STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of

FIREFIGHTERS LOCAL 311, INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS

Involving Certain Employees of

CITY OF SUN PRAIRIE

Case 40
No. 65095
ME-4050

Decision No. 31564

Appearances:

Joseph Conway, President, Fire Fighters Local 311, IAFF, 821 Williamson Street, Madison, Wisconsin 53703, appearing on behalf of the International Association of Fire Fighters Local 311.

Thomas R. Crone, Melli, Walker, Pease & Ruhly, S.C., Attorneys at Law, P.O. Box 1664, Madison, Wisconsin 53701-1664, appearing on behalf of the City of Sun Prairie.

Laurence Rodenstein, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 8033 Excelsior Drive, Suite B, Madison, Wisconsin 53717-1903, appearing on behalf of Dane County Wisconsin Employees, Local 60, AFSCME, AFL-CIO.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DIRECTION OF ELECTION

On August 18, 2005, Firefighters Local 311, International Association of Fire Fighters filed a petition with the Wisconsin Employment Relations Commission seeking an election pursuant to Sec. 111.70(4)(d), Stats., to determine whether certain paramedics employed by the City of Sun Prairie wish to be represented for the purposes of collective bargaining by Local 311.

Hearing on the petition was held in Madison, Wisconsin on October 6, 2005, before Commission Examiner Peter G. Davis.

At the beginning of the hearing, Dane County Wisconsin Employees, Local 60, AFSCME, AFL-CIO intervened and asserted that the election sought by Local 311 is not appropriate because the paramedics should be included in a "wall to wall" non-professional City employee unit that Local 60 currently represents. The City concurred with the position

of Local 60. Local 311 responded by contending that the paramedics are professional employees who are therefore excluded from the existing Local 60 unit and that, in any event, the failure of Local 60 and the City to include the paramedics in the existing unit prior to the filing of this election petition calls into question the "wall to wall" nature of the Local 60 unit.

The parties orally argued the matter at the conclusion of the hearing and the record was closed upon receipt of the hearing transcript on November 1, 2005.

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

FINDINGS OF FACT

1. The City of Sun Prairie, herein the City, is a municipal employer of approximately 200 individuals who provide services to City residents. Approximately 30 of those individuals are in a law enforcement employee unit represented for the purposes of collective bargaining by the Wisconsin Professional Police Association/LEER Division. Approximately 80 of these individuals are in a non-professional employee bargaining unit represented by Dane County Wisconsin Employees, Local 60, AFSCME, AFL-CIO. The remaining 90 individuals include the 12 paramedics at issue in this proceeding as well as supervisors and executive, managerial, professional and confidential employees of the City.

2. Firefighters Local 311, International Association of Fire Fighters, herein Local 311, is a labor organization.

3. Dane County Wisconsin Employees, Local 60, AFSCME, AFL-CIO, herein Local 60, is a labor organization certified by the Wisconsin Employment Relations Commission on August 31, 1983 as the representative of a bargaining unit consisting of:

> . . . all regular full-time and regular part-time employes of the City of Sun Prairie, excluding supervisory, confidential, professional, craft employes, law enforcement employes with the power of arrest, and employes of the Water and Light Department . . .

The 2005-2007 collective bargaining agreement between Local 60 and the City describes the bargaining unit as follows:

> . . . all regular full-time and regular part-time employees of the City of Sun Prairie, including pages, and excluding supervisory, confidential, professional, craft employees, law enforcement employees with the power of arrest, and employees of the Water and Light Department, Dec. No. 20841, dated August 31, 1983, and Crossing Guards . . .

4. In March 2002, the City employed four emergency medical technicians. On March 21, 2002, Local 60 wrote the City and asked that these four employees be added to the existing Local 60 unit. The City did not agree and Local 60 took no further action.

5. In 2004, the City decided to upgrade the emergency medical technician position to that of paramedic and increase the number of such positions. By January 2005 the City employed 12 full-time paramedics.

6. On July 22, 2005, Local 311 asked the City to voluntarily recognize it as the collective bargaining representative of the paramedics. On August 5, 2005, Local 60 asked the City to add the paramedics to the existing Local 60 unit or to recognize Local 60 as the representative of the paramedics in a separate unit. On August 12, 2005, the City denied the Local 311 request citing Local 60's claim that the paramedics should be added to the existing Local 60 unit.

