

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of
DOOR COUNTY

Requesting a Declaratory Ruling
Pursuant to Section 111.70(4)(b),
Wis. Stats., Involving a Dispute
Between Said Petitioner and

DOOR COUNTY DEPARTMENT OF SOCIAL
SERVICES EMPLOYEES, LOCAL 1658,
AFSCME, AFL-CIO

Case 74
No. 46795 DR(M)-492
Decision No. 27158

Appearances:

- Mr. Dennis Costello, Corporation Counsel, 421 Nebraska Street, P.O. Box 670, Sturgeon Bay, Wisconsin 54235-0670, on behalf of the County.
- Mr. Michael J. Wilson, Staff Representative, 5 Odana Court, Madison, Wisconsin 53719-1169, on behalf of the Union.

ORDER DISMISSING PETITION FOR DECLARATORY RULING

Door County filed a petition with the Wisconsin Employment Relations Commission on December 27, 1991 seeking a declaratory ruling pursuant to Sec. 111.70(4)(b), Stats., as to whether it had a duty to bargain with Door County Department of Social Services Employees, Local 1658, AFSCME, AFL-CIO, over certain matters. On January 10, 1992, Local 1658 filed a request that the petition be dismissed as untimely filed pursuant to ERB 32.12(3). The parties thereafter submitted written argument as to the motion and further agreed that no hearing was needed as to the motion. The Commission advised the parties by letter dated January 29, 1992 that it would proceed to decide the motion and would take notice of the content of the case file of the Commission's investigator. The Commission, having considered the matter and being fully advised in the premises, makes and issues the following

ORDER 1/

The petition for declaratory ruling is dismissed.

Given under our hands and seal at the City of
Madison, Wisconsin this 12th day of February,
1992.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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

Herman Torosian /s/
Herman Torosian, Commissioner

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

(Find footnote 1/ on pages 2 and 3)

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

1/Continued

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.

MEMORANDUM ACCOMPANYING ORDER DISMISSING PETITION
FOR DECLARATORY RULING

On May 6, 1991, Local 1658 filed a petition with the Wisconsin Employment Relations Commission seeking interest arbitration pursuant to Sec. 111.70(4)(cm)6, Stats. The Commission assigned a member of its staff to act as investigator regarding the petition. During the investigation of the petition, the parties began to exchange final offers. During that exchange, Local 1658 submitted a final offer dated September 2, 1991, which contained the following proposal:

1. ARTICLE XXIX - JOB POSTING

A vacancy shall include job openings created either by an employee leaving the position or a newly created position.

Notice of vacancies shall be posted within five (5) working days after the vacancy occurs in each department for a minimum of five (5) working days. The notice of posting shall include the following minimum information: Wage rate, hours of work, department, position title, job description, and qualifications. Any employee desiring to fill any such posted vacancy shall make application in writing at the Human Resources Office. After the conclusion of the posting period, the application shall be opened in the Human Resources Office in the presence of a representative of the Union and a representative of the Executive and Personnel Committee, or its designee, at a time to be mutually agreed upon.

Whenever any vacancy occurs, it shall be given to the senior qualified employee within seven (7) work days after the completion of the posting period.

On October 21, 1991, the County filed an objection to portions of the September 2 final offer submitted by Local 1658. That objection stated in pertinent part as follows:

We are hereby objecting to certain items of the bargaining unit's Final Offer as not qualifying as mandatory subjects of bargaining under Wisconsin Administrative Code ERB 31.10. They are as follows:

1. Job Posting Paragraph No. 1

. . .

The Union subsequently submitted a new final offer dated November 30, 1991. That final offer contained the following proposal:

1. ARTICLE XXIX - JOB POSTING

A vacancy shall include job openings created either by an employee leaving the position or a newly created position.

Notice of vacancies shall be posted within five (5) working days after the vacancy occurs in the department for a minimum of five (5) working days. The notice of posting shall include the following minimum information: Wage rate, hours of work, department, position title, job description, and qualifications. Any employee desiring to fill any such posted vacancy shall make application in writing at the Human Resources Office. After the conclusion of the posting period, the application shall be opened in the Human Resources Office in the presence of a representative of the Union and a representative of the Executive and Personnel Committee, or its designee, at a time to be mutually agreed upon.

