

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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In the Matter of the Petitions of	:	
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ASSOCIATION OF MENTAL	:	
HEALTH SPECIALISTS	:	Case 221
	:	No. 38766 DR(M)-427
Requesting Declaratory Rulings	:	Decision No. 24794-A
Pursuant to Section 111.70(4)(b)	:	
Wis. Stats., Involving a Dispute	:	Case 222
Between Said Petitioner and	:	No. 38861 DR(M)-428
	:	Decision No. 24795-A
ROCK COUNTY	:	
	:	

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Appearances:

Mr. John S. Williamson, Jr., Attorney at Law, 120 North Morrison Street, Appleton, Wisconsin, 54911-5494, on behalf of the Association.  
Mr. Bruce K. Patterson, Labor Relations Consultant, 3685 Oakdale Drive, New Berlin, Wisconsin, 53151, and Mr. Thomas A. Schroeder, Corporation Counsel, 51 South Main Street, Janesville, Wisconsin, 53545, on behalf of the County.

ORDER DENYING PETITION FOR REHEARING

The Wisconsin Employment Relations Commission having on August 20, 1987, issued Findings of Fact, Conclusions of Law and Order dismissing petitions for declaratory ruling in the above-entitled matters; and a petition for rehearing under Sec. 227.49, Stats., having been delivered by a taxi cab driver to the Commission's General Counsel as he was leaving the Commission's offices on September 9, 1987, at 4:42 p.m. after the Commission's normal business hours had concluded at 4:30 p.m.; and the parties having submitted written argument in support of and in opposition to the petition for rehearing, the last of which was received on September 30, 1987; and the Commission having considered the matter and being fully advised in the premises, issues the following

ORDER 1/

That the petition for rehearing is hereby denied.

Given under our hands and seal at the City of Madison, Wisconsin this 9th day of October, 1987.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Stephen Schoenfeld /s/  
Stephen Schoenfeld, Chairman

Herman Torosian /s/  
Herman Torosian, Commissioner

1/ Pursuant to Sec. 227.48(2), Stats., the Commission hereby notifies the parties that a petition for judicial review naming the Commission as Respondent, may be filed by following the procedures set forth in Sec. 227.53, Stats.

227.53 Parties and proceedings for review. (1) Except as otherwise specifically provided by law, any person aggrieved by a decision specified in s. 227.52 shall be entitled to judicial review thereof as provided in this chapter.

(Footnote 1/ continued on page 2).

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1/ Continued

(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. 227.49, 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. 227.48. If a rehearing is requested under s. 227.49, 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. 77.59(6)(b), 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. 227.57 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.

ROCK COUNTY

MEMORANDUM ACCOMPANYING  
ORDER DENYING PETITION FOR REHEARING

POSITION OF THE ASSOCIATION

The Association asserts that the petition for rehearing should be granted because the Commission inadvertently denied the Association the opportunity to present argument and evidence as to the merits of the dispute when it dismissed the declaratory ruling petitions. The Association argues that the Commission's action violated the Association's constitutional rights to due process and deprived the Association of its statutory right under Sec. 227.44, Stats., to a hearing. The Association asserts the Commission not only may not, but should not, deny the Association its right to fair play and due process. Otherwise, the Association asserts that the Commission will become the victim of its own error. The Association argues that the dispute between the parties is one of first impression and that without a full factual record and full argument, the ability of the Commission and possibly reviewing courts to reach the correct result would be severely jeopardized.

In response to the Commission's invitation that the Association submit through the rehearing process the argument which the Association asserts it was deprived of presenting prior to dismissal of the declaratory ruling petitions, the Association generally responds that absent a hearing it can only act upon hypothetical possibilities. The Association specifically asserts that evidence adduced at a hearing might establish that the County, before the Association filed its petition for declaratory ruling, deliberately withheld from the Association its intent to withdraw Sec. 15.04 from its final offer if the Association challenged said proposal as non-mandatory; that the County intended, by concealing this fact from the Association, to avoid a challenge to its authority to compel bargaining unit nurses to be supervisory nurses thus preserving the County's authority to do so. The Association argues that if this is what a hearing established the County did, then the County abused the bargaining process, and the Commission should not reward it for doing so. The Association asserts that a hearing might also show that the first time the County considered using the management's rights clause to compel bargaining unit nurses to be supervisory nurses was after and as a result of the Association's petition for declaratory ruling challenging Sec. 15.04. The Association contends that such facts would show that the Association acted in a timely fashion once the County made its new position known. Under this hypothesis, the Association asserts that the Commission is penalizing the Association for not challenging a position of the County before the County adopted that position. The Association asserts that such a holding would make negotiations a game of hide and seek rather than an effort to reach an agreement. Worse, the Association argues that the Commission's holding, if adhered to, would penalize that party who acts in good faith and reward a party who acts by concealment and misdirection. The Association argues that it was not until the removal of Sec. 15.04 from the County's proposal that any issue of the County's authority under the management's rights clause to compel bargaining unit employees to perform supervisory duties came into existence. For that reason, the Association asserts that a decision by the Commission resolving the dispute over Sec. 15.04 would have resolved the entire dispute between the parties over the question of whether compelling bargaining unit nurses to be supervisory employees is a mandatory subject of bargaining. Unlike the employer in Racine Unified School District, Dec. No. 21689 (WERC, 5/84), the Association argues that it did not and does not seek to resolve another pre-existing dispute separate and distinct from the dispute which precipitated the original petition for declaratory ruling. The Association contends that the dispute between the parties has been, and has remained throughout one and the same: Whether a contract provision authorizing a municipality to compel bargaining unit employees to supervise other bargaining unit employees is a mandatory subject of bargaining. Thus, contrary to the Commission's conclusion, the Association argues there was no piecemeal litigation in this proceeding.