7. The paramedics provide transport and emergency medical care to individuals in need of assistance. They work three 24 hour shifts on a nine day work cycle out of a free standing facility and are directly supervised by the EMS Director. The paramedics are paid $13.81 per hour with 832 hours of mandatory overtime. The wage rate was unilaterally established by the City after discussions with the paramedics. Their fringe benefits are established by the City's non-represented employee compensation plan and are not distinct from those of other non-represented employees except as dictated by their 24 hour shifts and work cycle.

8. Employees in the Local 60 unit dispatch the paramedics to emergency calls and maintain the ambulances used by paramedics. No Local 60 employees are supervised by the EMS Director or work out of the same location as the paramedics. The hourly wage of employees in the Local 60 unit ranges from $7.52 to $20.51.

9. The work of a City paramedic requires knowledge necessary to receive a Wisconsin Paramedic license and related certifications but does not require knowledge of an advanced type in a field of science or learning customarily acquired through a four-year specialized degree.

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

CONCLUSIONS OF LAW

1. The City of Sun Prairie paramedics are not professional employees within the meaning of Sec. 111.70(1)(L), Stats.

2. All regular full-time and regular part-time paramedics employed by the City of Sun Prairie excluding supervisors and confidential, managerial and executive employees is an appropriate collective bargaining unit within the meaning of Sec. 111.70(4)(d) 2.a., Stats.

3. A question concerning representation exists within the collective bargaining unit described in Conclusion of Law 2.

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

DIRECTION OF ELECTION

That an election by secret ballot shall be conducted under the direction of the Wisconsin Employment Relations Commission within forty-five (45) days from the date of this Direction in the collective bargaining unit consisting of all regular full-time and regular part-time paramedics employed by the City of Sun Prairie excluding supervisors and confidential, managerial and executive employees, who were employed on December 20, 2005, except such employees as may prior to the election quit their employment or be discharged for cause, for the purpose of determining whether a majority of the voting employees wish to be represented by Local 311, International Association of Firefighters, or by Local 60, AFSCME for the purposes of collective bargaining with the City of Sun Prairie, or whether such employees vote not to be so represented.

Given under our hands and seal at the City of Madison, Wisconsin, this 20th day of December, 2005.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/
Judith Neumann, Chair

Susan J. M. Bauman /s/
Susan J. M. Bauman, Commissioner

I concur in part and dissent in part

Paul Gordon /s/
Paul Gordon, Commissioner

City of Sun Prairie

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND DIRECTION OF ELECTION

As reflected in the preface to this decision, the City and Local 60 contend that the paramedic bargaining unit sought by Local 311 is not appropriate within the meaning of Sec. 111.70(4)(d)2.a., Stats. When determining whether the unit sought is appropriate, we measure the facts presented by the parties against the statutory language of Sec. 111.70(4)(d)2.a., Stats.

Section 111.70(4)(d)2.a., Stats., provides in pertinent part:

> The commission shall determine the appropriate bargaining unit for the purposes of collective bargaining and shall whenever possible, unless otherwise required under this subchapter, avoid fragmentation by maintaining as few collective bargaining units as practicable in keeping with the size of the total municipal work force. In making such a determination, the commission may decide whether, in a particular case, the employees in the same or several departments, divisions, institutions, crafts, professions or other occupational groups constitute a collective bargaining unit.

We use the following factors as interpretive guides to the statute:

> 1. Whether the employees in the unit sought share a "community of interest" distinct from that of other employees.
> 2. The duties and skills of employees in the unit sought as compared with the duties and skills of other employees.
> 3. The similarity of wages, hours and working conditions of employees in the unit sought as compared to wages, hours and working conditions of other employees.
> 4. Whether the employees in the unit sought share separate or common supervision with all other employees.
> 5. Whether the employees in the unit sought have a common workplace with the employees in said desired unit or whether they share a workplace with other employees.
> 6. Whether the unit sought will result in undue fragmentation of bargaining units.
> 7. Bargaining history.
>
> ARROWHEAD UNITED TEACHERS V. WERC, 116 WIS.2D 580 (1984).

