STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of

LOCAL 1486, AFFILIATED WITH MILWAUKEE DISTRICT COUNCIL 48, AFSCME, AFL-CIO

To Initiate Arbitration Between Said Petitioner and

MAPLE DALE - INDIAN HILL SCHOOL DISTRICT

Case 25
No. 58617
INT/ARB-8966

Decision No. 29933

Appearances:

Ms. Malou Noth, Staff Representative, Milwaukee District Council 48, AFSCME, AFL-CIO, 3427 West St. Paul Avenue, Milwaukee, Wisconsin 53208, appearing on behalf of Local 1486.

Davis & Kuelthau, S.C., by **Attorney Daniel Vliet,** Suite 1400, 111 East Kilbourn Avenue, Milwaukee, Wisconsin 53202-6613, appearing on behalf of Maple Dale – Indian Hill School District.

ORDER GRANTING MOTION TO DISMISS

On March 3, 2000, Local 1486, Milwaukee District Council 48, AFSCME, AFL-CIO, filed a petition for arbitration with the Wisconsin Employment Relations Commission pursuant to Sec. 111.70(4)(cm)6, Stats., relating to a bargaining unit of clerical employes of the Maple Dale - Indian Hill School District. The petition alleged that the Local and the District had exchanged proposals on December 2, 1999 and met to bargain on three occasions thereafter.

The petition was accompanied by a preliminary final offer and a cover letter that stated in pertinent part:

> The filing of this Interest Arbitration is in order to protect the rights of this bargaining unit that was newly organized as of February 17, 1999.

It is our intent to continue negotiations on a regular basis unless an impasse is reached.

By letter dated March 7, 2000, the District asked the Commission to "decline to accept the Petition since the statutory prerequisites have not yet been met."

On March 23, 2000, certain employes in the clerical unit filed a petition with the Wisconsin Employment Relations Commission seeking an election to determine whether the employes wished to continue to be represented by the Local for the purposes of collective bargaining.

The District and the Local thereafter filed written argument, the last of which was received April 11, 2000.

By letter dated April 27, 2000 the Commission advised the parties that it would presume that the matter of the petition's dismissal should be decided based on the interest arbitration petition and the cover letter unless either party advised the Commission to the contrary by May 5, 2000. Neither party responded to this letter.

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

ORDER

The District's motion to dismiss the petition for interest arbitration is granted.

Given under our hands and seal at the City of Madison, Wisconsin this 27th day of June, 2000.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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

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

I dissent.

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

Maple Dale – Indian Hill School District

MEMORANDUM ACCOMPANYING ORDER GRANTING MOTION TO DISMISS

POSITIONS OF THE PARTIES

The District argues that the parties were not deadlocked/at impasse when the petition for interest arbitration was filed and thus that the petition should be dismissed. As evidence of the absence of an impasse, the District cites the Local's cover letter to the Commission that states that the Local intended to continue negotiations "unless an impasse is reached."

The Local argues that the petition for arbitration should not be dismissed. The Local contends that it is the Commission investigator who determines whether the parties are at impasse/deadlocked and asserts that continued bilateral negotiations are appropriate despite the presence of the arbitration petition.

DISCUSSION

Section 111.70(4)(cm)6, Stats., provides in pertinent part:

> (a) If . . . the parties are deadlocked with respect to any dispute between them over wages, hours and conditions of employment to be included in a new collective bargaining agreement, either party . . . may petition the commission, in writing to initiate compulsory, final and binding arbitration. . . .

In MILWAUKEE SCHOOLS, DEC. NO. 23689 (WERC, 5/86), the Commission concluded that the appropriate forum for resolving disputes as to whether the parties are at deadlock/impasse is an investigation of the petition by a Commission investigator/mediator. That conclusion was based in part upon the Commission's view that the delay (and we would add the expense to the parties) produced by allowing formal litigation of such issues is contrary to the overriding statutory purpose of prompt resolution of labor disputes.

We continue to find MILWAUKEE SCHOOLS persuasive. But for the content of a portion of the cover letter which accompanied the instant petition, we would deny the motion to dismiss based on MILWAUKEE SCHOOLS and assign an investigator/mediator to determine whether the parties are deadlocked/at impasse as alleged in the interest arbitration petition. However, where, as here, we have the unique situation of the petitioning party's own cover letter stating that the parties are not yet at impasse and thus contradicting the allegation of deadlock contained in the petition, we conclude that dismissal of the petition is appropriate.

