STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of

WISCONSIN SCIENCE PROFESSIONALS, AFT, AFL-CIO

Requesting a Declaratory Ruling Pursuant to Sec. 227.41, Stats., Involving a Dispute Between Said Petitioner and

TIMOTHY A. KESSENICH and TERRY KURZYNSKI

Case 399
No. 52742 DR(S)-3
Decision No. 28762

Appearances:

Shneidman, Myers, Dowling & Blumenfield, Attorneys at Law, by Mr. Timothy E. Hawks, 700 West Michigan, Suite 500, P.O. Box 442, Milwaukee, Wisconsin 53201-0442, for the Petitioner.

Mr. Timothy A. Kessenich, 220 West Sunset Court, Madison, Wisconsin 53705, on his own behalf.

Mr. David J. Vergeront, Legal Counsel, Department of Employment Relations, 137 East Wilson Street, P.O. Box 7855, Madison, Wisconsin 53707-7855, on behalf of the State of Wisconsin.

FINDINGS OF FACT, CONCLUSION OF LAW AND DECLARATORY RULING

On June 12, 1995, Wisconsin Science Professionals, AFT, AFL-CIO, filed a petition for declaratory ruling pursuant to Sec. 227.41, Stats., with the Wisconsin Employment Relations Commission. In the petition, Wisconsin Science Professionals ask for an interpretation of Sec. 111.81(12m), Stats., relative to employes Timothy A. Kessenich and Terry Kurzynski and a maintenance of membership agreement between Wisconsin Science Professionals and the State of Wisconsin.

Following an exchange of correspondence between the parties, it was concluded that no hearing was necessary. The State of Wisconsin advised the Commission that it took no position as to the appropriate interpretation of the statute in question. Wisconsin Science Professionals and

Kessenich filed written argument. Kurzynski did not file any argument and the record was closed on November 22, 1995.

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

FINDINGS OF FACT

1. Wisconsin Science Professionals, AFT, AFL-CIO, herein the Union, is a labor organization representing Kessenich, Kurzynski and certain employes of the State of Wisconsin for the purposes of collective bargaining. The Union has its principal offices at 1334 Applegate Road, Madison, Wisconsin 53713.

2. Section 111.81(12m), Stats., was created by 1983 Wisconsin Act 160 and states in pertinent part:

> "'Maintenance of membership agreement'" means an agreement between the employer and a labor organization representing employers or supervisors specified in s. 111.825(5) which requires that all of the employes or supervisors whose dues are being deducted from earnings under s. 20.92(1) or 111.84(1)(f) at the time the agreement takes effect shall continue to have dues deducted for the duration of the agreement and that dues shall be deducted from the earnings of all employes or supervisors who are hired on or after the effective date of the agreement." (emphasis added)

3. The Union and the State of Wisconsin entered into a maintenance of membership agreement effective August 28, 1988, and said agreement currently states:

> "Where a maintenance of membership agreement is authorized in a referendum certified by the Wisconsin Employment Relations Commission, the Employer agrees to deduct the amount of dues or proportionate share of the cost of the collective bargaining process and contract administration, as certified by the Union, from the earnings of all affected employes in the bargaining unit. The Employer will be obligated to deduct only a single uniform amount as maintenance of membership for all employes. The Employer will remit all such deductions and a list of employes who had such deductions to the Union Treasurer within ten (10) days after the payday covering the pay period of deduction. The list will include the departments, names, and amounts deducted. The Union shall provide the Employer with thirty (30) days advance notice, in

> writing, of any changes in the certified Union dues deduction amount. Changes in deduction amounts shall be made effective at the start of an "A" pay period."

Pursuant to said agreement, the State has been deducting dues from all employes who have entered the Union bargaining unit since August 28, 1988, without regard to whether the employes were already employed by the State prior to that date.

4. Timothy A. Kessenich, herein Kessenich, began his employment with the State of Wisconsin on December 17, 1979, in a position represented for the purpose of collective bargaining by the Union. Kessenich subsequently transferred out of the Union's bargaining unit on November 11, 1981 into another sSate position. On September 22, 1991, Kessenich returned to a bargaining unit position represented by the Union.

5. Terry Kurzynski, herein Kurzynski, began his employment with the State of Wisconsin on May 15, 1972, and, at least until March 8, 1981, was in the bargaining unit represented by the Union. On that date, Kurzynski transferred out of the Union's bargaining unit into another State position. On November 1, 1994, he returned to a Union bargaining unit position.

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

CONCLUSION OF LAW

Section 111.81(12m), Stats., does not allow the Union and the State to apply a maintenance of membership agreement to employes who enter the Union bargaining unit on or after August 28, 1988, but who began their employment with the State prior to August 28, 1988.

