STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of

LOCAL 2918, AFSCME, AFL-CIO

To Initiate Arbitration Between Said Petitioner and

VERNON COUNTY

Case 113
No. 57482
INT/ARB-8715

Decision No. 29685

Appearances:

Klos, Flynn & Papenfuss, Chtd., by **Attorney Jerome J. Klos,** 800 Lynne Tower Building, 318 Main Street, P.O. Box 487, LaCrosse, Wisconsin 54602-0487, appearing on behalf of Vernon County.

Mr. Daniel R. Pfeifer, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 18990 Ibsen Road, Sparta, Wisconsin 54656-3755, appearing on behalf of Local 2918, AFSCME, AFL-CIO.

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER GRANTING MOTION TO DISMISS PETITION FOR INTEREST ARBITRATION

On April 8, 1999, Vernon County Courthouse and Human Services Employees, Local 2918, AFSCME, AFL-CIO, filed a petition with the Wisconsin Employment Relations Commission seeking interest arbitration pursuant to Sec. 111.70(4)(cm)6, Stats., regarding the wage rate applicable to a LIHEAP position in an existing bargaining unit of Vernon County employes.

On April 14, 1999, the County filed a motion to dismiss the petition.

Hearing was held in Viroqua, Wisconsin on May 25, 1999 before Commission Examiner Peter G. Davis. The parties thereafter filed written argument, the last of which was received June 30, 1999.

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

FINDINGS OF FACT

1. Vernon County, herein the County, is a municipal employer having its principal offices in Viroqua, Wisconsin.

2. Vernon County Courthouse and Human Services Employees, Local 2918, AFSCME, AFL-CIO, herein the Union, is a labor organization functioning as the collective bargaining representative of certain County employes.

3. Effective January 1, 1998, the County assigned certain new duties to Clerk III Debra Moran. In response to the reassignment, on or about February 2, 1998, the Union wrote the County as follows:

> Please note that it is my understanding that Vernon County terminated its contract with the Community Action Program for the LIEAP Program. It is further my understanding that said duties were assigned to a bargaining unit, Clerk III position.
>
> Local 2918 hereby notifies you that it desires to bargain of (sic) the impact of the assignment of the LIEAP duties. Local 2918 proposes that the current Clerk III be reclassified to a higher position, retroactive to the date of the assignment of the LIEAP duties.

At the time of the reassignment and the Union's demand to bargain, the parties were bargaining a 1998-1999 contract. In the context of this bargaining, the Union had the right to bargain and, if necessary, proceed to interest arbitration over impact of the new duties on Moran's wage rate/appropriate job classification. In September, 1998, the parties successfully concluded their bargaining by reaching agreement on the terms of a 1998-1999 contract.

Independent of the bargaining process, Moran asked the County to reclassify her position as part of an annual contractual opportunity open to all employes who believe their jobs were wrongly classified. As part of this reclassification process, the County did reclassify Moran but not to a compensation level which Moran and the Union found to be acceptable.

On October 26, 1998, upon completion of the reclassification process, the County changed Moran's job title from Clerk III to LIHEAP Specialist and posted the job. On November 2, 1998, Moran filed a grievance with the County which asserted that:

> Management placed new position (LIHEAP Specialist) on wage schedule without bargaining the impact of said position with union. Position was posted rather than assigned to the grievant.

The grievance further indicated that the "corrective action desired" was:

> Bargain impact of LIHEAP position.
> Make employee whole.
> Assign position to the grievant.

Moran was the only applicant for the LIHEAP position and received the position. Her duties are the same duties she assumed in January 1998 while still a Clerk III.

In response to the filing of the grievance, the Union and the County thereafter met on several occasions in an effort to reach an agreement on a mutually acceptable wage rate for Moran. Those efforts were unsuccessful.

4. On April 8, 1999, the Union filed a petition for interest arbitration pursuant to Sec. 111.70(4)(cm)6, Stats. The petition alleged among other matters that:

> e. There is an existing collective bargaining agreement which will expire on 12/31/99.

The Union's preliminary final offer that accompanied the petition consisted of the following:

LIHEAP position to be placed in Pay Grade I effective 1/1/99.

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

CONCLUSION OF LAW

1. The parties' dispute over the appropriate wage rate for the LIHEAP position is not a dispute over the ". . . wages, hours and conditions of employment to be included in a new collective bargaining agreement . . ." within the meaning of Sec. 111.70(4)(cm)6, Stats.

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

ORDER

The petition for interest arbitration filed by the Union is dismissed.

Given under our hands and seal at the City of Madison, Wisconsin this 13th day of August, 1999.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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

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

Paul A. Hahn /s/
Paul A. Hahn, Commissioner

Vernon County

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER GRANTING MOTION TO DISMISS PETITION FOR INTEREST ARBITRATION

The question presented in this litigation is whether the Union currently has a statutory right to use interest arbitration under Sec. 111.70(4)(cm)6, Stats., to resolve a dispute over the wage rate for the LIHEAP position.

