STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of CITY OF MILWAUKEE Involving Certain Employes of CITY OF MILWAUKEE	:	Case 14 No. 38923 ME-189 Decision No. 6215-P Case 3 No. 38922 ME-188 Decision No. 6215-Q

Appearances:

Mr. Thomas C. Goeldner, Assistant City Attorney, City of Milwaukee, 800 City Hall, 200 East Wells Street, Milwaukee, WI 53202-3551, appearing on behalf of the City.

Padway & Padway, Ltd., Attorneys at Law, by Mr. Milton S. Padway, 606 West Wisconsin Avenue, Milwaukee, WI 53203, appearing on behalf of Local 195, IBEW, AFL-CIO.

Milwaukee District Council 48, AFSCME, AFL-CIO entered no appearance and took no position in this matter.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On April 20, 1987, the City of Milwaukee having filed with the Commission a petition, requesting that the Commission issue an order including the Bridge Operator and Bridge Operator Leadworker positions currently constituting a separate unit represented by Milwaukee District Council 48, AFSCME, AFL-CIO and Local 195, IBEW, AFL-CIO in an existing unit represented by Milwaukee District Council 48, AFSCME, AFL-CIO; and copies of said petition having been served on the City of Milwaukee, on Milwaukee District Council 48, AFSCME, AFL-CIO, and on Local 195, IBEW; and following unsuccessful informal settlement discussions between the parties and Commission personnel, the Commission having, on September 29, 1987, noticed the matter for hearing on October 26, 1987; and on October 12, 1987, AFSCME District Council 48 having advised the Commission in writing that it would neither appear at hearing nor enter any position in the instant matter; and on October 13, 1987, the City having amended its above-noted petition to specify that it is the AFSCME Blue Collar unit described in WERC Dec. No. 35926 (6/87) in which it requests the above-noted positions be included, and having filed a statement in support of its petition; and on October 22, 1987, Local 195 having filed a motion to dismiss the City's amended petition, a request that the Commission order the City to cease and desist from interfering with the protected rights of self-determination of the employes holding the positions in question, and a statement in support of its motion and in opposition to the petition; and Counsel for the City and Local 195 having agreed that the Commission should decide the preliminary motion to dismiss without need of a hearing; and on October 23, 1987, the hearing in the matter having been formally postponed indefinitely; and on November 10, 1987, the City having filed a statement in opposition to Local 195's motion to dismiss; and the Commission being fully advised in the premises, makes and issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. The City of Milwaukee (herein City) is a municipal employer with offices at City Hall, 200 East Wells Street, Milwaukee, WI 53202-3551.

2. That Local 195, International Brotherhood of Electrical Workers, AFL-CIO (herein Local 195) is a labor organization with a mailing address of P.O. Box 1375, Milwaukee, WI 53210.

3. That Milwaukee District Council 48, AFSCME, AFL-CIO (herein District Council 48) is a labor organization with offices at 3427 West St. Paul Avenue, Milwaukee, WI 53208; and that District Council 48 has entered no appearance and taken no position in this matter.

4. That on April 16, 1963, in City of Milwaukee, Dec. No. 6215-C, following a representation election conducted by it, the Wisconsin Employment Relations Commission (herein Commission) certified Local 195 as the exclusive collective bargaining representative of a bargaining unit of City employes described in that certification as follows:

> all regular employes having the classifications of Bridgetender and Boat Operator employed in the division of Bridges and Viaducts in the Bureau of Bridges and Public Buildings in the Department of Public Works of the City of Milwaukee, excluding all other employes, confidential employes, supervisors and executives;

that Local 195 has represented that bargaining unit at all times since the Commission's issuance of that certification; and that in its petition, the City describes that bargaining unit as currently consisting of 36 Bridge Operator positions and 7 Bridge Operator Leadworker positions.

