FILED
03-29-2024
Anna Maria Hodges
Clerk of Circuit Court
2023CV002825

BY THE COURT:

DATE SIGNED: March 29, 2024

Electronically signed by Brittany C. Grayson
Circuit Court Judge

STATE OF WISCONSIN CIRCUIT COURT MILWAUKEE COUNTY
CIVIL DIVISION – BRANCH 16

MILWAUKEE POLICE ASSOCIATION,

Plaintiff,

v. **Case No. 2023-CV-2825**

CITY OF MILWAUKEE,

Defendant.

DECISION AND ORDER

The City of Milwaukee ("City") moves the court to dismiss the Milwaukee Police Association's ("MPA") claim of a violation of Article 59 of the parties' Collective Bargaining Agreement ("CBA"). The MPA in turn seeks a declaration that the City was required to collectively bargain over Standard Operating Procedure 575 ("SOP 575") prior to its implementation. For the following reasons, the court **DENIES** the City's motion to dismiss and **DENIES** the MPA's motion for declaratory relief.

BACKGROUND

The MPA is a labor organization located at 6310 West Bluemound Road, Milwaukee, Wisconsin, 53213. Compl., Dkt. 2, ¶ 2. Pursuant to § 111.70 of the Wisconsin Municipal Employment Relations Act ("MERA), the City recognizes the MPA as the exclusive bargaining

representative for certain nonsupervisory police officers of the Milwaukee Police Department ("MPD"). *Id.*

The City is a political subdivision established by laws of the State of Wisconsin, with its principal place of business located at 200 East Wells Street, Milwaukee, Wisconsin, 53202. *Id.* at ¶ 3. The City employs all MPA members. *Id.* The City of Milwaukee Fire and Police Commission ("FPC") is a civilian-led, quasi-judicial board whose members are appointed by the Mayor, approved by the Common Council, and paid by the City. *Id.*

The FPC planned to create an MPD Standard Operating Procedure ("SOP") relating to the release of officer body camera footage of critical incidents. *Id.* at ¶ 5. Once informed of the FPC's proposed SOP, the MPA contacted the City's Chief of Police ("Chief") and the FPC's Executive Director to remind them of the need to collectively bargain in good faith. *Id.* at ¶ 6. The Chief advised the MPA that the matter was "out of his hands," and that MPD had no intention of bargaining with the MPA over the new SOP numbered 575. *Id.* at ¶ 7. The FPC also declined to bargain with the MPA over SOP 575 before ultimately voting to approve it on April 20, 2023. *Id.* at ¶ 8, 10.

PROCEDURAL HISTORY

On April 20, 2023, the MPA filed suit claiming a violation of Article 59 of the parties' CBA. Compl., Dkt. 2, ¶¶ 12-17. The MPA seeks a declaration that SOP 575 is unlawful because the City impermissibly failed to collectively bargain prior to its vote of approval and implementation. *Id.* at ¶ A. Additionally, the MPA seeks compensatory damages, punitive damages, and attorney fees. *Id.* at ¶¶ B-E.

The MPA filed a motion for preliminary injunction on April 20, 2023, and an expedited motion on May 8, 2023. Pl. Inj., Dkt. 3; Pl. Inj., Dkt. 30. On May 16, 2023, the Honorable

Fredrick C. Rosa granted the MPA's motion for preliminary injunction, thereby temporarily enjoining the City from implementing SOP 575. Order, Dkt. 41.

On April 28, 2023, the City filed a motion to dismiss based on the MPA's failure to state a valid claim upon which relief may be granted. Def. Br., Dkt. 20, 21. The MPA filed a motion for declaratory relief on June 12, 2023. Pl. Br., Dkt. 44.

ANALYSIS

I. The MPA's complaint states a valid claim upon which relief may be granted because SOP 575 could primarily relate to wages, hours, and conditions of employment.

