

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the the Petition of :
 :
ASSOCIATION OF MENTAL :
HEALTH SPECIALISTS : Case 226
 : No. 39628 DR(M)-436
Requesting Declaratory Rulings : Decision No. 25066
Pursuant to Section 111.70(4)(b) :
Wis. Stats., Involving a Dispute :
Between Said Petitioner and :
 :
ROCK COUNTY :
 :

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.

FINDINGS OF FACT, CONCLUSIONS OF LAW
AND ORDER DISMISSING PETITIONS
FOR DECLARATORY RULING

The Association of Mental Health Specialists having on November 2, 1987, filed a petition with the Wisconsin Employment Relations Commission seeking a declaratory ruling pursuant to Sec. 111.70(4)(b), Stats., as to whether a proposal contained in Rock County's final offer in an interest arbitration proceeding was a mandatory subject of bargaining; and said Association having on November 4, 1987, filed a motion seeking to reactivate a May 8, 1987, petition for declaratory ruling which the Commission had previously dismissed; and the County having on November 4, 1987, responded to the November 2, 1987, petition by modifying its final offer to eliminate the proposal which was the subject of said petition; and the Association having on November 9, 1987, filed a motion with the Commission seeking a ruling that the County had waived its right to revise its final offer to delete the proposal which was the subject of the Association's November 2, 1987, petition for declaratory ruling; and the Association also having filed on November 9, 1987, a petition pursuant to Sec. 111.70(4)(b), Stats., seeking a declaratory ruling from the Commission as to whether a portion of the County's final offer other than that challenged through the November 2, 1987 petition was a mandatory subject of bargaining; and the County having on November 23, 1987, responded to the Association's various motions and petitions by moving that they be dismissed; and the Association having on December 2, 1987, submitted its written argument on the various matters and having also therein withdrawn its motion to reactivate its May 8, 1987, petition for declaratory ruling; and the Commission having considered the matter, makes and issues the following

FINDINGS OF FACT

1. That Rock County, herein the County, is a municipal employer having its offices at 51 South Main Street, Janesville, Wisconsin, 53545.
2. That the Association of Mental Health Specialists, herein the Association, is a labor organization having its offices at 2504 Burbank Avenue, Janesville, Wisconsin, 53545, and functioning as the collective bargaining representative of certain nurses and psychosocial workers employed by the County.
3. That during collective bargaining between the parties over a successor agreement, a dispute arose as to the Association's duty to bargain with the County over the following proposal which was included in the County's final offer submitted to a Commission investigator pursuant to ERB 32.10:

15.04 Supervisory

- A. Association of Mental Health Specialists, Nursing Division, will designate a pool of nurses who have volunteered to serve as 'supervisory nurse' as may be requested by their appropriate supervisor. The Association of Mental Health Specialists will provide the pool of nurses by December 1st of each year for the following calendar year. Nurses added to this list after December 1st will be valid for the remainder of the calendar year. Placement of personnel on said list shall be subject to authorization by employer. Notice of said authorization shall be given by employer within fifteen (15) days of application for placement on said list.

Insofar as it is feasible, 'supervisory nurse' responsibilities shall be equally apportioned among those members listed in the pool.

Any individual required to exercise the responsibilities of 'supervisory nurse' shall be paid one and one-half times the salary he/she would regularly receive for working such shift. For purposes of computing time and one half, base pay shall include any shift differential paid to the nurse.

and that on May 8, 1987, the Association filed a petition for declaratory ruling with the Commission pursuant to Sec. 111.70(4)(b), Stats., asserting that the above quoted proposal was a non-mandatory subject of bargaining.

4. That on May 21, 1987, the County responded to the Association's petition through the following letter:

Enclosed, please find the revised Final Offer which provides for the deletion of Section. 15.04(A) Supervisory from said Final Offer. The deletion should resolve the basis for the above cited petition and allow the Commission to certify impasse on WERC Case 218 No. 38361 Arb 4302.

and that the County's revised final offer stated:

The Employer makes the following final offer on all issues in dispute for a successor Agreement to begin January 1, 1987 and remain in full force and effect through December 31, 1988.

