

WERC UPDATE

*Presented to Labor and Employment Section
State Bar of Wisconsin*

*By Peter G. Davis, WERC General Counsel****

*April 24, 2003-Milwaukee
April 25, 2003-Madison*

I. Agency Update

A. Commission Composition

New Chairperson-Judy Neumann appointed to fill a Commissioner vacancy and became WERC Commissioner and Chairperson on April 1, 2003 for a term expiring March 2007.-Appendix A.

New Commissioner-Paul Gordon appointed to fill a Commissioner vacancy created by the April 25, 2003 resignation of Commissioner Paul Hahn and will become a WERC Commissioner on May 1, 2003 for a term expiring March 2009.-Appendix B.

New Commissioner-Sue Bauman appointed as Commissioner effective on June 1, 2003(if a vacancy exists) or upon her Senate confirmation for a term expiring March 2005.-Appendix C.

B. 2003-2005 Budget

Governor's proposed budget requires WERC to significantly reduce staff (eliminate at least 4 of the WERC's 22.5 staff positions and cut \$400,000 from \$2.4 million tax dollar spending) and assume additional responsibilities (Personnel Commission's civil service caseload).-Appendix D.

Surprises?

C. Status of Comprehensive Administrative Rule Revisions

Close to finish line?

D. Web Site

<http://badger.state.wi.us/agencies/werc/index.htm>

***** Speaker's remarks do not necessarily represent the views of the WERC.**

II. Case Law Update

A. Duty to Bargain Issues

DODGELAND EDUCATION ASSOCIATION V. WERC, 240 Wis.2d 287 (2002)

Supreme Court (4-3) affirms the Commission's decision that:

- (1) teacher preparation time continues to be a permissive subject of bargaining; and
- (2) the maintenance of "fringe benefits" component of a QEO is limited to mandatory subjects of bargaining [Hempe dissents as to (2)].

RACINE EDUCATION ASSOCIATION V. WERC, Case No. 01-0247 (Ct. App. Dist II 10/01)

Court of Appeals affirms legitimacy of Commission's use of union's conduct when determining that employer's implementation of offer was permissible despite absence of impasse.

CITY OF MILWAUKEE, DEC. NO. 30427 (WERC, 7/02).

Police union proposal that would allow employees to grieve any assignment or transfer that was believed to be disciplinary (in whole or in part) is a mandatory subject of bargaining. Employer concern that such a contract provision would inhibit management decision-making is relevant argument at bargaining table but not as to mandatory/permissive status of proposal. Potential for arbitral reversal of critical law enforcement decision is not sufficient to overcome relationship of proposal to employee discipline.

CITY OF APPLETON, DEC. NO. 30253 (WERC, 12/01).

Firefighter union proposal that would cleanse employee's disciplinary record or limit the employer's ability to use past discipline in future disciplinary situations is a prohibited subject of bargaining to the extent it prevents:
(A) PFC and circuit court from meeting their obligation

under Sec. 62.13(5)(em)7, Stats., to consider the employee's "record of service" when deciding whether a suspension, reduction in rank or discharge was for just cause; and (B) the chief from considering the employee's "record of service" when deciding whether to seek suspension, reduction in rank or termination. The proposal is a mandatory subject of bargaining to the extent it applies to disciplinary actions that are not subject to the provisions of Sec. 62.13(5), Stats.

MILWAUKEE COUNTY, DEC. NO. 30431 (WERC, 7/02)

Sheriff deputy union proposal that would prevent sheriff from deciding to subcontract unit duties which give "character and distinction" to the office of sheriff (jail security/crime scene evaluation) is a prohibited subject of bargaining because it infringes on the sheriff's constitutional powers. Decision driven by Court of Appeals' analysis in WISCONSIN PROFESSIONAL POLICE ASS'N V. DANE COUNTY, 149 Wis.2d 699 (Ct. App. 1989) and WASHINGTON COUNTY V. DEPUTY SHERIFF'S ASS'N, 192 Wis.2d 728 (Ct. App. 1995)

RANDOM LAKE SCHOOL DISTRICT, DEC. NO. 29998-C (WERC, 8/02)

Where employer proposes to modify existing fringe benefits during the term of the contract, union has no obligation to demand to bargain and can rely on existing contract.