5. That on May 6, 1963, in City of Milwaukee, Dec. No. 6215-J, following a representation election conducted by it, the Commission certified District Council 48 as the sole and exclusive collective bargaining representative of a bargaining unit of City employes described in that certification as follows:

> all regular employes employed in the various bureaus in the Department of Public Works of the City of Milwaukee excluding engineers and architects, craft employes receiving prevailing construction and building trade rates, confidential employes, supervisors and executives and also excluding natatorium supervisors, firemen (natatoria), natatorium assistants, bridgetenders and boat operators in the Bureau of Bridges and Public Buildings; Clerks II - field (who are scalemen), cranemen, furnacemen, incinerator plant maintenance workers, garbage disposal laborers, garbage collection laborers, machinery operators, maintenance mechanics, maintenance mechanic foreman and boiler repairmen employed in Incinerator Plants of the Disposal Division of the bureau of Garbage Collection and Disposal; and garbage collection laborers employed in the Collection Division of the Bureau of Garbage Collection and Disposal; and machinists, blacksmiths, laborers (Electrical Services), mechanic helpers and city laborers employed in the Machine Shop of Shops and Yard in the Division of Street Services of the Bureau of Traffic Engineering and Electrical Services.

6. That on April 20, 1987, the City filed the instant petition requesting that the Commission issue an order clarifying the Local 195-represented bargaining unit described in Finding of Fact 4 and the District Council 48 - represented unit described in Finding of Fact 5 in such a way that all of the positions in the former would be unconditionally included in the latter, without a representation election being conducted; and that, in that petition, the City stated the basis for its request as follows:

> This petition is filed for the purpose of seeking implementation of the antifragmentation statute, i.e., Sec. 111.70(4)(d) 2.a.-d., Stats. Local #195, IBEW, AFL-CIO was certified prior to the enactment of the antifragmentation statute and as such is an accident of history.

superceded by the City and District Council 48's agreement to restructure several certified and recognized bargaining units into four agreed-upon units, to wit, blue-collar, professional, technical, and white-collar; and that the blue-collar unit was described in said order as follows:

> All "blue-collar" employes of the City of Milwaukee as more specifically defined as: all employes of the City of Milwaukee (and their successors) occupying the classifications set forth upon Exhibit "A" attached hereto and who are represented for purposes of collective bargaining as to wages, hours and conditions of employment by Milwaukee District Council 48, AFSCME, AFL-CIO, as of April 1, 1987, but excluding all supervisory, confidential, managerial, executive, professional craft, executive, temporary and casual employes, and all other employes of the City of Milwaukee, and further excluding employes of the City of Milwaukee (and their successors) occupying the classifications set forth in Exhibit "A" attached hereto who were as of April 1, 1987, represented either by a collective bargaining representative other than Milwaukee District Council 48, AFSCME, AFL-CIO, for purposes of collective bargaining as to wages, hours or conditions of employment, or who were not represented as of said date by any collective bargaining representative. (Exhibit "A" to blue-collar unit description omitted)

8. That on October 12, 1987, pursuant to a Commission request that the City make its petition more definite and certain in light of the development noted in Finding of Fact 7, above, the City amended its petition herein so as to request that the Commission issue an order clarifying the Local 195-represented bargaining unit described in Finding of Fact 4 and the District-Council 48 represented blue-collar unit described in Finding of Fact 7 in such a way that all of the positions in the former would be unconditionally included in the latter, without a representation election being conducted.

9. That on October 22, 1987, Local 195 filed a motion to dismiss the City's amended petition, asserting that the Commission should refuse to take jurisdiction of the instant petition because Local 195 is duly and conclusively certified as representative of the employes involved, because Local 195 and the City are in the process of negotiating a successor to their historical series of collective bargaining agreements, and because the anti-fragmentation provision in Sec. 111.70(4)(d)2.a., Stats., is tempered by the language of Sec. 111.70(6), which provides that the public interest is promoted by allowing municipal employes the opportunity to bargain collectively if they so desire, through representatives of their own choosing; and that in said motion, Local 195 further requests that the Commission order the City "to cease and desist in its attempt to interfere with the rights of the covered employes to be represented by a labor organization of their own choosing."

10. That the City opposes Local 195's motion to dismiss on the grounds that Local 195's certification pre-dated the adoption of the Sec. 111.70(4)(d)2.a., Stats., anti-fragmentation provision, that the employes represented by Local 195 share a community of interest with employes represented by AFSCME and are promoted to and from positions in that unit, and that the City filed its petition herein shortly after a grievance arbitration became necessary to overcome Local 195's unjustified and potentially-chaos-producing unwillingness to acquiesce in interpretations of its seniority language consistent with the longstanding and uniform interpretations of identical language by the City and each of the other unions with identical seniority language as regards the operation of the City's inter-unit integrated seniority and bumping system.

