STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of LOCAL 60, AFSCME, AFL-CIO To Initiate Arbitration Between Said Petitioner and SUN PRAIRIE AREA SCHOOLS	Case 90 No. 52470 INT/ARB-7613 Decision No. 28676

Appearances:

Shneidman, Myers, Dowling & Blumenfield, by Mr. Bruce F. Ehlke and Mr. Aaron N. Halstead, Attorneys at Law, 217 South Hamilton, P.O. Box 2155, Madison, Wisconsin 53701-2155, for Local 60.

Godfrey & Kahn, S.C., by Mr. William G. Bracken, Coordinator of Collective Bargaining Services, 219 Washington Avenue, P.O. Box 1278, Oshkosh, Wisconsin 54902-1278, for Sun Prairie Area Schools.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On April 5, 1995, Local 60, AFSCME, AFL-CIO filed a petition with the Wisconsin Employment Relations Commission seeking to initiate interest arbitration pursuant to Sec. 111.70(4)(cm)6, Stats., as to a bargaining unit of certain employes of the Sun Prairie Area Schools.

On April 10, 1995, Sun Prairie Area Schools filed a Motion to Dismiss the petition with the Commission.

Hearing on the Motion was held on July 18, 1995, in Sun Prairie, Wisconsin, before Examiner Peter Davis. The parties thereafter filed written argument, the last of which was received September 18, 1995.

Having considered the matter and being fully advised in the premises, the Commission makes and issues the following

FINDINGS OF FACT

1. Sun Prairie Area Schools, herein the Employer, employs certain individuals to clean and maintain the Employer's buildings. The Employer maintains its principal offices at 509 Commercial Avenue, Sun Prairie, Wisconsin.

2. Local 60, AFSCME, AFL-CIO, herein Local 60, is a labor organization functioning as the exclusive collective bargaining representative for certain employes of the Employer in a bargaining unit described in the parties' July 1, 1993-June 30, 1996 contract as:

> ...all regular full-time and regular part-time clerical, buildings and grounds employees, assistants: clerical, instructional, playground, special education, health and school nutrition employees of the Sun Prairie Area School District....

3. On February 27, 1995, the Employer established a new job classification of Cleaner. The position of Cleaner differs from existing bargaining unit custodian positions to the extent Cleaners will not perform any minor repairs or routine maintenance; will not perform seasonal jobs such as grass cutting or snow removal; will not perform any program support activities such as preparing for special events, meetings, etc.; will not have any building security responsibilities; and will not report to faculty or other school staff in a supervisory context.

4. The parties entered into collective bargaining as to the new Cleaner position and reached agreement as to all matters except wages. Local 60 seeks to resolve the parties' impasse as to wages through Sec. 111.70(4)(cm)6, Stats., interest arbitration. The Employer asserts that interest arbitration is not available to resolve this impasse.

Based upon the above and foregoing Findings of Fact, the Commission makes and issues the following

CONCLUSIONS OF LAW

1. Because the Cleaner position falls within the scope of the bargaining unit represented by Local 60 and described in Finding of Fact 2, the parties' 1993-1996 collective bargaining agreement automatically applies in all pertinent respects to the Cleaner position and all employes who fill same.

2. Because the 1993-1996 collective bargaining agreement automatically applies to the Cleaner position and the employes who hold same, the dispute between Local 60 and the Employer as to the Cleaner wage rate is not dispute over the terms of a "new collective bargaining agreement"

within the meaning of Sec. 111.70(4)(cm)6, Stats.

3. Because the parties are not bargaining over a "new collective bargaining agreement" within the meaning of Sec. 111.70(4)(cm)6, Stats., interest arbitration under Sec. 111.70(4)(cm)6, Stats., is not available as a matter of right to resolve the dispute between the parties as to the wage rate for the Cleaner position.

Based upon the above and foregoing Findings of Fact and Conclusions of Law, the Commission makes and issues the following

ORDER 1/

The petition for interest arbitration filed by Local 60 is hereby dismissed.

Given under our hands and seal at the City of Madison, Wisconsin, this 22nd day of March, 1996.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By James R. Meier /s/
James R. Meier, Chairperson

Herman Torosian /s/
Herman Torosian, Commissioner

A. Henry Hempe /s/
A. Henry Hempe, 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.

(footnote 1 continued on page 4)

(footnote 1 continued from page 3)

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.

SUN PRAIRIE AREA SCHOOL DISTRICT

MEMORANDUM ACCOMPANYING
FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

POSITIONS OF THE PARTIES

The Employer

Citing City of Oak Creek, Dec. No. 27074-C (WERC, 5/93), the Employer asserts that interest arbitration under Sec. 111.70(4)(cm)6, Stats., is unavailable to resolve the impasse between the parties as to the Cleaner wage rate. The Employer argues that the Cleaner position clearly falls within the existing collective bargaining unit and that the existing contract therefore automatically applies in all pertinent respects to the Cleaner position. Therefore, the Employer argues the parties are not bargaining a new or initial collective bargaining agreement for the Cleaner position, but rather modifying an existing contract as to issues uniquely related to the Cleaner position.