VILLAGE OF WILLIAMS BAY, DEC. NO. 30385-A (WERC, 9/02)

Where statutory interest arbitration is unavailable under Sec. 111.77, Stats., proposal for contractual interest arbitration is a permissive subject of bargaining because it is not related to the employee wages, hours and conditions of employment for the contract being bargained.

B. Process/Procedure

SUPERIOR SCHOOLS, DEC. NO. 30347 (WERC, 5/02)

Employer petition for declaratory ruling dismissed as untimely where employer files “written objections” prior to request from investigator.

SOUTH MILWAUKEE SCHOOLS, DEC. NO. 30277-A (WERC, 3/02)

Commission concludes that Sec. 227.49(1), Stats., requires that an “original” petition for rehearing be filed. Rehearing petition is dismissed because only a copy of petition is filed with Commission.

WATERFORD SEWERAGE DISTRICT, DEC. NO. 30214-B (WERC, 6/02)

Commission majority (Hahn dissenting) holds that a sworn affidavit detailing alleged change in circumstances must accompany a unit clarification petition that seeks to litigate an issue already decided by the Commission in an earlier case. Petition is dismissed without prejudice to refiling. Commission Hahn concludes that counsel’s assertions of specific changed circumstances are insufficient.

CITY OF MILWAUKEE, DEC. NO. 30297 (WERC, 3/02)

Looking for guidance to judicial interpretations of Sec. 805.04(2), Stats., Commission concludes that union can withdraw and then refile interest arbitration petition to take advantage of change in law. “Rudiments of fair play” not offended where investment in time and resources in resolving dispute under “old law” is limited.

AFSCME COUNCIL 24, DEC. NO. 30215-B (WERC, 1/02)

Examiner properly required complainant to amend complaint to comply with requirements of administrative rules and appropriately dismissed complaint when complainant did not do so despite multiple opportunities to amend and warnings of dismissal.

C. Election/Unit Clarification Issues

MINERAL POINT UNIFIED SCHOOL DISTRICT V. WERC, 251 Wis.2d 325 (Ct. App. 2002)

Court broadly affirms Commission's analysis of a "confidential employee" issue.

CITY OF MARSHFIELD V. WERC, 252 Wis.2D 656 (Ct. App. 2002)

Court affirms Commission conclusion that craft employees have a statutory right to election to determine whether they wish to continue to be included in same unit as non-craft employees.

CITY OF LAKE GENEVA, DEC. NO. 30225 (WERC, 10/01).

If the "volunteers" in a mixed Sec. 62.13(8), Stats., "paid" and "volunteer" fire department are compensated and hired and disciplined by the City, the "volunteers" are "municipal employees." Unit of casual employees and regular part-time employees found appropriate.

CITY OF KENOSHA, DEC. NO. 7529-E (WERC, 6/02)

Unit of "long term seasonals" found appropriate (Hempe dissenting) where employees had remained outside an existing unit for many years and unit clarification petition seeking their inclusion in existing unit with employees performing same work in same locations with same supervision is dismissed.

MOUNT HOREB SCHOOLS, DEC. NO. 23377-B (WERC, 2/02)

Following issuance of Direction of Election, incumbent union cannot withdraw from its stipulation for election based on claim that rival union's showing of interest was tainted.

JANESVILLE SCHOOLS, DEC. NO. 6678-A (WERC, 2/02)

Unit clarification petition seeking inclusion of part-time teachers is dismissed because historical exclusion of employees and existing contract language defining unit combine to establish an agreement to exclude these employees.

