STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of SHAWANO COUNTY (MAPLE LANE HEALTH CARE FACILITY) Involving Certain Employes of SHAWANO COUNTY (MAPLE LANE HEALTH CARE FACILITY)	Case 55 No. 34856 ME-2445 Decision No. 22568-A

Appearances:

Mulcahy & Wherry, S.C., Attorneys at Law, 408 Third Street, P. O. Box 1004, Wausau, Wisconsin 54401-1004, by Mr. Ronald J. Rutlin, appearing on behalf of the County.

Mr. James W. Miller, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 2785 Whippoorwill Drive, Green Bay, Wisconsin 54304, appearing on behalf of Maple Lane Health Care Center Employees, Local 2648, AFSCME, AFL-CIO.

Cullen, Weston & Pines, Attorneys at Law, 20 North Carroll Street, Madison, Wisconsin 53703, by Ms. Cheryl Rosen Weston, appearing on behalf of District 1199W/United Professionals for Quality Health Care.

ORDER GRANTING MOTION TO DISMISS

On April 11, 1985, Shawano County, herein the County, filed a Petition for Election with the Wisconsin Employment Relations Commission, herein the Commission, seeking an election among all regular full-time and regular part-time non-professional employes of the Shawano County Maple Lane Health Care Facility, excluding supervisory, managerial, confidential and clerical employes. The County asserted in its Petition that all non-professional employes of the Facility should be included in a single collective bargaining unit under "established criteria recognized by the WERC and under the statutory mandate to avoid unnecessary fragmentation." 1/

1/ On February 25, 1985, the Commission dismissed the County's Petition to Clarify Bargaining Unit wherein the County sought an order unconditionally including the employes currently represented by United Professionals in the unit currently represented by AFSCME. The Commission therein concluded that:

> The County's contentions do not amount to a claim that the unit is in conflict with an unequivocal requirement of the statute, as would be the case, for example, if a claim were made that a certified unit included professional employes with non-professionals without the vote of a majority of the professionals in favor of such inclusion required by Sec. 111.70(4)(d)2.a., Stats. Although the County's anti-fragmentation argument is phrased in terms of the unit's alleged repugnance to the statute, that argument amounts only to a claim that the combined unit would be more appropriate than the unit for which the United Professionals is now certified to represent. While the above-noted requirement for a self-determination vote among professionals constitutes an unequivocal statutory requirement before a combined professional-nonprofessional unit can be certified, the anti-fragmentation provision of the statute is a less absolute, general statement of unit determination policy 6/ which the Commission has, with judicial approval historically included as one of several factors considered in resolving appropriate unit disputes. 7/
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> It should therefore be clear, not only from the nature of the representation election process itself, but also from Commission case law, that the unit clarification process is not an available means of attacking the appropriateness of an existing collective bargaining unit on anti-fragmentation, community of interest, or

(footnote continued on Page 2)

The employes referenced in the Petition are currently in two separate collective bargaining units respectively represented by Maple Lane Health Care Center Employees, Local 2648, AFSCME, AFL-CIO, herein AFSCME, and District 1199W/United Professionals for Quality Health Care, herein United Professionals.

On April 15, 1985, AFSCME filed a Motion to Dismiss the County's Election Petition as being untimely and inappropriate. On April 16, 1985, United Professionals filed a separate Motion arguing that the Petition should be summarily dismissed under the reasoning utilized by the Commission in its Order of February 25, 1985, dismissing a County Petition for Unit Clarification involving the same two units, or, alternatively, because the Petition is untimely filed due to an existing collective bargaining agreement between the County and AFSCME which provides for the opening of negotiations on a successor agreement in August, 1985.

On April 19, 1985, the Commission advised all parties pursuant to Sec. 227.08(3), Stats., that it intended to take official notice of the pendency of a petition for mediation-arbitration pursuant to Sec. 111.70(4)(cm)6, Stats., which was filed by United Professionals on July 30, 1984, with respect to the non-professional unit of Shawano County Maple Lane Health Care Center employes which it represents. On that date, the Commission also ordered the County to show cause, if it had any, in written form filed in the Commission's office on or before May 3, 1985, as to why the Petition for Election should not be dismissed (without a hearing being convened) as untimely due to the pendency of a mediation-arbitration petition filed by a labor organization representing employes covered by the County's Petition under the rationale of the Commission's decisions in Dunn County, Dec. No. 17861 (WERC, 6/80); City of Prescott, Dec. No. 18741 (WERC, 6/81); and Oconto County, Dec. No. 21847 (WERC, 7/84).

The County filed a response to the Commission's Order to Show Cause on May 2, 1985. Having considered said response and the respective positions of AFSCME and United Professionals, the Commission has concluded that the pendency of the mediation-arbitration petition, a fact as to which the Commission hereby takes official notice, renders the County's Petition for Election untimely.

NOW, THEREFORE, it is

ORDERED 2/

That the instant Petition for Election is hereby dismissed.

