STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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| In the Matter of the Petition of<br><br>WAUSAU SCHOOL DISTRICT MAINTENANCE AND CUSTODIAL UNION<br><br>To Initiate Arbitration Between Said Petitioner and<br><br>WAUSAU SCHOOL DISTRICT | Case 31<br>No. 41624 INT/ARB-5157<br>Decision No. 25972 |

Appearances:
Ms. Melissa A. Cherney, Staff Counsel, Wisconsin Education Association Council, 33 Nob Hill Road, P.O. Box 8003, Madison, WI 53708, for the Union.
Mulcahy and Wherry, S.C., Attorneys at Law, by Mr. Jeffrey T. Jones, and Mr. Ronald J. Rutlin, First Wisconsin Plaza, P.O. Box 1004, Wausau, WI 54402-1004.

## ORDER DISMISSING PETITION FOR ARBITRATION

Wausau School District Maintenance and Custodial Union having on January 20, 1989, filed a petition for arbitration pursuant to Sec. 111.70(4)(cm)6, Stats. which alleged that the Union had reached a deadlock in negotiations with the Wausau School District over the wages, hours and conditions of employment of a printer who, during the term of an existing collective bargaining agreement, had been included in a collective bargaining unit represented by the Union through the agreement of the parties; and the Wausau School District having on January 24, 1989, filed a Motion to Dismiss the Union's petition alleging that Sec. 111.70(4)(cm)6, Stats., is not available to the Union for resolution of the parties' dispute as to the wages, hours and conditions of employment of the printer; and the parties having waived hearing and filed written argument, the last of which was received on February 17, 1989; and the Commission having considered the matter and being satisfied that the interest-arbitration provisions set forth in Sec. 111.70(4)(cm)6, Stats. are not applicable to the instant dispute;

NOW, THEREFORE, it is

ORDERED 1/

That the petition filed by the Wausau School District Maintenance and Custodial Union on January 20, 1989 is hereby dismissed.

Given under our hands and seal at the City of Madison, Wisconsin this 14th day of April, 1989.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By S. H. Schoenfeld
S. H. Schoenfeld, Chairman

A. Henry Hempe, Commissioner

I dissent.

Herman Torosian, Commissioner

(Footnote 1/ appears on page 2)

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 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.

WAUSAU SCHOOL DISTRICT

MEMORANDUM ACCOMPANYING ORDER DISMISSING PETITION FOR ARBITRATION

BACKGROUND

The facts of this matter are undisputed. A printer employed by the Wausau School District was added to the appropriate collective bargaining unit during the term of an existing collective bargaining agreement which covers that unit. The parties have been unable to reach an agreement as to the wages, hours and conditions of employment applicable to the newly accreted employe. The Union has petitioned for interest arbitration to resolve the bargaining impasse.

The Union claims its petition is properly filed pursuant to the provisions of Sec. 111.70(4)(cm)6, Stats.

The District acknowledges that this section provides for interest arbitration to resolve bargaining disputes, but argues that the term "new agreement" as contained within such section makes it inapplicable, where, as here, an employe is accreted to a bargaining unit already covered by a valid labor agreement.

Section 111.70(4)(cm)6, Stats. provides, in pertinent part, as follows:

> If a dispute has not been settled after a reasonable period of negotiation and after mediation by the commission under subd. 3 and other settlement procedures, if any, established by the parties have been exhausted, and 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, either party, or the parties jointly, may petition the commission, in writing, to initiate compulsory, final and binding arbitration, as provided in this paragraph.

POSITIONS OF THE PARTIES

The Union

The Union argues that the language and intent of Sec. 111.70(4)(cm)6, Stats. support a conclusion that interest arbitration should be available when impasse is reached over the initial wages, hours and conditions of employment applicable to newly accreted employes. The Union asserts that it has just gained representational rights for the employe in question, that there is no collective bargaining agreement in place that covers this employe, and that the parties are bargaining over the first agreement to cover said employe. As such, the Union contends that the agreement in question can only be viewed as a "new agreement", within the meaning of Sec. 111.70(4)(cm)6, Stats.

The Union notes that if the Commission concludes that the Union does not have access to interest arbitration, the District can simply bargain to impasse and implement its last final offer. The Union argues that as both parties generally view this initial contract as critical since it establishes the status quo for future contracts, employes will lose much of what they sought to gain by acquiring Union representation if interest arbitration is not available.

