STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS BOARD

WILLIAM E. MOES, Complainant, vs. CITY OF NEW BERLIN, Respondent.	Case IV No. 9897 MP-17 Decision No. 7293

Appearances:
Mr. Robert E. Gratz, Attorney at Law, for the Complainant.
Mr. Clayton A. Cramer, City Attorney, for the Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

The above entitled matter having come on for hearing before the Wisconsin Employment Relations Board on the 27th day of October, 1964 at New Berlin, Wisconsin, Chairman Morris Slavney being present; and the Board having considered the evidence and arguments and briefs of Counsel, and being fully advised in the premises, makes and files the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. That William E. Moes, hereinafter referred to as the Complainant, is an individual residing at 16046 South Monterey Drive, New Berlin, Wisconsin.

2. That City of New Berlin, hereinafter referred to as the Respondent, is a municipal corporation and has its principal office at 16300 West National Avenue, New Berlin, Wisconsin.

3. That on January 23, 1963, following an election conducted by it, the Wisconsin Employment Relations Board certified Local 647, American Federation of State, County and Municipal Employees, AFL-CIO, hereinafter referred to as the Union, as the exclusive collective bargaining representative of all employes of the Respondent employed in its Highway and Street Departments, excluding department heads and supervisory employes.

4. That in June, 1962, the Complainant commenced his employment with the Respondent as a part-time employe in a classification in the above noted collective bargaining unit; and that in December, 1962, the Complainant became a full-time employe of the Respondent and continued to be employed in said collective bargaining unit until October 1, 1963, on which date his employment was terminated by the Respondent.

5. That at the time of his termination Complainant had the least seniority of any full-time employe employed in the Respondent's Highway and Street Departments; that Complainant was terminated as a result of a determination by the Respondent to sub-contract some of its highway and street construction and maintenance work because of economic reasons, that the sub-contracting of said work resulted in the need of fewer employes, and since the Complainant had the least seniority of any employes involved, the Complainant was terminated on the date previously noted; and that the determination of the Respondent to sub-contract said work and to terminate the employment of the Complainant was made without notice, consultation, discussion or bargaining with the Union.

6. That on December 16, 1963, following petitions filed by the Union requesting the Board to initiate fact finding, and after an informal investigation thereon, the Board issued an order initiating fact finding, wherein it found that the Union and Respondent were deadlocked after a reasonable period of negotiations with respect to wages and a guaranteed work week of forty-five (45) hours for employes in the collective bargaining unit, and also with respect to the discharge of Complainant and another named employe; that pursuant to that Order the parties proceeded to fact finding before Reynolds C. Seitz of Milwaukee; that on February 25, 1964 the Fact Finder issued his recommendations wherein he urged the Union to reduce its demand for a guaranteed work week to forty (40) hours, and wherein he further recommended that the Respondent submit additional data to the Union with respect to wage factors and with respect to the termination of thetwo employes; and that the Fact Finder made no specific recommendations with respect to the propriety of said terminations.

Upon the basis of the above and foregoing Findings of Fact, the Board makes the following

CONCLUSIONS OF LAW

1. That the Complainant, William E. Moes, is a proper party in interest, within the meaning of Section 111.70(4)(h), so as to file a complaint with the Wisconsin Employment Relations Board, alleging that the termination of his employment by the Respondent, City of New Berlin, constitutes a prohibited practice within the meaning of Section 111.70 of the Wisconsin Statutes.

2. That the recommendations of Fact Finder, Reynolds C. Seitz, issued on February 25, 1964, with respect to the termination of the employment of the Complainant, William E. Moes, by the Respondent, City of New Berlin, do not constitute res ajudicata of the issues raised in the instant proceeding.

3. That, since Section 111.70 of the Wisconsin Statutes, the

statutory provision relating to labor relations in municipal employment, does not impose any statutory duty, which is enforceable in a proceeding before the Wisconsin Employment Relations Board, upon either a municipal employer or the representative of its employes, in an appropriate collective bargaining unit, to bargain in good faith over wages, hours and conditions of employment governing municipal employes, the Respondent, City of New Berlin, has not committed any prohibited practices within said section by failing to notify, consult, discuss or bargain with the Union, Local 647, American Federation of State, County and Municipal Employees, AFL-CIO, with respect to sub-contracting of work previously performed by employes in its Highway and Street Departments, or with respect to the termination of employment of Complainant, William E. Moes.

4. That the termination of employment of the Complainant, William E. Moes by the Respondent, City of New Berlin, on October 1, 1964, did not constitute a prohibited practice within the meaning of Section 111.70 of the Wisconsin Statutes.

Upon the basis of the above and foregoing Findings of Fact and Conclusions of Law, the Board makes the following

ORDER

IT IS ORDERED that the complaint filed in the instant matter be, and the same hereby is, dismissed.

Given under our hands and seal at the City of Madison, Wisconsin this 24th day of March, 1966.

WISCONSIN EMPLOYMENT RELATIONS BOARD

By _____
Morris Slavney, Chairman

_____
Zel S. Rice II, Commissioner

I concur in part and dissent in part.

_____
Arvid Anderson, Commissioner

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS BOARD

WILLIAM E. MOES, Complainant, vs. CITY OF NEW BERLIN, Respondent.	Case IV No. 9897 MP-17 Decision No. 7293

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The complaint herein was filed by Moes, as an individual whose employment had been terminated by the Municipal Employer. He contended that his discharge constituted a prohibited practice in that it interfered, restrained, coerced and discriminated against him in the exercise of the rights guaranteed in Section 111.70(2) and (3) of the Wisconsin Statutes, and that the Municipal Employer "failed, refused and neglected at all times to bargain" with the Union concerning said discharge, and "failed and refused to meet and negotiate in good faith at reasonable times in a bona fide effort to arrive at a settlement concerning said discharge" in violation of Section 111.70(4)(e)2 of the Wisconsin Statutes.

In its answer, the Municipal Employer generally denied the commission of any prohibited practice and further, affirmatively alleged, in effect, that the fact finding proceeding constituted res adjudicata of the issues herein. At the outset of the hearing the Municipal Employer moved to dismiss the complaint, contending that the Union and not the individual employe was the proper party complainant. Said motion was denied by Chairman Slavney, who conducted the hearing, and his ruling in that regard is herein confirmed.

Section 111.70(4)(h)1 provides as follows:

> "Proceedings to prevent prohibited practices. Any labor organization or any individual affected by prohibited practices herein is a proper party to proceedings by the board to prevent such practice under this subchapter."

The complaint alleged that the discharge of Moes constituted a prohibited practice. Moes is the "individual affected" by the termination of his employment by the Municipal Employer.[1/] The fact

1/ We do not deem it necessary to discuss the right of Moes to proceed on the complaint that the Municipal Employer failed to meet and negotiate in good faith for reasons which will become obvious subsequently herein.

that at the time the Union was the certified collective bargaining agent of the employes does not preclude an individual represented by said collective bargaining agent from initiating the instant proceeding. Under the above-quoted section of the statute, either the Union or Moes could have filed the complaint of prohibited practices.