Given under our hands and seal at the City of Madison, Wisconsin this 29th day of May, 1985.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Herman Torosian, Chairman

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Marshall L. Gratz, Commissioner

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Dahae Davis Gordon, Commissioner

1/ (footnote continued from Page 1)

> any other grounds short of a direct conflict of the unit composition with a specific requirement of MERA.
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> The representation election proceeding that led up to the certification of United Professionals as representative of the unit in question provided the County with an opportunity to make anti-fragmentation, community of interest, or other relevant arguments regarding the appropriateness of the instant unit of the sort that it now seeks to advance in the instant unit clarification proceeding. Were the Commission to now entertain such a contention, unit clarification proceedings would significantly undercut certification election processing and the stability of labor-management relationships. (Footnotes omitted)

2/ 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.

(b) The petition shall state the nature of the petitioner's interest, the facts showing that petitioner is a person aggrieved by the decision, and the grounds specified in s. 227.20 upon which petitioner contends that the decision should be reversed or modified.

. . .

(c) Copies of the petition shall be served, personally or by certified mail, or, when service is timely admitted in writing, by first class mail, not later than 30 days after the institution of the proceeding, upon all parties who appeared before the agency in the proceeding in which the order sought to be reviewed was made.

Note: For purposes of the above-noted statutory time-limits, the date of Commission service of this decision is the date it is placed in the mail (in this case the date appearing immediately above the signatures); the date of filing of a rehearing petition is the date of actual receipt by the Commission; and the service date of a judicial review petition is the date of actual receipt by the Court and placement in the mail to the Commission.

MEMORANDUM ACCOMPANYING
ORDER GRANTING MOTION TO DISMISS

In its May 2, 1985 response, the County argues that the pendency of the mediation-arbitration petition should not bar the processing of the election petition through which the County seeks consolidation of two existing certified collective bargaining units. The County asserts that because the parties' bargaining has focused exclusively upon a contract covering a period (calendar year 1984) which predates this election petition, the petition should be deemed timely under Oconto County, Dec. No. 21847 (WERC, 7/84). The County further submits that neither the election year bar or contract bar doctrines are applicable herein because more than one year has passed since the election and the contract covering the AFSCME employes potentially affected contains an August 1, 1985 reopener date.

The County contends that dismissal of its petition would not enhance stability in the existing bargaining relationship. It asserts that as the parties have had more than a year to reach agreement on an initial collective bargaining agreement, the Commission should give the County its "day in court" on the issue of whether the existing units represented by United Professionals and AFSCME should be combined.

DISCUSSION:

It is undisputed that after being certified by the Commission as the collective bargaining representative of certain non-professional employes of Shawano County, United Professionals commenced bargaining with the County over an initial collective bargaining agreement which would establish the wages, hours and conditions of employment for employes in said non-professional unit. After initial efforts to reach agreement proved unsuccessful, United Professionals filed a petition for mediation-arbitration pursuant to Sec. 111.70(4)(cm)6, Stats., and a Commission investigator subsequently met with the parties in an effort to assist them in reaching agreement on an initial contract. As of this date, the parties have not settled their dispute, and the investigation of the mediation-arbitration petition remains open.

In other cases, we have been confronted with the question of whether an interest arbitration petition filed before, or at the same time, as an election petition of a competing labor organization filed after a contract had expired should bar employes from having the opportunity to decide whether they wished to change bargaining representatives. In those cases, we have found the substantial interests of employe freedom to change or eliminate their bargaining representative to have been outweighed by the interest of stability in collective bargaining relationships. Dunn County, Dec. No. 17861 (WERC, 6/80); City of Prescott, Dec. No. 18741 (WERC, 6/81). We do not find the employer interest in eliminating a collective bargaining unit to warrant a result different than that reached when the employe interests noted above are present.

The County correctly notes that we have developed an exception to the interest arbitration bar policy where the final offers before the arbitrator cover a contractual period of time which has already expired under the terms of either party's final offer. Oconto County, Dec. No. 21847 (WERC, 7/84); Marinette County, Dec. No. 22102 (WERC, 11/84). In such instances, it is certain that the contract which the arbitrator will establish will have already expired and thus the strength of the interest in collective bargaining stability is sufficiently lessened so as to allow for the processing of the election petition. Here the parties have not yet submitted their final offers and thus the term of their contract is uncertain. In such circumstances, the need for stability in the bargaining relationship remains sufficient to block the processing of an election petition.

Given the foregoing, we conclude that the pendency of the mediation-arbitration petition warrants the dismissal of the County's petition for election. 3/

Dated at Madison, Wisconsin this 29th day of May, 1985.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Herman Torosian, Chairman

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Marshall L. Gratz, Commissioner

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Danae Davis Gordon, Commissioner

3/ Absent a material reorganization of the County's health care facility or a question arising as to the continuing representative status of the United Professionals, it is questionable whether the Commission would ever entertain an election petition, such as that herein, which asserts that a unit already certified by the Commission should be eliminated because it allegedly conflicts with the statutory directive that the Commission "avoid fragmentation." We note in this regard that avoidance of fragmentation is but one of the considerations which the Commission examines when determining whether a unit is appropriate. Arrowhead United Teachers v. WERC, 116 Wis.2d 580 (1984). However, ruling upon whether we would entertain such a petition after the resolution of the pending mediation-arbitration petition is both unnecessary and inappropriate in the current context of this proceeding.