STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

OAK CREEK PROFESSIONAL POLICEMEN'S ASSOCIATION, Complainant, vs. CITY OF OAK CREEK, Respondent.	Case 91 No. 46112 MP-2512 Decision No. 27074-C

Appearances:

Gimbel, Reilly, Guerin & Brown, S.C., Attorneys at Law, by Ms. Marna M. Tess-Mattner, 2400 Milwaukee Center, 111 East Kilbourn Avenue, Milwaukee, Wisconsin 53202, appearing on behalf of the Oak Creek Professional Policemen's Association.

Davis & Kuelthau, S.C., Attorneys at Law, by Mr. Robert H. Buikema, 111 East Kilbourn Avenue, Suite 1400, Milwaukee, Wisconsin 53202, appearing on behalf of the City of Oak Creek.

ORDER AFFIRMING, IN PART, AND SETTING ASIDE, IN PART, EXAMINER'S FINDINGS OF FACT AND CONCLUSIONS OF LAW AND AFFIRMING EXAMINER'S ORDER

On September 2, 1992, Examiner Lionel L. Crowley issued Findings of Fact, Conclusions of Law and Order, with Accompanying Memorandum, in the above matter, wherein he determined: (1) the City of Oak Creek had not committed prohibited practices within the meaning of Sec. 111.70(3)(a)4, Stats., and (2) it was not appropriate to assert Commission jurisdiction over the alleged violation of Sec. 111.70(3)(a)5, Stats. He therefore dismissed the complaint.

The Oak Creek Professional Policemen's Association filed a petition with the Commission on September 22, 1992, seeking review of the Examiner's decision pursuant to Secs. 111.70(4)(a) and 111.07(5), Stats. The parties thereafter filed written argument in support of and in opposition to the petition, the last of which was received December 2, 1992.

Having reviewed the record, the Examiner's decision and the parties argument on review, the Commission makes and issues the following

ORDER 1/

The Examiner's Findings of Fact, Conclusions of Law and Order are affirmed with the exception of Finding of Fact 16 and Conclusion of Law 3 which are set aside. 2/

Given under our hands and seal at the City of Madison, Wisconsin this 25th day of May, 1993.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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

Herman Torosian /s/
Herman Torosian, Commissioner

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

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

(footnote continued on Page 3.)

2/ See footnote on Page 3.

1/ (footnote continued from Page 2)

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.

2/ Finding of Fact 16 and Conclusion of Law 3 stated:

> 16. Bargaining for a successor contract to the 1990-91 contract began on October 15, 1991. During these contract negotiations the issue of the Investigator position came up with the City proposing it be included in the contract. The Union responded by indicating they didn't want to talk about that position or issue. The matter was dropped and accordingly, the Association waived bargaining and the right to proceed to interest-arbitration for the 1992-93 contract period concerning the Investigator position.
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> 3. The Association waived its right to bargain on and to proceed to interest arbitration in the successor agreement to the 1990-91 agreement when it had the opportunity to negotiate on the Investigator position and to proceed to interest arbitration and it offered no proposals and declined the City's offer to negotiate on the issue.

CITY OF OAK CREEK

MEMORANDUM ACCOMPANYING
ORDER AFFIRMING, IN PART, AND SETTING ASIDE, IN PART,
EXAMINER'S FINDINGS OF FACT AND CONCLUSIONS OF LAW
AND AFFIRMING EXAMINER'S ORDER

BACKGROUND:

The facts in this case are undisputed. The City created a new bargaining unit position of Investigator. The parties bargained over the wages, hours and conditions of employment applicable to the position but did not reach agreement.

The City contends that it has bargained in good faith over the Investigator's wages, hours and conditions of employment and can now fill the position, thereby implementing its management decision to create the position. The Association asserts that the City cannot fill the position until the parties either reach agreement on the Investigator's wages, hours and conditions of employment or receive an interest arbitration award establishing same pursuant to Sec. 111.77, Stats.

In his decision, the Examiner concluded that the City had met its obligation to bargain over the Investigator's wages, hours and conditions of employment and was free to fill the position. In reaching his conclusion, the Examiner rejected the Association's view that the dispute in question was subject to interest arbitration.

