STATE OF WISCONSIN
CIRCUIT COURT BRANCH 13
DANE COUNTY

UNIVERSITY OF WISCONSIN
HOSPITALS AND CLINICS,

Petitioner,

v.

WISCONSIN EMPLOYMENT RELATIONS
COMMISSION,

Respondent.

Case No. 99 CV 0036
[Decision No. 29478-B]
[NOTE: This document was re- keyed by WERC. Original pagination has been retained.]

NOTICE OF ENTRY

TO: Attorney Steven B. Rynecki
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PLEASE TAKE NOTICE that a final order affirming the Commission's decision and order, of which a true and correct copy is hereto attached, was signed by the court and duly entered in the Circuit Court for Dane County, Wisconsin, on the 9th day of September, 1999.

Notice of entry of this final order is being given pursuant to Wis. Stats., § 806.06(5) and 808.04(1).

Dated this 21st day of September, 1999.

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STATE OF WISCONSIN
CIRCUIT COURT BRANCH 13
DANE COUNTY

UNIVERSITY OF WISCONSIN HOSPITALS AND CLINICS AUTHORITY,

Petitioner,

v.

WISCONSIN EMPLOYMENT RELATIONS
COMMISSION,

Respondent.

MEMORANDUM DECISION AND ORDER
Case No. 99CV0036
[Decision No. 29478-B]
[NOTE: This document was re-keyed by WERC. Original pagination has been retained.]

Petitioner, University of Wisconsin Hospitals and Clinics Authority (hereinafter "the Hospital"), is an employer operating a hospital and clinic in Wisconsin. In this action, the Hospital seeks judicial review, pursuant to ch. 227, Stats., of a decision of the Wisconsin Employment Relations Commission (WERC), dated Oct. 26, 1998[1], which concluded that the Wisconsin Employment Peace Act mandated the establishment of a single collective bargaining unit for patient care employees and ordered the accretion of 135 "per diem" registered nurses into the 1199W/ United Professionals for Quality Healthcare, SEIU (hereinafter "District 1199W" or "the Union") unit of Nurse Clinicians.

For the reasons set out below, I affirm the decision of WERC.

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[1] The Hospital does not expressly seek review of WERC's December 11, 1998 order denying its petition for rehearing, but it challenges the reasoning of that order throughout its briefs. It will consider that order as part of the matter before this court for review.

BACKGROUND

The facts are undisputed. The Hospital employs both full-time registered nurses and therapists, and "per diem" registered nurses who work when needed to cover absences of full-time nurses and when patient need exceeds the capacity of the full-time staff. Prior to WERC's decision of October 26, 1998, District 1199W consisted of approximately 935 full-time nurses; the "per diem nurses were not included in the bargaining unit. In response to the Union's unit clarification petition, WERC determined that sec. 111.05(5)(a) requires one collective bargaining unit for all Hospital patient care employees, pre-empting application of a "community of interest" analysis.

RELEVANT STATUTES AND ADMINISTRATIVE RULES

Sections 111.05(a) and (b) provide:

111.05 Representatives and Elections

(5)(a) Collective bargaining units for representation of the employes of the University of Wisconsin Hospitals and Clinics authority shall include one unit for employes engaged in each of the following functions:

1. Fiscal and staff services.

2. Patient care.

3. Science.

(b) Collective bargaining units for representation of the employes of the University of Wisconsin Hospitals and Clinics Authority who are engaged in a function not specified in par. (a) shall be determined in the manner provided in this section. The creation of any collective bargaining unit for such employes is subject to approval of the commission. The commission shall not permit fragmentation of such collective bargaining units or creation of any such collective bargaining unit that is too small

> to provide adequate representation of employes. In approving such collective bargaining units, the commission shall give primary consideration to the authority's needs to fulfill its statutory missions.

STANDARD OF REVIEW

The Hospital does not challenge WERC's factual findings. Instead, it aruges that WERC's interpretation of § i11.05(5), Stats., is "erroneous as a matter of law." This presents a question of law.

A court is not bound by an administrative agency's conclusions of law. However, where the issue involves the interpretation of a statute which the legislature has entrusted the agency to administer, a court will ordinarily extend deference to the agency's interpretation. Lisney v. LIRC, 171 Wis.2d 499, 505 (1992). WERC has been charged by Chapter 111 to administer its terms. Due to WERC's experience, technical competence and specialized knowledge in administering the Wisconsin Employment Peace Act, its interpretation and application of that statute has been accorded deference. *See* Madison School Dist. v. WERC, 133 Wis.2d 462, 467 (Ct.App. 1986).

