Memorandum Accompanying Dissenting Vote of Commissioner Judith Neumann

to the March 26, 2012 Draft Proposed Emergency Rules Regarding "Base Wages" Calculations

On Monday, March 26, 2012, over my dissent, the WERC submitted to the Governor's office a second set of draft emergency rules regarding calculation of base wages. It is my understanding that the Governor's office intends to approve these draft rules today.[1]

Whereas I was in agreement with my fellow commissioners regarding the first draft of these rules, I do not concur in this second version. As explained more fully below, I believe that the new draft rules, which have been revised during the statutory gubernatorial approval/rejection process, are unlawful on their face. While my primary objection is to the substance of the new draft rules, I also have concerns about the impact of the new administrative rules process on the timing and content of these rules.

The WERC's customers have been eagerly awaiting our guidance about how to implement the provisions of 2011 Wisconsin Act 10 regarding the obligation to bargain over "total base wages" that is codified in Sec. 111.70(mb), Stats. (for the municipal sector) and in Sec. 111.91(3), Stats. (for the state sector). The process of issuing "emergency" rules has now consumed nine months. I would like to note that the delay owes much to 2011 Wisconsin Act 21 requiring that the Governor's office pre-authorize an agency to prepare a draft of rules. That pre-authorization process is followed by a publication and legislative approval period, followed by the actual drafting of the rules, and the submission of those rules for gubernatorial approval before they can be implemented. See Secs. 227.135 and 227.185, Stats. The fact that this process applies even to emergency rules is particularly significant in terms of elongating the issuance of these base wage rules. I also think it weakens the effectiveness of any eventual public input.

Here's the time line of events. Act 10 went into effect on June 29, 2011. The WERC submitted the newly-requisite "Statement of Scope" (essentially its intention to make rules regarding the base wages issue) to the Governor's office on July 15, 2011. The Governor's Office did not authorize the WERC to draft the rules until August 31, 2011. At that point, the new administrative procedures required that the Commission's Statement of Scope be published and that, once published, the pertinent legislative oversight committee would also have to authorize the WERC to begin drafting – which could not occur for at least 10 days after publication.

As a result of these preliminary hoops, WERC could not lawfully begin any work on drafting even emergency rules until the end of September 2011. The subject matter of the base wage rules, as may be clear from reading them, is somewhat arcane and the underlying policies complex. The drafts underwent many revisions and were the subject of discussion at several

[1] Unlike our first draft rules on this subject, which were posted on our website the day they were sent to the Governor's office, the March 26 revised rules were not posted on the website at that time. It is my understanding that they will be posted today along with this dissenting memorandum.

formal Commission meetings. By early February, the Commission as a body had reached consensus on these difficult issues. On February 14, 2012, our proposed rules were submitted to the Governor's office for the now-statutorily required approval or rejection.

Between February 14 and March 25, 2012, Administration officials reviewed the WERC's first proposed rules and suggested various revisions. On March 25, 2012, the WERC submitted a second set of draft proposed rules, reflecting the Administration's requested revisions. I am dissenting from this second set of draft base wage rules.

I have special concerns about how the new gubernatorial review process has affected the timing and substance of these important rules, which will control the entirety of what is left of the collective bargaining process for tens of thousands of municipal and state employers and employees. The WERC is an independent agency that has jurisdiction over the Administration as one side in a labor relations context. It is the very purpose of this agency to bring labor relations expertise to bear in formulating rules to implement labor legislation. Having reached a consensus on how to employ that expertise as to the base wages legislation, we are now issuing a second draft, reformulated to accommodate concerns from the Administration. WERC has still not received input from our customers or the public. I am concerned that this process – which appears to be sanctioned by Chapter 227 – may effectively preclude most of our customers from a true opportunity to offer input and advice.

More importantly, I cannot concur in the substance of the redrafted rules.

Among the many changes in public sector collective bargaining laws effectuated by 2011 Wisconsin Act 10 is the elimination for most public employees of the right to collectively negotiate over anything affecting their working conditions except for "base wages," which is defined to exclude "overtime, premium pay, merit pay, performance pay, supplemental compensation, pay schedules, and automatic pay progressions." As to municipal employees, see Sec. 111.70(mb)1, Stats. Even as to base wages, the parties are limited to bargaining over an amount of total base wages that does not exceed the officially established increase , if any, in the consumer price index (CPI) – absent an authorizing referendum. See Sec. 111.70(mb)2, Stats.