We have used the phrase "community of interest" as it appears in Factor 1 as a means of assessing whether the employees participate in a shared purpose through their employment. We have also used the phrase "community of interest" as a means of determining whether

employees share similar interests, usually – though not necessarily – limited to those interests reflected in Factors 2-5. This definitional duality is long standing and has received the approval of the Wisconsin Supreme Court. ARROWHEAD UNITED TEACHERS V. WERC, SUPRA.

Factor 6 reflects our statutory obligation under Sec. 111.70(4)(d)2.a., Stats., to "avoid fragmentation by maintaining as few collective bargaining units as practicable in keeping with the size of the total municipal work force."

Factor 7 – (bargaining history) involves an analysis of the way in which the workforce has bargained with the employer or, if the employees have been unrepresented, an analysis of the development and operation of the employee/employer relationship. MARINETTE SCHOOL DISTRICT, DEC. NO. 27000 (WERC, 9/91).

It is well established that, within the factual context of each case, not all criteria deserve the same weight and a single criterion or a combination of criteria listed above may be determinative. See, e.g., MADISON METROPOLITAN SCHOOL DISTRICT, DEC. NOS. 20836-A and 21200 (WERC, 11/83) (common purpose); MARINETTE SCHOOL DISTRICT, SUPRA (similar interests); COLUMBUS SCHOOL DISTRICT, DEC. NO. 17259 (WERC, 9/79) (fragmentation); LODI JOINT SCHOOL DISTRICT, DEC. NO. 16667 (WERC, 11/78) (bargaining history).

Here, by virtue of their role providing quality services to citizens, it is apparent that the paramedics share a general "community of interest" with other City employees. However, as reflected in the following analysis of Factors 2-5, it is also apparent that the paramedics have a specific "community of interest" that distinguishes them from other City employees.

As to Factor 2, the paramedics' duties and skills providing emergency medical service and transport are unique among City employees. However, we reject the Local 311 contention that these unique duties and skills are those of professional employees.[1]

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[1] Section 111.70(1)(L), Stats., defines professional employees in pertinent part as:

> 1. Any employee engaged in work:
>
> . . .
>
> d. Requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital . . .

We have interpreted the "prolonged course of specialized intellectual instruction and study" portion of this statutory definition as referring to a four-year specialized degree. VILLAGE OF ASHWAUBENON, DEC. NO. 23746-C (WERC, 8/02).

While it is clear that paramedics are highly trained employees, it is also clear that the knowledge needed to perform paramedic work is not "customarily acquired" through a four-year specialized degree. Thus, the paramedics are not professional employees.

Regarding Factor 3, the paramedics' wages and fringe benefits are not distinctive but their 24 hours shifts again make them unique.

Looking at Factors 4 and 5, the paramedics have supervision and work sites that are not shared by other City employees.

As to Factor 6, with the exception of the paramedics, all of the City's approximately 125 non-professional municipal employees are included in either the Local 60 unit or the law enforcement unit.

As to Factor 7, the wages, hours and conditions of employment of the paramedics have been unilaterally established through a combination of the separate City/paramedic interaction as to wages and the general processes by which these matters are established by the City for unrepresented employees.

Considering all of the foregoing, we conclude that the paramedics do constitute an appropriate bargaining unit. They are an "occupational group" within the meaning of Sec. 111.70(4)(d)2.a., Stats., which, as evidenced by our consideration of Factors 2-5 above, possesses a unique community of interest. Given the number of City employees and the composition of the two existing bargaining units, creation of an additional unit consisting of all employees in an "occupational group" does not offend the statutory "anti-fragmentation" directive contained in Sec. 111.70(4)(d)2.a., Stats., and reflected in Factor 6. The separate interaction between the City and the paramedics (Factor 7) as to wages also supports the conclusion that a unit of paramedics is appropriate.

Having concluded that a unit of paramedics is appropriate within the meaning of Sec. 111.70(4)(d)2.a., Stats., we turn to the contention of Local 60 and the City that we should not direct the election sought by Local 311 because the paramedics fall within the scope of the existing Local 60 unit. We disagree with the premise underlying the position of Local 60 and the City. While the contractual recognition clause is susceptible to a reading that would have automatically included the paramedics, such reading is not the only possible interpretation of the contract language. Here, Local 60 did not challenge the City's refusal to recognize Local 60 as the paramedics' bargaining representative (for example, through a grievance, an unfair labor practice, or a unit clarification petition), which would have lent credence to its argument that the contractual recognition clause by its terms already included these positions. Rather, in this case, the actions of both the City and Local 60 indicate that the parties have not construed the recognition clause to cover the new positions. Such actions include the City's rejection of a March 2002 request for inclusion of the emergency medical technicians and Local 60's failure to pursue the matter.