The matter of the propriety of the Municipal Employer's act in discharging Moes and another employe was ordered to fact finding, and on February 25, 1964 the fact finder issued his recommendations. Complainant's Counsel contends that "in effect" the fact finder concluded that Moes was not discharged for cause. The fact finder did not specifically make such a finding. He did state: "I find here that in respect to the discharges on the grounds that the employes did not perform their duties properly, the City did not accord due process which arbitrators and courts insist upon." The fact finder also made no specific recommendations with respect to the re-employment of Moes.

The fact that the discharge of Moes was involved in the fact finding proceeding, does not preclude a determination by this Board as to whether the Municipal Employer discriminatorily discharged Moes in violation of Section 111.70. In the first instance, the fact finder's recommendations, if any, are merely advisory and not binding upon parties to the fact finding. Such a result cannot constitute res adjudicata of the issues with respect to Moes' discharge. This is so even had the fact finder recommended that Moes be reinstated to active employment.

The Board by virtue of Section 111.70(4)(a), Stats., is specifically granted jurisdiction to adjudicate the issue of whether any person has committed a "prohibited practice" defined in Section 111.70(3), Stats.; and if it is concluded that a prohibited practice has been committed, the Board has authority to require the party committing the prohibited practice to take such action as will remedy the violation. The Board's Orders are reviewable and enforceable in the courts. Therefore, we find there to be no sound reason in law or policy which would act to bar Complainant from presently proceeding before the Board to seek an adjudication as to whether the City committed a prohibited practice in terminating his employment.

It is also important, we believe, to clarify another procedural point in regards to the relationship between "fact-finding proceedings" and complaint proceedings alleging prohibited practices. Fact finding procedures are designed to be non-adversary in character, whereas complaint proceedings are clearly of an adversary nature. The responsibility for the determination of the facts in a

prohibited practice case brought before this Board pursuant to Section 111.70(4)(a) has been lodged with this Board. The Board cannot relieve itself of this responsibility by pro forma acceptance of the facts as found by a fact finder in a possibly related earlier fact finding case involving one or more of the same parties. The record before the Board must be made de novo in the prohibited practice proceeding and must contain all the material facts upon which a party relies in establishing its case. The Board will make its independent finding of facts, conclusions of law, and order only upon the record as made before it in the prohibited practice proceeding.

The Complainant in the instant proceeding argues that his discharge was the result of a discriminatorily motivated decision by the City to contract out work formerly performed by the employes in the bargaining unit, and therefore was in violation of Section 111.70(3)(a)1 and 2.

However, the evidence in the instant record is insufficient to establish or attribute any unlawful motive to the City in its decision to contract out work. The evidence relied upon to establish an unlawful motive consists of two alleged statements made by Mr. Klawitter, Superintendent, one of which was allegedly made in January 1963, and the other allegedly made in June, 1963.[2/]

With respect to the alleged statement made in January, 1963, assuming arguendo that Klawitter had made the statement, it is our conclusion that it is too remote in time and too isolated an incident to base a finding of unlawful motivation in contracting out the work. In this regard we wish to note that the alleged statement was made some nine months before the discharge, and some 20 months before the filing of the complaint.

With respect to the alleged statement made in June, 1963, we conclude that it was nothing more than a statement of position that if the bargaining representative persisted in its economic demands for a 45-hour guaranteed work week, the City for economic reasons would consider contracting out more work. While to the employe this may be considered a "threat", it is a "threat" to take lawful action, i.e., contracting out work for economic reasons.

The Complainant argues that the City took inconsistent positions before the fact finder from the position taken before the Board with respect to the reason for Complainant's termination. It would appear that the Complainant's argument is that the City

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2/ Mr. Klawitter denied making the statements, but because of the disposition we have made, it is unnecessary to resolve any credibility issues.

thought of the contracting out of work as a defense only after the fact finder had issued his report wherein it could be inferred that upon the evidence presented to him, the City had not been able to establish "just cause" as a basis for terminating two employes.

Some of the confusion on this point emanates from the fact that due to contracting out more work, there was need for fewer employes, which is what gave rise to the decision to terminate some employes. However, just which employes were to be selected and how many was determined by other factors unilaterally decided by the City. Thus, both the contracting out of work and the reason given before the fact finder played a role in determining why Complainant was ultimately terminated.

Again we wish to emphasize that there is no contention that Complainant's selection for termination was discriminatorily motivated, and in fact there is no evidence to establish that Complainant was more active or that he was a leader on behalf of the Union or that his circumstances were any different than any of the other employes in the unit.

The most that Complainant can assert under the circumstances is that his selection for termination was arbitrary; but if the reason for discharge is not for an unlawful purpose prescribed by Section 111.70(3)(a), this Board has no jurisdiction to remedy mere arbitrary action. This is not to say that the City's actions in this regard were arbitrary, for it was established that Complainant had the least seniority of the full-time employes.

We conclude that the City had lawful economic reasons which justified its decision to contract out more work and reduce the number of its regular full-time employes.

We now approach a crucial issue raised in this proceeding, and that is whether Section 111.70 permits the Board to enter an order against a municipal employer requiring it to bargain in good faith on questions of wages, hours and working conditions covering employes of said municipal employer represented by the union in an appropriate bargaining unit. Section 111.70 does not contain language indicating that a refusal to bargain collectively in good faith is a specific prohibited practice. The question then arises as to whether such a prohibited practice may be implied as being within the meaning of Section 111.70(3)(a)1, which provides as follows:

> "Municipal employers, their officers and agents are prohibited from interfering with, restraining or coercing any municipal employe in the exercise of the rights provides in sub. (2).".

Section 111.70(2) defines the rights of municipal employes as follows:

> "Municipal employes shall have the right of self-organization, to affiliate with labor organizations of their own choosing and the right to be represented by labor organization of their own choice in conferences and negotiations with their municipal employers or their representatives on questions of wages, hours and conditions of employment, and such employes shall have the right to refrain from any and all such activities."

The only provisions relating to the failure or refusal to meet and negotiate in good faith in public employment are contained in Section 111.70(4) as follows:

> "(e) Fact Finding. Fact finding may be initiated in the following circumstances: 1. If after a reasonable period of negotiation the parties are deadlocked, either party or the parties jointly may initiate fact finding; 2. Where an employer or union fails or refuses to meet and negotiate in good faith at reasonable times in a bona fide effort to arrive at a settlement."

> "(f) Same. Upon receipt of a petition to initiate fact findings, the board shall make an investigation and determine whether or not the condition set forth in par. (e) 1 or 2 has been met and shall certify the results of said investigation. If the certification requires that fact finding be initiated, the board shall appoint from a list established by the board a qualified disinterested person or 3-member panel when jointly requested by the parties, to function as a fact finder."