The City seeks dismissal of the case based on the MPA's failure to state a claim upon which relief may be granted. The MPA claims the City violated Article 59 of the CBA when SOP 575 was implemented without collective bargaining. Compl., Dkt. 2, ¶¶ 12-17. For the following reasons, the court rules the MPA, within the "four corners" of the complaint, has sufficiently pled that SOP 575 may primarily relate to wages, hours, and conditions of employment, therefore potentially triggering the requirement to collectively bargain under the CBA.

a. Legal Standard – Motion to Dismiss

"A motion to dismiss for failure to state a claim tests the legal sufficiency of the complaint." *Data Key Partners v. Permira Advisers LLC*, 2014 WI 86, ¶19, 356 Wis. 2d 665, 849 N.W.2d 693. To withstand the motion, the complaint must set out "[a] short and plain statement of the claim, identifying the transaction or occurrence or series of transactions or occurrences out of which the claim arises and showing that the pleader is entitled to relief." Wis. Stat. § 802.02(1)(a); *Data Key Partners*, 2014 WI 86, ¶ 20.

On review, the court must accept as true all well-pleaded facts alleged in the complaint, along with all reasonable inferences from those facts. *Data Key Partners*, 2014 WI 86, ¶ 19; *Kaloti Enterprises, Inc. v. Kellogg Sales Co.*, 2005 WI 111, ¶ 11, 283 Wis. 2d 555, 699 N.W.2d 205. The court cannot add facts to a complaint and is not required to accept legal conclusions contained therein. *Cattau v. Nat'l Ins. Servs. of Wis., Inc.*, 2019 WI 46, ¶ 5, 386 Wis. 2d 515, 926 N.W.2d 756. "[A] formulaic recitation of the elements of a cause of action is not enough to state a claim upon which relief may be granted." *Id.*

It does not matter how the facts in the complaint are labeled. *See Tikalsky v. Friedman*, 2019 WI 56, ¶ 14, 386 Wis. 2d 757, 928 N.W.2d 502; *Strid v. Converse*, 111 Wis. 2d 418, 423, 331 N.W.2d 350 (1983) (citing *Jost v. Dairyland Power Cooperative,* 45 Wis. 2d 164, 169-170, 172 N.W.2d 647 (1969)). "If proof of the well-pleaded facts in a complaint would satisfy each element of a cause of action, then the complaint has stated a claim upon which relief may be granted." *Cattau*, 2019 WI 46, ¶ 6.

b. The complaint is legally sufficient.

The MPA's complaint alleges the City, via the FPC and MPD, violated Article 59 of the CBA by declining to collectively bargain over SOP 575 prior to its implementation. Compl., Dkt. 2, ¶¶ 12-17. The MPA asserts that SOP 575 is primarily related to wages, hours, and conditions of employment, thereby triggering the collective bargaining provision in Article 59 of the CBA. *Id.* at ¶¶13-16.

The City initially makes four arguments to support its contention that the complaint fails to state a claim upon which relief may be granted. *See* Def. Br., Dkt. 21. First, the City argues the FPC did not violate Article 59 of the CBA because it is the statutory rule-maker for the MPD pursuant to Wis. Stat. § 62.50(1m). *Id.* at 3. Second, the City maintains that it has no obligation

to collectively bargain over SOP 575 because the SOP is primarily based on management and direction of the police department, not conditions of employment. *Id.* at 3-5. Third, the City argues the FPC did not violate the CBA when it implemented SOP 575 without collective bargaining because Article 59(5)'s "meet-and-confer" obligation is not binding on the FPC. *Id.* 5-8. Fourth, the City argues the case is not properly before this court because the complaint breaches the parties' explicit intent to arbitrate Article 59 disputes. *Id.* at 8-9.

The MPA argues that the City's motion to dismiss is baseless, as its complaint more than satisfies the requisite burden. Pl. Br., Dkt. 44, 14. The MPA further asserts that its complaint implicates both the FPC and the Chief, as it was the FPC that sought to unilaterally implement SOP 575 and it was the Chief's involvement that triggered the requirement to collectively bargain. *Id.* at 15-16. Additionally, the MPA argues that the City's position on arbitration is contradictory, as the grievance and arbitration procedure within the CBA only binds the MPA and the Department, not the FPC. *Id.* at 17.