Based on the above and foregoing Findings of Fact and Conclusion of Law, the Commission makes and issues the following

DECLARATORY RULING 1/

Kessenich and Kurzynski are not subject to the provisions of the maintenance of membership agreement between the Union and the State.

Given under our hands and seal at the City of Madison, Wisconsin, this 18th day of June, 1996.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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

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

(footnote 1 begins on page 4)

(footnote 1 referred to on page 3 begins)

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 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.

(footnote 1 continues on page 5)

(footnote 1 continued from page 4)

(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.

WISCONSIN SCIENCE PROFESSIONALS,
AFT, AFL-CIO

MEMORANDUM ACCOMPANYING
FINDINGS OF FACT, CONCLUSION OF LAW
AND DECLARATORY RULING

The Pleadings

Through its petition, the Union asks the Commission to declare that Kessenich and Kurzynski are subject to the terms of the maintenance of membership agreement between the Union and the State. The Union asserts that the statutory language regarding the dues payment obligation of employes "who are hired on or after the effective date of the agreement" applies to any employes who enter the bargaining unit represented by the Union, without regard to whether the individuals are already employed by the State of Wisconsin prior to August 28, 1988. Kessenich and Kurzynski assert that because they were "hired" prior to the effective date of any maintenance of membership agreement, they are not obligated to pay dues pursuant to said agreement.

Positions of the Parties

The Union argues that the maintenance of membership agreement bargained with the State is consistent with Sec. 111.81(12m), Stats. The Union contends that the statute gives the State and the Union discretion to negotiate over the terms of the "maintenance of membership" agreement, provided only that they do not violate the plain meaning of the statute. Given "uncertain statutory meaning," the Union asserts that the State and the Union entered into an agreement to clarify the statutory ambiguity so as to be able to administer the maintenance of membership agreement.

The Union asserts that understanding the statutory term "hire" as the date an employe enters the bargaining unit is logically consistent with and related to the Union's status as the collective bargaining representative of such employes from the date of unit entrance.

Contrary to the arguments of Kessenich, the Union asserts that it is not necessarily reasonable to assume that the statutory reference to a "hire" can refer only to an employe's initial entrance into State service. The Union asserts that State agencies, commissions, departments, etc., are separate "appointing authorities" under Secs. 230.03(3) and 230.06(1)(b), Stats., and that agencies "hire" employes both when employes initially enter State service and when they move from one agency to another.

The Union further argues its interpretation of the statute places employes who enter the bargaining unit after the effective date of a maintenance and membership agreement in the same position whether they have just entered State service or are transferring from an existing State

position. In each instance, the Union asserts that the employes can elect not to accept the position if they object to the payment of dues. The Union contends that the manifest purpose of the "date of hire" standard was to avoid upsetting the reasonable expectation of employes already in the bargaining unit. Thus, the Union asserts that an employe who held a position in the bargaining unit prior to August 28, 1988, came to the job with the understanding that he or she was not required to pay dues. The Union contends that there is no public policy basis for providing transferring employes such as Kessenich and Kurzynski with different rights than those of employes who enter the bargaining unit as their initial position in State service.

Kessenich asserts that he is not subject to the maintenance of membership agreement because he was hired into State service prior to the initial effective date of such an agreement. Kessenich asserts that he was hired only once and that his date of hire was December 17, 1979. Kessenich asserts that the word "hire" has a specific meaning which is separate and distinct from entrance into a bargaining unit by means of transfer, promotion, demotion, or reallocation.

DISCUSSION

Section 111.81(12m), Stats., provides:

> "'Maintenance of membership agreement'" means an agreement between the employer and a labor organization representing employers or supervisors specified in s. 111.825(5) which requires that all of the employes or supervisors whose dues are being deducted from earnings under s. 20.92(1) or 111.84(1)(f) at the time the agreement takes effect shall continue to have dues deducted for the duration of the agreement and that dues shall be deducted from the earnings of all employes or supervisors who are hired on or after the effective date of the agreement." (emphasis added)

When assessing whether the law allows a maintenance of membership agreement between the State and the Union to apply to Kessenich and Kurzynski, the critical question is whether these two employes were "hired on or after the effective date of the agreement" within the meaning of Sec. 111.81(12m), Stats.

The Union asks that we interpret the word "hired" as being synonymous with "entered the bargaining unit" by any type of personnel transaction, while Kessenich asks that "hired" be given a more literal interpretation. We find Kessenich's position to be more persuasive.

The disputed statutory phrase was part of 1983 Assembly Bill 51 as originally introduced. No effort was made to amend this phrase during legislative consideration of Assembly Bill 51. The phrase ultimately became law with the passage of Assembly Bill 51 as 1983 Wisconsin Act 160.