Act 10 did not direct the Commission to issue regulations interpreting the terms used in the new base wage provisions. Nonetheless, in response to informally articulated requests for guidance from many agency customers, the Commission drafted rules designed to assist the parties in calculating the amount of total wages over which they could bargain without an authorizing referendum (proposed ERC Chapter 90, governing municipal employees, and proposed ERC Chapter 100, governing state employees). Those proposed rules, on which all three members of the Commission were in agreement, reflected an experienced approach to some of the practical problems confronting employers and unions who would have to pivot from a platform of existing wage provisions and schedules – resulting in most cases from

decades of bargaining over every kind and form of compensation -- into the completely new negotiating environment now limited by the statutory construct of "base wages."

In developing the initial proposed rules, we recognized that in the state sector and in most municipalities, a pre-existing wage structure existed, one that had been established over the years through lawful collective bargaining. For many or most employees, wages were a function of length of service and/or various educational or licensure increments. Many public sector wage schedules were in the form of a grid reflecting length of service increments on one axis and educational or licensure increments on the other. Thus, a teacher who had worked in the school district for 10 years and who had a Master's Degree might be a "Step 10" on the longevity axis and at the second column on the educational attainment axis. Salary schedules for DPW workers and other "blue collar" jobs often reflected similar automatic progressions related to years of service and/or additional licensure or credentials.

The new law, however, prohibits bargaining over "pay schedules," "automatic pay progressions," "premium pay," and "supplemental compensation." Those items are specifically excluded from "base wages" – not only for purposes of bargaining but also for purposes of calculating the total amount available for bargaining without resorting to a referendum. I believe this legislation had two main goals: first, to make wage increases more transparent to the public by excluding the sometimes hidden boosts that formerly came from automatic pay progressions, automatic premium pay, and similar structures, thus assuring the public that the cost of the successor contract is transparently measured by whatever increase is actually negotiated each year. Second, quite obviously, the Legislature wanted to limit those transparent negotiated wage increases to no more than the cost of living (absent a referendum).

Most existing wage schedules, having been negotiated prior to Act 10, included some elements of compensation (automatic length of service increases and education increments, for example) that, while lawfully negotiated at the time, cannot lawfully be included in future negotiations. Applying the new law, therefore, presented a conundrum: how to honor the statutory definition of "total base wages" in light of the practical reality that the starting point for the first such calculation, if it was to match reality, had to include certain wage elements that – while lawfully negotiated at the time – <u>henceforth</u> would have to be excluded from both bargaining and calculating "base wages."

The proposed rules, as we had originally drafted them, resolved the conundrum by distinguishing between the initial calculation of base wages and the subsequent calculations. In those earlier proposed rules, the initial calculation would have built on the platform of preexisting, lawfully-negotiated actual wages. Subsequent calculations would be built upon whatever base wages the parties had negotiated after and in accordance with the Act 10 definition, and would therefore exclude the various "supplemental" wages that Act 10 prescribes. For the first post-Act 10 negotiations, parties would have calculated the potential total wage increase by applying the applicable cost of living multiplier (consumer price index or CPI) to whatever employees actually earned in the previous year, even though those wages

inevitably included some elements (such as automatic progressions and education increments) that could not be included in future base wage negotiations or calculations. The salary of the hypothetical teacher in the example above would have been the teacher's actual salary (Step 10 for years of service and the Master's Degree column). The contract resulting from the first post-Act 10 negotiations presumably would have identified a new base wage for employees that comports with the statutory definition. As we saw it, post-Act 10 negotiated salaries could not be in the form of a schedule, because schedules or grids inevitably imply "automatic wage progressions," educational increments, shift differentials, etc., all of which are now prohibited subjects of bargaining. In future years, therefore, the conundrum would have evaporated. Employees' actual wages would be match the statutorily-defined base wages

In contrast with the practical and statutorily-consistent calculations authorized by our first set of draft rules, the Commission, at the behest of the Administration, has now proposed rules that are unfair, arbitrary, difficult to understand, and in outright violation of Act 10. Under the new formulation, no distinction is made between the first base wage calculations and subsequent ones. Base wage calculations will include seniority or service-based increments but not educational increments. Merit pay that is incorporated into an employee's hourly wage will be included as base wages, but "lump sum" merit pay will not be included. Only the wages pertaining to positions that are actually filled at a snapshot date of 180 days prior to the expiration date of the prior contract will be included in the aggregate amount subject to the CPI multiplier.

