STATE OF WISCONSIN
CIRCUIT COURT
MARATHON COUNTY
BRANCH IV

WAUSAU SCHOOL DISTRICT MAINTENANCE AND CUSTODIAL UNION,
Plaintiff,

vs.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION,
Defendant.

File No. 89-CV-358
Decision No. 25972

DECISION

INTRODUCTION

The petitioner, Wausau School District Maintenance and Custodial Union (Union) seeks a review of an order of the Wisconsin Employment Relations Commission (commission) that denied interest arbitration pursuant to sec. 11.70(4)(cm)6 of the Wisconsin Statutes. The Commission held that interest arbitration was not applicable here because the inability to arrive at an agreement over the wages, hours and conditions of employment of an accreted employee since it does not result in a "new collective bargaining agreement". The Union contends that such a restrictive interpretation is contrary to the legislative purpose of the law. Because the Commission's interpretation is too narrow given the broad remedial purpose of the legislation, the Court reverses and remands the matter for interest arbitration.

DECISION

Factual Background:

The petitioner here represents a group of employees of the Wisconsin School District with whom they have a collective bargaining agreement. The terms of the current agreement run from January 1, 1987, through December 31, 1989. In October of 1988 the parties voluntarily included the position of printer in the bargaining unit. When bargaining over an initial agreement on the wages, hours and working conditions became deadlocked, petitioner requested interest arbitration pursuant to sec. 111.70(4)(cm)6, Wis. Stats. The Commission denied that request, which is now subject to this review.

Legal Environment:

At issue here is an interpretation of a statutory provision. When determining a question of law, the reviewing court is not bound by an interpretation given to it by the administrative agency. CITY

OF MILWAUKEE vs. WERC, 71 Wis.2d 709, 239 NW2d 63 (1976). The administrative interpretations, however, are entitled to great weight if the administrative practice is "long continued, substantially uniform and without challenge by governmental authorities and courts." BELOIT EDUCATION ASSOCIATION vs. WERC, 73 Wis. 2d 43, 67-68, 242 NW2d 231 (1976). The weight given to such determinations of an administrative agency is based upon their administrative experience and expertise. Our Supreme Court, on the other hand, has found that an agency that has applied a statute a mere six times had a "poverty of administrative experience." WHITEFISH BAY vs. WERB, 34 Wis.2d 432, 444-445, 149 NW2d 662 (1967).

No Deference Warranted Here:

The Court, upon its review of the authorities cited, finds that the administrative determinations in this area are not entitled to judicial deference. Several factors require that conclusion. First, it appears that the commission has interpreted this statute within the factual framework presented here a mere three times and accordingly has a "poverty of administrative experience".

The second reason is even more important. The pronouncement of the commission itself has not been substantially uniform in this area. In GREENDALE SCHOOL DISTRICT, WERC DEC. NO. 20184 (12/82) the commission held that interest arbitration was not applicable to a deadlock in negotiations for employees accreted to a bargaining unit under an existing collective bargaining agreement. That decision was affirmed in Circuit Court but was appealed to the Court of Appeals. The Commission, however, short circuited that appeal when there was a change in composition of the Commission who then 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."

In the more recent case of UNION NO. 487, et al vs. CITY OF EAU CLAIRE, WERC DEC. 2279-B (3/86) the Commission not only alerted all concerned developments following the issuance of the GREENDALE SCHOOL DISTRICT decision, but specifically stated as follows:

> We think it appropriate that the examiner and parties be apprised that Commissioner Torosian's dissent in Green Dale Schools represents the view of at least a majority of the present Commission." (Dec. at p. 4)

Accordingly, although the GREENDALE decision has not been specifically overruled by WERC, it has publicly, repeatedly and in rather strong language repudiated its holding in that case. The case here presents another swing in the view of the commission, perhaps once again determined by make up of that Commission. Finally, it is also clear that the holding now relied upon by the Commission has been challenged by governmental authorities, specifically the Commission itself.

In essence, after 11 years the Commission has taken inconsistent positions on this issue, and thus all

interested parties still do not have a definitive answer on the correct legal interpretation.

Legal Determination:

The statutory provision here at issue is sec. 111.70(4)(cm)6 Wis. Stats., which provides in its 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." (emphasis added)

In interpreting this provision, it is also relevant to consider the legislative purpose as set forth in that statute.