The Legislative Reference Bureau Analysis which accompanied Assembly Bill 51 stated in pertinent part:

> Currently, if two-thirds of the state employes voting in a statutory collective bargaining unit vote by secret ballot in a referendum conducted by the employment relations commission to authorize a labor union which represents the employes to enter into a "fair-share" agreement with the state, the state must deduct the amount of dues uniformly required of all members of the union for the cost of the collective bargaining process and contract administration from the paychecks of all employes in the unit, regardless of whether the employes are union members, and pay the total amount deducted to the union. A fair-share agreement may be effective in any of the 14 statutory units of nonsupervisory employes or the 2 statutory units of supervisory employes in the classified service. There is no provision for exemption of employes from fair-share payments based on religious beliefs.
>
> Under this bill, a majority of the state employes voting in one of the statutory units may, in a similar referendum, authorize a "maintenance of membership" agreement with the state, whereby the state must deduct the amount of dues uniformly required of all members of the union for the cost of the collective bargaining process and contract administration from the paychecks of all union members in the unit on the date of the agreement and also deduct the same amount from the paychecks <u>of all new employes hired after the date of the agreement</u> and pay the total amount deducted to the union. Employes in the collective bargaining unit on the date of the agreement who are not union members are not affected by the agreement. (emphasis added)

The State Employment Labor Relations Act (SELRA) does not provide a statutory definition for the word "hire." Nor is there a general definition of this word found in Chapter 990-Construction of Statutes. Section 990.01(1), Stats., does provide that "All words and phrases shall be construed according to common and approved usage; but technical words and phrases and others that have a peculiar meaning in the law shall be construed according to such meaning."

Absent a statutory definition, consideration of the use of the words "hire" or "hired" or "hiring" in SELRA provisions other than Sec. 111.81(12m), Stats., has the potential to provide substantial guidance as to the meaning of the word "hired" in Sec. 111.81(12m), Stats.

Section 111.81(10), Stats., defines a "Supervisor" as an individual "... who has the authority,

in the interest of the employer to hire, transfer, suspend, layoff, recall, promote, discharge, assign ..." (emphasis added)

Section 111.90(2), Stats., provides:

> 111.90 Management rights. Nothing in this subchapter shall interfere with the right of the employer in accordance with this subchapter to:
>
> * * *
>
> (2) Manage the employes of the agency; hire, promote, transfer, assign or retain employes in positions within the agency; ... (emphasis added)

Section 111.84(1)(c), Stats., states:

> (1) It is an unfair labor practice for an employer individually or in concert with others:
>
> * * *
>
> (c) To encourage or discourage membership in any labor organization by discrimination in regard to hiring, tenure or other terms or conditions of employment. (emphasis added)

The above-quoted uses of the words "hire" and "hiring" (emphasis added) are at odds with the Union's proposed interpretation of the word "hired." For instance, the Sec. 111.90(2), Stats., use of the words "transfer" and "promote" in the same sentence as "hire" establishes that the Legislature intended these words to have distinct meanings and that "hired" when used in Sec. 111.81(12m), Stats., cannot reasonably be understood as encompassing personnel transactions such as transfers and promotions.

The above-quoted uses of the words "hire" and "hiring" also persuade us that the Legislature did not intend the word "hired" to be given any "technical" meaning but rather wanted the word's common usage to be understood. Common usage of the word "hired" is consistent with Kessenich's view that this word should be understood as the employe's initial employment by the State of Wisconsin.

Kessenich's interpretation is also consistent with the Legislative Reference Bureau's

Analysis of 1983 Assembly Bill 51. In our view, use of the phrase "new employes hired" in the Analysis is more consistent with an understanding of "hired" as meaning initial employment with the State than an interpretation of "hired" as encompassing personnel transactions affecting current employes which bring said employes into a bargaining unit.

In reaching our conclusion, we acknowledge that as a matter of civil service parlance, State employes are "appointed" not "hired." Thus, for instance, Sec. 111.91(2)(b)1, Stats., prohibits bargaining over "policies, practices and procedures of the civil service merit system" including "original appointments and promotions. ..." Nonetheless, our task is to determine the most reasonable labor relations meaning to be given "hired" in the context of Sec. 111.81(12m), Stats., and we are satisfied that language of SELRA clearly supports Kessenich's interpretation.

In summary, because Kessenich and Kurzynski were "hired" before the effective date of the maintenance of membership agreement, Sec. 111.81(12m), Stats., does not authorize the State and the Union to apply a maintenance of membership agreement to them. 2/

Dated at Madison, Wisconsin, this 18th day of June, 1996.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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

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

2/ As reflected in the text of our Conclusion of Law, employes hired by the State on or after August 28, 1988 who thereafter enter the bargaining unit in question are covered by the maintenance of membership agreement. Thus, ultimately, all employes in the unit will be covered by the maintenance of membership agreement, assuming it is not terminated at some point pursuant to Sec. 111.85(2)(a), Stats.