POSITIONS OF THE PARTIES

The Union

The Union contends that the parties' dispute over the LIHEAP wage rate is subject to interest arbitration under Sec. 111.70(4)(cm)6, Stats., because the LIHEAP is a newly created position. Citing Dane County Circuit Court Judge Pekowsky's May 1997 decision in LOCAL 60 V. WERC, CASE NO. 96 CV 730, the Union argues that it is bargaining a "new" contract for the LIHEAP position and thus is entitled to use the statutory interest arbitration process to resolve the wage dispute.

The Union notes that the record contains conflicting testimony as to whether the issue of Moran's wages was bargained by the parties during the 1998-1999 contract negotiations. The Union asserts that this factual question is not determinative of the legal issue presented but also argues that the conflict should be resolved in favor of a conclusion that no such bargaining occurred. However, if the Commission believes resolution of this factual question is critical to the outcome of the case, the Union asks that the record be reopened for the receipt of additional evidence.

The Union also contends that the contractual language which states:

> "No questions affecting the allocation of classifications to a pay grade will be considered arbitrable"

is irrelevant to this case. The Union argues that while such language is certainly relevant in a grievance arbitration case, it has no impact on the Union's right to use statutory interest arbitration.

Given all of the foregoing, the Union asks that the County's Motion to Dismiss be denied.

The County

The County argues that the Union's interest arbitration petition should be dismissed.

The County contends that because Moran received the additional duties while the parties were bargaining the 1998-1999 contract, the Union appropriately raised the issue of Moran's compensation during that bargaining process. When the parties ultimately settled the 1998-1999 contract, the County argues that Moran's wage level was thereby established for the term of the 1998-1999 contract – subject to Moran's contractual right to pursue a reclassification during the term of the contract under Article 5.05. Thus, the County asserts there is no dispute between the parties that is subject to interest arbitration.

The County argues that the facts of this case distinguish this dispute from those before the Court in the LOCAL 60 case cited by the Union. In LOCAL 60, the Union had not already had the opportunity to proceed to interest arbitration on the issue in question. Here, the Union has already had that opportunity. Further, in LOCAL 60, the position and employe were new to the bargaining unit. Here, an existing unit employe was assigned additional duties.

Given all of the foregoing, the County asks that the petition be dismissed.

DISCUSSION

Section 111.70(4)(cm)6, Stats., provides that interest arbitration is available to resolve disputes over ". . . wages, hours and conditions of employment to be included in a new collective bargaining agreement. . . ."

This statutory provision was most recently interpreted in LOCAL 60, AM. FED. OF MUN. EMPLOYEES V. WERC, 217 WIS.2D 602 (CT. APP. 1998) in the context of a new bargaining unit position created during the term of an existing contract. The Court held that the wages, hours and conditions of employment applicable to that position constituted a "new collective bargaining agreement" within the meaning of Sec. 111.70(4)(cm)6, Stats., and thus that interest arbitration was available to resolve a deadlock on the wage rate for the new position.

Applying the holding of LOCAL 60 to this case, we conclude that interest arbitration is not available to resolve the parties' wage dispute. We reach this conclusion because, unlike the scenario before the Court in LOCAL 60, the Union has already had the opportunity to proceed to interest arbitration on the wage dispute as to Moran.

The new duties were added to Moran's job while the parties were still bargaining the 1998-1999 contract. In the context of this bargaining, the Union had the right to take the issue of Moran's compensation for her new duties to interest arbitration. The Union elected not to do so and settled the contract voluntarily. Having already had one opportunity to "bite the apple" for the 1998-1999 contract years, the Union is not now entitled to a "second bite" for the same period of time. The law does not give the Union two opportunities to create a "new agreement.

In reaching this conclusion, we need not resolve the factual dispute as to whether the compensation issue was or was not actually addressed at the bargaining table during the 1998-1999 contract negotiations. All that matters is the fact that the Union has already had the opportunity to interest arbitrate the compensation issue.

Although Moran began to perform the LIHEAP duties in January 1998, we acknowledge that the LIHEAP job was not actually posted and filled until October and November 1998 – after the September 1998 settlement of the 1998-1999 contract. Thus, an argument can be made that the dispute here is the same as the dispute before the Court in LOCAL 60 – a position was created after the master collective bargaining agreement had been settled and thus the Union is entitled to interest arbitrate the wages, hours and conditions of employment applicable to the new position.

However, acceptance of such an argument would ignore the reality that: Moran began performing the duties of the "new" position nine months before the 1998-1999 contract was ultimately settled; that the Union demanded to bargain about the impact of the new duties on Moran's compensation eight months before the 1998-1999 contract was ultimately settled; and thus that the 1998-1999 contract negotiations provided the Union with the right and opportunity to bargain, and if necessary, arbitrate the question of how Moran's new duties should affect her compensation. Thus, unlike the scenario present in LOCAL 60, we are satisfied that the "new" job was not "created" after the parties had settled the overall labor agreement but well before the settlement. Therefore, the opportunity for collective bargaining and, if necessary, interest arbitration – the statutory interests highlighted by the Court in LOCAL 60 – has already been present as to this dispute.

Given all of the foregoing, we have granted the County's request that the petition for interest arbitration be dismissed.

Dated at Madison, Wisconsin this 13th day of August, 1999.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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

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

Paul A. Hahn /s/
Paul A. Hahn, Commissioner

rb
29685