STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of

AFSCME COUNCIL 24, WISCONSIN STATE EMPLOYEES UNION, AFL-CIO and its affiliated LOCAL 2748

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

WISCONSIN DEPARTMENT OF EMPLOYMENT RELATIONS and NANCY AHLER

Case 522
No. 60859
DR(S)-6

Decision No. 30345

Appearances:

Attorney P. Scott Hassett, Lawton & Cates, S.C., Ten East Doty Street, Suite 400, P.O. Box 2965, Madison, Wisconsin 53701-2965, appearing on behalf of AFSCME Council 24, Wisconsin State Employees Union, AFL-CIO and its affiliated Local 2748.

Ms. Nancy Ahler, appearing on her own behalf.

Attorney David J. Vergeront, Chief Legal Counsel, Department of Employment Relations, State of Wisconsin, 345 West Washington Avenue, P.O. Box 7855, Madison, Wisconsin 53707-7855, appearing on behalf of the Department of Employment Relations.

FINDINGS OF FACT, CONCLUSION OF LAW AND DECLARATORY RULING

On February 4, 2002, AFSCME Council 24, Wisconsin State Employees Union, and its affiliated Local 2748 filed a petition for declaratory ruling pursuant to Sec. 227.41, Stats., with the Wisconsin Employment Relations Commission asking for an interpretation of Sec. 111.81(12m), Stats., as to Nancy Ahler, an employee of the State of Wisconsin.

The parties stipulated to the relevant facts and filed written argument, the last of which was received on March 26, 2002.

The State of Wisconsin takes no position on the merits of the dispute.

To maximize the ability of the parties we serve to utilize the Internet and computer software to research decisions and arbitration awards issued by the Commission and its staff, footnote text is found in the body of this decision.

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

FINDINGS OF FACT

1. AFSCME Council 24, Wisconsin State Employees Union, AFL-CIO and its affiliated Local 2748, herein the Union, is a labor organization representing Nancy Ahler for the purposes of collective bargaining. The Union has its principal offices at 8033 Excelsior Drive, Madison, Wisconsin 53717.

2. Nancy Ahler was hired by the State of Wisconsin on June 26, 1989. Ms. Ahler left her employment with the State on June 23, 1996.

3. Ahler was again hired by the State on October 11, 1999 into a position represented for the purposes of collective bargaining by the Union. At the time of her return to employment by the State, a maintenance of membership agreement between the State and the Union was in effect.

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

CONCLUSION OF LAW

On October 11, 1999, Nancy Ahler was "hired" within the meaning of Sec. 111.81(12m), Stats.

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

DECLARATORY RULING

Because Nancy Ahler was hired after the effective date of a maintenance of membership agreement between the State of Wisconsin and AFSCME Council 24 and its affiliated Local 2748, applicable to employees in the bargaining unit within which Ahler is employed, the State of Wisconsin is obligated by said agreement to deduct Union dues from Ahler's earnings.

Given under our hands and seal at the City of Madison, Wisconsin, this 16th day of May, 2002.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Steven R. Sorenson /s/
Steven R. Sorenson, Chairperson

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

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

STATE OF WISCONSIN
(DEPARTMENT OF EMPLOYMENT RELATIONS)

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

Through its petition, the Union asks the Commission to declare that the State must deduct Union dues from the earnings of Ahler pursuant to a maintenance of membership agreement between the Union and the State. The Union asserts that such a declaration is warranted because Ahler was "hired" within the meaning of Sec. 111.81(12m), Stats., after the June 1, 1992 effective date of the applicable maintenance of membership agreement. The Union argues that, where, as here, there has been a break in State service, either an employee's subsequent hire date or adjusted seniority date qualifies as a "hire" under Sec. 111.81(12m), Stats.

Ahler contends that she was "hired" within the meaning of Sec. 111.81(12m), Stats. before the effective date of the maintenance of membership agreement and thus that the State cannot deduct Union dues from her earnings. Ahler argues that only her original date of hire in June, 1989 is applicable to Sec. 111.81(12m), Stats. and cites an August 1999 State Department of Employment Relations bulletin which agrees with her interpretation. In further support for her position, Ahler argues that upon her reinstatement to State service in 1999, she received rights and benefits based on her original date of hire. Ahler argues by analogy that if her rights and benefits upon reinstatement relate to her original date of hire, so should the Union's right to deduct dues.

DISCUSSION

As reflected earlier herein, the question to be resolved in this proceeding is whether Ahler was "hired" within the meaning of Sec. 111.81(12m), Stats. when she returned to State employment on October 11, 1999. If she was "hired" at that point in time, the State is obligated to deduct "dues" from her earnings pursuant to the "maintenance of membership agreement" between the State and the Union. If she was not "hired" at that point in time, then "dues" cannot be so deducted.

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)

In STATE OF WISCONSIN, DEC. NO. 28762 (WERC, 6/96), the Commission rejected a conclusion that "hired" as used in this statutory provision should be interpreted as being synonymous with "entered the bargaining unit." The Commission reasoned on pertinent part as follows:

> 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 of all new employes hired after the date of the agreement 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.

Both parties correctly argue that STATE OF WISCONSIN does not directly resolve the issue raised here. However, as reflected by the above-quoted portions of that decision, the Commission therein generally concluded that "hired" should be given its "common usage". When we give "hired" its common usage here, we conclude that Ahler was "hired" in October, 1999 and thus that the State must deduct "dues" from her pay because she was "hired" after the maintenance of membership agreement became effective.

As reflected in the Findings of Fact, Ahler was first hired by the State in June, 1989 but left her State employment in 1996. She returned to State employment in October, 1999. In our view, the critical question when determining Ahler was "hired" when she returned in October, 1999 is whether the State had an obligation to return her to State employment. Put another way, if the State was free to reject Ahler's interest in returning to State employment, then the State "hired" her within the common usage of that word. Here, there is no contention that the State was obligated to return Ahler to State employment in October, 1999 and we find nothing in the law that indicates otherwise.

Although Ahler received certain "reinstatement" benefits upon her return to State service, receipt of those benefits does not transform her return into something other than a "hire". The critical question remains whether the State was free to reject her return -- not whether Ahler received certain benefits once the State elected to accept her interest in returning. Because the State was free to reject her return, the State's decision to return her to State service was a "hire". 1/

1/ Section 111.89(2)(b), Stats. acknowledges the State's right to "cancel the reinstatement eligibility" of employees who engage in an illegal strike. Consistent with our interpretation of "hired", this provision impacts on the reinstatement benefit eligibility of employees who leave State service and subsequently wish to return and does not reflect any underlying obligation to re-employ an individual.

We acknowledge that our interpretation of Sec. 111.81(12m), Stats., is at odds with the State DER information bulletin cited by Ahler. That bulletin reflected DER's reasonable

interpretation of Sec. 111.81(12m), Stats., and our decision in STATE OF WISCONSIN. Nonetheless, we are the agency charged with the responsibility of interpreting this statutory provision, and we have done so here.

Dated at Madison, Wisconsin, this 16th day of May, 2002.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Steven R. Sorenson /s/
Steven R. Sorenson, Chairperson

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

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

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