STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of MILWAUKEE DISTRICT COUNCIL 48, AFSCME, AFL-CIO and its affiliated LOCAL 2 To Initiate Mediation-Arbitration Between Said Petitioner and GREENDALE SCHOOL DISTRICT	Case XVIII No. 29312 MED/ARB-1563 Decision No. 20184

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER DISMISSING PETITION FOR MEDIATION-ARBITRATION

Milwaukee District Council 48, AFSCME, AFL-CIO and its affiliated Local 2 having, on February 15, 1982, filed a petition requesting the Wisconsin Employment Relations Commission to initiate mediation-arbitration, pursuant to Sec. 111.70(4)(cm)6 of the Municipal Employment Relations Act, to resolve an alleged impasse in collective bargaining between said Union and Greendale School District involving bus drivers in the employ of said District; and on February 18, 1982 the District having, in a letter over the signature of its Superintendent, alleged various facts and contended that mediation-arbitration was not appropriate in the matter; and on March 3, 1982 the Commission having, by letter, over the signature of its General Counsel, advised the District that its objection should be set forth in a formal motion filed with the Commission; and on March 19, 1982 Counsel for the District having filed a motion and an affidavit in support thereof, requesting that the petition be dismissed; and the parties having waived hearing in the matter and having stipulated, by June 1, 1982, to the facts material to the issues herein, and having filed briefs in support of, and in opposition to, the motion to dismiss the mediation-arbitration petition; and the Commission having been informed on September 17, 1982 that the parties were unable to voluntarily resolve the dispute; and the Commission, being fully advised in the premises, makes and issues the following

FINDINGS OF FACT

1. That the Milwaukee District Council 48, AFSCME, AFL-CIO and its affiliated Local 2, hereinafter referred to as the Union, is a labor organization representing employes for purposes of collective bargaining, and that the Union has its offices at 3427 West St. Paul Avenue, Milwaukee, Wisconsin 53208.

2. That Greendale School District, hereinafter referred to as the District, is a municipal employer maintaining and operating a school district for the benefit and education of children of the District; and that the District maintains its principal offices at 5900 South 51st Street, Greendale, Wisconsin 53129.

3. That following an election conducted by the Wisconsin Employment Relations Commission and a certification issued on August 9, 1978, the Union has

Union requested that its petition be dismissed, and the Commission did so on September 3, 1981.

5. That thereafter the parties engaged in negotiations in an attempt to reach an accord with respect to the wages, hours and working conditions applicable to said bus drivers; that they were unable to reach agreement thereon, and as a result the Union filed the instant mediation-arbitration petition seeking to invoke, if necessary, final and binding interest arbitration to establish the wages, hours and working conditions of said bus drivers.

Upon the basis of the above and foregoing Findings of Fact, the Commission makes and issues the following

CONCLUSION OF LAW

That, since the mediation-arbitration provisions contained in Sec. 111.70(4)(cm)6 of the Municipal Employment Relations Act are only applicable to deadlocks in reopened negotiations under a binding collective bargaining agreement to amend or modify a specific portion of an existing collective bargaining agreement subject to a specific reopener provision, or with respect to negotiations over wages, hours and working conditions to be included in a successor agreement for a new term, or negotiations for an initial collective bargaining agreement where no such agreement exists, said statutory provisions are, therefore, inapplicable to deadlocks which may arise in negotiations with respect to wages, hours and working conditions applicable to employes accreted to an existing bargaining unit where there exists a collective bargaining agreement covering the wages, hours and working conditions of other employes in said unit, and where the conditions precedent for mediation-arbitration do not exist with respect to negotiations covering wages, hours and working conditions of all the employes in the collective bargaining unit.

Upon the basis of the above and foregoing Findings of Fact and Conclusion of Law, the Commission makes and issues the following

ORDER 1/

That the petition filed herein by District Council 48, AFSCME, AFL-CIO and its affiliated Local 2, requesting the initiation of mediation-arbitration with respect to an alleged deadlock between said Union and Greendale School District in negotiations on wages, hours and working conditions of bus drivers in the employe of said District, be and the same hereby is, dismissed.