In its reply brief, the City makes additional arguments that the MPA made contradictory representations to the court stating that the Chief created and implemented SOP 575, the language of the CBA recognizes it is subordinate to the FPC's statutory authority, and principles of contract interpretation foreclose the MPA's reliance on Article 59. Def. Br., Dkt. 51, 1.

The City bases its motion to dismiss on the assertion that the MPA fails to state a claim upon which relief may be granted pursuant to Wis. Stat. § 802.06(2)(a)(6). However, the City's arguments, as outlined above, fail to adequately challenge the legal sufficiency of the complaint. The City instead focuses a majority of its arguments on the *merits* of the claims made by the MPA, rather than the legal sufficiency of the pleadings.

The court accepts as true all well-pleaded facts in the complaint, along with all reasonable inferences from those facts. The complaint alleges that SOP 575, which provides for the release of video footage of critical incidents, primarily relates to wages, hours, and conditions of employment. It further alleges that the City, via the FPC and MPD, refused to collectively bargain before SOP 575's implementation on April 20, 2023, in violation of Article 59 of the CBA. These allegations are sufficient to support a determination that the complaint states a valid claim upon which relief may be granted.

Additionally, this court is not persuaded by the City's argument that the failure to arbitrate pursuant to Article 59 warrants dismissal of this case. Compliance with an arbitration provision in the CBA is unrelated to the determination of whether the complaint sufficiently states a claim upon which relief may be granted. Rather, if the City believed arbitration was the exclusive remedy for the alleged Article 59 violation, then it should have filed a motion to stay the proceedings and compel arbitration, which it has not done in this case.

As such, the City's motion to dismiss is **DENIED**.

II. The MPA fails to establish that the City violated either Wisconsin law or the CBA by implementing SOP 575.

The MPA seeks a declaration that the City violated Wisconsin law and the CBA by unilaterally implementing SOP 575. The MPA establishes that there is a controversy in which a claim of right is asserted against the City, who has an interest in contesting it. The controversy is between the MPA and the City, who each hold adverse interests. Additionally, the MPA has a legally protectable interest in the controversy. However, for the following reasons, the issue before the court is not ripe for judicial determination. Further, entering such a judgment at this

stage of the proceedings would not terminate the uncertainty or controversy giving rise to the proceeding.

a. Legal Standard – Declaratory Judgment

Courts have statutory authority to "declare rights, status, and other legal relations whether or not further relief is or could be claimed." Wis. Stat. § 806.04(1). The following four elements need to be present for the court to entertain an action for declaratory judgment:

> (1) A controversy in which a claim of right is asserted against one who has an interest in contesting it.
> (2) The controversy must be between persons whose interests are adverse.
> (3) The party seeking declaratory relief must have a legal interest in the controversy—that is to say, a legally protectable interest.
> (4) The issue involved in the controversy must be ripe for judicial determination.

Olson v. Town of Cottage Grove, 2008 WI 51, ¶ 21, 309 Wis. 2d 365, 375, 749 N.W.2d 211, 216.

In order to be ripe for judicial determination, the "facts [must] be sufficiently developed to avoid courts entangling themselves in abstract disagreements." *Miller Brands-Milwaukee, Inc. v. Case*, 162 Wis. 2d 684, 694, 470 N.W.2d 290, 294 (1991). The court may not decide hypothetical rights "that might, or might not, reflect the facts as ultimately determined in the lawsuit." *Sipl v. Sentry Indem. Co.*, 146 Wis. 2d 459, 467, 431 N.W.2d 685 (Ct. App. 1988). Parties may stipulate to uncontested facts or agree not to contest some facts they might dispute. *Id.* at 467-68. "However, a stipulation must be conclusive on the question presented, at least for the purposes of the litigation, before a court may use it as the factual basis for a declaration of rights." *Id.* Additionally, "[t]he court may refuse to render or enter a declaratory judgment or decree where such judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding." Wis. Stat. § 806.04(6).

b. The MPA fails to establish, at this stage of the proceedings, that it is entitled to a declaration that Wisconsin law requires collective bargaining over SOP 575.