> "(g) Same. The fact finder may establish dates and place of hearings which shall be where feasible in the jurisdiction of the municipality involved, and shall conduct said hearings pursuant to rules established by the board. Upon request the board shall issue subpoenas for hearings conducted by the fact finder. The fact finder may administer oaths. Upon completion of the hearings, the fact finder shall make written findings of fact and recommendations for solution of the dispute and shall cause the same to be served on the municipal employer and the Union."

While it may be argued that the refusal of a municipal employer to bargain collectively in good faith with the representative of its employes as a result of discharge or concerted activity of employes, tends to interfere with their right of self-organization and membership in a labor organization of their own choosing, the Board must determine whether the Wisconsin Legislature, in enacting the municipal employer-employe labor relations statute, intended to make such a prohibited practice under the statute. In 1939 the Wisconsin Legislature enacted a comprehensive labor relations statute applying to non-municipal and non-public employers and employes and their representatives. The Wisconsin Employment Peace Act has remained, except in a few

instances, in the form originally enacted. In Section 111.04, it established the rights of employes as follows:

> "Employes shall have the right of self-organization and the right to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection; and such employes shall also have the right to refrain from any or all of such activities."

It contains a provision setting forth employer unfair labor practices. Provisions therein material for the Board's consideration herein are as follows:

> "Section 111.06 What are unfair labor practices. (1) It shall be an unfair labor practice for an employer individually or in concert with others:
> (a) to interfere with, restrain or coerce his employes in the exercise of the rights guaranteed in section 111.04.
> (d) To refuse to bargain collectively with the representative of a majority of his employes in any collective bargaining unit;
> (e) To bargain collectively with the representatives of less than a majority of his employes in a collective bargaining unit;"

It would appear to us that had the legislature intended that a refusal to bargain in good faith in public employment should constitute a prohibited practice, it would have specifically provided for same in the statute, especially since, in Wisconsin, a comprehensive labor relations statute affecting employes in private industry has contained such a provision for over twenty-five years. We conclude that the intent is otherwise and this conclusion is reached in examining the applicable provisions of Section 111.70.

In the first instance, while Section 111.04 specifically recognizes that employes in private industry have the right "to bargain collectively through representatives of their own choosing", the corollary provision in the public employer-employe labor relations statute does not contain such an expressed right. We do not deem the language "Municipal employes shall have the right . . .to be represented by labor organizations of their own choice in conferences and negotiations with their municipal employers or their representatives on questions of wages, hours and conditions of employment" to establish a duty upon a municipal employer to bargain collectively.

On further examination of the pertinent provisions of

Section 111.70 we observe that subsection (4)(d) provides as follows:

> "Collective bargaining units. Whenever a question arises between a municipal employer and a labor union as to whether the union represents the employes of the employer, either the union or the municipality may petition the board to conduct an election among said employes to determine whether they desire to be represented by a labor organization. Proceedings in representation cases shall be in accordance with ss. 111.02(6) and 111.05 insofar as applicable, except that where the board finds that a proposed unit includes a craft the board shall exclude such craft from the unit. The board shall not order an election among employes in a craft unit except on separate petition initiating representation proceedings in such craft unit."

We observe that such language contains no reference to Section 111.02(5) of the Wisconsin Employment Peace Act, which provides as follows:

> "'Collective bargaining' is the negotiating by an employer and a majority of his employes in a collective bargaining unit (or their representatives) concerning representation or terms and conditions of employment of such employes in a mutually genuine effort to reach an agreement with reference to the subject under negotiation."

We are convinced that the legislature, in enacting Section 111.70, did not intend to provide that a municipal employer engaged in prohibited practice by refusing to bargain, or to engage in conferences and negotiations, in good faith with the representative of its employes since it established a procedure for fact finding in those situations where either the municipal employer or the representative of its employes "fails or refuses to meet and negotiate in good faith at reasonable times in a bona fide effort to arrive at a settlement". If the refusal to meet and negotiate in good faith were to be considered a prohibited practice under Section 111.70(3)(a)1, it would appear illogical for the legislature to have established two types of procedures to cover such a matter since to do so would have established inconsistent remedies. The powers of the Board to prevent prohibited practices are governed by Section 111.07 which, in part, provides that the Board may issue orders which shall contain the Board's determination as to the rights of the parties, and further, that "final orders may dismiss the charged or require the person complained of to cease and desist from the unfair labor practices found to have been committed . . . and require him to take such action . . . as the Board may deem proper." Under this provision, the Board's orders may be enforced in the courts of this State.

The powers of the Board with respect to an issue as to whether a municipal employer or the representative of its employes

has failed or refused to meet and negotiate in good faith at reasonable times in a bona fide effort to arrive at a settlement are set forth in Section 111.70(4)(f), and such powers are limited to making an investigation and to determining whether either party has refused to bargain in good faith and, if such determination is reached, to initiate a fact finding proceeding and appoint a fact finder. The Board has no remaining formal functions following the issuance of its Order appointing the fact finder. After conducting his hearings, the fact finder issues his findings of fact and recommendations for the resolution of the dispute. The fact finder's recommendations can only be effective if the parties involved voluntarily implement his recommendations. The fact finder's recommendations are not enforceable either by the Board or by the courts of this State. Where the fact finder has determined that the municipal employer or the representative of its employes have refused to meet and negotiate in good faith, the fact finder, at the most, could recommend that the parties engage in good faith bargaining.

In the Wisconsin Employment Peace Act, the legislature recognized that the encouragement of collective bargaining in private employment requires an obligation of the employer to bargain in good faith with the representative of its employes. At the time the legislature enacted the municipal employer-employe labor relations statute, it apparently felt that the development of collective bargaining in public employment had not reached the stage where the Wisconsin Employment Relations Board can require a municipal employer to bargain collectively in good faith with the authorized representative of its employes in a collective bargaining unit.

In our opinion, if it is the policy of this State to protect the right of employes in municipal employment to engage in concerted activity and to be represented for the purposes of conferences and negotiations, it would be fitting to implement that right to specifically set forth in the statute the right of employes and their representatives to bargain collectively on their behalf with their municipal employer and further to include statutory language to protect same.

Dated at Madison, Wisconsin this 24th day of March, 1966.

