STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of

AFSCME LOCAL 774
POLK COUNTY JOINT COUNCIL

To Initiate Arbitration Between Said Petitioner and

POLK COUNTY

Case 118
No. 67858
INT/ARB-11149

Decision No. 32536

Appearances:

Mindy K. Dale, Weld, Riley, Prenn & Ricci, Attorneys at Law, 3624 Oakwood Hills Parkway, P.O. Box 1030, Eau Claire, Wisconsin 54702-1030, appearing on behalf of Polk County.

Steve Hartmann, Staff Representative, Wisconsin Council 40 AFSCME, P.O. Box 364, Menomonie, Wisconsin 54751, appearing on behalf of AFSCME Local 774, Polk County Joint Council.

ORDER GRANTING MOTION TO DISMISS

On March 19, 2008, AFSCME Local 774 filed a petition with the Wisconsin Employment Relations Commission seeking interest arbitration pursuant to Sec. 111.70(4)(cm) 6, Stats. to resolve an alleged deadlock in negotiations between Local 774 and Polk County. Accompanying the petition was Local 774's "PRELIMINARY FINAL OFFER (SEVERANCE PACKAGE)" which consisted of the following:

1. PAYOUT OF ALL UNUSED COMPENSABLE TIME

2. ONE WEEKS WAGES FOR EACH YEAR OF SERVICE

3. ONE MONTHS HEALTH INSURANCE (FAMILY OR SINGLE) FOR EVERY THREE YEARS OF SERVICE

4. ALL TA'S

On March 31, 2008, the County filed a motion to dismiss the petition asserting that interest arbitration pursuant to Sec. 111.70(4)(cm) 6, Stats. is not available to resolve a deadlock as to impact bargaining that arises during the term of collective bargaining.

The parties thereafter filed written argument-the last of which was received July 14, 2008.

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

ORDER

The petition for interest arbitration is dismissed.

Given under our hands and seal at the City of Madison, Wisconsin, this 2nd day of September, 2008.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/
Judith Neumann, Chair

Paul Gordon /s/
Paul Gordon, Commissioner

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

POLK COUNTY

MEMORANDUM ACCOMPANYING ORDER GRANTING MOTION TO DISMISS

In DANE COUNTY, DEC. NO. 17400 (WERC, 11/79), *aff'd* Cir Ct Dane, 80-CV-0097 6/80, the Commission determined whether interest arbitration pursuant to Sec. 111.70 (4)(cm) 6, Stats. was available as a matter of right to resolve a deadlock as to negotiations with respect to the impact on employees' wages, hours and conditions of employment of a decision to end a program (and terminate the 92 employees so employed) during the term of an existing collective bargaining agreement.

As reflected in the following Conclusion of Law and Declaratory Ruling, the Commission concluded that interest arbitration was not available as a matter of right:

CONCLUSION OF LAW

The mediation-arbitration provisions contained in Sec. 111.70(4)(cm)6, Stats., are only applicable to deadlocks in reopened negotiations under a binding collective bargaining agreement to amend or modify a specific portion of an existing collective bargaining agreement subject to a specific reopener provision or with respect to negotiations over the wages, hours and working conditions to be included in a successor collective bargaining agreement for a new term, or negotiations for an initial collective bargaining agreement where no such agreement exists and that said provisions are, therefore, inapplicable to deadlocks which may arise in other negotiations which may occur during the term of a collective bargaining agreement.

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

DECLARATORY RULING

The County is not required to proceed to mediation-arbitration under the provision of Sec. 111.70(4)(cm)6, Stats., on the deadlock in negotiations with the Association concerning the impact of the County's decision to terminate its special education programs on the wages, hours and working conditions of the employees represented by the Association.

In the Memorandum accompanying the DANE COUNTY decision, the Commission stated the following:

DISCUSSION

Based on the record it is clear that the dispute herein arises out of bargaining over the impact of the County's decision to terminate its special education programs on the wages, hours and working conditions of the employees represented by the Association. It is not a dispute over the wages, hours and working conditions to be included in a successor collective bargaining agreement for a new term. In fact, it would appear that neither party sought to reopen negotiations under the existing collective bargaining agreement for the obvious reason that such negotiations would be pointless in view of the County's decision to terminate its special education programs. The letter dated August 5, 1977, was not a request to amend the agreement under the terms of Article II. The letter in question amounted to a demand to negotiate concerning the decision to terminate the special education programs and the decision, implicit therein, to terminate the employees represented by the Association.