Because the Cleaner position and the employes who will fill it have always been represented by Local 60 since the position was created, the Employer asserts that the holding of Wausau School District Maintenance and Custodian Union v. WERC, 157 Wis. 2d 315 (1990) is not applicable to this dispute. Unlike the instant circumstances, Wausau involved the addition of previously existing positions to a collective bargaining unit. In such circumstances, Wausau holds that interest arbitration is available to resolve any collective bargaining impasse between the parties as to the new unit position/employes because the existing contract does not automatically apply to said position/employes. The Employer argues that is not the case here where the existing contract automatically applies to the new position/employes because the position has never existed outside the scope of the collective bargaining unit.

The Employer asserts that the effort by Local 60 to dispute the similarities and differences between the Cleaner and custodian positions is misdirected. The Employer contends Local 60's arguments are more properly addressed to an interest arbitrator in some future proceeding. The Employer argues that the question of whether the wage rate it has proposed is appropriate or inappropriate is a matter as to which the Commission has no jurisdiction and which is irrelevant to the issue of whether interest arbitration is available. The Employer contends that the Commission's decision in City of Oak Creek is consistent with the purposes and policies of the Municipal Employment Relations Act and clearly applies to the instant dispute between the parties.

Given all of the foregoing, the Employer asks that the Commission grant its motion to dismiss.

Local 60

Local 60 asserts that the Wausau decision is controlling and that interest arbitration is therefore available to resolve the parties' wage impasse as to the Cleaner position. Local 60 argues that because the Cleaner position did not exist prior to its creation, the parties are bargaining "a new collective bargaining agreement" within the meaning of Sec. 111.70(4)(cm)6, Stats.

Local 60 asserts that if the Commission denies it access to interest arbitration in this case, the Commission will be violating the purpose and spirit of the Municipal Employment Relations Act. Here, Local 60 contends that the Employer has engaged in the subterfuge of creating a Cleaner position which is little different than existing custodian positions and then seeking the ability to unilaterally establish a substandard wage rate. Local 60 argues this is exactly the type of employment dispute which should be submitted to interest arbitration to avoid what the Wausau Court correctly viewed as a means of "preventing individual problems from growing into major labor disputes." Local 60 contends the Commission should not allow the Employer to circumvent the parties' collective bargaining agreement through the dramatic reduction in wages and benefits applicable to a new "position."

Even if the Commission were to erroneously conclude that the Oak Creek decision governs this dispute, Local 60 asserts that interest arbitration would still be available because the Cleaner position is not a "newly created" position, but rather is merely a custodian position being compensated at a lower pay rate. Should the Commission disagree, Local 60 asserts the Commission should abandon the Oak Creek decision because there is no legally relevant distinction between a position which is added to a bargaining unit and one which is newly created within a bargaining unit. Local 60 contends the potential for disruption of labor peace is just as great in either situation.

Given all of the foregoing, Local 60 asks the Commission to deny the Employer's motion to dismiss.

DISCUSSION

Because we are satisfied that the instant dispute is governed by our holding in Oak Creek, we have granted the Employer's motion to dismiss Local 60's petition for interest arbitration.

In Oak Creek, the Employer created a new position within an existing law enforcement collective bargaining unit. We therein concluded that because the new position fell within the scope of the existing bargaining unit, the existing contract automatically applied to the new position in all respects. Because the existing contract was automatically applicable to the new position, we concluded that the parties were not bargaining a "new" contract as to the newly created position and thus that interest arbitration was unavailable.

In our Oak Creek decision, we discussed the differences between the situation in Wausau and that presented to us in Oak Creek. We stated:

> 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 the 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:
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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 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 issues 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 position 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 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.

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); Cheteck 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).
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> This narrow potential for disagreement is consistent with the interests of labor pease. Further, because the position falls within the confines of the existing unit and thus has always been represented, there are no fragmentation concerns present herein.
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> 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, the Association is free to seek whatever changes it wishes as to the Investigator's wages, hours and conditions of employment.

Here, the Cleaner position is analytically the same as the Investigator position in Oak Creek. The parties' 1993-1996 contract establishes the wages, hours and conditions of employment for all "building and grounds" employes of the Employer and thus the parties already have a collective bargaining agreement which covers the Cleaner position. In Wausau, the existing collective bargaining agreement did not automatically apply to the printer position which had existed outside the collective bargaining agreement and was subsequently added by agreement of the parties.

In our Oak Creek decision quoted above, we stated why we believe this result is consistent with the purposes of the Municipal Employment Relations Act. We stand by that analysis herein. We also think it appropriate to emphasize that although the initial wage rate for the Cleaner position will not be established through the interest arbitration process, Local 60 will have access to that process when the parties bargain a successor to the 1993-1996 agreement.

Given the foregoing, we have granted the Employer's motion to dismiss.

Dated at Madison, Wisconsin, this 22nd day of March, 1996.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By James R. Meier /s/
James R. Meier, Chairperson

Herman Torosian /s/
Herman Torosian, Commissioner

A. Henry Hempe /s/
A. Henry Hempe, Commissioner