WISCONSIN EMPLOYMENT RELATIONS BOARD

By _____
Morris Slavney, Chairman

_____
Zel S. Rice II, Commissioner

OPINION OF COMMISSIONER ARVID ANDERSON CONCURRING IN PART AND DISSENTING IN PART

I concur in the ultimate conclusion that the complaint in this matter should be dismissed. My colleagues believe it necessary to determine herein certain basic and fundamental questions, (1) whether subchapter IV, Chapter III, Wisconsin Statutes, gives to municipal employes the right to engage in collective bargaining with their municipal employers in regard to their wages,hours and conditions of employment; (2) whether subchapter IV, Chapter III, Wisconsin Statutes, imposes upon the municipal employer a duty to bargain collectively with the majority representative of its employes in regard to their wages, hours and conditions of employment; (3) and whether the violation of the duty to bargain by either the municipal employer or the bargaining representative is a prohibited practice within the meaning of Section 111.70(3), Wisconsin Statutes. I would not deem it necessary in this proceeding to determine these important questions, because the instant complaint is brought by an individual rather than a labor organization. Prior to the hearing the labor organization herein abandoned its representative status. However, since the majority has concluded that the answer to all three issues set forth above is negoative, I must respectfully register my dissent to these conclusions.

While my colleagues have stated the issue to be "whether Section 111.70 permits the Board to enter an order against a municipal employer requiring it to bargain in good faith on questions of wages, hours and working conditions covering employes of said municipal employer represented by the union in an appropriate collective bargaining unit", they have, in fact, determined three fundamental and basic issues.

They have determined that:

1. Municipal employes have no enforceable right under Section 111.70(2) to engage in "collective bargaining".

2. Municipal employers have no legal duty to bargain collectively with the bargaining representative selected by a majority of its employes.

3. That since there is no legal bargaining duty imposed upon anyone, that to refuse to bargain cannot be deemed a prohibited practice.

The first issue that I believe must be answered is whether subchapter IV, Chapter III was intended to grant to municipal employes the right to bargain collectively through representatives of their own choosing, in regard to their wages, hours and conditions of employment.

In 1959, subchapter IV of Chapter III of the Statutes was enacted.[3] The law was entitled, "Right of Public Employes to Organize of Join Labor Organizations". The law, as passed in 1959, contained only three basic provisions, one of which was the following:[4]

> "Municipal employes shall have the right of self-organization, to affiliate with labor organizations of their own choosing and the right to be represented by labor organizations of their own choice in conferences and negotiations with their municipal employer or their representatives on questions of wages, hours and conditions of employment, and such employes shall have the right to refrain from any and all such activities."

However, while Chapter 509, Laws of 1959, declared that municipal employes had certain rights among which was, "the right to be represented by labor organizations of their own choice in conferences and negotiations with their municipal employer. . .", it did not contain any administrative procedures for determining such issues as whom the municipal employer had to deal with when several labor organizations claimed the right to represent its employes.

Thus, Chapter 509, Laws of 1959, appears to have afforded municipal employes the right of so-called "members only bargaining" as distinguished from "collective bargaining" with an exclusive bargaining representative.

The 1961 legislature, in order to implement the rights established by Chapter 509, amended subchapter IV, Chapter III, Wisconsin Statutes, by adding paragraph (4) to Section 111.70, which states:

> "POWERS OF THE BOARD. The board shall be governed by the following provisions relating to bargaining in municipal employment. . ." (emphasis added).[5]

Thereafter, subchapter IV, Chapter III became entitled, "Right of Public Employes to Organize of Join Labor Organizations; Bargaining in Municipal Employment" (emphasis added).[5a] Clearly the language manifests that "bargaining in municipal employment" was the underlying legislative intent in enacting subchapter IV, Chapter III, Stats.

Paragraph 4(d) is entitled collective bargaining units. Paragraph 4(e) provides for fact finding if the parties are deadlocked after a reasonable period of negotiations or where either an employer or union refuses to negotiate in good faith. Paragraph

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3/ Chapter 509, Laws of 1959.

4/ Section 111.70(2), Wis. Stats.

5/ Chapter 663, Laws of 1961

5a/ In citing the title to subchapter IV, Chapter III, I am aware of Section 990.001(6), Stats., but emphasize that the words "bargaining" and "collective bargaining unit" also appear in the body of the statute.

4(h)(2) refers again to collective bargaining units. Paragraph 4(i) refers to negotiations with a labor organization representing a majority of employes in a collective bargaining unit. (emphasis added)

The 1961 amendments contain extensive administrative procedures in regard to the determination of bargaining units and the holding of secret elections among municipal employes, as well as conferring jurisdiction upon this Agency to entertain complaints of prohibited practices.

The repeated use of the terms "bargaining," "negotiations" and "collective bargaining unit" in Paragraph 4 evidences that it was the intent of the legislature in enacting Chapter 663, Laws of 1961, to make clear that municipal employes did have the legal right to bargain with their employer through the employes' own representative, but that before a municipal employer had any duty to recognize the bargaining representative, it would have to establish that it represented a majority of the eligible employes involved. However, because Section 111.70(2) asserts, "Municipal employes shall have the right of self-organization. . .and the right to be represented by labor organizations of their own choice in conferences and negotiations with their municipal employers. . .on questions of wages, hours and conditions of employment", the majority concludes that municipal employes do not have the right to bargain collectively.

Section 111.02(5), which defines the term, "collective bargaining", states, "Collective bargaining is the negotiating by an employer and a majority of his employes in a collective bargaining unit (or their representatives) concerning representation or terms and conditions of employment of such employes in a mutually genuine effort to reach an agreement with reference to the subject under negotiation" (emphasis added). I believe that in the context of a labor relations statute with which we are dealing here, the words "negotiate" and "bargain" are synonomous and interchangeable. I would give to the words,"...right to be represented...in conferences and negotiations with their municipal employers...on questions of wages, hours and conditions of employment...", their natural and reasonable meaning and it is my conclusion that these words clearly support the conclusion that the employes have a right to bargain with their employer through their own freely chosen representative, as to their wages, hours and conditions of employment.

The majority apparently has also concluded that Section 111.70(2) merely confers upon municipal employes a right to representation in conferences and negotiations, but does not confer a right to negotiate upon municipal employes over questions of wages, hours

and conditions of employment, nor does the statute impose an obligation upon the municipal employer to negotiate.

It is important to emphasize that the word "employes" in Section 111.70(2), is plural and thus, the right to bargain belongs to the employes collectively and not to any particular individual employes, hence the term, "collective bargaining". The collective right of employes to negotiate is exercised by their chosen representative. All certifications of representatives issued by this Board under subchapter IV since 1962 in which the employes have chosen a majority representative, have certified the union as the exclusive collective bargaining representative of all such employes for the purpose of conferences and negotiations with the municipal employer on questions of wages, hours and conditions of employment. I believe such certifications, in addition to establishing a right to petition for fact finding in the event of impasse, confers the right of the majority to negotiate, and likewise imposes an obligation on the municipal employer to negotiate. to conclude that Section 111.70 merely confers a right to representation does not seem logical since in public employment as contrasted to private employment, citizens have a constitutional right, Art. 1, Sec. 4, Wis. Const., to petition their government, which presumably includes an employe's right to a hearing by his municipal employer. Furthermore, the right to fact finding conferred upon the majority representative also presupposes (1) that there has been a reasonable period of negotiations, or (2) that there has been a refusal to negotiate. Both conditions imply that the right and obligation to negotiate exists where a majority representative has been recognized or certified.