The Union asserts that public policy strongly supports allowing the parties to have access to interest arbitration to establish, if necessary, the wages, hours and conditions of employment of newly-accreted employes. It asserts that the Legislature intended Sec. 111.70(4)(cm)6, Stats., to be read broadly, consistent with promoting peaceful resolution of labor disputes. The Union notes that the statute uses the words "any dispute" as an indication of this broad intention. The Union agrees with Commissioner Torosian's dissent in Greendale School District, Dec. No. 20184 (WERC, 12/82) which argues that the majority's opinion in that case results in similarly situated employes being treated differently in that employes accreted to an existing unit do not have access to interest arbitration while employes who form a separate unit do. The Union notes that this disparate treatment can have the effect of encouraging fragmentation of bargaining units, contrary to Sec. 111.70(4)(d)(2)a, Stats.

Given the foregoing, the Union asks that the Commission deny the Motion to Dismiss.

The District

The District believes the Commission should continue to be guided by the majority's opinion in Greendale. It argues that the Legislature simply did not intend that interest arbitration procedures could be used where an employe was accreted into a bargaining unit encompassed by an existing collective bargaining agreement. The District contends that to permit the Union to proceed to use interest arbitration would be in direct conflict with the Legislature's intent. Absent legislative amendment of the statute as it existed in Greendale, the District asserts that the Commission must dismiss the Union's petition herein.

The District also submits that public policy mandates dismissal of the Union's petition. It contends that use of interest arbitration under the circumstances of this case would promote over use of interest arbitration procedures and would discourage employers from voluntarily agreeing to accrete employes into existing bargaining units. The District contends that these results are not conducive to the voluntary settlement of labor disputes or harmonious employer - employe relations.

Given the foregoing, the District requests that the Commission grant the Motion to Dismiss.

DISCUSSION

Once again this Commission is asked to determine the appliction of Sec. 111.70(4)(cm)6, Stats. At immediate issue is whether interest arbitration is available to resolve a bargaining impasse concerning wages, hours, and conditions of employment for an employe accreted to a bargaining unit which is covered by an existing labor agreement.

We conclude it is not.

The identical issue was raised in Greendale School District. 2/ The Greendale majority 3/ determined that the Legislature did not intend interest arbitration to be available to resolve a bargaining impasse where, as here, the impasse involves an employe accreted to a bargaining unit which is already covered by an existing bargaining agreement.

Quoting from an earlier case, 4/ that majority noted:

> The key phrase in the law is the phrase contained in Sec. 111.70(4)(cm)6, 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. (Emphasis supplied)."

Quoting the same case, 5/ the Greendale majority identified the "key phrase" as having statutorily displaced a parallel phrase which had provided for "fact-finding" if the parties were ". . . deadlocked with respect to any dispute between them arising in the collective bargaining process." 6/ (Emphasis

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2/ Dec. No. 20184 (WERC, 12/82).

3/ Chairman Covelli and Commissioner Slavney.

4/ Dane County, Dec. No. 23400 (WERC, 11/79).

5/ Dane County, supra.

6/ Sec. 111.70(4)(c)3, Stats. This section never has been repealed. But inasmuch as "fact-finding" is now applicable to only City of Milwaukee firefighters and to law enforcement and firefighter personnel in cities, villages or towns having a population under 2,500, its scope has been drastically limited. It is in this sense that it was "displaced."

Supplied)

This parallel phrase had been interpreted as ". . . cover(ing) deadlocks in all disputes which are subject to the collective bargaining process under Sec. 111.70, Stats. 7/ Significantly, though, the Legislature did not opt to use it in establishing the mediation-arbitration process. Instead, legislators resorted to the more restrictive " . . . in a new collective bargaining agreement."

On this basis, the Greendale majority reasserted the Commission's earlier view 8/ that the Legislature had intended to limit the application of mediation-arbitration to only those situations " . . . where the parties are negotiating a collective bargaining agreement which constitutes the first collective bargaining agreement between the parties or a 'new' agreement to replace an existing or expired agreement." 9/ The Greendale majority deemed neither of these instances as including a bargaining deadlock as to an accreted employe. We find no fault with this analysis.

