargaining unit.

(3) Whenever a question arises concerning the representation of employes in a collective bargaining unit the commission shall determine the representative thereof by taking a secret ballot of the employes and certifying in writing the results thereof to the interested parties and to the secretary of the department. There shall be included on any ballot for the election of representatives the names of all labor organizations having an interest in representing the employes 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 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 employes 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 employes in that unit 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 employes 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 employes 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 employes at any institution included within the collective bargaining unit at which no petition is filed and no election is held or at which the employes 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 employes 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 employes in that collective bargaining unit, except those excluded under par. (c).

(e) If at an election held under par. (b), a majority of the employes 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 employes 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 employes 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 employes 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 employes 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 bar-

gaining agreement between the employer and the existing representative.

History: 1971 c. 270; 1975 c. 238; 1985 a. 42.

**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 state employees in the exercise of their rights guaranteed in s. 111.82.

(b) To initiate, create, dominate or interfere with the formation or administration of any labor or employee organization or contribute financial support to it. However, it is not an unfair labor practice for the employer to reimburse state employees at their 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 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 state 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 his 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 its 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 him on his 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) 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 its employees, to induce him 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 him personally, or by telegram, advising him 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.

Employer who terminates state employee in part because of employee's participation in union activities violates SELRA. *State v. WERC*, 122 W (2d) 132, 361 NW (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 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 the state depart-

ment or agency involved to conduct the referenda provided for herein.

**History:** 1971 c. 270; 1981 c. 112; 1983 a. 160; 1985 a. 42.

**111.86 Grievance arbitration.** 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 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.

**History:** 1971 c. 270; 1979 c. 32 s. 92 (15); 1985 a. 42.

**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.

**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 employes specified in s. 111.81 (7) (a), has been duly recognized by the employer, as the exclusive representative of employes 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 such 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 costs to the parties, he 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 his 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 his 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 employe representative constitutes a violation of s. 111.84 (1) (d) or (2) (c).

**History:** 1971 c. 270; 1985 a. 42.

**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. In this regard it shall be the responsibility of the department of employment relations to decide whether to seek an injunction or file an unfair labor practice charge. The existence of an administrative remedy shall not constitute grounds for denial of injunctive relief.

**(2)** The occurrence of a strike and the participation therein by a state employe 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 employe participating therein;

**(b)** The right to cancel the reinstatement eligibility of any employe engaging therein; and

**(c)** The right of the employer to request the imposition of fines, either against the labor organization or the employe 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.

**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 the agency utilizing personnel, methods and means in the most appropriate and efficient manner possible.

**(2)** Manage the employes of the agency; hire, promote, transfer, assign or retain employes 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 employe for just cause; or to lay off employes 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.

**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, as related to general salary scheduled adjustments consistent with sub. (2), and salary adjustments upon temporary assignment of employes to duties of a higher classification or downward reallocations of an employe's position; fringe benefits; hours and conditions of employment.

**(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 shall be prohibited from bargaining on matters contained in sub. (2), except as provided under sub. (3).

**(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 employe occupancy of houses or other lodging provided by the state.

(2) Except as provided in sub. (3), 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, appointments, and policies with respect to probationary periods.

2. The job evaluation system specifically including position classification, position qualification standards, establishment and abolition of classifications, assignment and reassignment of classifications to salary ranges, and allocation and reallocation of positions to classifications, and the determination of an incumbent's 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.

(3) The employer may bargain and reach agreement with a labor organization which is certified or recognized to represent a collective bargaining unit composed of classified employees to provide for an impartial hearing officer to hear appeals on differences arising under actions taken by the employer under sub. (2) (b) 1 and 2. The hearing officer shall make a decision accompanied by findings of fact and conclusions of law. The decision shall be reviewed by the personnel commission under s. 230.45 (1) (f) on the record and either affirmed, modified or reversed, and the personnel commission's action is subject to review under ch. 227. This subsection does not empower the hearing officer to expand the basis of adjudication beyond the test of "arbitrary and capricious" action, nor does this subsection diminish the authority of the personnel commission under s. 230.45.

(4) The secretary of the department, in connection with the development of tentative collective bargaining agreements to be submitted under s. 111.92, 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) 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.

Effective date of state employees' collective bargaining agreement was mandatory subject of collective bargaining agreement. Department of Administration v. WERC, 90 W (2d) 426, 280 NW (2d) 150 (1979).

Unfair labor practices and collective bargaining regarding pensions as to state employees discussed. 64 Atty. Gen. 18.

**111.915 Labor proposals.** The secretary of the department 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.

**111.92 Agreements.** (1) Tentative agreements reached between the department of employment relations, acting for the executive branch, and any certified labor organization shall, after official ratification by the labor organization, be submitted 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 shall not be 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 negotiation.

(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 state 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.

Matters within the scope of bargaining under 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) who are not included in a collective bargaining unit for which a representative is certified.

(3) Except as provided in ss. 40.05, 40.80 (3) 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.

**111.94 Rules, transcripts, 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 prescribed by the commission at a uniform rate of not less than 60 cents per page. All transcript fees shall be deposited into the general fund, except that fees collected in excess of 60 cents per page for any transcript produced by a reporter who is not employed by the commission shall be deposited under the appropriation in s. 20.425 (1) (g).

**(2)** The commission shall assess and collect a filing fee of \$25 from the party or parties 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 of \$25 from the party or parties 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. If such a 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. Fees required to be paid under this subsection shall be paid at the time of filing the complaint or the request for arbitration. A complaint or request for arbitration is not filed until the date such fee or fees are paid. Fees collected under this subsection shall be deposited as general purpose revenue—earned.

**History:** 1971 c. 270; 1973 c. 90; 1981 c. 20; 1983 a. 27.