II

If the legislature has granted to municipal employes the legal right to engage in collective bargaining, as I believe it has done, it necessarily follows that a corrollary of such right is the duty to "bargain" or "negotiate" with the majority representative of ite employes. If there be no legal duty on the municipal employer to bargain with the representative selected by its employes, then how can the employes be said to have a right to bargain? To ask the question is to answer it, and that answer is that there must be a legal duty imposed upon the municipal employer to bargain with the representative of its employes.

In a 1963 decision involving the basic purpose of Section 111.70, this Board was required to determine whether it would process a petition for fact finding filed by a striking union. At

that time the Board commented upon the legislature's intention in adopting Section 111.70 as follows:

> "The Legislature in adopting Section 111.70 authorized fact finding with public recommendations as an aid in the resolution of municipal employer-employe labor disputes, and as a substitute for the strike weapon utilized in private employment. The Legislature recognized that employment policies in municipal employment should be determined largely as a result of reasonable persuasion and negotiation rather than by the pressures generated as a result of a strike.
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> * * *
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> "We wish to emphasize that good labor relations in municipal employment will best be served when both municipal employers and municipal labor organizations recognize their responsibilities and obligations under Section 111.70 to confer and negotiate in good faith on questions of wages, hours and conditions of employment and to reach a mutually satisfactory agreement thereon without having to resort to any activity which is prohibited by statute or to fact finding." (emphasis added)5b/

The majority conclusion herein would ignore their prior recognition in the above case that Section 111.70 was intended to impose a responsibility and obligation upon municipal employers and municipal labor organizations to confer and negotiate in good faith on questions of wages, hours and conditions of employment.

If the basic duty to bargain does not exist, as my colleagues contend, then it is unnecessary to extensively discuss the meaning of "good faith" since "good faith" supposes an existing duty to bargain, and the term "good faith" merely amplifies upon the manner

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5b/ City of Milwaukee, Decision No. 6575B, 12/63.

in which the duty must be carried out. If the duty to bargain is manifested in the law, as I believe it is, then it would necessarily follow that in order to discharge said duty the municipal employer would have to act in "good faith".

III

Is the violation of the duty to bargain a prohibited practice within the meaning of Section 111.70(3)(a), Stats.?

If, as I have concluded, the municipal employer has an affirmative duty to bargain with the lawfully selected representative of its employes, then where shall the employes seek to enforce their right to bargain collectively when the municipal employer violates its duty to bargain?

Implicit in the majority rationale is the recognition that should the municipal employer refuse to bargain in good faith, the employes' bargaining representative may initiate fact finding. This in itself supports the conclusion that subchapter IV, Chapter III imposes some duty to bargain upon municipal employers.

Therefore, the real issue becomes not whether subchapter IV, Chapter III imposes a duty to bargain upon municipal employers, but rather whether the legislature intended that municipal employes must solely depend upon fact finding as the exclusive procedure to remedy a municipal employer's violation of its bargaining duty.

In substance, the majority argues that the exclusive remedy against a party who refuses to meet or otherwise refuses to negotiate in good faith is limited to invoking fact finding procedures.

Section 111.70(4)(e) states:

> "Fact finding may be initiated in the following circumstances: 1. If after a reasonable period of negotiation the parties are deadlocked, either party or the parties jointly may initiate fact finding; 2. Where an employer or union fails or refuses to meet and negotiate in good faith at reasonable times in a bona fide effort to arrive at a settlement." (emphasis added)

The fact that certain conduct might be of such a nature that it may be made the basis for invoking fact finding does not thereby mean that the same conduct is not a prohibited practice. Whether or not a complaining party must make an election of remedies or whether it could pursue both routes, I do not believe it necessary to decide at this time.

Section 111.70(4)(e), Stats, states, "Fact finding may be initiated. . .", (emphasis added), but this does not mean that the sole remedy afforded municipal employes for an employer's refusal to bargain is a resort to fact finding.

It is also important to note in this regard, Section 111.70 (4)(h)2 which states:

"Parties. 2. Fact finding cases. Only labor unions which have been certified as representative of the employes in the collective bargaining unit or which the employer has recognized as the representative of said employes shall be proper parties in initiating fact finding proceedings. Cost of fact finding proceedings shall be divided equally between said labor organizations and the employer."

Thus, only a labor union which is voluntarily recognized by the municipal employer as representing a majority of its employes in an appropriate unit is entitled to proceed to fact finding or one that has been certified by the Board, after a representation election conducted by the Board. If the sole relief municipal employes have to enforce the municipal employers' duty to bargain is fact finding, what would happen in the case of a municipal employer who refused to voluntarily recognize a labor union as the representative of a majority of its employes, and at the same time engaged in a campaign of threats and coercive conduct designed to undermine that union's majority status, and which conduct also made it impossible to conduct an election wherein the employes could express their free and uncoerced choice.

The labor union could not proceed to fact finding in such a situation, since it was neither voluntarily recognized by the employer nor had it been, nor could it be under the circumstances, certified by the Board. Even assuming that the Board could on the facts set forth above order fact finding because the municipal employer had dissipated the bargaining representatives majority through unlawful conduct, the bargaining representative is required by Section 111.70(4)(h)2 to pay one-half of the costs of fact finding. It is highly unlikely that the legislature intended to penalize the municipal employes by making them pay one-half the cost: of a proceeding wherein they are simply attempting to vindicate their right to "be represented by labor organizations of their own choice in conferences and negotiations with their municipal employer

It is my conclusion that nothing in subchapter IV, Chapter III, Stats., limits municipal employes from vindicating their rights as expressed in Section 111.70(2) solely to the procedure of "fact finding", but, on the contrary, where the municipal employer's conduct interferes with, restrains or coerces municipal employes in the exercise of their rights as expressed in said Section 111.70(2 that the employe or his representative has a cause of action within

with their municipal employers. . .on questions of wages, hours and conditions of employment. . ."(emphasis added). It is my view that fact finding as well as all other rights of employes are ancillary to their basic right to engage in collective bargaining since if they don't have the right to bargain collectively, of what purpose are their other rights?

Obviously conduct which is intended to interfere with or restrain or coerce municipal employes from exercising any of the rights set forth in 111.70(2), including the right to be represented in conferences and negotiations, is a prohibited practice within the clear language of Section 111.70(3), Statutes.

While we have earlier framed the issue as being whether a violation of the duty to bargain is a prohibited practice, it must be emphasized that at all times we are dealing with conduct. Thus, the issue is not whether a violation of the duty to bargain is a prohibited practice per se, but instead the issue in each case must be, has a party by engaging in certain conduct, which would constitute a violation of its duty to bargain, interfered with, restrained, or coerced the employes in their rights under Section 111.70(2)?