Where the issue is "very nearly" one of first impression, the agency's decision is entitled to the intermediate level of deference, "due weight". Sauk County v. WERC, 165 Wis.2d 406, 413-14 (1991), *citing* West Bend Education Ass'n v. WERC, 121 Wis.2d 1, 67-68 (1984). Under this standard, WERC's interpretation and application of the Act will be upheld unless a more reasonable alternative exists. *See* UFE, Inc. v. LIRC, 201 Wis.2d 274, 287 (1996). § 111.05(5) was created by 1995 Wisconsin Act 27. It appears undisputed that WERC's interpretation of it in this case was the first time it had been called upon to do so. As a result, WERC's conclusion is entitled to due weight.

DISCUSSION

The threshold question is the proper interpretation of the language in §11.05(5)(a), Stats.,

which provides, "collective bargaining units for representation of the employees of the [Hospital] shall include one unit for employes engaged in each of the following functions: . . . 2. Patient care." WERC concluded that "one unit" meant only one unit. The Hospital argues that this phrase should be read to mean "at least one unit."

Resolution of this issue presents a question of statutory interpretation. The fundamental aim in such an inquiry is to ascertain the intent of the legislature. The best evidence of that intent is the language it has chosen. Here, I conclude that the language is unambiguous and thus there is no need to resort to other sources of evidence of the legislature's intent.

§111.05(5), Stats., was created as part of the law which changed the status of the University of Wisconsin Hospital and Clinics from a department of the State to a public authority. It is found in the portion of Chapter 111 that deals with determining collective bargaining units and representation of employes who are neither state nor municipal employes. This section, however, establishes a separate and distinct scheme for determining those issues in reference to Hospital employes. It is clear that the legislature intended that the circumstances of Hospital employes be treated differently than other non-state or non-municipal employes. Both in the definitions of "collective bargaining" and "collective bargaining unit" and in the directions to WERC "whenever a question arises concerning the determination of a collective bargaining unit". the legislature expressly excepted the circumstances of Hospital employes. *See* §§ 11.02(2), 111.02(3) and 111.05(3), Stats. To read the statute as the Hospital urges would negate this clear legislative intent. If "one unit" is read to mean "at least one unit", Hospital employes

would be in exactly the same circumstances as their non-governmental employe counterparts. There would be no statutory restriction on the number of units. Apart from the division of units

by function, this would make subsec. 5(a) surplusage, a result that is not condoned by the rules of statutory construction.

Moreover, the Hospital has wholly failed to present any explanation for why the words "at least" should be engrafted onto the language chosen by the legislature. It has identified no purpose for the law that would be furthered by this step, much less one which requires such a step. As a result, the plain meaning of "one unit" as a straightforward expression of limitation to one must be adopted. This reading is also entirely consistent with the clear policy of anti-fragmentation that is found in subsec. 5(b). In short, the Hospital has failed to show that its interpretation is more reasonable than WERC's and thus WERC's must be upheld.

The Hospital also argues that WERC erred in its application of the statute by failing to undertake a community of interest analysis and by failing to require what it refers to as an "accretion election." The Hospital does not challenge WERC's determination that per diem nurses are employes covered by the law and that their function is patient care. WERC further determined that it need not undertake a community of interest analysis before deciding whether to accrete the per diem nurses into the existing unit. The Hospital is correct that under a community of interest analysis, WERC would look at a number of factors including, but not limited to, whether the employes perform similar functions. The Hospital is mistaken, however, when it argues that WERC was required in this case to undertake such an analysis.

Our Supreme Court concluded that WERC's development and use of the community of interest concept had a proper statutory basis. Arrowhead United Teachers v. ERC, 116 Wis.2d

580, 595 (1984). There the Court was dealing with WERC's authority to determine the appropriate bargaining unit in a municipal employe setting under § 111.70(4)(d)2.a, Stats. It upheld WERC's use and application of the community of interest concept in a unit clarification petition, concluding,

> The statute provides that the commission shall determine the appropriate bargaining unit. In determining the appropriate unit, the statute states that the commission may decide whether employes in "the same or several . . . professions or other occupational groupings constitute a unit." The statute does not mandate that employes with similar duties must be grouped within a single unit. (Emphasis in original) Id.