The MPA seeks to establish SOP 575 as a mandatory subject of collective bargaining. To do so, the MPA must show its interests relating to wages, hours, and conditions of employment outweigh the City's interests regarding managerial prerogatives and public policy. The MPA argues its interests of heightened public scrutiny and stress caused by SOP 575's disclosure deadlines outweigh the City's interests of increasing government accountability and transparency. For the following reasons, the court determines the MPA has not carried its burden.

i. *West Bend Ed. Ass'n v. WERC* – "Primarily Related" Standard

At the time SOP 575 was implemented, Wisconsin law provided that collective bargaining:

> means the performance of the mutual obligation of a municipal employer, through its officers and agents, and the representative of its municipal employees in a collective bargaining unit, to meet and confer at reasonable times, in good faith, with the intention of reaching an agreement, or to resolve questions arising under such an agreement, **with respect to wages, hours, and conditions of employment for public safety employees** . . .

Wis. Stat. § 111.70(1)(a). In other words, § 111.70 requires the City to collectively bargain over SOP 575 prior to its implementation if it is primarily related to wages, hours, and conditions of employment. In order to make this determination, the court looks to the primarily related standard provided in *West Bend Ed. Ass'n v. WERC*, 121 Wis. 2d 1, 357 N.W.2d 534, 538 (1984).

The Wisconsin Supreme Court explained its interpretation of Wis. Stat. § 111.70 in *West Bend Ed. Ass'n v. WERC* as setting forth a primarily related standard which is a balancing test that:

> recognizes that the municipal employer, the employees, and the public have significant interests at stake and that their competing interests should be weighed to determine whether a proposed subject for bargaining should be characterized as mandatory. If the employees' legitimate interest in wages, hours, and conditions of employment outweighs the employer's concerns about the restriction on managerial prerogatives or public policy, the proposal is a mandatory subject of bargaining. In contrast, where the management and direction of the [municipality] or the formulation of public policy predominates, the matter is not a mandatory subject of bargaining. In such cases, the professional association may be heard at the bargaining table if the parties agree to bargain or may be heard along with other concerned groups and individuals in the public forum.

West Bend Ed. Ass'n, 121 Wis. 2d 1, 9. Put simply, if SOP 575 is primarily related to "wages, hours, and conditions of employment," then it must be bargained over.[1] Conversely, if SOP 575 is primarily related to the "management and direction" of the City or the "formulation of public policy predominates," then it need not be bargained over unless the "parties agree to bargain." *Id.* at 8-9.

The MPA argues its interests outweigh those of the City because public scrutiny of police has reached unprecedented levels. Pl. Br., Dkt. 44, 13. Further, the MPA argues MPD employees will experience new stress, especially those now tasked with complying with SOP 575's disclosure deadlines. *Id.*

In contrast, the City argues its public policy interests are rooted in a desire for increased government accountability and transparency. Def. Br., Dkt. 49, 1-2. The City also points to the plain text of SOP 575.00(A)-(B), which provides:

---

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

A. The purpose of this standard operating procedure (SOP) is to foster greater public trust in the Milwaukee Police Department by increasing transparency with respect to department operations involving the use of deadly force. The department recognizes that the Milwaukee community has a strong and undeniable interest in being informed – in a complete, accurate, and timely manner – about incidents that result in death or great bodily harm that is caused by a department member's actions or occurs while in police custody.

B. To that end, this SOP establishes criteria for when video evidence that captures officer-involved incidents that result in death or great bodily harm will be released to the public. This policy is intended to balance important interests, including the public's interest in transparency and police accountability, the necessity of preserving the integrity of criminal and administrative investigations, and the privacy interests of individuals depicted in such videos (including victims, witnesses, bystanders, and the individuals against whom force is used.) This policy creates a presumption of release.