> DECLARATION OF POLICY.
> The public policy of the state as to labor disputes arising in municipal employment is to encourage voluntary settlement through the procedures of collective bargaining. Accordingly, it is the public interest that municipal employees so desiring be given an opportunity to bargain collectively with the municipal employer through a labor organization or other representative of the employees own choice. If such procedures fail, the parties should have available to them a fair, speedy, effective and, above all, peaceful procedure for settlement as provided in this subchapter. (Sec. 11.70(6) Wis. Stats.

No one who recalls the Hortonville School strike which prompted the enactment of this legislation could deny that it had a remedial intent. Accordingly, the statutes in this regard must be liberally construed to effectuate the purposes set forth above.

The Commission here has taken the position that an initial agreement regarding an accreted employee is not a "new agreement". If so, where is the old agreement or, more precisely, where is the present agreement. It certainly is not the old collective bargaining agreement which may be presently in effect, but which does not cover the accreted employee. Nor can it be the old policy of the employer because of the unionization of that position and the requirement to bargain in good faith. The parties must come to an agreement regarding wages, hours and terms of employment and such agreement would appear to be a "new agreement" within the contemplation of the statute as liberally construed.

The employee also becomes "subsumed" into the larger group and eventually that collective bargaining agreement. To subsume is to "classify in a more comprehensive category or under a general principle". American Heritage Dictionary, 2d Ed. The Commission apparently argues that an employee's position can be subsumed into a current collective bargaining agreement without

provisions concerning that positions wages, hours and conditions of employment. However, to so argue would result in the agreements failure of its essential purpose which might very well then justify a reopening of the entire agreement. The public's interest in the finality of the collective bargaining agreements would, therefore, be defeated by that interpretation.

Interest arbitration, moreover, is just one of several techniques contained in sec. 111.70(4)(cm) which is entitled "methods for peaceful settlement of disputes". One of the conditions for such methods is the notice of commencement of negotiations, which includes the situation here; when no agreement exists of the other methods set forth, only interest arbitration will guarantee a peaceful result and settlement of the dispute. The Commission's interpretation would deprive an accreted employee and his union of this most important method for a peaceful settlement of their dispute and thereby encourage strikes or other actions deemed harmful of the public interest.

The legislation at issue provides for a prohibition against strikes by public employees, sec. 111.70(4)(1) Wis. Stats. In return, alternatives to strike were set forth and interest arbitration is one of them; if not the most important one.

Moreover, sec. 111.70(4)(d)2 sets forth a "anti-fragmentation policy" which purpose is to prevent a large number of small bargaining units. Interpretation given by the Commission would discourage unions and employers to agree to subsume a new position or group of positions within a existing collective bargaining agreement. The result would be that which the legislature seeks to avoid, numerous small bargaining units.

Given the statutory provision and the liberal interpretation which a remedial statute deserves, the position adopted by the commission is clearly inconsistent with the legislative purpose. Accordingly, the determination of the Commission must be reversed.

CONCLUSION

On issues of law, such as presented here, the court determines the issue ab initio, giving any determination of the Commission great weight if it has a long, uniform and unchallenged history and is consistent with the legislative purpose. Here the Commission has a "poverty of administrative experience" concerning this statute in this fact situation. It has publicly taken inconsistent positions which has resulted in a confusion as to its true position, especially as commission members change. For these reasons alone, the determination of the commission is not entitled to any deference.

Moreover, the strict and narrow determination used by the Commission is inconsistent with the broad and remedial legislative policy present in this area. The Commission takes the position that an agreement where none previously existed is not a "new agreement" within the meaning of the statute. That is clearly a very strict and narrow interpretation as opposed to a broad and liberal one. The commission also asserts that a position can be subsumed into a prior collective bargaining unit and agreement without subsumation of the essential purpose; an agreement on wages, hours and conditions of employment. It would lead one to believe that one of the most important legislation creations for the peaceful settlement of disputes in the area of municipal employment is unavailable when an employee, or a whole class of employees, are subsumed into a larger unit. All of these

positions are strict and narrow ones.

The agreements advanced in support of the Commission's determination would appear to be reasonable if one takes a narrow and strict interpretive approach. However, the provision here is remedial in nature requiring a liberal interpretation to effectuate the legislative purpose. In that light, the Commission's determination is unreasonable. Accordingly, the determination of the Commission is reversed and the matter remanded for further proceedings consistent with this decision.

Dated at Wausau, Wisconsin, this 8th day of November, 1989.

BY THE COURT:

/s/ Vincent K. Howard
VINCENT K. HOWARD
Circuit Judge, Branch 4
Marathon County, Wisconsin

cc:
Jeffrey T. Jones
Melissa A. Cherney
John D. Niemisto