11. That the City's amended petition seeks, by unit clarification, to incorporate one existing unit into another, solely on the grounds of anti-fragmentation and a claimed community of interest between the positions in the Local 195-represented unit described in Finding of Fact 4 and the District Council 48-represented blue-collar unit described in Finding of Fact 7.

CONCLUSIONS OF LAW

1. That the anti-fragmentation and community of interest grounds upon which the City bases the instant amended petition amount only to a claim that a combined

unit would be more appropriate than the unit for which Local 195 was certified as exclusive representative on May 6, 1963; and that a post-certification petition for unit clarification is not a proper or available means of obtaining Commission adjudication of that claim.

2. That, under Sec. 111.70(4)(d), Stats., a petition for unit clarification is not a proper or available means by which to seek a merger of two existing units.

3. That, under Sec. 111.70(4)(d), Stats., a unit clarification proceeding is not a proper or available means by which to adjudicate or remedy an alleged prohibited practice.

ORDER 1/

1. That the motion filed by Local 195 that the amended petition in this matter be dismissed is hereby granted, and the petition for unit clarification filed by the City in the above matter, as amended, shall be and hereby is dismissed.

2. That Local 195's additional request for an order that the City cease and desist from interfering with employe Sec. 111.70(3)(a)1, Stats., rights to bargain collectively through a representative of their own choosing, is dismissed without prejudice to its merits.

Given under our hands and seal at the City of Madison, Wisconsin this 27th day of January, 1988.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Stephen Schoenfeld
Stephen Schoenfeld, Chairman

Herman Torosian, Commissioner

A. Henry Hempe, Commissioner

1/ Pursuant to Sec. 227.48(2), Stats., the Commission hereby notifies the parties that a petition for rehearing may be filed with the Commission by following the procedures set forth in Sec. 227.49 and that a petition for judicial review naming the Commission as Respondent, may be filed by following the procedures set forth in Sec. 227.53, Stats.

227.49 Petitions for rehearing in contested cases. (1) A petition for rehearing shall not be prerequisite for appeal or review. Any person aggrieved by a final order may, within 20 days after service of the order, file a written petition for rehearing which shall specify in detail the grounds for the relief sought and supporting authorities. An agency may order a rehearing on its own motion within 20 days after service of a final order. This subsection does not apply to s. 17.025(3)(e). No agency is required to conduct more than one rehearing based on a petition for rehearing filed under this subsection in any contested case.

227.53 Parties and proceedings for review. (1) Except as otherwise specifically provided by law, any person aggrieved by a decision specified in s. 227.52 shall be entitled to judicial review thereof as provided in this chapter.

(Footnote 1 continued on Page 5.)

(Footnote 1 continued from Page 4.)

(a) Proceedings for review shall be instituted by serving a petition therefore personally or by certified mail upon the agency or one of its officials, and filing the petition in the office of the clerk of the circuit court for the county where the judicial review proceedings are to be held. Unless a rehearing is requested under s. 227.49, petitions for review under this paragraph shall be served and filed within 30 days after the service of the decision of the agency upon all parties under s. 227.48. If a rehearing is requested under s. 227.49, any party desiring judicial review shall serve and file a petition for review within 30 days after service of the order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. The 30-day period for serving and filing a petition under this paragraph commences on the day after personal service or mailing of the decision by the agency. If the petitioner is a resident, the proceedings shall be held in the circuit court for the county where the petitioner resides, except that if the petitioner is an agency, the proceedings shall be in the circuit court for the county where the respondent resides and except as provided in ss. 77.59(6)(b), 182.70(6) and 182.71(5)(g). The proceedings shall be in the circuit court for Dane county if the petitioner is a nonresident. If all parties stipulate and the court to which the parties desire to transfer the proceedings agrees, the proceedings may be held in the county designated by the parties. If 2 or more petitions for review of the same decision are filed in different counties, the circuit judge for the county in which a petition for review of the decision was first filed shall determine the venue for judicial review of the decision, and shall order transfer or consolidation where appropriate.

(b) The petition shall state the nature of the petitioner's interest, the facts showing that petitioner is a person aggrieved by the decision, and the grounds specified in s. 227.57 upon which petitioner contends that the decision should be reversed or modified.

. . .

(c) Copies of the petition shall be served, personally or by certified mail, or, when service is timely admitted in writing, by first class mail, not later than 30 days after the institution of the proceeding, upon all parties who appeared before the agency in the proceeding in which the order sought to be reviewed was made.