SOP 575, Dkt. 36, 1.

During the motion hearing presided over by this court on January 18, 2024, the City proffered the testimony of Leon Todd ("Todd"), Executive Director of the FPC. In part, Todd provided testimony to support the City's position that SOP 575 was primarily implemented to increase government accountability and transparency. Todd highlighted the substantial amount of public interest and comment at the FPC's board meetings regarding an SOP that addressed deadlines for the disclosure of body camera footage of officer-involved deaths and other critical incidents. In response to this public interest, the FPC started meeting with members of community organizations, including the Milwaukee Alliance, Black Leaders Organizing for Communities ("BLOC"), the Milwaukee District Attorney's Office, the MPA, the Chief, and the Milwaukee Area Investigative Team ("MAIT").

Conversely, the MPA, at the same hearing, did not provide any additional evidence to support its interests related to the increase in public scrutiny of police and new employment stress.

The court has considered the legitimate interests of both the MPA and the City. The evidence presented by the City establishes that there is considerable public interest in the implementation of SOP 575, as it addresses the desire for more transparency and police accountability. At some point, the MPA may be able to establish that the increase in public scrutiny of police and employment stress are legitimate interests that outweigh those of the City. However, at this point, the MPA has not met its burden of establishing that its interests outweigh those of the City, or that SOP 575 is primarily related to wages, hours, and conditions of employment. As such, the MPA has not established the City was required under Wisconsin law to collectively bargain over SOP 575 prior to its approval and implementation.

c. The MPA fails to establish, at this stage of the proceedings, that it is entitled to a declaration that the CBA requires collective bargaining over SOP 575.

While the City may not be required under Wisconsin law to collectively bargain over SOP 575, the court must consider whether collective bargaining is required under the CBA.

i. The CBA contains ambiguous language, which is not resolved by considering extrinsic evidence to determine the parties' intent.

Contract interpretation seeks to follow through with the parties' intentions. *Seitzinger*, 2004 WI 28, ¶ 22. However, "subjective intent is not the be-all and end-all." *Kernz v. J.L. French Corp.*, 2003 WI App 140, ¶ 9, 266 Wis.2d 124, 667 N.W.2d 751. Rather, "unambiguous contract language controls contract interpretation." *Id.* Where the terms of a contract are clear and unambiguous, the court will construe the contract according to its literal terms. *Maryland Arms Ltd. Partnership v. Connell*, 2010 WI 64, ¶ 23, 326 Wis.2d 300, 786 N.W.2d 15 (quoting *Gorton v. Hostak, Henzl & Bichler*, S.C., 217 Wis.2d 493, 506, 577 N.W.2d 617 (1998)). "We

presume the parties' intent is evidenced by the words they chose, if those words are unambiguous." *Kernz*, 2003 WI App 140, ¶ 9.

"A contract provision is ambiguous if it is fairly susceptible of more than one construction." *Mgm't Computer Servs., Inc. v. Hawkins, Ash, Baptie & Co.*, 206 Wis.2d 158, 177, 557 N.W.2d 67 (1996). Contract language is construed according to its plain or ordinary meaning, *Huml v. Vlazny*, 2006 WI 87, ¶ 52, 293 Wis.2d 169, 716 N.W.2d 807, consistent with "what a reasonable person would understand the words to mean under the circumstances." *Seitzinger*, 2004 WI 28, ¶ 22.

The court construes contracts "as they are written." *Columbia Propane, L.P. v. Wisconsin Gas Co.*, 2003 WI 38, ¶ 12, 261 Wis.2d 70, 661 N.W.2d 776. Ultimately, "the office of judicial construction is not to make contracts or to reform them, but to determine what the parties contracted to do." *Marion v. Orson's Camera Centers, Inc.*, 29 Wis.2d 339, 345, 138 N.W.2d 733 (1966) (quoting *Wisconsin Marine & Fire Ins. Co. Bank v. Wilkin*, 95 Wis. 111, 115, 69 N.W. 354 (1897)).