Leaving aside the practical difficulties of determining the fictional wages that would apply to employees under the new formulation (as opposed to using employees' actual wages), the now-proposed formulation unfairly and irrationally reduces the amount of money that will be available for the first round of post-Act 10 bargaining by basing the calculation on wages that are lower than most employees are receiving and upon a number of positions that may be lower than actually existed. Using the example of the hypothetical teacher with 10 years of experience and a Master's Degree, let us say that her actual salary under the expired contract (negotiated pre-Act 10) was $45,000. But let us also say that her salary at the 10$^{th}$ step of the existing salary schedule would have been $35,000 if she did not have a Master's Degree. Under the new draft rules, her salary for purposes of the calculation would be the fictional $35,000 – not her actual $45,000. Let's say the bargaining unit includes 50 teachers, all of them with 10 years of experience but 40 of them with Master's Degrees. If the actual salaries were used for the first round of post-Act 10 negotiations, the total base wages would be $2.15M. Assuming a CPI of 2.5%, then the amount available for bargaining would be $53,750. Under the new formulation, the total base wages would be $1.75M and the amount available for bargaining would be $43,750.

A second narrowing of the base wage amount arises from the new requirement that positions must not only be "authorized" (as the statute says) but "filled." Assume three or four of the 50 teaching positions in the example are temporarily vacant at the snapshot date but that the District fully intends to fill them. Under the new formulation, none of the salary related to

those three or four positions can be included in the aggregate base wages, even though the positions are "authorized" within the meaning of the statute and will be filled. The statute uses the term "authorized" not the term "filled." "Authorized" is not the same thing as "filled."

It is axiomatic that administrative rules cannot change or narrow the meaning of a statute, and that axiom applies to both the WERC and the Governor. By using a fictional rather than actual initial basis for calculating the total base wages and by adding the term "filled" to "authorized positions," the proposed rules narrow the amount of money that would be available for negotiating the first post-Act 10 contract. Insofar as "filled" narrows "authorized positions," the new draft rules further narrow the available money for successor contracts. I can perceive no rational relationship between the purpose of the base wage provisions in Act 10 and the artificial restriction in the amount of money available for negotiations, and none has been suggested to me. The formulation is therefore inconsistent with the authorizing legislation and invalid.

Even more alarming is that the new formulation plainly conflicts with the clear language of the base wage provisions of Act 10. In both the municipal and the state sectors, the Legislature expressly prohibited bargaining over every subject "except wages, which includes only total base wages and excludes any other compensation, which includes, but is not limited to, overtime, premium pay, merit pay, performance pay, supplemental compensation, pay schedules, and automatic pay progressions." Sec. 111.70(mb)1, Stats., and Sec. 111.91(3)(a), Stats. (emphasis added). In the very next subparagraph of each respective section, the Legislature expressly prohibited bargaining over any proposal that "exceeds the total base wages for authorized positions … by a greater percentage than the consumer price index change." Sec. 111.70(mb)2.a., Stats., and Sec. 111.91(3)(b)1, Stats. (emphasis added).

It could not be more obvious that the term "base wages" used in these contiguous sections – the first to describe what form of wages are prohibited from bargaining and the second to describe how much of an increase may lawfully be negotiated absent a referendum – has the identical meaning. It is impossible to imagine an argument to the contrary, and none has been suggested. Despite the obvious statutory parallelism, the revised draft rules that the Commission majority proposes today, as they have been explained to me, require that automatic length of service increments and base-building merit pay must be included when calculating total base wages for purposes of determining the maximum amount of money available for bargaining (absent a referendum), but those forms of wages will remain prohibited subjects of bargaining.

The explanation I was given for this obvious incongruity between the new draft rules and the statute is that the state's payroll system would make it difficult to apply the statute's actual requirements (excluding automatic pay progressions and merit pay). Since no municipal employers were privy to the discussions that resulted in this rules draft, there is no reason to believe that they would endorse this indefensible solution to the state's payroll problem.

Either seniority-based increments and merit pay are bargainable and included in calculating the maximum negotiable wages or they are not includable in either. "Base wages" cannot mean one thing for the first purpose and a different thing for the second, given the term's use in the same statutory section and in contiguous subparagraphs. This is a classic case of the Administration wanting to have its cake and eat it, too.

For the foregoing reasons, I dissent from the newly-revised version of the base wages rules.

Dated at Madison, Wisconsin, this 30th day of March, 2012.

/s/ Judith Neumann
Commissioner