Whenever any vacancy occurs, it shall be given to the senior qualified employee within seven (7) work days after the completion of the posting period.

The investigator transmitted this Union final offer with a cover letter dated December 5, 1991. That cover letter stated in pertinent part:

...Further, Mr. Costello, if the County has any continuing objection regarding the non-mandatory nature of the Union's final offer offering in light of the changes the Union has made in some of the previously objected-to provisions, please make those objections in the form described in ERB 32.11, Wis. Adm. Code (mailing copies to WERC in Madison, to me in Shorewood and to the Union) and be advised that the ERB 32.12(3) ten day period within which a declaratory ruling petition on those subjects must be received in Madison to avoid waiver will begin to run as of the date of the Commission's receipt of the County's objection document at the Madison office.

On December 16, 1991, the Commission's investigator received a letter from the County which stated in pertinent part:

We are again going to object to the posting language as a non-mandatory issue of bargaining.

By letter dated December 18, 1991, the Commission's investigator advised the parties in pertinent part as follows:

I reiterate my December 5 direction that Mr. Costello formalize the County's remaining objections that a portion of the Union's final offer constitutes a non-mandatory subject of bargaining. If it obviates the County's objection, Mr. Uglund states that he will change the posting language so that it specifically and expressly applies to only vacancies in positions that are included in the instant bargaining unit.

By letter dated December 20, 1991, the County thereafter advised the Commission as follows:

Door County hereby files its objection to the posting

language placed in the Final offer of AFSCME for the Door County Department of Social Services. Notice is hereby served upon the Department and the Union, by copy of this letter, of our objection to the language.

Our specific objection is that the language is a non-mandatory or permissive subject of bargaining and as it does not effect wages, hours of working conditions.

On December 27, 1991, the County filed a petition for declaratory ruling which states in pertinent part:

1. Commencing in July of 1990 after several bargaining sessions on the 1991 contract the parties reached an impasse at which time a petition for binding arbitration was filed on May 2, 1991 with a request for mediation first. The bargaining unit consists of approximately 30 social workers, aides, income maintenance workers and clerical employees.
2. On September 2, 1991 the bargaining unit submitted its final offer.
3. On October 17, 1991 the employer submitted its final offer.
4. On October 14, 1991 Marshall L. Gratz held a mediation session after which the parties did not reach an agreement on the contract and did not exchange final offers.
5. Door County Department of Social Services bargaining unit took Door County's final offer to its membership and it was voted down.
6. On November 30, 1991 the bargaining unit mailed out its final offer.
7. The employer revised its final offer and sent a new final offer to Mediator Gratz and the bargaining unit representative on December 13, 1991.
8. The bargaining unit's final offer contains the following language:

1. ARTICLE XXIX - JOB POSTING

A vacancy shall include job openings created either by an employee leaving the position or a newly created position.

Notice of vacancies shall be posted within five (5) working days after the vacancy occurs in the department for a minimum of five (5) working days. The notice of posting shall include the following minimum information: Wage rate, hours of work, department, position title, job description, and qualifications. Any employee desiring to fill any such

posted vacancy shall make application in writing at the Human Resources Office. After the conclusion of the posting period, the application shall be opened in the Human Resources Office in the presence of a representative of the Union and a representative of the Executive and Personnel Committee, or its designee, at a time to be mutually agreed upon.

Whenever any vacancy occurs, it shall be given to the senior qualified employee within seven (7) work days after the completion of the posting period.

9. The Petitioner alleges that posting does not effect hours of employment, wages, or working conditions and therefore is not a mandatory subject of bargaining. In addition provisions in the posting language require the employer to fill vacancies. The employer may wish to eliminate or "freeze" positions, therefore the requirement that vacant positions be filled infringes on management rights.