We wish to emphasize that our holding is not based in any part on the portion of the cover letter that reflects the Local's ongoing willingness to meet bilaterally with the District despite the filing of the petition. Such meetings are consistent with the overriding statutory purpose of resolution of labor disputes.

Having dismissed the interest arbitration petition, we invite all parties to the election petition to file written argument with us on or before July 14, 2000 as to the impact which our dismissal should have on the pending election petition.

Dated at Madison, Wisconsin this 27th day of June, 2000.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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

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

Maple Dale - Indian Hill School District

Dissent of Commissioner A. Henry Hempe

Until the majority's decision in this matter, the policy governing motions to dismiss petitions for interest arbitration was established in a 1986 Commission case. There, as here, the basis of a motion to dismiss a petition for interest arbitration had been that the statutory requirements set forth in Sec. 111.70(4)(cm)6.a., Stats., had not been met. The Commission denied the motion:

> Our reading of subsection 6.a. indicates that the Commission shall make an investigation to determine whether the procedures set forth in subsection 6 have been complied with, and if they have not been complied with, then it may order such compliance prior to ordering mediation-arbitration. Thus, it seems clear that one of the purposes of the investigation is to determine whether the requirements of a reasonable period of negotiation, as well as mediation, and other settlement procedures, established by the parties, have been exhausted. Thus we conclude that these requirements are not prerequisites for the initiation of an investigation, but rather, as argued by the District, are prerequisites to any order for mediation-arbitration . . . We have not considered the factual underpinnings of the Association's argument because we are of the opinion that, as a matter of policy as stated above, the appropriate forum for resolving the instant dispute between the parties is through an investigation." (Emphasis supplied). MILWAUKEE PUBLIC SCHOOLS, DEC. NO. 35990 (WERC, 5/86).

The majority's decision, of course, inevitably unravels this policy. Under the new rule enunciated by the majority, at least one of the requirements of subsection 6.a. has become a prerequisite for the initiation of the peacekeeping, settlement procedure contained therein *in those instances where* the Commission finds that the petitioner's cover letter contradicts the allegation of deadlock contained in the petition. In fairness, apart from those instances, the majority pledges its intent to continue the policy set forth in MILWAUKEE PUBLIC SCHOOLS, SUPRA. In effect, however, the majority has converted a statutorily authorized request for agency service into a lawyer's game.

I find the majority's rationale illogical and unpersuasive. Logic suggests that if the conditions listed in Sec. 111.70(4)(cm)6.a., Stats., are *not* prerequisites for the statutory settlement procedure to be initiated, why should it matter if compliance with them is confirmed or denied in a separate letter of transmittal? If, on the other hand, the statutory conditions *are* prerequisites and allegations of noncompliance are made, logically it would seem to follow that the statutory settlement procedure should not be initiated until an investigation establishes full compliance with them. That, however, was precisely the argument made by one of the parties in MILWAUKEE PUBLIC SCHOOLS, SUPRA, and rejected as poor policy by the Commission some fourteen years ago.

It still is. For it is one thing to insist that a petition for interest arbitration not be flawed by obvious contradictions and deliberate misstatements that appear on its face and that bargaining agents have a duty of truthfulness to the units they represent. 1/ It is quite another to use an extraneous, routine cover letter as the basis for dismissing a properly drafted and prepared petition for interest arbitration, 2/ thus delaying or denying indefinitely the access of these parties to the peacekeeping, settlement procedure found in Sec. 111.70(4)(cm)6., Stats.

1/ See Dissent in PORTAGE SCHOOL DISTRICT, DEC. NO. 20470-A (WERC, 7/97). Ironically, the same majority that herein dismisses a petition for interest arbitration because it is critical of one sentence found not in the petition, but in the petition's cover letter of transmittal to the Commission, in the PORTAGE SCHOOL DISTRICT case allowed a petition for interest arbitration to be a barrier to a representation election even though the petition, itself, contained the contradictory allegations that the parties had never met but negotiations were deadlocked. The petition was further flawed by the absence of an attached preliminary final offer containing petitioner's latest proposal (another prerequisite of Sec. 111.70(4)(cm)6.), Stats.) As it turned out, no preliminary final offer existed since the parties had not only never met, but had never even exchanged initial offers.