D. Recent Cases of Note

MILWAUKEE SCHOOLS, DEC. NO. 30201-C (WERC, 10/02)

Where the Court elected to honor the Commission's jurisdiction under Sec. 111.70(3)(a) 5, Stats. rather than proceed to consider the merits of the employer's Chapter 788 motion to vacate an award, the pending Chapter 788 motion does not insulate the employer from liability under Sec. 111.70(3)(a) 5, Stats. for refusing to comply with the award.

STATE OF WISCONSIN (PICHELMANN), DEC. NO. 30124-D (WERC, 1/03)

Statutory right of employee to present grievances to the employer is distinct from any contractual employee right to file grievances.

No right to union representation in employer/employee meeting held to advise employee of discipline the employer has decided to impose.

Delay caused by employer/union agreement to extend time periods for processing contractual grievances does not have reasonable tendency to interfere with employee's statutory rights even though such delay may discourage employees from filing grievances.

Employer answer requesting attorneys fees and costs does not have a reasonable tendency to interfere with employee's right to file an unfair labor practice complaint.

STATE OF WISCONSIN (PESHUT), DEC. NO. 30125-F (WERC, 1/03)

Union business agent's raising concerns about employee's conduct as a union steward did not have a reasonable tendency to interfere with employee's exercise of statutory rights. Even if such reasonable tendency was present, union's valid business need to police the conduct of its stewards would warrant a finding of no interference.

CITY OF EAU CLAIRE, DEC. NO. 29346-C (WERC, 12/02)

Rejection of employer argument that there is a distinction between that status quo that must be maintained during a

contract hiatus and the status quo form which the parties bargain a successor agreement.

Specific 1990 grievance settlement agreement defined status quo rather than general provisions of the expired 1995-1997 contract.

Employer's interest in saving money does not establish "necessity" for modifying the status quo.

CITY OF MADISON, DEC. NO. 30288-B (1/03)

Discussion of the scope of phrase "employee's legal rights" in the context of Sec. 111.70(3)(b) 1, Stats. that provides it is a prohibited practice for a union "To coerce or intimidate a municipal employee in the enjoyment of the employee's legal rights, including those guaranteed in sub. (2)."

1. Involve employer/employee relationship; or
2. Involve a MERA right; or
3. Coercion as to non-MERA right is motivated by the employee's exercise of a MERA right.

Employee's MERA right to "assist" a labor organization does not include right to be steward.

Alleged union violation of its constitution/bylaws or of LMRDA does not fall within the scope of Sec. 111.70(3)(b)1, Stats. because alleged basis for such coercion did not involve employee's exercise of a MERA right.

CITY OF RHINELANDER, DEC. NO. 24518-C (WERC, 11/02)

Not enough confidential work to justify exclusion of two Deputy Clerk/Treasurers from the unit. Employer's desire for the two positions to be "interchangeable" not persuasive-no "undue disruption" to have all confidential work performed by one Deputy Clerk/Treasurer.

SHEBOYGAN SCHOOLS, DEC. NO. 10488-B (WERC, 8/02), 10488-D (WERC, 11/02)

Two Payroll Clerks are not confidential employees. Extent of exposure to employer's bargaining strategy not sufficient to warrant exclusion.

RIVER FALLS SCHOOL DISTRICT, DEC. NO. 30563 (WERC, 2/03)

Union can waive its statutory right to require that a school district implement a qualified economic offer that complies in all respects with sec. 111.70(1)(nc), Stats.

Fringe benefit that expired at end of contract term must nonetheless be maintained as part of a Qualified Economic Offer for a successor agreement because the benefit was in effect on the "90th day."

CAMPBELLSPORT SCHOOL DISTRICT, DEC. NO. 30585 (WERC, 3/03)

WERC has jurisdiction to determine whether a WERC investigator correctly determined that a deadlock exists or continues to exist within the meaning of Sec. 111.70 (4)(cm) 5s, Stats. and ERC 33.10(5).

Deadlock is equivalent to impasse.

WERC investigator correctly concluded that a deadlock existed at the time the school district implemented its final offer.

