STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MAYVILLE EDUCATION ASSOCIATION AND
LOUISE MACIEJEWSKI, PRESIDENT,
MAYVILLE EDUCATION ASSOCIATION, Complainants,

vs.

MAYVILLE SCHOOL DISTRICT AND THE
BOARD OF EDUCATION OF THE
MAYVILLE SCHOOL DISTRICT, Respondents.

Case 17
No. 39952
MP-2052

Decision No. 25144-G

Appearances:

Mr. Anthony L. Sheehan, Staff Counsel, and **Ms. Chris Galinat**, Associate Counsel, Wisconsin Education Association Council, 33 Nob Hill Drive, P.O. Box 8003, Madison, WI 53708-8003, on behalf of the Complainants.

Godfrey & Kahn, S.C., Attorneys at Law, by **Mr. Edward J. Williams,** 219 Washington Avenue, P. O. Box 1278, Oshkosh WI 54902-1278, and Lathrop & Clark, Attorneys at Law, by **Mr. Kirk D. Strang,** 740 Regent Street, Suite 400, Madison, WI 53715, on behalf of the Respondents.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

In May, 1992, in Decision No. 25144-D, the Commission ordered the Mayville School District to:

> Restore the wage status quo by providing the health and dental benefits set forth in the parties' collective bargaining agreement and underlying insurance policy to employes through a source for which the requirements and limitations of Sec. 893.80, Stats, are not applicable.

The Memorandum accompanying the Commission's decision stated in pertinent part:

> Turning to the sixth and last wage impact, when the District began to self-fund health benefits, employes who previously could, if necessary, seek redress for unpaid claims through civil actions against the insurance company were now confronted with the need to sue their employer and with access to less desirable remedies due to requirements and limitations of Sec. 893.80, Stats.
>
> . . . Thus, prior to self-funding, employes have always been able to file civil suits seeking redress for unpaid claims without having to sue the District and without being subject to the requirements and limitations of Sec. 893.80, Stats. which include a $50,000 damage limitation for tort actions and the need to file a notice of claim within 120 days. Thus, the historical application of the insurance language is supportive of the position that the status quo does not give the District the right to eliminate this wage. . . .
>
> Given the foregoing, we are satisfied that the historical application of the language warrants the conclusion that the District's unilateral self-funding of health benefits did violate its <u>status quo</u> obligations as to this sixth wage impact. Thus, we have entered an appropriate remedial Order.

The District sought judicial review of the Commission's Order. On October 7, 1993, Dodge County Circuit Court Judge Joseph E. Schultz affirmed the Commission and stated in pertinent part:

> The District and Board further argue that based on the rules set forth in, <u>Marshall v. City of Green Bay</u>, 18 Wis. 2d 496, 118 N.W.2d 747 (1987), the WERC's application of Sec. 893.80, Stats., is wrong as a matter of law because the District has waived the limitations of Sec. 893.80, Stats. (District and Board Brief at 21-25). However, both <u>Marshall</u> and <u>Gonzales</u> are distinguishable in that those precedents address the power of a city to waive its immunity from suit. This Court has not been presented with any authority which supports a school district's power to waive its immunity. In addition, the record does not support the position that the District waived its immunity in this case.
>
> This Court finds that when the District began to self-fund benefits, it created a situation where employees of the District who need to seek redress for denied claims will be required to bring a civil action against their employer. In addition, the plain language of Sec. 893.80, Stats., clearly imposes restrictions and limitations on the abilities of the District's employees to recover damages in actions against the District. The WERC correctly determined that the operation Sec. 893.80, Stats., creates a direct wage impact under the self-funded plans. WERC Decision 25144-D at 14-15.

It is well established in Wisconsin that "subject matters that [are] primarily related to wages or hours or conditions of employment [are] mandatorily bargainable." Beloit Education Association v. WERC, 73 Wis. 2d 43, 54, 242 N.W.2d 231 (1976). In light of the direct wage impact of the decision to self-fund, the WERC correctly found that the District and Board had violated Sec. 111.70(3)(a)4, Stats., in refusing to bargain with the Association on the decision to self-fund.