It is important to emphasize that it is the underlying conduct involved with which we are concerned and not the label which has been used to describe such conduct. Thus, "a refusal to bargain in good faith", is merely a conclusionary label utilized to describe many various types of conduct covering various situations, all the way from an out-and-out refusal to recognize and negotiate with the duly certified representative of the employes for the purpose of undermining the bargaining representative to engaging in so-called "surface bargaining" with no bona fide intent to reach an agreement.

In each instance the Board, subject to judicial review, must determine whether the conduct, which may consist of acts of omission as well as commission, was intended to interfere with or restrain or coerce employes' rights as guaranteed to them by the legislature in Section 111.70(2), Statutes.

The majority concludes that since in the Wisconsin Employment Peace Act there is an express provision making it an unfair labor practice "to refuse to bargain collectively with the representative of a majority of his employes. . ."[6/] and that since there is no comparable prohibited practice provision set forth in Section 111.70(3)(a) that it must follow that the legislature did not

6/ Section 111.06(1)(d).

intend to make a violation of the bargaining duty a prohibited practice.

Section 111.06(1) of the Employment Peace Act contains twelve specific subsections wherein certain specified conduct is made an unfair labor practice.

Some of the conduct which is specifically proscribed is as follows:

> "To initiate, create, dominate or interfere with the formation or administration of any labor organization. . ."7/

> "To discharge or otherwise discriminate against an employe because he has filed charges or given information or testimony. . ."8/

> "To deduct labor organization dues or assessments from an employe's earnings unless the employer has been presented with an individual order therefor. . ."9/

> "To employ any person to spy upon employes or their representatives. . ."10/

If the logic of the majority is followed it could well be argued that a municipal employer may engage in the above described conduct since there is no express prohibition contained in Section 111.70(3) proscribing such specific conduct.

However, the Board has already indicated that it will not tolerate municipal-employer-dominated organizations and that the conduct of supervisors in the affairs of an employe organization may make the municipal employer liable for interfering with the employes' rights.11/

Also the Board has previously concluded that a municipal employer committed a prohibited practice by engaging in surveillance or spying.12/ The Board did not then think it necessary that certain conduct had to be expressly made a prohibited practice before it would afford a remedy. It quite properly concluded that Section 111.70(3)(a)1 was broad enough to cover the conduct in issue.

Because certain conduct is not expressly set forth and enumerated as being a prohibited practice, it does not follow that such conduct is nonetheless proscribed by Section 111.70(3). It must be remembered that the Employment Peace Act was enacted in 1939. There was little precedent at that time as to what types of conduct were meant to be proscribed, and it was therefore necessary for the legislature to specifically set forth conduct

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7/ Section 111.06(1)(b)

8/ Section 111.06(1)(h)

9/ Section 111.06(1)(i)

10/ Section 111.06(1)(j)

11/ City of Milwaukee, Case VI, Dec. No. 6960, 5/65.

12/ Green Lake County, Decision No. 6061, 7/62.

which was inimical to the ends it sought to achieve.

However, in the better than a quarter of a century that has passed since 1939, a vast body of law and precedent has been established in the area of law regarding employe-employer bargaining and therefore the legislature did not have to set forth with as great a specificity all the types of conduct it meant to proscribe as prohibited practices.

It appears clear that the legislature did not intend to narrow the conduct proscribed by Section 111.70, because it did not specifically enumerate all the types of conduct it wished to proscribe, but rather its intent was to leave to the Board's determination, subject to judicial review, whether any type of conduct did in fact interfere with or restrain or coerce employes in their rights set forth in Section 111.70(2).

In each case it is not the lable describing the conduct which is important, but rather whether the specific conduct engaged in interfered with, restrained, or coerced municipal employes in the exercise of rights guaranteed them in Section 111.70(2). One of these rights, as stated above, is, "to be represented by the labor organization of their own choice in conferences and negotiations with their municipal employer. . .on questions of wages, hours and conditions of employment. . ."

It is clear that should the municipal employer engage in conduct which is designed to frustrate this right, then by whatever label such conduct may have come to be known, it is nonetheless violative of Section 111.70(3)(a)1, Stats. The same logic also applies to a labor union, should it refuse to bargain in good faith.

As I have earlier indicated, fact finding does not necessarily provide and was not intended to provide the sole remedy for violations of Section 111.70. The Board, however, if it were satisfied that the evidence established a violation of the duty to bargain could order the wrongful party to cease and desist from engaging in said wrongful conduct and affirmatively to bargain and more particularly to bargain in good faith.[13/]

Section 111.70(4)(a) provides that Section 111.07 of the Wisconsin Employment Peace Act shall govern procedures in all cases involving prohibited practices. Section 111.07(4) confers upon the Board broad powers in fashioning appropriate remedial orders for

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13/ The Board has utilized this type of order to remedy unfair labor practices arising under the Wisconsin Employment Peace Act--see Portage Stop 'N' Shop, Inc., Dec. No. 7037, 2/65; Pleasant Valley Co-operative Creamery, Dec. No. 6304, 4/63; Mt. Nebo Fur Farm, Dec. No. 6898, 10/64.

prohibited practices. Therefore, it cannot be reasonably concluded that the Board is limited, as the majority concludes, to holding that fact finding is the only remedy for a finding that a party has refused to bargain in good faith and thus interfered with the basic rights conferred by the Statute.

I find support for the conclusions reached here in the past history and development of collective bargaining legislation and in the administrative and judicial determinations under the Railway Labor Act, the National Labor Relations Act and this State's own Employment Peace Act. All of these statutes, or their predecessors, were challenged on the ground that they did not expressly provide an affirmative duty to bargain in good faith.