The statute involved here does mandate that employes engaged in a specific function be in a single unit. The legislature has thus implicitly directed WERC not to employ the community of interest analysis for Hospital employes, but instead to simply determine whether the employes who are the subject of the unit clarification petition engage in the same "function" as the existing unit employes. That is precisely what WERC did here, and its decision must be upheld.

The Hospital next argues that WERC improperly used the process of accretion to join the per diem nurses into the existing unit. It reasons that accretion is only available for residual units and newly created positions. This contention is easily dismissed for two reasons. First, the Hospital has cited no case which so limits the use of accretion. Second, in Arrowhead the subjects of the unit clarification petition were a group of intern teacher positions that had apparently been used by the school district for some time. While WERC did not accrete the interns into the existing unit because of its application of the community of interest analysis, neither WERC, the Court of Appeals nor the Supreme Court concluded that the interns could

not be accreted simply because they were not newly created positions.

The Hospital also claims that WERC erred by not conducting an election among the per diem nurses before ordering their inclusion in the existing unit. This claim is also easily dismissed for two reasons. First, when dealing with a question concerning the determination of a collective bargaining unit for non-governmental employes, the statutes does direct WERC to utilize a secret ballot. *See* §111.05(2), Stats., This directive, however, expressly does not apply to the determination of collective bargaining units for Hospital employes. This is a strong statement of intent by the legislature that elections are not a necessary part of the unit determinations here. Second, WERC followed its own past practice in cases where elections are not mandated by statute. Citing its own decision in City of Cudahy, Dec. No. 21887-B (WERC, 1/90), WERC pointed out that accretion without a vote was permissible where inclusion is clearly warranted by the existing unit description (here, patient care employes) unless the inclusion would call into question the incumbent union's continuing majority status. The Hospital cites other WERC cases where accretion was denied without a vote. The Hospital's reliance in this regard on Adams County (Highway Department), Dec. No. 27093 (WERC, 11/91) is instructive. There WERC had two unions competing to represent the subject employes, and WERC concluded an election would be a better method of determination. Here, because the per diem nurses are indisputably patient care employees, the statute precludes any second unit from representing them, Adams County is inapposite.

Finally, the Hospital appears to argue that WERC erred in concluding the accretion ordered here "clearly does not call into question 1199's continuing majority status." (Order of 12/11/98, p.5). This contention offers no basis to reverse WERC's accretion order for several

reasons. First, the Hospital itself concedes, "One hundred and thirty-five employes may not call into question the majority status of District 1199W in a bargaining unit of 935 employes." Brief at p. 10. Second, the Hospital steadfastly persists in referring to a second unit clarification petition that it claims will involve an additional 330 employes to argue that it is really 465 employes that must be considered in determining whether the Union's majority status is threatened. This second petition has been held in abeyance pending judicial review of the October 26, 1998 order. Thus WERC has made no determination as to whether the subject employes are employes of the Hospital, whether any, all or some of them are involved in patient care, and whether those that are found to be patient care employes are of sufficient number to call into question the Union's majority status in light of all circumstances including the accretion of the 135 per diem nurses. These 330 employes and the fact of a second petition are irrelevant to the issues in this case. On judicial review of an administrative agency decision, it is the record of the proceedings that produced the order to be reviewed that may be considered; it is not the record from some different proceeding that has not been concluded and about which the best that can be observed is pure speculation.[2]

Third, the Hospital argues from the definition of majority (fifty percent plus one) that the addition of even one employe to a bargaining unit could destroy the majority. To use this approach would foreordain that accretion would never be appropriate and would make WERC's test of "calling into question the majority status" a nullity. As such it is an absurd construct that can be disregarded. The Hospital offers no reasonable alternative manner of making this

[2] The fact of this second petition having been filed and held in abeyance was a matter that this court took judicial notice of at the request of the Hospital and without objection of any opposing party. That a fact is judicially noticed does not mean that it is necessarily relevant.

determination that WERC failed to utilize, and thus WERC's determination must stand.

For all of the foregoing reasons,

IT IS ORDERED that the October 26, 1998 and December 11, 1998 orders of WERC are hereby affirmed and this action is dismissed.[3]

Dated this 9th day of September, 1999

BY THE COURT

Michael Nowakowski /s/
MICHAEL NOWAKOWSKI
CIRCUIT COURT JUDGE

[3] On June 21, 1999, the Hospital filed with this court a motion to stay arbitration. In light of the order now entered, the issue raised by this motion is nowmoot.