Consequently the paramedics were in an unrepresented status at the time Local 311 filed its election petition. Local 60 remains free to argue that these unrepresented employees should appropriately be placed into Local 60's bargaining unit. However, in circumstances such as these the Commission generally will grant a petition that seeks an election in an appropriate bargaining unit of presently unrepresented employees. Local 60's appearance on

the ballot will effectuate its organizational interest in representing these employees. Should Local 60 prevail in the election, the City and Local 60 may choose to accrete these employees into the existing Local 60 bargaining unit.

In response to our dissenting colleague, we disagree that our decision is premised on a waiver of Local 60's rights. We do not view Local 60's conduct as waiving any rights, contractual or otherwise. Nor do we hold or imply that Local 60 has forfeited any statutory right. Unlike the situation in TAYLOR COUNTY, DEC. NO. 29046-A (SHAW, 11/97), AFF'D BY OPERATION OF LAW (WERC, 12/97), where both the employer and the union had acknowledged that the Fuel Assistance Worker was in the unit, Local 60's and the City's conduct in this case reflects no such mutual agreement to include the paramedics, at least not until after Local 311's petition. In our view, there is a crucial distinction between treating employees as unrepresented (i.e., as outside a unit), a view our colleague also attributes to Local 60 prior to Local 311's petition, and tacitly agreeing to their exclusion. Neither we nor our dissenting colleague believe that Local 60 has agreed, tacitly or overtly, to an exclusion of these employees, nor do we imply that Local 60 has abandoned its right to claim that they should be accreted to AFSCME's unit. We hold only that, in the circumstances present here, where Local 60 does not already represent the paramedics, and where Local 311 has filed an election petition in an appropriate unit comprising those paramedics, it is appropriate to grant the election petition and allow both unions to appear on the ballot.[2]

Dated at Madison, Wisconsin, this 20th day of December, 2005.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/
Judith Neumann, Chair

Susan J. M. Bauman /s/
Susan J. M. Bauman, Commissioner

[2] The dissent states that "Allowing an election extinguishes these rights of Local 60," referring to Local 60's "rights to seek inclusion of these positions into its unit by way of negotiations with the City or by seeking a traditional unit clarification." In response, we emphasize that Local 60's statutory right to seek to accrete these employees has been *exercised*, not extinguished, in the instant case. Losing an argument is not equivalent to being denied the right to advance that argument. Similarly, we have considered but rejected Local 60's argument that it had a contractual right to represent these employees. As noted in the majority opinion, the recognition clause could be construed to cover these positions, but that construction is not required by the express language or any necessary implication. The dissent's suggestion that the parties would have excluded these positions expressly in the 2005-07 contract, if that were their intent, is not only speculative but attempts to counter something the majority has not asserted, i.e., that Local 60 has agreed to exclude these positions. Finally, contrary to the dissent's view, our conclusion is not premised solely upon the lapse of time during which Local 60 was inactive in pursuing its alleged contractual right to represent these employees. Had Local 60 been unaware of the existence of these positions or unaware that the City viewed the positions as outside the unit, Local 60's inaction would have substantially less import regardless of the lapse of time.

City of Sun Prairie

Commissioner Paul Gordon - Concurring in Part and Dissenting in Part

I concur with my colleagues that the paramedic only unit proposed by Local 311 is an appropriate bargaining unit.

Inclusion of the paramedics in the existing wall to wall unit, as proposed by Local 60, would also create an appropriate bargaining unit.

However, the controlling issue in this case is whether the election in the unit sought by Local 311 should be directed where the paramedics fall within the scope of the existing Local 60 unit. I dissent from that part of the majority decision which directs such an election.