STATE OF WISCONSIN, DEC. NO. 30166-B (WERC, 10/02)

WERC majority (Hempe dissents) rejects employer contention that employer's prison security concerns warrant prohibiting the wearing of union buttons by majority and minority union supporters.

CITY OF WAUSAU, DEC. NO. 30272-B (WERC, 10/02)

Union breached its duty of fair representation under MAHNKE V. WERC, 66 Wis. 2d 24 (1975) by failing to assess the likelihood of success in arbitration when settling a grievance that altered the seniority date of an employee.

III. Pending Issues

ACT 11 ramifications for QEO calculations.

How to place "partial step/no step" teachers under an implemented QEO.

MAPLE DALE-INDIAN HILLS SCHOOLS
BIG FOOT SCHOOLS
PRAIRIE DU CHIEN SCHOOLS

Extent of union right to use employer email.

Appeal of UW HOSPITALS, DEC. NO. 30202-B (Nielsen, 7/02)

Does Sec. 111.70(4)(cm) e., Stats. preclude Commission from halting further processing of in interest arbitration petition until a pending bad faith bargaining complaint is resolved?

OZAUKEE COUNTY.

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Appendix A

March 5, 2003

JUDITH NEUMANN NAMED WERC CHAIR

Governor Jim Doyle announced the appointment today of Judith M. Neumann as Chair of the Wisconsin Employment Relations Commission. Neumann, a native of Milwaukee, most recently served as legal counsel with the Massachusetts Teachers Association in Boston.

"Judith is a knowledgeable, experienced individual who will be a true asset to the Wisconsin Employment Relations Commission," Doyle said. "This appointment will restore public confidence in the WERC, an agency with a long and proud history. The WERC has a crucial role in maintaining harmony in public employee labor relations. To fulfill that role, unions and employers must have trust that their issues will be handled expertly and efficiently. "

"Judith has over 25 years of experience in both neutral and advocacy roles, " Doyle said. "Having practiced in both Wisconsin and Massachusetts, she brings a broad vision and a fresh perspective. Her intellect and accomplishments are well respected across all sectors

of the labor community. We are pleased that she is returning to Wisconsin to handle this important job during our administration."

Judith Neumann, 53, served as legal counsel with the Massachusetts Teachers Association in Boston, Massachusetts for the past 11 years. She is a former counsel and hearing officer for the Massachusetts Labor Relations Commission. Born and raised in Milwaukee, Neumann worked as staff counsel at the Wisconsin Education Association Council in Madison and as a history teacher in the Milwaukee Public School System before moving to Boston in 1982. She is a 1971 magna cum laude and Phi Beta Kappa graduate of Marquette University and received a law degree cum laude from the University of Wisconsin Law School in 1977, where she also served on the Law Review. Neumann and her husband Ken Goldberg will be moving back to Wisconsin from Boston. They have two children, both students at the University of Colorado at Boulder.

Appendix B

April 10, 2003

PAUL GORDON NAMED COMMISSIONER

Governor Jim Doyle announced the appointment today of Paul Gordon to the Wisconsin Employment Relations Commission. Gordon has most recently served as the City Attorney for Chippewa Falls.

"I am pleased to appoint Paul Gordon to the Wisconsin Employment Relations Commission," Governor Doyle said. "Paul has over 23 years of legal experience in a variety of areas and is respected throughout the community, and I know that he will be a true asset to the Commission."

"As City Attorney for Chippewa Falls, Paul has shown his ability to serve the people of Wisconsin honestly, fairly and efficiently," Doyle said. "And I know that he will bring these qualities to the Employment Relations Commission."

Gordon will begin serving on May 1. Gordon will serve a term to expire March 1, 2009.

Paul Gordon, 48, has served as the City Attorney for the City of Chippewa Falls for the past 10 years. He currently serves on the Board of Education for the Chippewa Falls School District and is a board member and former chair of the Work Force Development Board for West Central Wisconsin. He has been active in the United Way, and is a former president of the Chippewa Area YMCA and the Chippewa Area Senior Center. He is also on the Board of Directors of Group Health Cooperative of Eau Claire and the Board of Governors for the Shriners Hospital for Children-Twin Cities. A 1976 graduate of the University of Wisconsin-Madison, he received a law degree from the J.D. Drake Law School in Des Moines, Iowa in 1979. Gordon and his wife, Christine, have two children and live in Chippewa Falls.