On review, the Association contends that the Commission should reverse the Examiner and order the City to proceed to interest arbitration. Citing Wausau School District Maintenance and Custodial Union v. WERC, 157 Wis.2d 315 (1990), the Association argues the Examiner wrongly concluded that interest arbitration is unavailable. It asserts that both the plain language of Wausau as well as the policies underlying the Municipal Employment Relations Act warrant a conclusion that interest arbitration is available to resolve disputes over the wages, hours and conditions of employment applicable to newly created unit positions. In this regard, the Association alleges that the absence of interest arbitration does not promote peaceful resolution of labor disputes and encourages fragmentation of bargaining units.

On review, the City responds by urging the Commission to affirm the Examiner. The City argues the Examiner correctly concluded that interest arbitration was unavailable under a Wausau rationale and that the City was therefore free to fill the Investigator position. The City asserts that because its creation of a new unit position during the term of an existing contract did not involve an accretion of new employes or previously unrepresented employes into an existing unit, the Wausau result and rationale are distinguishable. Citing Dane County, Dec. No. 17400 (WERC, 11/79), aff'd Dec. No. 80-CV-0097 (CirCt Dane, 6/80), the City contends that interest arbitration is unavailable for resolution of this mid-contract term dispute.

DISCUSSION:

In our view, the Examiner correctly determined interest arbitration is not available to the Association to establish the Investigator's wages, hours and conditions of employment. We also conclude the Association's refusal to bargain allegation was correctly dismissed. Our rationale follows.

Consistent with our prior holdings in Milwaukee Sewerage Commission, Dec. No. 17302 (WERC, 9/79); and Milwaukee Board of School Directors, Dec. No.

20093-A (WERC, 2/83), we held in City of Madison, Dec. No. 17300-C (WERC, 7/83) that:

> An employer's fulfillment of its bargaining obligation with regard to the impact of a permissive subject decision is not a condition precedent to implementation of that permissive subject decision. In some cases, however, the parties' rights and obligations to bargain impact matters 'at reasonable times' may require that bargaining over impact commence prior to implementation. Such requestions are subject to a case by case analysis as to whether the employer's totality of conduct is consistent with the statutory requirement of good faith. (Footnotes omitted.)

See also, City of Brookfield, Dec. No. 20691-A (WERC, 2/84).

Here, the City made the "permissive subject decision" to establish the Investigator position. Prior to the proposed implementation date, the parties not only commenced bargaining on the impact of this permissive decision but also reached impasse. Thus, within the confines of a City of Madison analysis, there can be no doubt that the City met its obligation to bargain in good faith with the Association.

However, we have also held that if a dispute is subject to the interest arbitration procedures of Sec. 111.77, Stats., a bargaining impasse generally does not allow the employer to make unilateral changes in the status quo. Green County, Dec. No. 20308-B (WERC, 11/84). Thus, the Association argues that if the dispute over the Investigator's wages, hours and conditions of employment is subject to interest arbitration, the City could not implement its permissive decision to establish an Investigator position until the interest arbitration procedure established the Investigator's wages, hours and conditions of employment.

Here, we need not determine how interest arbitration and the City's implementation rights under City of Madison co-exist. This is so because we are satisfied interest arbitration is not applicable to this dispute.

The availability of interest arbitration to resolve this dispute is determined by the provisions of Sec. 111.77, Stats., which apply to law enforcement personnel. The parties and the Examiner focused their attention and analysis upon the interest arbitration provisions of Sec. 111.70(4)(cm)6, Stats., as interpreted in Wausau Schools. While the language of Sec. 111.77 Stats., does not precisely parallel that in Sec. 111.77(4)(cm), Stats., both statutes make reference to interest arbitration as being available to resolve disputes over the terms of a "new contract" (Sec. 111.77(1)(b), Stats.) and a "new collective bargaining agreement" (Sec. 111.70(4)(cm)6, Stats.). Both statutory procedures exist within the auspices of the Municipal Employment Relations Act and thus they share a common legislative purpose. 3/ Thus, although it is the provisions of Sec. 111.77, Stats., which are operative herein, we are satisfied that an analysis of Sec. 111.70(4)(cm)6, Stats., and Wausau Schools is both appropriate and helpful.