1. All provisions of the 1985-86 Agreement between the parties not modified by a Stipulation Of Agreed Upon Items, if any, or this Final Offer shall be included in the successor Agreement between the parties for the term of said Agreement.
2. Delete Section 15.04 A. Supervisory of the 1985-86 Agreement from the successor Agreement (see attachment for specific language).
3. Term of Agreement: Beginning January 1, 1987 through December 31, 1988. The dates in the Agreement setting forth the terms shall be changed to reflect the above cited terms.
4. Stipulation Of Agreed Upon Items.
5. Wages: Effective January 1, 1987, increase wage rates on the 1986 Wage Appendix B as follows: (see attached 1987 Wage Appendix).

Effective January 1, 1988 increase wages rates on the 1987 Wage Appendix as follows: (see attached 1988 Wage Appendix).

5. That on June 4, 1987, the Association filed a petition for declaratory ruling with the Commission pursuant to Sec. 111.70(4)(b) Stats., asserting that the following portion of the County's final offer was a non-mandatory subject of bargaining.

Article II -- Management Rights, Section 2.01

"(T)he management of the County of Rock and the direction of the work force is vested exclusively in the County, including, but not limited to . . . the right to create job descriptions and determine the composition thereof, the right to plan and schedule work . . . together with the right to determine the methods and manner of performing work . . ."

6. That on August 20, 1987, the Commission issued Findings of Fact, Conclusions of Law and Order Dismissing Petitions for Declaratory Ruling wherein it was concluded that the Association had waived its right to obtain a declaratory ruling from the Commission as to the proposal challenged in the June 4, 1987 petition, and wherein it was further concluded that by deleting from its final offer the proposal challenged by the Association in its May 8, 1987 petition for declaratory ruling, the County had eliminated any dispute between the parties concerning the duty to bargain as to said proposal which the Association would have been entitled to have resolved pursuant to Sec. 111.70(4)(b), Stats.

7. That following issuance of said decision and a subsequent Commission decision denying the Association's Petition for Rehearing, the parties submitted new final offers to the Commission Investigator; that both the Association's and the County's final offer contained the language from Sec. 2.01 set forth in Finding of Fact 5; that the Association's final offer also included Sec. 15.04(A) as set forth in Finding of Fact 3 while the County's final offer did not contain said language; and that the County subsequently revised its final offer to include Sec. 15.04(A) as set forth in Finding of Fact 3.

8. That on November 2, 1987, the Association filed a petition for declaratory ruling with the Commission pursuant to Sec. 111.70(4)(b) Stats., asserting that Sec. 15.04(A) of the County's final offer was a non-mandatory subject of bargaining; that on November 4, 1987, the County revised its final offer to delete Sec. 15.04(A) in response to the Association's November 2, 1987 petition; that on November 9, 1987, the Association submitted motions to the Commission seeking inter alia a ruling that the County was estopped from revising its final offer to delete Sec. 15.04(A) as well as a petition for declaratory ruling alleging that Sec. 2.01 of the County's final offer was a non-mandatory subject of bargaining.

Based upon the above and foregoing Findings of Fact, the Commission makes and issues the following

CONCLUSIONS OF LAW

1. That as the Association has previously been held to have waived its right to obtain a declaratory ruling from the Wisconsin Employment Relations Commission pursuant to Secs. 111.70(4)(b) and 111.70(4)(cm)(6)(a) Stats., as to the proposal challenged in its November 9, 1987 petition and set forth in Finding of Fact 5, said proposal is considered a mandatory subject of bargaining.