The District then sought judicial review of the Circuit Court's Order. On March 2, 1995, in Mayville School Dist. V. WERC, 192 Wis.2d 379 (1995), the Court of Appeals affirmed the Circuit Court and Commission stating in pertinent part at pages 390-396:

The argument in this case – which the commission found persuasive – was that the district's unilateral change in its employee health plan violated the status quo because: (1) employees would now have to proceed directly against the district – their employer – rather than an "outside" party to seek redress for allegedly improper benefit denials; and (2) under Sec. 893.80, STATS. a notice of claim must be filed with the district within 120 days of the event in order to proceed and, further, the district is not liable in tort for any amount in excess of $50,000. From those facts, gleaned from the plain and unambiguous language of Sec. 893.80, 8/ the commission reasoned that the status quo had been violated.

We do not believe that the commission was construing or interpreting Sec. 893.80, STATS., in reaching that decision. It simply noted that the statute's unambiguous and unchallenged requirements place limitations on union members wishing to challenge benefit denials in court 9/ -- and that no such requirements

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8 Section 893.80, STATS., provides, in pertinent part:

[N]o action may be brought or maintained against any [school district] . . . unless:
Within 120 days after the happening of the event giving rise to the claim, written notice of the circumstances of the claim . . . is served on the [district]. . . .
. . .
The amount recoverable by any person for any damages . . . in any action founded on tort against any [school district] . . . shall not exceed $50,000. . . .
No suit may be brought against any [school district] for the intentional torts of its . . . agents or employe[e]s [or] for acts done in the exercise of legislative, quasi-legislative, judicial or quasi-judicial functions.

9 The district does not challenge the fact that Sec. 893.80, STATS., requires the filing of a notice of claim within 120 days, and that the statute caps a district's tort liability at $59,000.

or limitations existed under the prior plan. This is thus not a case like *GLENDALE* OR *CITY OF BROOKFIELD* where the merits of the commission's decision depended on its interpretation and harmonization of labor and nonlabor statutes. There was nothing to interpret, construe or harmonize in the commission's reference to Sec. 893.80 in this case; the unambiguous provisions of the statute were simply noted as potential limitations on the employees' enforcement of their legal remedies.

[4]

We see no reason not to accord the commission's status quo determination any less deference in this case than in any other simply because, as part of the legal justification of that determination, it referred to a nonlabor statute. The commission's decision is a proper subject for deference under *Carrion, Drummond* and *Jefferson County,* and we do not see Glendale or City of Brookfield as compelling a different result.

Prohibited-Practice Claim

The district argues first that we should reverse the commission because it improperly considered Sec. 893.80, STATS., in its analysis. The argument appears to proceed as follows: (1) the test for determining whether a particular matter is a mandatory subject of bargaining is whether it is "primarily related" to the wages, hours and conditions of employment of the employees of the Mayville School District; and (2) because Sec. 893.80 is a statewide legislative declaration primarily related to "government management and public policy," it cannot possibly be primarily related to the Mayville employees' wages or working conditions.

[5]

First, we agree with the commission's characterization of this and several of the district's other arguments as "variations of a single theme, namely, that [Sec. 893.80, STATS.] does not affect [wages or] benefits." We also agree that the district's argument is largely misplaced because the scope of our review of the commission's decision is limited to whether it has a rational basis, that is whether it is reasonable. *Jefferson County,187 Wis.2d at 653, 523 N.W.2d at 174-175. We do not examine the issue anew.*

[6, 7]

Second, we note that the impact of public policy decisions on employee wages has always been recognized as a mandatory subject of bargaining. *See, e.g., City of Brookfield,* 87 Wis.2d at 830, 833, 275 N.W.2d at 728, 730, where the supreme court held that while a city's *decision* to lay off employees for budgetary reasons was "primarily related to the exercise of municipal powers and responsibilities and the integrity of the political processes of municipal government," and thus not a mandatory subject of bargaining, there was a primary relation between the *impact* of the layoffs and the remaining employees' working conditions, with the result that the issue of the impact of the layoffs was ruled to be a mandatory subject of bargaining.

The district next urges us to reverse on grounds that one of the assertions in the commission's analysis – that, under the prior plan, employees had always been able to file civil suits seeking redress for unpaid claims without having to sue the district and without being subject to the requirements and limitations of Sec. 893.80, STATS., -- is untrue.