3/ Section 111.70(6), Stats., declares the purpose of the Municipal Employment Relations Act as:

> 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 in the public interest that municipal employes so desiring be given an opportunity to bargain collectively with the municipal employer through a labor organization or other representative of the employes' 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.

In Wausau, a printer position was added to a custodial and maintenance bargaining unit during the term of a contract. The parties were unable to reach agreement on all aspects of the printer's wages, hours and conditions of employment. The union filed for interest arbitration under Sec. 111.70(4)(cm)6, Stats., arguing the dispute was over a "new collective bargaining agreement" for the printer. The Court agreed with the union. The Court held that such an interpretation of ambiguous statutory language best serves the Municipal Employment Relations Act's policy goals of "peaceful resolution of disputes between municipalities and unions over newly accreted positions" and encouraging the existence of "a limited number of bargaining units in each municipality." The Court quoted at length from Commissioner Torosian's previously expressed views on the meaning of a "new" collective bargaining agreement as follows:

> 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.

As reflected in the above discussion of Wausau, the interest arbitration issue therein involved accretion of previously unrepresented employes who were not automatically covered by the terms of the existing contract. 4/ Here, we are dealing with positions which are (a) newly created and (b) fall within the bargaining unit, instead of existing but previously unrepresented positions which were accreted to the bargaining unit. In effect, these positions and the employes who fill them have been represented by the Association since the inception of the position. In our view, this is a significant distinction. Further, the parties have already bargained a contract which establishes the wages, hours and conditions of employment for the City's law enforcement personnel. In our view, where, as here, the new law enforcement position is created within the unit, the existing contract is generally applicable to the new positions and the employes that fill same. Thus, there already is a contract in place which generally covers the Investigator position and the

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4/ City of Oconomowoc, Dec. No. 6982-A (WERC, 10/89); Sheboygan County (Unified Board), Dec. No. 23031-A (WERC, 4-86); Trempealeau County (Housing Authority), Dec. No. 23469 (WERC, 3/86); Juneau County, Dec. No. 18728-A (WERC, 1/86); Joint School District No. 2, City of Sun Prairie, et al., Dec. No. 20459 (WERC, 3/83); Minocqua Jt. School District, Dec. No. 19381 (WERC, 2/82); Chetek School District, Dec. No. 19206 (WERC, 12/81); Cochrane-Fountain City Community Joint School District No. 1, Dec. No. 13700 (WERC, 6/75); City of Fond du Lac, Dec. No. 11830 (WERC, 5/73).

employes who will fill it. While we acknowledged the need for the parties to supplement the existing contract with a specific Investigator wage rate, etc., it is nonetheless the case that the parties, unlike the situation in Wausau, are not bargaining a "new" initial agreement for previously unrepresented positions and employes. Thus, interest arbitration is unavailable.

Our result is consistent with the Municipal Employment Relations Act's policy considerations as discussed in Wausau. Because the already bargained contract is automatically applicable to the position, the scope of any bargaining dispute can be no broader than those few issues uniquely related to the position. This narrow potential for disagreement is consistent with the interests of labor peace. Further, because the position falls within the confines of the existing unit and thus has always been represented, 5/ there are no fragmentation concerns present herein.

In summary, the City is free to implement the Investigator position consistent with its last offer to the Association. The parties are of course encouraged to make another effort at resolving their dispute so as to have implementation occur in the context of a mutually acceptable wage rate, etc. During bargaining over the successor to the parties' existing agreement, 6/ the Association is free to seek whatever changes it wishes as to the Investigator's wages, hours and conditions of employment.

Dated at Madison, Wisconsin this 25th day of May, 1993.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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

Herman Torosian /s/
Herman Torosian, Commissioner

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

5/ We have held that it is inappropriate under Sec. 111.70(4)(d)2.a., Stats., to have more than one sworn law enforcement unit. See, City of Marshfield, Dec. No. 25700-A (WERC, 10/92).

6/ As the City has been enjoined from implementing the position during the pendency of this proceeding, implementation will now occur during the existing successor to the parties' 1990-1991 agreement. Thus, we need not determine whether the Examiner correctly found the Association to have waived its right to bargain and proceed to interest arbitration over the position for the 1992-1993 contract period.