On January 10, 1992, Local 1658 filed a request with the Commission that the petition for declaratory ruling be dismissed as untimely filed. Local 1658 argued that the County's objections regarding the job posting proposal were initially made by a letter dated October 17, 1991. Pursuant to ERB 32.12(3), Local 1658 argues that because the petition for declaratory ruling was not filed within the ten day period following the service of the County's objections upon the Commission or its investigator, the County has waived its objection to the job posting proposal. Therefore, Local 1658 asks that the petition for declaratory ruling be dismissed as untimely filed.

On January 21, 1992, the County responded to the request for dismissal by arguing that because the final offer of Local 1658 contained changes, the County's petition for declaratory ruling was not untimely.

By letter filed January 24, 1992, Local 1658 advised the Commission that it wished to pursue its motion to dismiss the County's petition as untimely filed. By January 28, 1992, both parties had advised the Commission that they did not wish to submit further argument or to have a hearing conducted as to the request for dismissal.

DISCUSSION

ERB 32.12(3) states in pertinent part:

If a petition or stipulation is filed after the investigator calls for final offers, the petition or stipulation for a declaratory ruling must be filed within ten (10) days following the service on the commission or its investigator of the written objection that a proposal or proposals relate to non-mandatory subjects of bargaining. Failure to file such a petition or stipulation within this time period shall constitute a waiver of the objection and the proposal or proposals involved therein shall be treated as mandatory subjects

of bargaining.

Here, on October 21, 1991, the County served upon the Commission its objections to the first paragraph of a job posting proposal. Pursuant to ERB 32.12(3), if it wished to pursue this objection, the County was obligated to file its petition for declaratory ruling on or before October 31, 1991. Absent such a filing, ERB 32.12(3) states that the County is deemed to have waived its objection.

The County argues herein that because the Union made changes in other portions of its final offer, no waiver should be found. We reject this argument. The provisions of the administrative rule are clear. The continuing evolution of the bargaining process as to other provisions does not impact on parties' obligations under ERB 32.12(3).

We note that on December 16 and December 21, 1991, the County advised the investigator that it was objecting to "the posting language" in the final offer of Local 1658. This objection is broader in scope than the objection filed in October, 1991. The County's petition for declaratory ruling filed ultimately on December 27, 1991, also objects to the job posting proposal in its entirety. Thus, it can be argued that as to paragraphs two and three of the proposal (which were not previously objected to in October, 1991), the petition for declaratory ruling is timely filed under ERB 32.12(3). We do not find such an argument persuasive.

The second and third paragraphs of the job posting proposal cited in the petition for declaratory ruling are substantively identical to the second and third paragraphs of the proposal as it existed in October, 1991. In our view, when the County filed its initial objections to the Union's final offer in October, 1991, it was obligated to state all of its objections. As we held in Madison Metropolitan School District, Dec. No. 16598-A (WERC, 1/79), Racine Unified School District, Dec. No. 21689 (WERC, 5/84) rev'd Dec. No. 84-CV-810 (CirCt Racine, 11/84) appeal dismissed as moot Dec. No. 85-0444 (CtApp-II, 1/86), and Rock County, Dec. No. 24795 (WERC, 8/87), where a party could have but did not raise an objection to an existing proposal, said party shall be deemed to have waived its right to subsequently object to those portions of said proposal. In Madison we stated:

To conclude otherwise would be to encourage piecemeal litigation and to allow one or the other party to engage in dilatory tactics contrary to the policy of the statute and intent of our rules, namely to encourage voluntary settlements but if voluntary procedure fail, to ensure that the parties have available to them a fair, speedy and above all peaceful procedure for settlement.

Here, it does not appear that the County was engaged in dilatory tactics. On the contrary, the parties appear to have been engaged in an ongoing effort to narrow if not settle their dispute. Nonetheless, we are persuaded that the policies quoted above require that we find that the County also cannot now pursue any objections as to paragraphs two and three of the job posting proposal.

Therefore, we have dismissed the petition for declaratory ruling and advised the investigator that he should continue with his investigation of the petition for interest arbitration.

Dated at Madison, Wisconsin this 12th day of February, 1992.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By A. Henry Hempe /s/

A. Henry Hempe, Chair

Herman Torosian /s/
Herman Torosian, Commissioner

William K. Strycker /s/

William K. Strycker, Commissioner