Note: For purposes of the above-noted statutory time-limits, the date of Commission service of this decision is the date it is placed in the mail (in this case the date appearing immediately above the signatures); the date of filing of a rehearing petition is the date of actual receipt by the Commission; and the service date of a judicial review petition is the date of actual receipt by the Court and placement in the mail to the Commission.

CITY OF MILWAUKEE

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The background facts, procedural development and basic positions taken by the parties in this case are as stated in the preface and Findings of Fact. All parties have had the opportunity to submit written arguments in support of and in opposition to the motion to dismiss.

POSITIONS OF THE PARTIES

The main thrust of Local 195's motion to dismiss is that there is no basis in law for the City to attempt to undo the results of the representation election certified by the Commission in 1963. Local 195 asserts that MERA's anti-fragmentation provision added in 1971 is not absolute, either by its terms or by its historical and judicially-approved mode of application by the Commission. Citing, Arrowhead United Teachers v. WERC, 116 Wis.2d 580, 601-3 (1984). Instead, Local 195 asserts, the right of employes to bargain through representatives of their own choosing--which is protected from employer interference by Sec. 111.70(3)(a)1, Stats., and underscored in the Legislature's policy statement in Sec. 111.70(6), Stats.,--must also be given effect. 2/ Where, as here, the municipal employer seeks to disrupt an on-going relationship in total disregard to employe choice, it is clearly acting in a manner inconsistent with the basic requirements of MERA. The Commission should therefore not only dismiss the petition out of hand, but also order the City to cease and desist from such Sec. 111.70(3)(a)1, Stats., interference with employe rights.

The City's basic contention is that the Local 195 unit was established at a time when the anti-fragmentation provision did not exist. While the Arrowhead decision, supra, 116 Wis.2d at 601-3, recognized that in "special situations" anti-fragmentation considerations would need to give way to other factors, there is no such special situation present here. Far from making an untimely effort to appeal the 1963 certification, the City merely seeks herein to bring its unit structure into conformity with the requirements of present-day statutory unit appropriateness criteria and current municipality-labor circumstances and relationships. In that regard, the City notes that it filed its petition within four months of the grievance arbitration award resolving what might have been a chaotic situation caused by Local 195's unwillingness to interpret its seniority language the way identical language has long been interpreted with all of the other unions in the City's integrated seniority system. The City contends that Local 195's charge of interference has no place in a unit clarification proceeding. The City requests that the motion to dismiss be denied and that the Commission go forward with the processing of the City's petition for unit clarification.

DISCUSSION

The Commission had occasion to address the same basic issues as are presented herein in the recent City of Milwaukee, Dec. No. 7432-A (WERC, 11/87). In that case we dismissed the City's petition for unit clarification which sought--without an election--to include all of the employes in one unit in a different bargaining unit on grounds of anti-fragmentation and community of interest. Quoting at length from Shawano County (Maple Lane Health Care Center), Dec. No. 22382, aff'd Case No. 85 CV 86 (Cir. Ct. Shawano, 7/22/85), the Commission reiterated:

The Commission does not consider the unit clarification procedure a proper means of securing a combination of two existing bargaining units into one combined unit. This is especially so where, as here, the two units are currently represented by different labor organizations. The County has cited no previous Commission case in which a unit clarification petition to such end was entertained or granted. (footnote omitted)

The unit clarification process is not an available means of attacking the appropriateness of a collective bargaining unit except where there is a claim that an existing unit is unlawful, that is, contrary to an unequivocal statutory requirement.

The County's contentions do not amount to a claim that the unit is in conflict with an unequivocal requirement of the statute, as would be the case, for example, if a claim were made that a certified unit included professional employes with non-professionals without the vote of a majority of the professional in favor of such inclusion required by Sec. 111.70(4)(d)2.a., Stats. Although the County's anti-fragmentation argument is phrased in terms of the unit's alleged repugnance to the statute, that argument amounts only to a claim that the combined unit would be more appropriate than the unit for which the United Professionals is now certified to represent. While the above-noted requirement for a self-determination vote among professionals constitutes an unequivocal statutory requirement before a combined professional-nonprofessional unit can be certified, the anti-fragmentation provision of the statute is a less absolute, general statement of unit determination policy 6/ which the Commission has, with judicial approval historically included as one of several factors considered in resolving appropriate unit disputes. 7/

6/ Section 111.70(4)(d)2.a., Stats., states in pertinent part,

> The commission shall determine the appropriate bargaining unit for the purpose of collective bargaining and shall whenever possible avoid fragmentation by maintaining as few units as practicable in keeping with the size of the total municipal work force. . . . The commission shall not decide, however, that any unit is appropriate if the unit includes both professional employes and nonprofessional employes unless a majority of the professional employes vote for inclusion in the unit. . . .