2. That as the County has deleted from its final offer the proposal challenged by the Association in its November 2, 1987 petition for declaratory ruling, there is presently no dispute before the Commission concerning the duty to bargain as to said proposal which the Association is entitled to have resolved pursuant to Sec. 111.70(4)(b), Stats.

Base upon the above and foregoing Findings of Fact and Conclusions of Law, the Commission makes the issues the following

ORDER 1/

That the Association's petitions for declaratory ruling are dismissed.

Given under our hands and seal at the City of
Madison, Wisconsin this 6th day of January, 1988.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Stephen Schoenfeld
Stephen Schoenfeld, Chairman
Herman Torosian
Herman Torosian, Commissioner

Commissioner A. Henry Hempe did not participate in this case.

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- 1/ Pursuant to Sec. 227.48(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. 227.49 and 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.

227.49 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.

227.53 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.

(a) Proceedings for review shall be instituted by serving a petition therefore 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

(Footnote 1 continued from Page 4.)

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 FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER DISMISSING PETITIONS FOR DECLARATORY RULING

Positions of the Parties

The County asserts that the Association's November 2, 1987 petition for declaratory ruling should be dismissed because the County has removed the language in question from its final offer thus eliminating any dispute between the parties concerning the duty to bargain over same. As to the Association's November 9, 1987 petition for declaratory ruling, the County asserts that said petition should be dismissed because the proposal in question is clearly a mandatory subject of bargaining. Lastly, as to the Association's motion that the County be estopped from revising its final offer to delete the language challenged in the November 2, 1987 petition for declaratory ruling, the County asserts that it is unaware of any valid basis for the Association's position and argues that the Association is engaging in dilatory tactics which warrant the award of attorney's fees and costs citing Rock County, Dec. No. 23656 (WERC, 5/86) and Madison Schools, Dec. No. 16471-D (WERC, 5/81).

The Association contends that it is the County who has engaged in dilatory tactics herein and further that the County's actions should compel the Commission to conclude that the Association is entitled to a ruling on the merits as to whether Section 15.04(A) is a non-mandatory subject of bargaining. The Association argues that it would be consistent with the Commission's rationale in Racine Unified School District, Dec. No. 21869 (WERC, 5/84) for the Commission to rule herein that the County, having exercised its right to avoid a ruling as to whether Sec. 15.04(A) is non-mandatory by removing it from its final offer in Rock County, Dec. No. 24794 (WERC, 8/87), is not permitted to exercise that right a second time in the same negotiations thereby prompting delay in the collective bargaining process. The Association argues that the Commission should accord the Association the same treatment that the Commission has accorded the County in these proceedings. In this regard, the Association asserts that if, as the Commission held in Rock County, Dec. No. 24794 (WERC, 8/87), the Association, as a matter of law, was required to anticipate that the County might treat the management rights clause as containing a contractual right that the Association challenged in Sec. 15.04(A), then the County, as a matter of law, should be required to have anticipated that the Association would file a second petition for declaratory ruling once the County reinserted Sec. 15.04 into its second revised final offer. The Association notes that if the Commission were to grant the Association's motion to estop the County from revising its final offer and thereby give the Association the opportunity to obtain a ruling on the merits of Sec. 15.04(A), the County would not be prevented from making further revised final offers after the Commission's decision. The Association asserts that it only seeks an order from the Commission preventing the County from utilizing revisions of its final offers to deny for the second time in the same negotiations a ruling on whether Sec. 15.04(A) is non-mandatory. In summary, consistent with the Commission's aim of avoiding delay, the Association urges the Commission to rule that a party cannot, over the other party's objection, withdraw more than once the same contractual provision that the other party sought to challenge. The Association asserts that such a ruling will deter the duplication that the County's maneuvering spawned herein and that such a ruling is particularly necessary where, as here, the initial withdrawal did not have the effect of resolving the basic dispute between the parties which is whether a contract provision empowering the County to compel bargaining unit nurses to supervise other nurses is a non-mandatory subject of bargaining. The Association notes that there would have been no further delay in the submission of the parties contract dispute interest arbitration if the County had not revised its final offer to again include Sec. 15.04(A).