I. RAILWAY LABOR ACT

The Nation's oldest continuing labor relations statute, the Railway Labor Act, which has been the primary source of the substantive provisions of the Wagner Act, the Employment Peace Act, and subsequently the Taft-Hartley Act, contains no express provision making the duty to bargain in good faith an unfair labor practice. The Railway Labor Act conferred upon employes the right to organize and bargain collectively through representatives of their own choosing, and protected employes from the interference by their employes in the exercise of their rights. In a suit brought by a railroad carrier to test the constitutionality of the statute, the carrier argued that the Act,

> "...imposes no legally enforceable obligation upon the carrier to negotiate with the representative so certified, and that in any case the statute imposes no obligation to treat or negotiate which can be appropriately enforced by a court of equity."14/

The United States Supreme Court rejected the argument and upheld an order to bargain issued by the National Mediation Board and used the following language:

> "Petitioner argues that the phrase 'treat with' must be taken as the equivalent of 'treat' in its intransitive sense, as meaning 'regard' or 'act towards', so that compliance with this mandate requires the employer to meet with authorized representatives of the employees only if and when he shall elect to negotiate with them. This suggestion disregards the words of the section, and ignores the plain purpose made manifest throughout the numerous provisions of the Act....The statute does not undertake to compel agreement between the employer

> steps without which no agreement can be reached. It at least requires the employer to meet and confer with the authorized representative of its employees, to listen to their complaints, to make reasonable effort to compose differences -- in short, to enter into a negotiation for the settlement of labor disputes such as is contemplated by Sec. 2, First."15/

The United States Supreme Court relied heavily on the legislative history of the Railway Act in arriving at its conclusion. The obligation to bargain under the Railway Labor Act has also been sustained in numerous court and National Mediation Board decisions in subsequent years.16/

II. THE WAGNER ACT

The Wagner Act as introduced into Congress, did not contain a specific refusal-to-bargain section. Senator Wagner, in testimony before the Senate Committee on Education and Labor, testified that he thought that the bill required bargaining in good faith without such a provision. Senator Wagner stated,

> "Therefore, while the bill does not state specifically the duty of an employer to recognize and bargain collectively with the representative of his employees, because of the difficulty in setting forth this matter precisely in statutory language, such a duty is clearly implicit in the bill."17/

Senator Wagner's conclusions were justified by the decisions and interpretations of the Old National Labor Board, which administered the provisions of Section 7(a) of the National Industrial Recovery Act of 1933, which did not contain an express provision making the refusal to bargain in good faith an unfair labor practice.18/ The basis of these early National Labor Board decisions was that Section 7(a) conferred upon employes the right to bargain collectively and that, therefore, such right imposed a corrollary duty on employers to bargain in good faith and that an employer's refusal to bargain in good faith necessarily interfered with the right to bargain collectively conferred by the statute.

The summary of one early case reads:

15/ Supra, previous footnote, P. 50-51.

16/ Larson, "Collective Bargaining Under The Railway Labor Act", Proceedings of the Eleventh Annual Institute on Labor Law, Southwestern Legal Foundation, Bureau of National Affairs, P. 190-195, 1965.

17/ Hearings Before the Senate Committee on Education and Labor On S. 1958, 74th Congress, First Session, P. 43.

18/ 48 Stats., 198, 1933.

"Obligation of employer under Sec. 7(a) is to negotiate in good faith with representatives of employees, to match their proposals with counter-proposals, and to make every effort to reach a binding agreement for a definite period of time. Where there is not evidence that company knew of union activity of employees alegedly discharged because of inefficiency, company is not guilty of violation of Sec. 7(a). Where it is established that union represents majority, it is entitled to act as the exclusive bargaining agent for employees."19/

A summary of six additional reported decisions of the Old National Labor Board in 1934 and 1935, holding the refusal to bargain as an unfair labor practice under Section 7(a), which contained no specific provision for a refusal to bargain as an unfair labor practice, may be found in 1 LRRM 208.

A leading scholar of our National Labor Relations Law has written of this development:

"The National Labor Board, in making its first official attempt to define the 'right' thus conferred, decided that it involved an implicit reciprocal duty in employers to bargain, and that this duty involved something more than a bare requirement that the employer meet and confer with employee representatives. 'True collective bargaining involved more than the holding conferences and the exchange of pleasantries....While the law does not compel the parties to reach an agreement, it does contemplate that both parties will approach the negotiations with an open mind and will make a reasonable effort to reach a common ground of agreement.' This 'incontestably sound principle' was followed by the National Labor Relations Board while it operated under a joint resolution in the year before the Wagner Act was passed, and by similar boards after the passage of the act. Indeed, as Justice Brennan was to say so many years later in the Insurance Agents' case, practically, it could hardly have been otherwise."20/

However, the Wagner Act, as introduced, was amended after Lloyd K. Garrison, Chairman of the Old National Labor Board, insisted, in testimony before the Senate Labor Committee, that it was necessary in order to make the right of self-organization effective.21/

Justice Brennan has detailed the legislative history of Section 8(a)(5) of the Wagner Act in the Insurance Agents' case as follows:

"However, the Senate Committee in charge of the bill concluded that it was desirable to include a provision making it an unfair labor practice for an employer to refuse to bargain collectively in order to assure that the Act would achieve its primary objective of requiring an employer to recognize a union selected by his employees as their representative. It was believed

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19/ Federal Mining & Smelting Company, No. 371, April 23, 1935, 1 LRRM 208.

20/ Robben W. Fleming, "The Obligation to Bargain in Good Faith", Public Policy and Collective Bargaining, Industrial Relations Research Association, P. 61, 1962.

21/ Supra 10, p. 61.

that other rights guaranteed by the Act would not be meaningful if the employer was not under obligation to confer with the union in an effort to arrive at the terms of an agreement. It was said in the Senate Report:

> 'But, after deliberation, the committee has concluded that this fifth unfair labor practice should be inserted in the Bill. It seems clear that a guarantee of the right of employees to bargain collectively through representatives of their own choosing is a mere delusion if it is not accompanied by the correlative duty on the part of the other party to recognize such representatives...and to negotiate with them in a bona fide effort to arrive at a collective bargaining agreement. Furthermore, the procedure of holding governmentally supervised elections to determine the choice of representatives of employees becomes of little worth if after the election its results are for all practical purposes ignored. Experience has proved that neither obedience to law nor respect for law is encouraged by holding forth a right unaccompanied by fulfillment. Such a course provokes constant strife, not peace.' S. Rep. No. 573, 74th Cong., 1st Sess., p. 12."22/

Justice Brennan further commented regarding the purpose of the Wagner Act provision,

> "...The duty of management to bargain in good faith is essentially a correllary of its duty to recognize the union."23/

Thus, it seems clear that the refusal-to-bargain provision was added to the Wagner Act to make it more effective, but not because such language was not already implicitly contained in Section 7(a).

III. THE WISCONSIN EMPLOYMENT PEACE ACT

The Wisconsin Employment Peace Act, Section 111.06(1)(d), makes it an unfair labor practice for an employer to refuse to bargain collectively with the majority ot his employes, but does not contain a similar provision with respect to the obligation of a labor union to bargain in good faith with the employer. The lack of this specific provision did not prevent this Board, 20 years ago, from finding a union guilty of an unfair labor practice in refusing to execute a contract which had been agreed upon and where the union threatened to strike unless their further demands for contract modifications were also agreed to by the employer.24/

22/ NLRB vs. Insurance Agents' Union, 361 U.S. 484, 45 LRRM 2706 and 2707.

23/ Supra, p. 2707.

24/ Universal Foundry Company vs. U.A.W. Local 345, Dec. No. 1102, 9/46.

The Circuit Court of Winnebago County, in an opinion by former Supreme Court Justice, Henry Hughes, upheld the Board decision and made these significant observiations in response to the union argument that the Employment Peace Act did not contain a specific provision making it an unfair labor practice for a union to refuse to bargain in good faith.