What It Is

As certified by the Wisconsin Employment Relations Commission in 1983, Local 60 is the exclusive bargaining representative of a unit consisting of:

> . . . all regular full-time and regular part-time employes of the City of Sun Prairie, excluding supervisory, confidential, professional, craft employes, law enforcement employes with the power of arrest, and employes of the Water and Light Department. . . .

In the 2005-2007 collective bargaining agreement between the City and Local 60, the bargaining unit had come to be described by the parties as:

> . . .all regular full-time and regular part-time employees of the City of Sun Prairie, including pages, and excluding supervisory, confidential, professional, craft employees, law enforcement employees with the power of arrest, and employees of the Water and Light Department, Dec. No. 20841, dated August 31, 1982, and Crossing Guards. . . .

The positions at issue here used to be emergency medical technicians, but those positions were eventually changed to become paramedic positions. Whether emergency medical technicians or paramedics, these positions were filled by employees of the City of Sun Prairie and they did not, and do not, come within the exceptions to the otherwise described wall to wall unit of Local 60. These positions are properly within the described unit either as certified or as now contractually recognized. There is nothing in the record which would render such a unit inappropriate. There is no reason why the exclusive nature of Local 60's representation should not be respected.

What It Is Not

I simply disagree with the conclusions drawn by the Majority that: ". . . the actions of both the City and Local 60 indicate that the parties have not construed the recognition clause to cover the new positions and that the paramedics have remained unrepresented". The paramedics may have gone unrepresented since those positions were established sometime in 2004, but that merely begs the question as to the applicability of the recognition clause. I simply disagree that any action or inaction on the part of Local 60 indicates that Local 60 construed the recognition clause the way the majority would have them do so. The record is to the contrary. In March of 2002, when these positions were still emergency medical technicians, Local 60 wrote to the City as follows:

> AFSCME Local 60 is recognized as the exclusive collective bargaining representative for all regular full-time and regular part-time employees of the City of Sun Prairie. Recently, the City established a professional fire department in lieu of the volunteer department. Included in this new City sub-division are four (4) permanent EMT positions.
>
> At this time, we are asking the City to voluntarily accrete the incumbents residing in this EMT position and any other position statutorily subject to accretion into the Local 60 bargaining unit. At that time, we would exercise our rights to bargain on their behalf. Thank you for your consideration in this matter.

Clearly Local 60 is construing the recognition clause to cover these positions.

The question next becomes, by what actions did Local 60 indicate that it somehow changed its mind and that it later construed the recognition clause otherwise? Clearly the City changed its mind and view of the matter by now agreeing that the positions are properly to be included in the Local 60 unit. The next bargain between the City and Local 60 would have been for the 2005-2007 contract. Presumably this would have occurred sometime in 2004 because the contract is signed in December of 2004. It is important to note that by the time of the 2005-2007 contract the recognition clause had changed from the originally certified unit. It now contains both an added inclusion, pages, and an added exclusion, Crossing Guards. If both parties had not construed the clause to cover the new positions then it would have been reflected in a new exclusion of these positions as they had done in the past. They did not do that here. Like the March 2002 letter, this is not an indication that Local 60 did not construe the recognition clause to cover the new positions. If anything it is evidence to the contrary.

So what is left by way of Local 60 actions by which to conclude they did not construe the recognition clause to cover the new positions? The Majority references the fact that Local 60 did not challenge the City's refusal to recognize Local 60 as the paramedics' bargaining representative (for example, through a grievance, an unfair labor practice, or a unit clarification petition), and the failure to pursue the matter after the City's 2002 rejection of

the accretion request. Regardless of how it may be phrased, it is Local 60's inaction for some period of time, as opposed to any positive action, which is left to indicate it did not construe the recognition clause to cover the new positions. Again, I simply disagree that on this record Local 60's inaction can properly be concluded to be an indication that it did not construe the recognition clause to cover these positions. When does inaction become such an indication, if at all? How does this non-action become an indication of anything if not for the passage of time? The Majority apparently views inaction and a failure to pursue the matter as an indication of how Local 60 construed the clause - despite what Local 60 actually said and continues to say. On the contrary, they did seek their inclusion, and at least now the City actually agrees with Local 60 that the employees should be in the unit. It is not unusual for a union and employer to initially disagree as to whether certain employees are or are not to be in a bargaining unit. That initial disagreement may exist for years before an actual agreement is reached on the issue or a unit clarification petition is filed. Even after unit clarification actions are filed with the Commission the parties sometimes reach agreement after the matter has pended for some time. The parties have a three-year contract. In this case the City's 2002 rejection of the Local 60 request is not an agreement by Local 60 that the positions are not in the unit. Quite the opposite is now the case. It is informative that it is the City which has changed its official position and agrees that the positions should be in the wall to wall unit.