2/ In the instant matter, the Union's petition included the allegations that the parties had met on three occasions, and that they were deadlocked. The petition had attached to it a preliminary final offer consisting of tentative agreements already reached between the parties and the Union's remaining contract proposals.

Majority's Action Violates Public Policy

Sec. 111.70(6), Stats., contains a Legislative Declaration of Policy:

> "**(6) Declaration of Policy.** The public policy of the state as to labor disputes arising in municipal employment is to encourage voluntary settlement through the procedures of collective bargaining. Accordingly, it is in the public interest that municipal employes so desiring be given an opportunity to bargain collectively with the municipal employer through a labor organization of the employes' own choice. *If such procedures fail, the parties shall have available to them a fair, speedy, effective and, above all, peaceful procedure for settlement as provided in this subchapter.*" (Emphasis supplied)

Sec. 111.70(4)(cm)6., Stats., provides such a peacekeeping, settlement procedure. The procedure is normally initiated when either party files with the Commission a petition for interest arbitration that alleges the parties are deadlocked. The Commission is then required to

"make an investigation" to determine whether arbitration should be ordered. By long-established practice, the Commission's "investigation" consists of intensive mediation by a professional Commission staff person or a Commissioner in an effort to resolve or at least narrow the issues between the parties. If the dispute cannot be totally resolved, the investigator so advises the Commission and the Commission certifies the parties to interest arbitration.

Commission mediators continue to be extremely effective as they function in this procedure, and have earned an enviable national reputation for their professional mediation skills. Total settlements are reached in the great majority of cases, enabling the parties (and the public) to avoid the expense, inconvenience, or even more serious risks endemic to an ongoing, possibly escalating, labor dispute.

It is this settlement procedure the Union attempted to initiate in the instant matter. But with its unprecedented dismissal of the Union's petition for interest arbitration, in effect, the majority not only causes the Commission to abdicate from its traditional peacekeeping role, but also indefinitely delays or deprives these parties of access to the peacekeeping, settlement procedure mandated by the Legislative policy declaration in Sec. 111.70(6), Stats., and established by the provisions of Sec. 111.70(4)(cm)6., Stats.

Ambivalence of the Record

Finally, the facts of this case do not provide unqualified support for application of what the majority seems determined to make its new policy. At best, the facts are mixed and provide an ambivalent picture on which it seems to me imprudent to base new policy.

Unacknowledged by the majority is an explanatory second letter from the Union to the Commission, provided in response to a Commission request to both parties for argument in this matter. In this letter AFSCME Staff Representative Malou Noth lists a chronology of events in connection with her petition for interest arbitration:

- Following a representation election, the bargaining unit was certified on February 17, 1999.

- On May 6, 1999, the bargaining unit sent to the District's business manager a notice of the union's intent to commence negotiations for a labor contract.

- Ms. Noth and the Maple Dale - Indian Hill School District business manager agreed to postpone negotiations involving the Maple Dale - Indian Hill secretarial/clerical bargaining unit until negotiations involving the custodial bargaining units at both Maple Dale and Glendale - River Hills School

Districts had been completed. 3/

- Negotiations were finally completed for the custodial unit at each school district on November 1, 1999.

- Negotiations on behalf of the secretarial/clerical unit commenced on December 2, 1999.

- The parties met almost every other week for three months.

- The Union filed a petition for interest arbitration on March 3, 2000.

3/ The Maple Dale-Indian Hill School District is a K-8 district, immediately adjacent to the Glendale-River Hills School District. Both districts share the same office location, have identical addresses, use the same business manager, and are represented in these cases by the same attorney. Each district has an AFSCME-represented custodial bargaining unit.

Ms. Noth concludes her second letter with the assertion that she filed the bargaining unit's petition for interest arbitration at least in part due to what she identified as "surface bargaining" on the part of the School District. She adds, ". . . it has always been my understanding that unless the investigator assigned to a case declares the parties are at impasse/deadlocked, an attempt to continue bilateral negotiations is in order."