Given under our hands and seal at the City of Madison, Wisconsin this 17th day of December, 1982.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Gary L. Covelli, Chairman

_____
Morris Slavney, Commissioner

I dissent:

_____
Herman Torosian, Commissioner

1/ Pursuant to Sec. 227.11(2), Stats., the Commission hereby notifies the parties that a petition for rehearing may be filed with the Commission by following the procedures set forth in Sec. 227.12(1) and that a petition for

judicial review naming the Commission as Respondent, may be filed by following the procedures set forth in Sec. 227.16(1)(a), Stats.

227.12 Petitions for rehearing in contested cases. (1) A petition for rehearing shall not be prerequisite for appeal or review. Any person aggrieved by a final order may, within 20 days after service of the order, file a written petition for rehearing which shall specify in detail the grounds for the relief sought and supporting authorities. An agency may order a rehearing on its own motion within 20 days after service of a final order. This subsection does not apply to s. 17.025 (3)(e). No agency is required to conduct more than one rehearing based on a petition for rehearing filed under this subsection in any contested case.

227.16 Parties and proceedings for review. (1) Except as otherwise specifically provided by law, any person aggrieved by a decision specified in s. 227.15 shall be entitled to judicial review thereof as provided in this chapter.

(a) Proceedings for review shall be instituted by serving a petition therefor personally or by certified mail upon the agency or one of its officials, and filing the petition in the office of the clerk of the circuit court for the county where the judicial review proceedings are to be held. Unless a rehearing is requested under s. 227.12, petitions for review under this paragraph shall be served and filed within 30 days after the service of the decision of the agency upon all parties under s. 227.11. If a rehearing is requested under s. 227.12, any party desiring judicial review shall serve and file a petition for review within 30 days after service of the order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. The 30-day period for serving and filing a petition under this paragraph commences on the day after personal service or mailing of the decision by the agency. If the petitioner is a resident, the proceedings shall be held in the circuit court for the county where the petitioner resides, except that if the petitioner is an agency, the proceedings shall be in the circuit court for the county where the respondent resides and except as provided in ss. 182.70(6) and 182.71(5)(g). The proceedings shall be in the circuit court for Dane county if the petitioner is a nonresident. If all parties stipulate and the court to which the parties desire to transfer the proceedings agrees, the proceedings may be held in the county designated by the parties. If 2 or more petitions for review of the same decision are filed in different counties, the circuit judge for the county in which a petition for review of the decision was first filed shall determine the venue for judicial review of the decision, and shall order transfer or consolidation where appropriate.

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER DISMISSING PETITION FOR MEDIATION-ARBITRATION

BACKGROUND

The Union, since August 9, 1978, has been and is the certified bargaining representative of the custodial and maintenance employes of the District. At all times material herein there existed a collective bargaining agreement between the parties, covering the wages, hours and working conditions of said employes, for a term from July 1, 1980 through, at least July 1, 1982. Bus drivers were not employed by the District at the time the Union was certified as the representative of the custodial and maintenance employes. The Union in the spring of 1981, during the term of the aforementioned agreement, filed a petition with the Commission seeking to accrete the occupants of the "newly created position title classification of Bus Driver" to the existing unit represented by the Union. Prior to any formal action by the Commission, the parties advised that the District had agreed to voluntarily accrete the bus drivers to the existing custodial and maintenance unit, and as a result the Commission dismissed the petition seeking formal Commission decision in the matter.

The representatives of the parties then commenced bargaining with respect to wages, hours and working conditions applicable to said bus drivers. They apparently reached a deadlock in such negotiations resulting in the filing of the instant petition by the Union seeking mediation arbitration. As noted, the District moved to dismiss the petition, contending that the statutory provision relating to such a proceeding does not apply to the instant deadlock.

POSITIONS OF THE PARTIES

Counsel for the parties filed briefs in support of and in opposition to the motion of the District to dismiss the petition.

The Union basically contends that the bus drivers have been accreted to the existing unit; that the Commission has held, in accretion cases, that the terms of any collective bargaining agreement in effect covering the wages, hours and working conditions of the existing unit do not cover the employes accreted to the unit during the term of that agreement; and that, however, the employer involved has a duty to bargain on wages, hours and working conditions affecting said accreted employes. Here, the Union contends that the negotiations with respect to the accreted bus drivers would result in a "new" collective bargaining agreement between the parties, and that therefore, since no previous collective bargaining agreement existed covering the bus drivers, mediation-arbitration is applicable under the conditions established therefore by the Commission in its decision rendered in Dane County (17400) 11/79.

