STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of	:	
WOOD COUNTY COURTHOUSE, SOCIAL SERVICES & UNIFIED SERVICES EMPLOYEES, LOCAL 2486, AFSCME	:	Case 81 No.41812 INT/ARB-5190 Decision No. 26178
To Initiate Arbitration Between Said Petitioner and	:	
WOOD COUNTY	:	

Appearances:

Mr. David White, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 1973 Strongs Avenue, Stevens Point, Wisconsin 54481, for the Union.

Mr. William G. Weiland, Corporation Counsel, 400 Market Street, Wisconsin Rapids, Wisconsin 54495, for the County.

ORDER DISMISSING PETITION FOR ARBITRATION

Wood County Courthouse, Social Services & Unified Services Employees, Local 2486, AFSCME, herein the Union, having, on February 21, 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 Wood County, herein the County, over the wages, hours and conditions of employment of correctional officers who, during the term of an existing collective bargaining agreement, had been included in a collective bargaining unit represented by the Union; and the County having, on February 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 correctional officers; and the parties having waived hearing and filed written argument, the last of which was received on May 23, 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/

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 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

That the petition filed by Wood County Courthouse, Social Services & Unified Services Employees, Local 2486, AFSCME on February 21, 1989, is hereby dismissed.

Given under our hands and seal at the City of Madison, Wisconsin this 29th day of September, 1989.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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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.

By A. Henry Hempe /s/
A. Henry Hempe, Chairman

William K. Strycker /s/
William K. Strycker, Commissioner

I dissent

Herman Torosian /s/
Herman Torosian, Commissioner

1/ See footnote on Page 2.

WOOD COUNTY

MEMORANDUM ACCOMPANYING ORDER DISMISSING
PETITION FOR ARBITRATION

BACKGROUND

The facts of this matter are undisputed. Correctional officers employed by the County were added to the 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., citing Commissioner Torosian's dissents in Greendale School District, Dec. No. 20184 (WERC, 12/82) and Wausau School District, Dec. No. 25972 (WERC, 4/89). The County disagrees citing the majority opinions in Greendale and Wausau.

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.

DISCUSSION

The issue raised in this case is identical to the issue recently considered and disposed of by the Commission in Wausau School District, Dec. No. 25972 (WERC, 4/89). In that case, a Commission majority concluded that Sec. 111.70(4)(cm)6., Stats., did not extend interest arbitration to employes newly accreted to a bargaining unit which is already covered by a collective bargaining agreement. Nothing in the instant matter has persuaded us that such disposition was erroneous.

The conclusion of the Wausau School District majority was based on its perception that the plain words of the statute appear to limit interest arbitration to those situations where the parties are deadlocked in their efforts to reach ". . . a new collective bargaining agreement . . ." (Emphasis

supplied). Applying an earlier Commission analysis of this phrase, 2/ the Wausau majority found that a collective bargaining agreement covering a newly accreted employe would not be a "new" agreement within the meaning of the statutes since it would neither replace the bargaining unit's existing agreement nor constitute a "first contract" for the unit. While a separate agreement covering the accreted employe would be "new" as to that employe, it would not be new, but merely supplemental to the labor contract covering the overall unit in which the individual accreted employe has, in this circumstance, become subsumed.

The Wausau majority agreed with an earlier Commission majority 3/ that the Sec. 111.70(4)(cm)6., Stats., language had statutorily displaced a parallel phrase which provides for "fact-finding" if the parties are ". . . deadlocked with respect to any dispute between them arising in the collective bargaining process." (Emphasis supplied). 4/ Such parallel phrase had been earlier interpreted by the Commission as applicable to deadlocks in all disputes which are subject to the collective bargaining process under Ch. 111.70, Stats. Had the Legislature opted to replicate the parallel phraseology in its creation of Sec. 111.70(4)(cm)6., Stats., there would be no statutory basis for denying newly accreted employes access to interest arbitration, whether or not their bargaining unit already had a labor contract in place.

As did the Wausau School District majority, however, we believe that we cannot responsibly ignore the fact that the Legislature did not choose to replicate the broad language of Sec. 111.70(4)(c)3., Stats., in its creation of Sec. 111.70(4)(cm)6., Stats., but employed, instead, substantially more restrictive language. The Legislature must be presumed to have acted with full knowledge of the existing law. Town of Madison v. City of Madison, 269 Wis. 609, 614, 70 N.W.2d 249 (1955). Also see, Kindy v. Hayes, 44 Wis.2d 301, 314, 171 N.W.2d 324 (1969).

Thus, we endorse the rationale used by the Wausau School District majority, as we reach the same result. We do so as a matter of deference to a legislative intent which appears to us to be plain. While we are not insensitive to the competing policy considerations which can also be argued, we

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2/ Dane County, Dec. No. 17400 (WERC, 11/79).

3/ Greendale School District, Dec. No. 20184 (WERC, 12/82), citing Dane County, supra.

4/ The parallel phrase is contained in Sec. 111.70(4)(c)3., Stats. While this subsection has never been repealed, inasmuch as "fact-finding" is now applicable to only City of Milwaukee firefighters and to law enforcement and firefighters in communities having a population under 2,500, its scope has been drastically limited. It is in this sense that it was "displaced" by the interest arbitration subsection.

regard the legislative halls as a more appropriate forum for consideration of these matters.

Dated at Madison, Wisconsin this 29th day of September, 1989.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By A. Henry Hempe /s/
A. Henry Hempe, Chairman

William K. Strycker /s/
William K. Strycker, Commissioner

DISSENTING OPINION OF COMMISSIONER TOROSIAN

The difference in language between the fact finding statutory provision and the interest arbitration statutory provision does not, in my opinion, establish an intent by the Legislature to deny accreted employes, the right to arbitrate the terms of a new collective bargaining agreement 5/ for themselves for the time period from their accretion to the expiration of the existing collective bargaining agreement covering other employes. The majority reasons that had the Legislature intended to cover accreted employes they would have adopted the same statutory language provided for in fact finding. This, however, is not convincing because the fact finding language, as noted by the majority, covered all disputes arising in the collective bargaining process, including grievances and mid-term bargaining, not just disputes over the negotiation of collective bargaining agreements. Thus, it does not follow that the Legislature in adopting more restrictive language than said all-inclusive fact finding language intended to also deny accreted employes interest arbitration coverage. Accordingly, I disagree with my colleagues' finding that the legislative intent with respect to the availability of interest arbitration to newly accreted employes is plain. What is plain in my opinion is that the Legislature intended to restrict the application and availability of interest arbitration as compared to fact finding. However, the adoption of this restrictive language cannot reasonably be relied upon as an interpretative aid in defining "new agreements" in a way that denies newly accreted employes the use of interest arbitration once impasse is reached in negotiations.

For reasons stated above and in my Wausau dissent, I disagree with the majority decision. In Wausau I stated:

> 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?
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> 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

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5/ It is undisputed that accreted employes have the right and the employer the duty to bargain over the terms of a collective bargaining agreement covering said employes.

> 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.
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> 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 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 29th day of September, 1989.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Herman Torosian /s/
Herman Torosian, Commissioner