In my view, this explanation creates at least a presumption and probably an aegis of legitimacy for the allegation of impasse contained in the petition for interest arbitration. 4/ Inexplicably, the majority ignores her explanation, choosing to focus only on Ms. Noth's cover letter. 5/

4/ Ms. Noth also argues that had the parties not agreed to postpone their negotiations, a labor agreement would likely be in place. This argument indirectly identifies the real issue underlying this case: the status of petitions for a new election filed on March 17, 2000 by four members of the nine-person bargaining unit.
The District appears to agree, for in its argument to the Commission, the District specifically alludes to the petitions for decertification, and asks that the Commission remove the impediment to a decertification election by dismissing the Union's petition for interest arbitration. [Dismissal of the interest arbitration petition denies the Union the limited protection from a representation election that would otherwise be provided by the "interest arbitration bar rule." See MUKWONAGO SCHOOL DISTRICT, DEC. NO. 24600 (WERC, 6/87); CITY OF PRESCOTT, DEC. NO. 18741 (WERC, 6/81); DUNN COUNTY, DEC. NO. 17861 (WERC, 6/80).]

5/ Neither does the majority appear to consider a remedial alternative of prospective application of its new rule of practice and procedure, although prospective application of a remedy is an avenue that at least one member of the majority has traveled in a past case. See footnote 2 of PORTAGE SCHOOL DISTRICT, SUPRA.

The cover letter candidly acknowledges the Union's interest in ". . . protect(ing) the rights of this bargaining unit . . ." i.e., that the Union not be distracted or bargaining disrupted by a decertification election. 6/ Certainly this constituted a tactical maneuver designed, in part, to preserve the Union's representational status but also, in part, to activate the dispute resolution mechanism set forth in Sec. 111.70(4)(cm)6., Stats. It is, in addition, a maneuver that this Commission has never disapproved in the past, even in the face of outrageous facts. 7/

6/ See note 3, supra.

7/ PORTAGE SCHOOL DISTRICT, SUPRA, note 1.

The sentence of the cover letter that the majority finds fatal to the petition it transmits is not lengthy: "It is our intent to continue negotiations on a regular basis unless an impasse is reached." The offending sentence is not part of the pleading that accompanies it; it is unsworn; no further explanation is offered for it. It is, moreover, arguably susceptible to a less literal, less simplistic interpretation than that imputed by the majority, e.g.: there is an impasse now, but we're willing to try again unless another impasse is reached. 8/ Under these circumstances, I read it as simply constituting a sincere, good faith attempt of a labor relations professional to communicate to the District the Union's continued willingness to work at achieving a voluntary settlement, notwithstanding its petition for interest arbitration.

8/ One key to the success of Commission mediators has been their recognition that any alleged bargaining "impasse" is not necessarily carved in stone. Frequently an alleged impasse proves to have fluidity, i.e., once the parties are assisted in rediscovering helpful mutual interests, a deadlock on day one may yield to an alternate solution on day two. Ms. Noth's cover letter may be simply reflecting this reality.

Obviously, Ms. Noth did not suspect that the District would request the Commission to

analyze her cover letter. Nor did she suspect that one sentence from her cover letter could

form the basis for the unprecedented action then taken by the Commission majority. Under MILWAUKEE PUBLIC SCHOOLS, SUPRA, then still in full effect, Ms. Noth had no reason for suspicion or greater caution.

Given this state of the record, I am dubious that it offers sufficient support for the new rule of practice and procedure the majority seeks to establish.

* * *

Certainly, a major responsibility of the Commission is to promote labor peace between the parties. Confounding the parties with shallow legalisms, themselves lacking logical consistency, does not appear a helpful means to this end. For as the results of this case demonstrate, under the majority's new rule, the parties' access to the peacekeeping, settlement mechanism contained in Sec. 111.70(4)(cm)6., Stats., is either delayed or denied for an indefinite period.

However well intended the new rule may be, for all of the reasons previously stated I believe it constitutes a flawed public policy that is contrary to existing legislative policy mandate.

Thus I dissent.

Dated at Madison, Wisconsin this 27th day of June, 2000.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

A. Henry Hempe /s/

A. Henry Hempe, Commissioner

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