Turning to the instant dispute, it is readily apparent that any agreement reached by the parties would not replace an existing or expired collective bargaining agreement. Nor does it seem to us that the parties are attempting to reach a "new" agreement within the parameters of the statutory limitation. Here, the parties are signatories to an existing collective bargaining agreement 10/ which covers the bargaining unit in which the accreted employe was placed. Thus, any agreement made between the parties as to this employe would not be a new agreement for the bargaining unit, but only supplementary to it. 11/ That it is also arguably "new" as to the individual employe seems to us immaterial, for the employe in this situation, by virtue of his accretion, has become subsumed to the bargaining unit in which he was placed.

Concern has been expressed that this outcome will promote fragmentation of bargaining units contrary to the legislative policy set forth in Sec. 111.70(4)(d)2.a., Stats. Suffice to say that this statute also makes plain that it is not one or both of the parties, but the Commission, which has the ultimate responsibility of determining the appropriate bargaining unit. We are confident of our continued ability to do so consistent with the anti-fragmentation policy established by the Legislature and regardless of the outcome we reach in the instant matter.

Dated at Madison, Wisconsin this 14th day of April, 1989.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By S. H. Schoenfeld
S. H. Schoenfeld, Chairman

A. Henry Hempe, Commissioner

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7/ Greendale, supra, 5, quoting Dane County, supra.

8/ Dane County, supra.

9/ Greendale, supra, 6.

10/ The record indicates such existing agreement does not expire until December 31, 1989.

11/ Of interest, though not critical to our view, is the apparent agreement between the parties that the accreted employe receive all of the rights and benefits enumerated in the existing agreement between the employer and the bargaining unit in which the accreted employe was placed. Wages appear to be the only item in controversy. This merely underscores our view that any agreement as to the printer will only supplement the collective bargaining agreement which now covers the entire bargaining unit.

WAUSAU SCHOOL DISTRICT, Case 31, No. 41624, INT/ARB-5157, Decision No. 25972

DISSENTING OPINION OF COMMISSIONER TOROSIAN

For reasons discussed in my dissent in the Greendale case, 12/ I disagree with my colleagues' decision. In Greendale I stated the following:

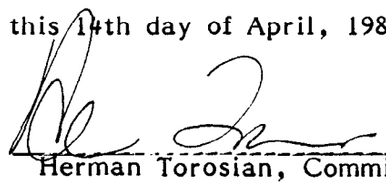
> I agree with the majority that the parties' negotiations with respect to the bus drivers was not pursuant to a "reopener" or for a "successor" agreement. I disagree, however, with their conclusion that ". . .the parties herein were not attempting to reach an accord on a 'new agreement' as that term 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 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.

While I agree with the majority's claim that ". . .any agreement made between the parties as to this employe would not be a new agreement for the bargaining unit. . .," it seems clear to me that such an agreement is a new collective

(Footnote 12/ appears on page 7.)

bargaining agreement covering the wages, hours and working conditions of the printer. Whether such an agreement is a supplement or addendum to the agreement of the maintenance and custodial employes is really a matter of form over substance and is neither persuasive nor determinative of the issue.

Dated at Madison, Wisconsin this 14th day of April, 1989.

By 
Herman Torosian, Commissioner

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12/ Shortly after the issuance of the Greendale case, the Greendale dissent became the majority view. The Commission's last stated position on the issue was enunciated in the City of Eau Claire case, Dec. No. 22795-B, (WERC, 3/86), as follows:

> . . .During judicial review of the Commission's decision, the composition of the Commission changed and the Commission informed the Court of Appeals as follows:
>
> > This letter will serve to inform you that the Wisconsin Employment Relations Commission will not file a brief in the above-entitled case. The Commission's decision being appealed does not represent the view of a majority of the present Commission, either as regards the proper statutory interpretation or the proper outcome. Accordingly, the Commission does not seek affirmance of the judgment of the circuit court.
>
> The Court of Appeals' dismissal of the appeal as moot was, however, on other grounds than the Commission's letter, above. Case No. 83-2007 (CtApp I, 3/84).
>
> We think it appropriate that the Examiner and the parties be apprised that Commissioner Torosian's dissent in Greendale Schools represents the view of at least a majority of the present Commission.

The Commission at the time was comprised of Chairman Torosian and Commissioners Marshall L. Gratz and Danae Davis Gordon.