The majority's rationale is basically time driven, being based on a "failure to pursue the matter". Time, however, especially where no statutory deadlines are prescribed, needs to be put into context. The record in this case shows that the positions at issue were in somewhat of a state of flux for several years and there was effort by Local 60 to have them included in their unit.

The development of the EMS department shows that some of the services were initially provided by a volunteer agency at the basic life support level. In the 1990s, as the certifications and available services by those volunteers increased and with an increase in demand for services, the City began to provide these services with volunteers, part-time employees, paid on-call employees and full-time employees. The record is not particularly clear as to exactly when these staffing and employment situations developed and changed. By March of 2002 the City employed four emergency medical technicians. As the level and volume of service increased, in 2004 the City upgraded to the paramedic level, sending the then six (6) existing full-time personnel to paramedic school and adding six (6) more full-time paramedics. By January of 2005 there were 12 full-time paramedics. While this situation was developing Local 60 did seek accretion, in March of 2002, of the four emergency medical technicians employed by the City at that time. The City did not agree to the accretion then. There is no record as to the decision making process, if any, as to why Local 60 did not pursue the issue at that time. The department continued to evolve, but there is nothing in the record to show that Local 60 ever agreed with the City that the employees should be excluded from the unit.

The efforts of Local 60 prior to the Local 311 election petition may not have been sustained or particularly aggressive, but in the context of the changing nature of the positions, a three-year contract and the overall timing, it was not so dilatory as to somehow avoid the

language of the certified and recognized bargaining unit. The view that Local 60 has somehow relinquished its right to rely on the certified and recognized scope of the bargaining unit, or has somehow indicated that it does not construe the clause to cover the positions, or that Local 60 ". . . did not view the emergency services employees as already within Local 60's bargaining unit" implies a tacit agreement with the City that the positions are not covered by the clause, and that agreement is evidenced by the failure to pursue the matter. This is essentially an acquiescence argument often found in arbitral law. It is true that the majority agrees that Local 60 has not waived any rights here and they can assert any position it wants. That is understood. But the reliance on inaction to find an indication of how Local 60 construed the clause is still based on waiver principles. Its analysis in the arbitral setting is instructive:

> Especially common in arbitration is that species of waiver known in law as "acquiescence". This term denotes a waiver that arises by tacit consent or by failure of a person for an unreasonable length of time to act on rights of which the person has full knowledge. While arbitrators generally hold that acquiescence by one party to violations of an express rule by the other party precludes action about past transactions, they do not consider that acquiescence precludes application of the rule to future conduct. . . . *Elkouri & Elkouri,* 6th Edition, p. 560.

The application of this principle here is that the majority sees a tacit consent of Local 60 to a particular reading of the recognition clause based on its failure to act for some unspecified length of time. This is acquiescence. The majority's perceived indication of how Local 60 construed the clause is indeed based on principles of waiver even though it is agreed there is no waiver here.

A very similar situation in the broader context of waiver, was present in TAYLOR COUNTY, DEC. NO. 29046-A, (SHAW, 11/97), AFF'D BY OPERATION OF LAW (WERC, 12/97) a refusal to bargain complaint case. In TAYLOR COUNTY a part-time seasonal Fuel Assistance Worker position was not included in a bargaining unit of regular full-time and regular part-time employees. Over time, the position acquired more hours and the County unilaterally decided to "slot" the position into a grade level in the collective bargaining agreement. The Union wrote to the County when this happened in 1993 requesting to negotiate over the wage issue. The County was then willing to negotiate, but there were no negotiations concerning that position and nothing happened on the wage issue. Apparently the Union's bargaining representative was not fully aware of the circumstances and successor agreements were negotiated which did not address the position. The Union filed a complaint in the matter in 1997. TAYLOR COUNTY went on to state:

> The County asserts that the Union waived its right to bargain collectively regarding the Fuel Assistance Worker position by the length of time it let pass between the position's inclusion in the unit in early 1993 and the request for

> bargaining in October, 1996, and by agreeing to the 1996-1998 agreement without mentioning the Fuel Assistance Worker position or proposing changes regarding the position during negotiations. Determinations as to whether or not a waiver exists are to be made by the Commission on a case-by-case basis (citation omitted). It has been said that, "waiver is the intentional relinquishment of a known right" (citation omitted). The Commission applies a rigorous standard to the question of determining whether the right to bargain has been waived, requiring that the waiver be clear and unmistakable. . . .