On the other hand, the notice of commencement of negotiatons filed with the Commission on April 17, 1978, was intended to comply (albeit retroactively) with the recently enacted provisions of Sec. 111.70(4)(cm)1, Stats., and the Commission's emergency rule, ERB 31.03, Wis. Adm. Code, to the extent that they were applicable to the impact negotiations that had taken place prior to that date. However, the question of the effectiveness of the Association's attempted compliance with those provisions of the statute and rules is not, in our opinion, controlling on the outcome of the dispute herein. The issue here is not whether the Association adequately complied with all of the prerequisites for the filing of a mediation-arbitration petition set out in Sec. 111.70(4)(cm)6 (introduction), Stats., or whether compliance with that procedure would have, in the Commission's view, tended to result in a settlement. 6/ The issue presented is whether the provisions of Sec. 111.70(4)(cm)6, Stats., are applicable to the deadlock which admittedly occurred in the negotiations over the impact of the County's decision to terminate its special education programs on the wages, hours and working conditions of the employees represented by the Association.

The answer to this question turns on the proper interpretation of certain statutory provisions. Consequently, the parties' arguments which are based on interpretations of the Commission's rules are deemed to be irrelevant unless it can be said that the legislature specifically authorized the Commission to develop rules regarding the applicability of the mediation-arbitration procedure or impliedly did so by failing to address the question itself. In our opinion the legislature specifically addressed the question of the applicability of the

mediation-arbitration procedure. While the wording of the statute leaves some room for debate as to its intended meaning, as reflected in the parties' arguments, we have no doubt that the legislature addressed this issue. For this reason we do not specifically treat each of the parties arguments regarding our emergency and permanent rules other than to point out that the permanent rules were reworded in such a way so as to be more consistent with the wording of the statute and avoid any implication that they were intended to rule on the question presented here sub silentio. 7/

6/ See Sec. 111.70(4)(cm)6a, Stats., which states in relevant part, ". . .If in determining whether an impasse exists the commission finds that the procedures set forth in this paragraph have not been complied with and such compliance would tend to result in a settlement, it may order such compliance before ordering mediation-arbitration."

7/ For example, in a letter dated March 2, 1978, and addressed to the Senate Agricultural, Aging and Labor Committee, Robert J. Taylor, Negotiations/Arbitration Specialist for the Wisconsin Education Association Council suggested the following two changes in the Commission's proposed permanent rules:

> 1. ERB 31.09(1) -- Line 9, change "successor" to "amended" so that the language of the Rules is consistent with 111.70(4)(cm)6, Stats.
>
> 2. ERB 31.09(2) – Line 12, change "successor" to "amended" as above.

In a letter from its general counsel dated March 8, 1978, the Commission advised the Committee of its willingness to incorporate the suggested changes for the reasons indicated.

> Suggestion No. 1: The use of the word "successor" in Section ERB 31.09(1), line 9, constitutes a departure from the statutory language of no intended significance. We will substitute the word "amended" in order to avoid any possible argument that this departure was intended to have a substantive effect.
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> Suggestion No. 2: For the same reasons stated in Suggestion No. 1 the word "successor" in ERB 31.09(2), line 12, will be replaced by the word "amended".

Likewise, because we view the issue here to be one of statutory interpretation, the policy arguments advanced by the Association, some of which are quite compelling based on the unusual factual situation presented here, are largely irrelevant. This is not a case where the legislature has failed to express its intent or granted the Commission considerable latitude in interpreting the statute in a way which, in its view, represents the most appropriate policy choice given the underlying purposes of the legislation. On the contrary, we view the legislation as addressing the question rather specifically.

The key phrase in the law is the phrase contained in Sec. 111.70(4)(cm)6 (introduction). Stats., to the effect that a petition for mediation arbitration can be filed 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. . ." This phrase stands in marked contrast to the parallel phrase contained in the fact finding procedure (Sec. 111.70(4)(c)3, Stats.), which it displaced, to the effect that a petition for fact finding may be filed if the parties are ". . .deadlocked with respect to any dispute between them arising in the collective bargaining process. . ." We have interpreted that provision to cover deadlocks in all disputes which are subject to the collective bargaining process under Sec. 111.70, Stats. 8/

8/ See MILWAUKEE COUNTY (8137-B), 12/67. Cf. MILWAUKEE COUNTY (9754), 6/70. On the other hand, the provisions of Sec. 111.70(4)(cm)5, Stats., which permit the parties to voluntarily agree in writing to arbitrate impasses in bargaining over the terms of any collective bargaining agreement under Subch. IV of Ch. 111, Stats. would, as argued by the Association, appear to be broad enough to encompass all disputes which are subject to the collective bargaining process.