Appendix C

April 18, 2003

SUSAN BAUMAN NAMED COMMISSIONER

Governor Jim Doyle announced the appointment today of former Madison Mayor Sue Bauman to the Wisconsin Employment Relations Commission.

"I am pleased that Sue Bauman will be serving our state as a member of the Wisconsin Employment Relations Commission," Governor Doyle said. "Having served six years as Mayor, 12 years on the Common Council, and 16 years as a lawyer on employment and labor issues, Sue is uniquely qualified for this job. She will bring valuable expertise to the Commission, and make an important contribution to our state."

Bauman will serve a term to expire March 1, 2005.

Susan J.M. Bauman was elected Mayor of Madison on April 1, 1997. Prior to assuming the office of Mayor, she served 12 years as a member of the Madison Common Council. She received her law degree from the University of Wisconsin-Madison in 1981 at the same time as she received a Master's Degree in Industrial Relations. Prior to her election as Mayor, she engaged in the private practice of law, emphasizing employment and labor, for almost 16 years. Before attending law school, Bauman was a teacher in the Madison Public Schools, teaching 8th grade mathematics for eight years.

Governor Doyle's press release announcing the appointment stated that Ms. Bauman's service with the WERC is scheduled to begin on June 1.

Appendix D (see next page)

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EMPLOYMENT RELATIONS COMMISSION

Budget Summary						FTE Position Summary				
Fund	2002-03 Adjusted Base	Governor		2003-05 Change Over Base Year Doubled		2002-03	Governor		2004-05 Over 2002-03	
		2003-04	2004-05	Amount	%		2003-04	2004-05	Number	%
GPR	\$2,479,100	\$2,162,700	\$2,162,700	-\$832,800	-12.8%	22.50	18.50	18.50	-4.00	-17.8%
PR	<u>228,200</u>	<u>251,900</u>	<u>251,900</u>	<u>47,400</u>	10.4	<u>3.00</u>	<u>3.00</u>	<u>3.00</u>	<u>0.00</u>	0.0
TOTAL	\$2,707,300	\$2,414,600	\$2,414,600	-\$585,400	-10.8%	25.50	21.50	21.50	-4.00	-15.7%

Budget Change Items

1. STANDARD BUDGET ADJUSTMENTS

GPR	\$167,200
PR	<u>47,400</u>
Total	\$214,600

Governor: Provide standard adjustments to the base budget totaling \$83,600 GPR and \$23,700 PR annually. Adjustments are for: (a) removal of non-continuing elements from the base (-\$42,900 GPR annually); (b) full funding of continuing salaries and fringe benefits (\$96,800 GPR and \$23,700 PR annually); and (c) fifth week of vacation as cash (\$29,700 GPR annually).

2. BASE BUDGET REDUCTIONS

Funding Positions		
GPR	- \$800,000	- 4.00

Governor: Reduce the agency's GPR general program operations appropriation by \$400,000 and 4.0 positions annually. The base reductions would be applied exclusively to amounts budgeted for salaries. The adjustments would represent a 16.1% reduction to the agency's GPR adjusted base budget and a 17.8% reduction to its GPR base position authority.

3. TRANSFER OF STATE EMPLOYEE APPEAL FUNCTIONS FROM THE PERSONNEL COMMISSION

GPR-REV	\$8,000
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Governor: Eliminate the Personnel Commission and transfer its state employee appeal functions to the Wisconsin Employment Relations Commission (WERC), as follows: (a) appeals of state employee classification and appointment decisions and examination scores; (b) final step arbitrations of state employee grievances relating to conditions of employment; (c) appeals of denial of state employee hazardous duty benefits; and (d) appeals of certain decisions under