The district has not referred us to any evidence in the record to support that assertion, however. It relies solely on a remark by the commission early in its decision to the effect that the former insurer, the Wisconsin Education Association Trust, was regulated by the federal government under the Employee Retirement Income Security Act (ERISA), not the state, from 1975 to 1985, and that such federal regulation is preemptive. The district maintains that, as a result, employees may have had a federal action under the prior plan but could not sue in state court to enforce their rights.

We are uncertain of the point the district attempts to make with such assertions. Prior to the changeover, an employee could prosecute a challenge – whether in state or federal court – without suing his or her employer. Moreover,

there is no question that, regardless of ERISA regulations, the insurer's bad faith in honoring a claim could be redressed in a state court action. *See Anderson v. Continental Ins. Co.,* 85 Wis.2d 675, 271 N.W.2d 368 (1978) (recognizing a state court cause of action for an insurer's bad-faith refusal to honor a claim). Additionally, as the union points out, the employees' former dental insurer, Blue Cross, was never subject to ERISA regulation and could be sued in state court all along.

[8]

We agree with the commission that historically the district's employees had remedies available in state court to ensure that the insurer provided their health and dental care benefits in a timely and good-faith manner, and we reject the district's argument.

Next, while agreeing with the proposition that "the means and ease by which an employee acquires access to the underlying insurance benefits has a wage impact," the district argues that Sec. 893.80, STATS., will have no effect on employee actions to recover benefits because such actions will necessarily be in contract, and the statute is applicable only to actions in tort. Thus, says the district, the commission erred in concluding that becoming subject to the statute would change the employees' access to benefits.

In *DNR v. City of Waukesha,* 184 Wis.2d 178, 190, 191, 515 N.W.2d 888, 892, 893 (1994), the supreme court, overruling language in previous cases, held that the "plain language of [Sec. 893.80(1), STATS.,] clearly does not limit the application of the notice of claim requirements to tort claims" or to "claims for money damages." Rather, said the court, the notice-of-claim provisions "appl[y] to all causes of action." We reject the district's argument.

[9]

We conclude that the commission could reasonably decide that, in certain situations at least, the necessity of suing one's employer to recoup wrongfully withheld benefits, coupled with the statutory limitations and restrictions on such actions under Sec. 893.80(1)(a) and (3), STATS., represented a change in the status quo during the contract hiatus 10/ because those factors were not present under the former health insurance plan. 11/

By the Court. – Order affirmed.

GARTZKE, P.J. (*concurring)*. The commission concluded on the facts of this case that the district's unilateral change in its employee health plan violated the status quo because employees must now sue their employers for redress of allegedly improper benefit denials. I do not read the commission's decision to turn on the effect of Sec. 893.80, STATS.

For us to pursue an unnecessary examination of Sec. 893.80, STATS., permits a nonmunicipal employer in a future case otherwise on all fours to argue that the majority decision applies only to municipalities. No reason exists for us to license that potential argument.

Whatever the case, the commission considered the evidence and arguments presented by the parties on the point and grounded its decision on the combined

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10 It is easy to forget in the flurry of arguments that, as the commission reminds us, its decision

is concerned only with the District's conduct during the contract hiatus. Arguably the . . . decis does not specifically require the District to bargain concerning its decision to self insure; rather, in this case, only the impact such a decision has during the contract hiatus on access to benefits presented matters subject to bargaining.

11 It may be, as the concurring opinion suggests, that the fact that the district's employees may in some circumstances be required to proceed against their employer rather than a private insurer in order to challenge benefit denials would be enough, by itself, to support a determination that the status quo had been altered. The commission's decision in this case, however, is grounded on the combined effect of the two factors, namely, the necessity of suing one's own employer and the necessity of bringing suit now subject to the provisions of Sec. 893.80, STATS. The parties' arguments on appeal have proceeded on that basis. The factors have not been argued separately and we have not been provided any factual basis on which to conclude that the "employer suit," standing alone, is sufficient – other than the union's assertion at one point in its brief that its members are reluctant to sue "the very hand that feeds them."

effect of the two factors. We affirm it on that basis. We do not decide whether, in some future case, we would or would not base a similar decision on the first ground alone.