If the court determines Article 59 of the CBA contains ambiguous language, extrinsic evidence may be used in determining the parties' intent. *Seitzinger v. Community Health Network*, 2004 WI 28, ¶ 22, 270 Wis.2d 1, 676 N.W.2d 426.

The MPA maintains that SOP 575 is primarily related to wages, hours, and conditions of employment and therefore subject to collective bargaining under Article 59. Pl. Br., Dkt. 44, 13. The MPA also argues the Chief's signature is what implements SOPs and not the FPC's statutory rule-making authority. *Id.* at 15-16. Further, the MPA argues the FPC granted the Chief the power to implement SOPs. *Id.* This granting of rule-making authority, the MPA contends, is established by the parties past practice of implementing SOPs. *Id.*

In response, the City argues that SOP 575 is primarily related to public policy and the managerial prerogatives of the government. Def. Br., Dkt. 49, 5-7. The City also argues the FPC creates and implements SOPs, and that the Chief's signature is "nothing more than a formality." *Id.* at 12.

Article 59 of the CBA provides in relevant part:

> 3. The parties hereto recognize that those rules and regulations established and enforced by the Fire and Police Commission and/or the Chief of Police, which affect the wages, hours, and working conditions of the police officers included in the collective bargaining unit covered by this Agreement are subject to the collective bargaining process pursuant to Section 111.70, Wisconsin Statutes.
>
> 5. During the term of this Agreement prior to the establishment of new rules or regulations, or changes in existing rules or regulations that do not fall within the City's unfettered management functions, the Association shall be afforded the opportunity to negotiate with the Chief of Police…

Lewis Aff., Ex. 1, Dkt. 10, 125, ¶¶ 3, 5.

The CBA's language is ambiguous regarding whether the contract puts further requirements upon the City to collectively bargain over SOPs beyond those already established by Wisconsin law. On its face, paragraph 3 of Article 59 grants the FPC and/or the Chief the power to establish and enforce SOPs, and if those SOPs "affect the wages, hours, and working conditions of the police officers," then collective bargaining is required pursuant to Wis. Stat. § 111.70. *Id.* at ¶ 3. The plain language of the CBA grants both the FPC and the Chief the authority to implement SOPs, but provides that rules or regulations falling outside of the City's unfettered management functions are only subject to negotiation with the Chief. *Id.* at ¶ 5. Since the CBA contains ambiguities, extrinsic evidence, such as past practice, may be used to determine the parties' intent. *See Seitzinger*, 2004 WI 28, ¶ 22.

The MPA argues the FPC has never unilaterally implemented an SOP until SOP 575. *See* Pl. Br., Dkt. 44, 10; Wagner Aff., Dkt. 43. Additionally, the MPA argues that hundreds of SOPs

have been implemented or modified since the CBA was entered into and that each SOP relating to wages, hours, and conditions of employment was collectively bargained over. *Id.*

The purported past practice of collective bargaining over SOPs primarily related to wages, hours, and conditions of employment provides further support for the MPA's interpretation of the terms of the CBA. However, evidence of past practice is not dispositive as to the parties' intentions at the time they entered into the CBA and does not resolve the ambiguities that exist. The question of the parties' intent is one of fact. *Peninsular Carpets, Inc. v. Bradley Homes, Inc.*, 58 Wis. 2d 405, 413–14, 206 N.W.2d 408 (1973); *Ginsu Products,* 786 F.2d at 262. In such a circumstance, it is the trier of fact that must resolve any disputes related to the parties' understandings at the time they entered into the CBA.

Therefore, the MPA has failed to carry its burden of establishing it is entitled to a declaration that collective bargaining was required under the CBA prior to SOP 575's implementation.

CONCLUSION

For the foregoing reasons, the court **DENIES** the City's motion to dismiss and **DENIES** the MPA's motion for declaratory relief.

SO ORDERED.