The District, to the contrary, argues that the Union's position results in the establishment of two bargaining agreements for employes in a single bargaining unit, and that such an approach "ignores the logic and purpose of an accretion of employes into a bargaining unit, and, in addition is inapposite to the Commission's policy favoring the antifragmentation of labor units."

DISCUSSION

It has been the policy of the Commission that when it accretes unrepresented employes to an existing bargaining unit, where there exists a collective bargaining agreement covering employes in that unit, said agreement does not cover the accreted employes. 2/ However, the union has the right, and the employer must bargain, with respect to the wages, hours and working conditions applicable to the latter employes.

2/ Chetek School District (19206) 12/81; Minoqua Jt. School District (19381) 2/82.

Here bargaining with respect to the accreted employes - the bus drivers - did occur. Had the parties reached an accord thereon, they could have voluntarily amended their existing agreement to include the provisions covering the bus drivers. However they failed to reach such an accord. The issue then arises as to whether the Union can proceed to final and binding mediation-arbitration with respect to the wages, hours and working conditions remaining in issue with respect to the bus drivers during the existence of the agreement covering the unit to which the drivers were accreted.

The Commission, in Dane County, supra., set forth the following rationale in support of its determination in dismissing a petition for mediation-arbitration to resolve a claimed impasse reached in bargaining between said County and the labor organization representing teachers in the employ of its Handicapped Children's Education Board, with respect to the determination of the County to terminate said Board at the expiration of the collective bargaining agreement between the County and said labor organization. Bargaining between said parties commenced during the term of said agreement and the matters in issue concerned the impact of the County's decision to terminate said function upon the employes represented by the labor organization. In that decision, the Commission determined that mediation-arbitration 3/ was not applicable, and set forth the following rationale in support thereof:

> This is not a case where the legislature has failed to express its intent or granted the Commission considerable latitude in interpreting the statute in a way which, in its view, represents the most appropriate policy choice given the underlying purposes of the legislation. On the contrary, we view the legislation as addressing the question rather specifically.
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> The key phrase in the law is the phrase contained in Sec. 111.70(4)(cm)6 (introduction), Stats., to the effect that a petition for mediation-arbitration can be filed if 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 . . ." This phrase, stands in marked contrast to the parallel phrase contained in the fact finding procedure (Sec. 111.70(4)c)3, Stats.), which it displaced, to the effect that a petition for fact finding may be filed if the parties are ". . . deadlocked with respect to any dispute between them arising in the collective bargaining process . . ." We have interpreted that provision to cover deadlocks in all disputes which are subject to the collective bargaining process under Sec. 111.70, Stats.
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> Absent some other indication of legislative intent, the working of this provision would appear, on its face, to limit the application of the mediation-arbitration procedure to situations where the parties are negotiating a collective bargaining agreement which either constitutes the first collective bargaining agreement between the parties or a "new" agreement to replace an existing or expired agreement. The provisions of Sec. 111.70(4)(cm)6a, Stats., calling for the execution of " . . . a stipulation, in writing, with respect

ing agreement are consistent with this interpretation. In fact, nowhere in the procedures outlined in Sec. 111.70(4)(cm)6, Stats., is there any indication that the legislature anticipated its application to deadlocks other than those which might occur in collective bargaining for a "new" agreement in this sense.

We note, as do the parties, that the legislature used slightly different terminology in the statutory provision requiring the parties to give notice to the Commission of the "commencement of contract negotiations." In Sec. 111.70(4)(cm)1, Stats., the parties are required to so notify the Commission ". . . 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 . . ."