Thereafter, the parties were unable to resolve their dispute as to whether the District had complied with the Commission's Order. An evidentiary hearing was held and briefs were filed, the last of which was received September 9, 1997.

Being fully advised in the premises, we make and issue the following

FINDINGS OF FACT

The Mayville School District, herein Respondent District, is a municipal employer having its principal offices at 500 North Clark Street, Mayville, Wisconsin 53050.

The Mayville Education Association, herein Complainant Association, is a labor organization having its principal offices c/o Winnebagoland UniServ Unit-South, P.O. Box 1195, Fond du Lac, Wisconsin 54936-1195.

Following receipt of Decision 25144-D, the District took all action it felt necessary to: (1) eliminate any requirement that an employe sue the Respondent District when pursuing allegedly improper benefit denials; and (2) voluntarily and intentionally relinquish its rights under Secs. 893.80(1) and (3), Stats. Those actions included:

Inclusion of the following language in health and dental policies:

The Board of Education of the Mayville School District waives the requirements

to (sic) Sec. 893.80, Wisconsin Statutes, regarding tort actions brought for failure to pay or not pay claims or benefits under this plan. The employee desiring to bring such tort action is not required to name the Board of Education of the School District of Mayville, the School District of Mayville, or any officer of the School District of Mayville as a defendant to such tort action inasmuch as such tort action may be brought directly against the Plan Administrator.

Amendment of the Plan Supervisor Agreement with Employers Health Insurance Company as follows:

AMENDMENT TO PLAN SUPERVISOR AGREEMENT

WHEREAS, effective May 5, 1992, Employers Health Insurance Company ("EHIC") and School District of Mayville ("Employer") entered into a Plan Supervisor Agreement ("Agreement"); and

WHEREAS, the parties to that Agreement wish to comply with the Decision and Order of the Wisconsin Employment Relations Commission dated May 5, 1992.

NOW, THEREFORE, the parties hereto agree as follows:

The Agreement shall be amended as follows:

The Plan Supervisor shall not be liable for any failure or refusal by the Plan Supervisor to pay or honor any application for benefits made pursuant to this Agreement; provided, however, the Plan Supervisor shall arrange for defense in court or otherwise of all disputes arising from any failure or refusal by the Plan Supervisor to pay or honor any application for benefits under the Plan pursuant to this Agreement and shall pay all expenses including reasonable attorney fees incurred in such defense, except the cost of the actual benefits claimed. It is agreed that all such actions shall be defended in the name of the Plan Supervisor, and the employer need not be a named party in the defense of such actions.

8.1 If the Federal Government, the government of any state, or any political subdivision or any instrumentality of either shall assess any tax against the Plan Supervisor arising out of the operations of the Plan and Trust and the Plan Supervisor is required to pay such tax, the Plan Supervisor shall report the payment to the Employer and make a charge against the Trust for such tax. Neither the Board of Education, the Mayville School District nor any office or employee of the School District need be named a party defendant to such civil actions.

A copy of this Amendment was provided to all employes represented by Complainant Association.

Acquisition of an Employee Benefits Liability Insurance Endorsement providing $1,000,000 in coverage for health and dental "benefits which should have been paid to any of your 'employees' under your employee benefits program, . . ." and removing the Respondent District from defense of any benefit lawsuit or claim.

Continuation of stop/loss insurance applicable to health and dental benefits.

Assertion to the Wisconsin Employment Relations Commission that the waiver to which the District commits itself is best stated as:

> The District waives the requirements and limitations of Section 893.80, Stats., with respect to future claims to the extent that such claims seek access to the underlying plan benefits.

and that this waiver language is applicable to any and all claims which could arise beginning January 1, 1988.

Elimination of any District role in the processing of claims beyond payment each month of whatever lump sum amount Employers Health Insurance advises the District is necessary for claims payment.

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

CONCLUSIONS OF LAW

Respondent School District of Mayville has established its intent to knowingly and voluntarily waive those statutory rights which would allow the District to continue to self-insure health and dental benefits while also complying with the remedial Order of the Wisconsin Employment Relations Commission in this matter.

Respondent School District of Mayville has not taken all action necessary to successfully waive those statutory rights which would allow the District to continue to self-insure health and dental benefits while also complying with the remedial Order of the Wisconsin Employment Relations Commission in this matter.