ID. PP 10-11. TAYLOR COUNTY went on to determine there was no waiver in those circumstances. The decision further noted that even assuming *arguendo*, a waiver by inaction, such a waiver would not continue in perpetuity. A party must be found to have waived a statutory right in a clear and unmistakable manner for the waiver to be held against it. In TAYLOR COUNTY, the union's silence, for whatever reason, did not constitute a clear and knowing waiver of its right to bargain the matter.

Applying these principles to this case, the right of Local 60 to seek clarification of its unit to include the paramedics, its right to rely on the scope of the certified and recognized unit, and the right to negotiate with the City on matters concerning these positions are commensurate with the rights involved in TAYLOR COUNTY. The similar length of time and passing of a negotiation session in between does not constitute a clear and unmistakable waiver of these rights. It is not a reason to exclude positions from a broadly defined unit. The existence of a three-year contract rather than a two-year or even one-year contract additionally militates in Local 60's favor. Occasionally positions are overlooked or their status not raised for any number of reasons. The Commission has historically been unreceptive to asserted waivers of the right of a union to have certain disputed positions included in an existing unit. See, CRAWFORD COUNTY, DEC. NO. 16931-B (WERC, 9/89) (some previously excluded positions changed over approximately 10 years). In CITY OF MILWAUKEE, DEC. NO. 6960-F (WERC, 3/73) at p. 4 the Commission addressed the issue of waiver in yet a different context, but with the same result, as follows:

> It is true that since the issuance of original certification, when these positions were not excluded as professionals, the job content of the positions has not changed. However, the positions in question were not challenged in the earlier lengthy proceedings, and one purpose of clarification proceedings is to determine questions of this nature which were overlooked or otherwise not raised at the time of the original proceedings.

If Local 311 had not initiated its action that would not have prevented Local 60 from exercising its right to seek a unit clarification between it and the City, or from otherwise agreeing with the City that the positions are properly included in the Local 60 unit. The mere fact of Local 311 filing its petition should not change this. Allowing the election in these

circumstances precludes Local 60 from relying on its status as the exclusive bargaining representative of all the employees who were not specifically excluded by the WERC or the parties when describing the scope of bargaining unit.

Unlike the majority, I do not find that the actions of the City and Local 60 indicate that the parties construed the recognition clause to exclude the emergency services employees or that Local 60 did not view the emergency services employees as already within the bargaining unit.

What Is Left

At this juncture it is quite clear that both Local 60 and the City agree that the paramedic positions would be in the Local 60 unit. Local 60 has not waived or otherwise relinquished its rights to seek inclusion of these positions into its unit by way of negotiations with the City or by seeking a traditional unit clarification. Allowing an election extinguishes these rights of Local 60.

The majority opinion allows a new third party to eliminate statutory rights that Local 60 would otherwise have and to infringe upon the collective bargaining agreement with the City as reflected in the recognition clause. This is being done without indicating how long is too long before inaction produces loss of a right or indicating how long a party must go without pursuing a matter before that will become evidence of how it construes a clause.

It is also worth noting that inclusion of the paramedics in the Local 60 unit would not forever deprive Local 311 or the employees in the Local 60 unit (including the paramedics) from challenging Local 60's status as the bargaining representative. If a timely election petition were filed with the required 30% showing of interest, the employees could exercise their statutory right to change, retain or end their represented status.

What Is To Be Done

Local 60 should be allowed to first exercise its rights. After the paramedics are accreted into the Local 60 bargaining unit, then Local 311 could seek to represent the paramedics in the context of the wall to wall unit through a timely filed election petition.

Dated at Madison, Wisconsin this 20th day of December, 2005.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Paul Gordon /s/
Paul Gordon, Commissioner

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