Absent some other indication of legislative intent the wording of this provision would appear, on its face, to limit the application of the mediation-arbitration procedure to situations where the parties are negotiating a collective bargaining agreement which either constitutes the first collective bargaining agreement between the parties or a new agreement to replace an existing or expired agreement. The provisions of Sec. 111.70(4)(cm)6a Stats. calling for the execution of . . .a stipulation, in writing, with respect to all matters which are agreed upon for inclusion in the new or amended collective bargaining agreement. . .and the provisions of Sec. 111.70(4)(cm)6d, Stats., regarding the incorporation of the award into a written collective bargaining agreement are consistent with this interpretation. In fact, nowhere in the procedures outlined

in Sec. 111.70(4)(cm)6, Stats., is there any indication that the legislature anticipated its application to deadlocks other than those which might occur in collective bargaining for a new agreement in this sense.

We note, as do the parties, that the legislature used slightly different terminology in the statutory provision requiring the parties to give notice to the Commission of the commencement of contract negotiations. In Sec. 111.70 (4)(cm)1, Stats., the parties are required to so notify the Commission . . .whenever either party requests the other to reopen negotiations under a binding collective bargaining agreement, or the parties otherwise commence negotiations if no such agreement exists. . ."

On the assumption that the legislature intended the notice requirements to be co-extensive with the applicability of the mediation-arbitration procedure, we believe it is a reasonable interpretation of the legislature's intent to conclude that the reference to "new collective bargaining agreement" in Sec. 111.70(4)(cm)6 (introduction), Stats., and the reference to a "new or amended collective bargaining agreement" in Sec. 111.70(4)(cm)6a, Stats., includes any agreement reached under a reopener clause whether it be a "successor" agreement or an amended agreement reached pursuant to a partial reopener clause. On the other hand, the reference to "reopen[ing] negotiations under a binding collective bargaining agreement" and the "commence[ment] of negotiations if no such agreement exists contained in Sec. 111.70(4)(cm)1, Stats., suggests that negotiations over new matters which arise during the term of a collective bargaining agreement are not covered by the notice requirements or the provisions of Sec. 111.70(4)(cm)6, Stats. 9/

For the above and foregoing reasons we conclude that the mediation-arbitration provisions contained in Sec. 111.70(4)(cm)6, Stats., are only applicable to deadlocks which occur in: (1) reopened negotiations under a binding collective bargaining agreement to amend or modify a specific portion of an existing collective bargaining agreement subject to a specific reopener provision; (2) negotiations with respect to the wages, hours and working conditions to be included in a successor collective bargaining agreement for a new term; or (3) negotiations for an initial collective bargaining agreement where no such agreement exists. Said provisions are therefore inapplicable to deadlocks which may arise in other negotiations which may occur during the term of a collective bargaining agreement. Here it is clear that the deadlock arose in negotiations which dealt with the impact of the County's decision to terminate its special education programs on the wages, hours and working conditions of employees represented by the Association and not in negotiations

that were conducted pursuant to a specific reopener clause or for the purpose of reaching agreement on the wages, hours and working conditions to be included in a successor collective bargaining agreement for a new term. Consequently, we have issued a Declaratory Ruling to the effect that the County is not required to proceed to mediation-arbitration on the deadlock in question. 10/

9/ The kinds of matters which might be subject to the duty to bargain during the term of a collective bargaining agreement ordinarily would be proposed changes in wages, hours and working conditions of bargaining unit employees or the impact of management decisions on the wages, hours and working conditions of bargaining unit employees which are not governed by the terms of the agreement and are not subject to the unilateral control of the employer because of the existence of a waiver of the right to bargain.

10/ We have also today issued an Order dismissing the Association's petition for mediation-arbitration.

In response to a petition for rehearing, the Commission further commented in DANE COUNTY, DEC. NO. 17400-A (WERC, 12/79) as follows:

A fair reading of the Association's Motion indicates that it alleges that the Commission's decision was affected by material errors of law. However, the only "grounds" for the relief sought set out in the Motion, which was not considered by the Commission when it decided the matter, is the fact that the legislature will be asked, when it reconvenes in January, 1980, to "clarify" the law or authorize the application of the mediation-arbitration procedure to the facts here. We do not deem this to be an appropriate basis for granting the Motion.