Respondent School District of Mayville has successfully modified relevant procedures and policies so that employes need not sue the District when they contest health and dental benefit denials.

Based on the above and foregoing Findings of Fact and Conclusions of Law, the Commission makes and issues the following

ORDER

The School District of Mayville, its officers and agents, shall immediately take the following action to successfully complete the District's effort to comply with the Commission's Order:

Modify the waiver language found in the health and dental plans to read as follows and then distribute the modified plans to all employes represented by Complainant Mayville Education Association:

> The Board of Education of the School District of Mayville waives Sec. 893.80, Stats., in its entirety as to any causes of action arising from failure to provide benefits under this plan. When filing any such cause of action, it is not necessary to name the Board of Education of the School District of Mayville, the School District of Mayville, or any officer or agent of the School District of Mayville as a defendant because the action may be brought directly against the Plan Supervisor.

Modify the Employee Benefits Liability Insurance Endorsement and District stop loss policy to include the following language:

> The Insurer is prohibited from using or relying upon any provision of Sec. 893.80, Stats.

Dated at Madison, Wisconsin this 28th day of January, 1998.

WISCONSIN EMPLOYMENT RELAITONS COMMISSION

James R. Meier /s/
James R. Meier, Chairperson

A. Henry Hempe /s/
Henry Hempe, Commissioner

Paul A. Hahn /s/
Paul A. Hahn, Commissioner

Mayville School District

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

POSITIONS OF THE PARTIES

The District

The District asserts that it has complied with the Commission's Order by waiving the requirements and limitations of Sec. 893.80, Stats., and amending existing insurance policy documents to provide that an employe need not name the District in any lawsuit arising out of the failure to pay health or dental benefits.

The District argues that it has the legal authority to waive all provisions of Sec. 893.80, Stats., and has done so.

The District contends that its ability to waive the requirements of Sec. 893.80, Stats., has already been implicitly acknowledged by both the Commission and the Association during the litigation of the prohibited practice proceeding. The District contends this is so because if the District cannot waive the requirements of Sec. 893.80, Stats., then the District is in no position to bargain over the issue which, in turn, means there was no "wage" impact to begin with. Having argued and found a wage impact exists, the District asserts Association and the Commission have respectively acknowledged the District's authority to waive Sec. 893.80, Stats.

Should the Commission conclude that waiver has not yet been accomplished, the District stands ready to take any other steps the Commission deems necessary to waive Sec. 893.80, Stats. The District further notes that by its assertions and conduct in this compliance litigation, it would be estopped from raising any Sec. 893.80, Stats., issue in any claims litigation and has thus again eliminated any potential wage impact on employes.

Given all of the foregoing, the District asks that it be found to have complied with the Commission's Order.

The Association

The Association asserts the District has not complied with the Commission's Order. Contrary to the requirements of the Order, the District continues to be the "source" of health and dental benefits and the requirements of Sec. 893.80, Stats., thus remain "applicable" to employe claims arising out of benefit disputes.

The Association argues that there is no clear legal authority allowing waiver of the notice of claim provisions of Sec. 893.80, Stats. Under such circumstances, the Association argues it is

not appropriate to place employes in jeopardy by having to rely on unsettled law when seeking remedies which were guaranteed when benefits were not provided through self-insurance.

Should the Commission conclude the District has the authority to waive Sec. 893.80, Stats., the Association asserts the waiver language used by the District is not sufficiently express to accomplish a waiver.

Even if the District has successfully waived the requirements of Sec. 893.80, Stats., the Association contends an employe would still need to name the District in a suit to recover benefits. Thus, the wage impact of the need to sue one's own employer, as identified in the Commission's decision, continues to exist and the District thus has not complied with the Commission's Order.

Given the foregoing, the Association asks the Commission to find that the District has failed to comply with the Commission's Order.