7/ In resolving disputes concerning appropriate units, the commission has consistently applied the following criteria,

> 1. Whether the employes in the unit sought share a "community of interest" distinct from that of other employes.
>
> 2. The duties and skills of the employes sought as compared with the duties and skills of other employes.
>
> 3. The similarity of wages, hours and working conditions of employes in the unit sought as compared to wages, hours and working conditions of other employes.

4. Whether the employes in the unit sought have separate or common supervision with all other employes.

5. Whether the employes in the unit sought have a common work place with the employes in said desired unit or whether they share a work place with other employes.

6. Whether the unit sought will result in undue fragmentation of bargaining units.

7. Bargaining history.

E.g., Arrowhead School District, Dec. No. 17213-B (WERC, 6/80) aff'd sub. nom., Arrowhead United Teachers v. WERC, 116 Wis. 2d 580 (1964); City of Madison (Water Utility, Dec. No. 19584 (WERC, 5/82); and Green County (Department of Human Services), Dec. No. 21433 (WERC, 2/84).

City of Milwaukee, supra, at 7-8.

Here, as in City of Milwaukee, supra, and Shawano County, supra, the employer has made no claim or showing that the nature and/or continued existence of the unit in question is contrary to an unequivocal statutory requirement.

It is true that the City did not have an opportunity to assert its anti-fragmentation and certain other arguments concerning appropriateness of the Local 195-represented unit as compared with some other possible unit structure because the Local 195-represented unit came into being under the substantially different legal standards and procedures for determining bargaining units that existed in 1963 as compared to those enacted in 1971. Nevertheless, the City's amended petition seeks, by unit clarification (and hence without a vote among the affected employes) to alter both the bargaining unit structure and the indentity of the representative for the positions now included in the Local 195-represented unit. We are satisfied that the interests served by maintaining the existing unit structure despite possible antifragmentation or community of interests considerations outweigh the impact on the City of continuing to operate with the current unit structure.

As we stated in City of Milwaukee, supra, at 9:

> Granting the City's petition would deprive the employes both of the fruits of the free choice exercised in the . . . (previously conducted) election and of any free choice in the matter of their current representation. Section 111.70(6), Stats., declares that "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 or other representative of the employes' own choice." Balancing the interests of the instant employes in freedom of choice against those of the employer in streamlining its unit structure to avoid undue fragmentation, we find that in the context of the instant amended petition, the former considerations outweigh the latter.
>
> Our decision herein does not mean that the existing unit arrangements are not subject to challenge through other means. A timely-filed and properly supported labor organization petition for a representation election in an appropriate unit including the positions currently included in the . . . (instant) unit with other positions would be a valid means by which the unit issue could be litigated on its merits. A material change in the City's organizational structure might also permit the City to initiate a petition for election raising the issue. See, e.g., Portage County, Dec. No. 18792-A (WERC, 7/81) and Green County, Dec. No. 21453 (WERC, 2/84).

> In the instant circumstances, however, the City seeks to eliminate an existing unit, merge it with another represented by another union, without any opportunity for employe expression of choice, and without the impetus of a presently unlawful unit structure. We have therefore concluded that the City's unit clarification petition is not an appropriate means of achieving the ends sought by the City herein, and we have accordingly granted . . . (the Local's) motion for dismissal.

For the same reasons, we have granted Local 195's motion to dismiss the City's petition herein.

On the other hand, we agree with the City that this unit clarification proceeding is not a proper proceeding in which to adjudicate Local 195's contentions that the City's filing of the instant petition constitutes employer interference with employe rights violative of Sec. 111.70(3)(a)1, Stats. See generally, City of Madison, Dec. No. 23183 (WERC, 1/86) at 12-13, citing, City of Milwaukee, Dec. No. 6960 (WERB, 12/64). Accordingly, we have dismissed that charge of interference without prejudice to its merits.

Dated at Madison, Wisconsin this 27th day of January, 1988.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By ______________________________
Stephen Schoenfeld, Chairman

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Herman Torosian, Commissioner

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A. Henry Hempe, Commissioner