Prior to our decision the parties were permitted to present evidence and argument with regard to legislative intent of the pertinent provisions. There are no grounds stated in the Motion which would indicate that the Commission's decision neglected to take into account any relevant argument regarding such intent. Any future action by the legislature attempting to clarify its intent would, in our view, be irrelevant to the question of whether we have correctly interpreted the legislature's intent as reflected in Chapter 178, Laws of 1977. 3/

3/ If the legislature passes mandatory legislation, such mandatory legislation would not serve as an appropriate basis for reviewing our decision here which was based on the statutes as they currently read. (citations omitted).

As Local 774 acknowledges, DANE COUNTY holds that there is no right to use Sec. 111.70(4)(cm)6 interest-arbitration to resolve a deadlock in bargaining over the impact of an employer's mid-contract decision to terminate a program (and the employees employed therein) on employees' wages, hours and conditions of employment. Local 774 asks that we overturn DANE COUNTY and conclude that there is such a right. We decline to do so.

The Commission in DANE COUNTY concluded the Legislature had determined that interest-arbitration is not available to resolve mid-contract bargaining deadlocks. The Legislature has not amended the pertinent portions of Sec. 111.70(4)(cm)6, Stats., [1] since DANE COUNTY was issued. This legislative inaction strongly supports a conclusion that the Commission correctly determined that the Legislature intended to provide more limited access to mandatory interest arbitration than Local 774 seeks here. As the Commission noted in DANE COUNTY, we recognize that some compelling policies might favor mandatory interest arbitration in situations, like DANE COUNTY and the instant case, where an employer has decided to cease operations and terminate its entire work force, thus ending its collective bargaining relationship with the union representing those employees. However, those policy choices are for the Legislature. Since, in our view, the Legislature chose a narrower policy when the statute was first enacted and has not changed its mind during the almost 30 years since DANE COUNTY thus interpreted the statute, granting the County's motion to dismiss is appropriate. [2]

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[1] Local 774 correctly notes that the statutory language in question is "new collective bargaining agreement" which the Commission in DANE COUNTY interpreted to mean "a new agreement to replace an existing or expired agreement" or, in other words, "a successor bargaining agreement for a new term." We acknowledge that "new agreement" could be interpreted more broadly to include what Local 774 labels as a "severance or terminal agreement." However, as the County points out, interpreting "new" as including "terminal" or "severance" would be somewhat unique in the labor relations context. The Commission implicitly rejected such a non-traditional interpretation through the result reached in DANE COUNTY, in accordance with the standard rules of statutory construction in which terms are to be given their customary and conventional meanings unless the Legislature makes clear it intends something else. See Sec. 990.01(1), Stats.; PERRIN V. UNITED STATES, 444 U. S. 37, 43 (1979); STATE V. MACARTHUR, ___ WIS.2D ___, 750 N.W.2D 910, 914 (SUP. CT. 2008). The Commission in DANE COUNTY saw nothing in the statute to indicate that the Legislature intended an unconventional meaning, and the Legislature has not seen fit to amend the legislation subsequently to so specify. Accordingly, we conclude that DANE COUNTY properly interpreted the statute in this regard.

[2] As reflected in the Commission's comments on rehearing, the legislature is obviously free to make the policy choice to amend the law to provide access to interest arbitration as a matter of right in future impact bargaining deadlocks. We also note that it is mandatory subject of bargaining to propose that interest arbitration be available to resolve mid-term duty to bargain deadlocks and that interest arbitration is available to seek inclusion of such a proposal in a collective bargaining agreement. See CITY OF MILWAUKEE, DEC. NO. 32115 (WERC, 5/07) and the cases cited therein.

Because this is a matter of law which does not turn on disputed facts [3], we also decline Local 774's request to hold an evidentiary hearing. Such a hearing would produce delay and expense for the parties and, given the statutory nature of the issue before us, could not produce any relevant evidence. We do note that the factual scenario presented in DANE COUNTY (the impact of the loss of jobs caused by the end of a program) is quite comparable to that apparently presented herein (the impact of the loss of jobs caused by the sale of an operation).

Given the foregoing, we have granted the County's motion to dismiss.

Dated at Madison, Wisconsin, this 2nd day of September, 2008.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/
Judith Neumann, Chair

Paul Gordon /s/
Paul Gordon, Commissioner

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

[3] Local 774 does not dispute that the impact bargaining obligation and alleged deadlock in question arose during the term of a collective bargaining agreement.

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