DISCUSSION

Section 893.80, Stats., provides in pertinent part:

> Except as . . . no action may be brought or maintained against any . . .political corporation, governmental subdivision or agency thereof . . . unless:
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> > Within 120 days after the happening of the event giving rise to the claim, written notice of the circumstances of the claim signed by the party, agent or attorney is served on the . . . governmental subdivision or agency. . . . Failure to give the requisite notice shall not bar action on the claim if . . . the claimant shows to the satisfaction of the court that the delay or failure to give requisite notice has not been prejudicial to the defendant . . . subdivision or agency . . .; and
> >
> > A claim containing the address of the claimant and an itemized statement of the relief sought is presented to the appropriate clerk or person who performs the duties of a clerk or secretary for the defendant . . . subdivision or agency and the claim is disallowed.
>
> Except . . . the amount recoverable by any person for any damages, injuries or death in any action founded on tort against any . . . governmental subdivision or agency thereof . . . shall not exceed $50,000. . . . No punitive damages may be allowed or recoverable in any such action under this subsection.

Respondents have sought to comply with our Order by: (1) attempting to waive Sec. 893.80, Stats. and (2) taking steps to remove themselves from any role in resolution of disputes over whether health and dental benefits have been appropriately provided to employes. Respondents have successfully accomplished (2), above. However, while we are persuaded that Respondents have the authority to and interest in waiving Sec. 893.80, Stats., we are not satisfied that they have taken all necessary steps to accomplish the waiver. Thus, we have ordered Respondents to take additional action.

In this litigation, the parties have appropriately focused on the questions of whether and how the damage limitations in Sec. 893.80(3), Stats. and the notice of claim and injury requirements of Sec. 893.80(1), Stats., can be waived. As to the damage limitations in Sec. 893.80(3), Stats., ANDERSON V. CITY OF MILWAUKEE, 208 WIS.2D 18 (1997) establishes that these limitations can be waived. However, ANDERSON makes it clear that the waiver must be express and requires that the governmental entity take action to satisfy the underlying purpose behind Sec. 893.80(3), Stats., which is: ". . . to protect the public treasury and enable public entities to conduct fiscal planning, while also protecting the public interest in compensating injured parties."

Respondents have taken action to expressly waive Sec. 893.80(3), Stats., by inserting waiver language in the health and dental plans. However, the existing waiver language is limited to tort actions and thus is not sufficient to accomplish Respondent's stated goal of fully waiving Sec. 893.80(3), Stats., as to any causes of action which might arise out of a benefits dispute. In addition, from our reading of GONZALEZ V. CITY OF FRANKLIN, 137 WIS.2D 109 (1987) and STANHOPE V. BROWN COUNTY, 90 WIS.2D 823 (1979), we are persuaded that for the waiver to be effective, the governmental entities' liability policies must also expressly waive Sec. 893.80, Stats. Thus, we have ordered modification of the waiver language to broaden its scope and inclusion of waiver language in the Respondents' stop loss and Benefit Liability insurance. If Respondents take these actions, we are satisfied they will have expressly waived the damage limitations of Sec. 893.80(3), Stats., in a way which meets the underlying statutory purpose of that statute.

Turning to Sec. 893.80(1), Stats., existing case law does not resolve the question of whether this provision can be waived and, if so, what is necessary to accomplish the waiver. However, from our review of existing precedent as to other portions of Sec. 893.80, Stats., we find no logical reason to conclude that Sec. 893.80(1), Stats., cannot be waived. So long as the waiver is express and the legislative purpose behind the statute is honored, we see no reason to conclude that the damage limitations of Sec. 893.80(3), Stats., can be waived but the notice provisions of Sec. 893.80(1), Stats., cannot.

The legislative objective behind Sec. 893.80(1), Stats., is ". . . to afford the municipality the opportunity to compromise and settle the claim without litigation." FIGGS V. CITY OF MILWAUKEE, 121 WIS.2D 44, 53 (1984). We are satisfied that this legislative purpose is met by the claims processing and appeal provisions in the health and dental plans. If Respondents

modify the existing waiver language and include it in the stop loss and Benefit Liability insurance policies (as discussed above in the context of Sec. 893.80(3), Stats.), we conclude they will have expressly and effectively waived the notice of claim and injury provisions of Sec. 893.80(1), Stats.

Dated at Madison, Wisconsin this 28th day of January, 1998.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Meier /s/
James R. Meier, Chairperson

A. Henry Hempe /s/
Henry Hempe, Commissioner

Paul A. Hahn /s/
Paul A. Hahn, Commissioner

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No. 25144-G.D