On the assumption that the legislature intended the notice requirements to be co-extensive with the applicability of the mediation-arbitration procedure, we believe it is a reasonable interpretation of the legislature's intent to conclude that the reference to "new collective bargaining agreement" in Sec. 111.70(4)(cm)6 (introduction), Stats., and the reference to a "new or amended collective bargaining agreement" in Sec. 111.70(4)(cm)6a, Stats., includes any agreement reached under a reopener clause whether it be a "successor" agreement or an amended agreement reached pursuant to a partial reopener clause. On the other hand, the reference to "reopen(ing) negotiations under a binding collective bargaining agreement" and the "commence(ment of) negotiations if no such agreement exists" contained in Sec. 111.70(4)(cm)1, Stats., suggests that negotiations over new matters which arise during the term of a collective bargaining agreement are not covered by the notice requirements or the provisions of Sec. 111.70(4)(cm)6, Stats. 4/

Consistent with the above rationale, we conclude that the parties herein were not attempting to reach an accord on a "new agreement" as that term is contemplated in the statutory provision involved. Further, there is no evidence that the parties were negotiating pursuant to a reopener provision in their existing collective bargaining agreement. It is obvious that they were not negotiating on a successor to their existing agreement. Therefore, we have concluded that the Union herein cannot initiate a mediation-arbitration proceeding to resolve the alleged deadlock existing in their negotiations with respect to the wages, hours and working conditions of the bus drivers to become applicable during the term of the agreement covering the custodial and maintenance employes.

We have considered the rationale expressed by our dissenting colleague, and we wish to note that the "new agreement" relating to the bus drivers does not replace an existing or expired agreement, a condition precedent for mediation/arbitration, as previously set forth by the full Commission in Dane County, supra. specifically in the third paragraph previously cited herein. Nor does such an agreement constitute the "initial agreement" covering wages, hours and working conditions of the unit involved.

Dated at Madison, Wisconsin this 17th day of December, 1982.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Gary L. Covelli
Gary L. Covelli, Chairman

Morris Slavney
Morris Slavney, Commissioner

4/ The Commission's decision was affirmed by the Dane County Circuit Court, Hon. George R. Currie writing the decision, on June 9, 1980.

MEMORANDUM OF DISSENT

I agree with the majority that the parties' negotiations with respect to the bus drivers was not pursuant to a "reopener" or for a "successor" agreement. I disagree, however, with their conclusion that ". . . the parties herein were not attempting to reach an accord on a 'new agreement' as that term is contemplated in the statutory provision involved." For if they were not negotiating in an attempt to reach a new agreement for the bus drivers, then what were they negotiating?

Unlike Dane County this is not a case where, during the term of an agreement, a new matter or issue arises over which the Union wants to bargain and if necessary proceed to mediation-arbitration. Here we have a group of employes who prior to their accretion were not represented for purposes of collective bargaining agreement. Under such circumstances the Commission has long held, as noted by the majority, that accreted employes are not automatically covered by the terms of an existing collective bargaining agreement covering employes in the accreted-to unit, and that said accreted employes have the right, and the employer has the duty, to bargain over their wages, hours and conditions of employment. It follows then that the parties must in good faith make an attempt to reach an agreement over matters that are mandatorily bargainable. The resultant agreement, if negotiated, is in my opinion, a new initial agreement; a new initial agreement because it covers employes who were not previously represented and who were not covered by an agreement. The fact that they have gained bargaining rights by way of an accretion to a larger unit of employes, does not in my opinion change the fact that said employes are negotiating for a new agreement. As such they have a right to utilize the mediation-arbitration process to secure same. Thus, it is clear to the undersigned that such an agreement is a new agreement within the contemplation of Sec. 111.70(4)(cm)6.

Further, I think the majority's decision will in the future encourage fragmentation of bargaining units - contrary to the intent of Section 111.70 (4)(d)2.a. - rather than avoiding same. This is so because employes similarly situated as the group of employes herein will not agree to an accretion, which would otherwise be acceptable, because to do so could deny them the use of the mediation-arbitration process. Thus, for no other purpose than to gain the right to utilize the mediation-arbitration process, they will be inclined to petition the Commission for an election in a separate unit. In the final analysis, I find there is no persuasive policy reason to promote such an outcome which (1) treats accreted employes differently than all other employes who gain representative status and (2) promotes fragmentation of bargaining units, when the statutory reference to "new agreement," in my opinion, covers all employes who are negotiating a new initial agreement regardless of how they obtained representative status.

Based on the above, I would process the instant mediation-arbitration petition.

Dated at Madison, Wisconsin this 17th day of December, 1982.

By _____
Herman Torosian, Commissioner