The Association also contends that the Commission erred when dismissing its petition in August, 1987 without a hearing. The Association asserts that it may well be necessary for the Commission to conduct a hearing before it can rule upon the Association's motion to estop the County from revising its final offer herein. The Association hopes that the Commission will recognize that the unique and

unprecedented actions the County has taken herein required the filing of the two petitions for declaratory ruling at issue herein and that the Commission to re-examine its prior rationale in Rock County, Dec. No. 24794 (WERC, 8/87). The Association asserts that had the County initially allowed the Commission to proceed to a ruling on the merits of Sec. 15.04(A), that issue would almost certainly have been resolved by now or at least would have been ripe for a prompt Commission ruling. Instead, the Association asserts that the County, by a series of maneuvers, has attempted and is attempting both to avoid the resolution of this issue and to maintain the contractual power to coerce nurses into supervising their fellow employees. The Association asserts that the County has done so without regard to the delay that it knew would almost certainly result from such maneuvers. The Association therefore asserts that the County should not now be heard to oppose a hearing on the grounds of delay, particularly where denial of a hearing would implicate basic statutory and constitutional concerns.

Given the foregoing, the Association asks that the Commission grant its motion, after hearing if appropriate, and then proceed to rule upon the merits of the Association's petition as to Sec. 15.04(A).

DISCUSSION

The tortuous history of this case has been recited in the Findings of Fact. Suffice it to say we have been compelled to revisit the same basic principles upon which we decided Rock County, Dec. No. 24794, because of the manner in which the parties exercised their right to revise their final offers after issuance of our decision in August, 1987. 2/

The issue before us now is whether we should depart from those basic principles and rule upon the mandatory or permissive status of Sec. 15.04(A) because of the manner in which the County amended its final offer. We conclude that no such departure is warranted. It can well be argued that the County was acting in a reasonable good faith manner when it elected to amend its final offer to again include Sec. 15.04(A) given that the Association had elected to include that same provision in its final offer. However, even assuming that the Association could establish at hearing that the County was seeking to delay and frustrate the interest arbitration process, we are not persuaded that it is appropriate or even jurisdictionally possible to "remedy" that conduct by proceeding to the merits of a declaratory ruling on a proposal as to which there is no "dispute" because the proponent has withdrawn same. We have therefore dismissed the November 2 petition. As we have previously found the proposal which is the subject of the Association's November 9 petition to be mandatory because of the Association's prior failure to timely object to same, we also have dismissed the November 9 petition. 3/

2/ ERB 32.12(4) provides:

(4) PROCEDURE FOLLOWING ISSUANCE OF DECLARATORY RULING. Following the issuance and service of the declaratory ruling, the commission or its investigator shall conduct further investigation or hearing for the purpose of obtaining the final offer of each party before closing the investigation. Neither final offer may include any proposal which the commission has found to be a non-mandatory subject of bargaining unless consented to in writing by the other party. Should the commission's decision be appealed the parties may agree to the conditional inclusion of such proposals in their final offers.

3/ ERB 32.10 provides that the mandatory status which attaches to a proposal as to which a party does not timely object continues throughout the duration of the impasse resolution process.

The Association acted well within its rights under Sec. 111.70(4)(b) Stats. and ERB 32.10, 32.11 and 32.12 by filing the November 2, 1987 petition and thus it is clear that the County's motion for attorneys fees must be denied as to said petition. Given the complex procedural history of the parties' litigation and the "protective" nature of the Association's November 9 petition, we find no attorneys fees to be warranted as to said petition either.

Dated at Madison, Wisconsin this 6th day of January, 1988.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Stephen Schoenfeld
Stephen Schoenfeld, Chairman
Herman Torosian
Herman Torosian, Commissioner

Commissioner A. Henry Hempe did not participate in this case.