As to the Commission's statement in its decision to the effect that "The Association's concern was not brought about by any claims made by the County with respect to any rights the County may have under the management's rights clause,"

the Association asserts that such a statement is technically correct but misleading. The Association asserts that this proceeding would have ended long ago if the County would simply state that it makes no claim of authority under the management's rights clause to compel bargaining unit nurses to be supervisory nurses. Thus far, the County has refused to make such a statement. Fortunately, the Association asserts that the County can be compelled to do so at the hearing the Association is entitled to herein.

#### POSITION OF THE COUNTY

The County initially contends that the Association's petition for a hearing was untimely filed with the Commission in that it was not delivered during business hours on September 9, 1987. The County asserts that such a result, while seemingly harsh at first glance, is a result necessary to the proper administration of the appeal process. The County asks whether a petitioner should be allowed to track down the Commission Chairman or its General Counsel at home, after hours, and deliver a petition? The County asserts that the Association herein cannot be found to have filed a timely petition based merely on the fortuity of gaining access to the Commission's offices after normal business hours. The County asserts that the Association delayed filing of the petition at its peril and that the Wisconsin Statutes and the decisions of the Wisconsin Supreme Court demand dismissal of the petition for that reason.

Responding to the Association's arguments as to denial of due process and right to hearing, the County argues that hearing need not be held by the Commission absent adequate justification for same. The County argues that Sec. 227.42(1), Stats., requires that there be a dispute of "material fact" before a hearing is required. The County asserts that no dispute of "material fact" exists in this case. The County further argues that ERB 18.06(1) and ERB 18.07 demonstrate that hearings are not mandated to decide a petition for declaratory ruling.

The County contends that it is under no obligation to state its position with regard to its authority under the management's rights clause and reiterates the Commission's finding that "The Association's concern was not brought about by any claim made by the County." The County maintains that none of the hypothetical facts mentioned by the Association in its argument herein are material to the issue before the Commission. Furthermore, the County asserts that the Association had the same opportunity as the County to present Affidavits setting out facts it felt were material to the Commission prior to a Commission ruling on the County's motion to dismiss. Thus, if the Commission decides it has jurisdiction over this petition, the County maintains that no constitutional or statutory basis exists mandating the granting of the petition or the scheduling of a hearing. Therefore, the County asks that the petition be dismissed.

#### DISCUSSION

Sec. 227.49(1), Stats., provides that "Any person aggrieved by a final order may, within 20 days of service of the order, file a written petition for rehearing . . ." Here, the Commission's decision was served upon the parties by placement in the U. S. mail on August 20, 1987. Thus, the last day upon which a petition for rehearing could be timely filed was September 9, 1987. As no such petition was received by the Commission during normal business hours, we conclude that we must dismiss the petition for rehearing as being untimely filed.

Had the petition been timely filed, we still would have denied it because we are persuaded from our review of the correspondence in this matter that the Association was given the opportunity to submit its position as to both the merits of the dispute as well as the need for hearing. We remain convinced that

ERB 32.10(1) and 32.12(3) 2/ mandate dismissal of the Association's June 4, 1987 petition because the Association could have but did not therein object to the management's rights proposal. As we therefore found no dispute as to material fact to exist, we granted the County's motion to dismiss without hearing. We stand by that decision.

Dated at Madison, Wisconsin this 9th day of October, 1987.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Stephen Schoenfeld /s/  
Stephen Schoenfeld, Chairman

Herman Torosian /s/  
Herman Torosian, Commissioner

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2/ ERB 32.10(1) and 32.12(3) provide:

ERB 32.10 Final offers. (1) Contents Generally. Final offers shall contain proposals relating only to mandatory subjects of bargaining, except either final offer may contain proposals relating to permissive subjects of bargaining if there is no timely objection by the other party to the inclusion of the proposals in such a final offer. Absent a timely objection, the proposals shall be treated as mandatory subjects of bargaining for the duration of the s. 111.70(4)(cm), Stats., impasse resolution process, including any exchanges of final offers which may follow declaratory ruling proceedings under s. ERB 32.12 or injunction proceedings referred to in s. ERB 32.18(1).

. . .

ERB 32.12 Petition or stipulation to initiate a declaratory ruling proceeding to determine whether a proposal or proposals relate to mandatory subjects of bargaining.

. . .

(3) When to File. A petition or stipulation may be filed with the commission during negotiations, mediation or investigation. If a petition or stipulation is filed after the investigator calls for final offers, the petition or stipulation for declaratory ruling must be filed within 10 days following the service on the commission or its investigator of the written objection that a proposal or proposals relate to non-mandatory subjects of bargaining. Failure to file such a petition or stipulation within this time period shall constitute a waiver of the objection and the proposal or proposals involved therein shall be treated as mandatory subjects of bargaining.

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