> "The probable reason that no mention is made in the Act of the employes' duty to bargain is because in the very nature of things employes are anxious to bargain to improve their condition of employment and wages. Assuming, for the purpose of this discussion, that employes have no duty to bargain with an employer, certainly the union voluntarily having entered into negotiations, under well-defined and long-established principles of law, the rules pertaining to the negotiations of a contract must be the same for one party as for the other. Certainly the union ought to be the last to suggest that there be one set of laws to apply to the conduct of the employer and another to the conduct of the bargaining agents of the union.
>
> "The court is of the opinion that it as much an unfair labor practice for the union to refuse to reduce its oral agreement to writing as it is for the employer to so do, and that under the case of Neniz vs. National Labor Relations Board, Supra, the conclusion of the Board in this case is well justified.
>
> "Chapter 111 of the Wisconsin Statutes makes clear that the purpose of the Board is to adjudicate disputes between employers and employes. Section 111.07(4) gives the Board specific power to make findings and enter appropriate orders. The order in the instant case was proper and apparently necessary."25/

From the above review of the interpretations of the labor relations statutes, which were the predecessors to the extention of collective bargaining to public employment by subchapter IV of Chapter 111, it is apparent that administrative and judicial bodies, including this agency, have understood that the duty to bargain in good faith is an integral part of statutes conferring upon employes the right to organize and to bargain collectively. Administrative and judicial interpretations have found the obligation to bargain in good faith to be implicit in such statutes even though the legislature may not have provided the express language that the refusal to bargain in good faith was an unfair labor practice.

Under the provisions of Section 111.07(4), I believe that the Wisconsin Employment Relations Board has the authority to find that a refusal to bargain in good faith is a prohibited practice under the broad language of Section 111.70(3)(a)1, which prohibits employers

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25/ U.A.W. vs. WERB, Winnebago County Circuit Court, 8/12/47.

from interfering with, restraining or coercing municipal employes in the exercise of their rights provided in Section 111.70(2).

While the majority concedes that subchapter IV was intended to encourage collective bargaining, it argues that the legislature did not establish an enforceable duty on municipal employers or municipal employe organizations to bargain in good faith. I am unwilling to conclude that the legislature has enacted a meaningless statute. It is difficult to imagine any employer conduct which could be more effective in frustrating the basic purposes of the Statute than refusing to bargain in good faith with the majority representative of the employes. If employers and labor organizations do not have an affirmative obligation to bargain in good faith, all of the remaining procedures for determining questions of representation, for mediation and for the resolution of impasses lose their meaning. I am unwilling, therefore, to administratively repeal the basic purpose of Section 111.70, which I believe is to encourage and promote collective bargaining in public employment, by finding that a duty to bargain in good faith does not exist as a prohibited practice for either municipal employers or municipal labor organizations.

I agree with the majority opinion that it would be highly desirable if the Statute were amended to include the refusal to bargain in good faith as a specific unfair labor practice for municipal employers and labor organizations in order to make the Statute more effective. Likewise, I believe numerous other procedural and substantive amendments should be made to Section 111.70, such as a clarification of the Board's authority to determine bargaining units and a section defining supervisory, draft, professional and confidential employes. The lack of such explicit legislative direction with respect to bargaining units and the definition of employes has not prevented the Board, to date, from making administrative determinations to implement the basic statutory purposes in the absence of clarifying amendments. I see no reason for the majority to take a negative attitude towards the basic purpose of the statute merely because the statute does not expressly provide a refusal to bargain in good faith as a prohibited practice.

Arvid Anderson, Commissioner

COMMENTS ON MINORITY OPINION

Our colleague questions the necessity, in this proceeding, for the Board to determine whether a refusal to bargain in good faith in municipal employment constitutes a prohibited practice within the meaning of Section 111.70 of the Wisconsin Statutes. This issue has not been raised by the Board, but by the pleadings. As indicated at the outset of our Memorandum, the Complainant alleged that the Municipal Employer "failed, refused and neglected at all times to bargain" with the union concerning said discharge, and "failed and refused to meet and negotiate in good faith at reasonable times in a bona fide effort to arrive at a settlement concerning said discharge." Proceedings in prohibited practice cases are governed by Section 111.70(4)(h), which provides that any individual affected by prohibited practices is a proper party in a prohibited practice proceeding.

Our colleague is convinced the phrase, "Bargaining in Municipal Employment", and certain terms in Section 111.70(4)(d) added in 1961, indicates an intent by the legislature to establish a duty upon a municipal employer to bargain collectively with the representative of its employes. The original title of subchapter IV of Chapter III, as enacted in 1959 did not contain said phrase.

The first three subsections of the law as it now exists have remained identical since the enactment of the 1959 Statute. Subsection (1) defines certain terms used in this Statute. Subsection (2), the "rights" section, has remained identical despite the change in the descriptive title added in 1961. Subsection (3), setting forth the prohibited practices, has also remained identical.

The provisions added to the Law in 1961 are contained in subsection (4) entitled "Powers of the Board", and provides that "the board shall be governed by the following provisions relating to bargaining in municipal employment:" It is significant that in this subsection the word "bargaining" appears for the first time. The powers set forth in this subsection provide for (a) procedures to govern prohibited practice cases, (b) for the voluntary mediation of disputes between municipal employers and employes, /there is no subparagraph (c)/, (d) for the procedures to be followed in establishing collective bargaining units and bargaining representatives. Subparagraphs (e) through (g) provide for fact finding. Subparagraph (h) defines parties to prohibited practice and fact finding cases. Subparagraph (i) provides for collective bargaining agreements under certain conditions. Subparagraph (j) provides for fact finding for members of police, sheriff and county traffic officer departments. Subparagraph (k) limits fact finding in

certain cases where civil service provisions exist. Subparagraph (l) prohibits strikes in municipal employment, and the last subparagraph, (n), provides for the effect of local fact finding ordinances.

Our fellow Commissioner states that Sec. 111.70(2) clearly supports the conclusion that employes have a right to bargain with their employer through their own freely chosen representative. The pertinent language therein establishes that employes have the right to be represented in conferences or negotiations, or in bargaining, with their municipal employer. To us this means that the municipal employer, if it chooses to bargain, cannot reject the designated representative of its employes as their bargaining agent.

In reference to our dissenting colleague's remarks concerning the effect of an election certification, we cannot perceive the logic of his argument concerning the constitutional right of citizens to petition their government. An employe of a municipal employer may reside outside the geographical limits of his employer.

But more to the point, a petition from citizens to their government is not to be equated with a proposal on wages, hours and working conditions submitted by municipal employes or their representative. Nor is the right to be heard on such a "petition" to be equated with collective bargaining. If such matters were so equated, there would be no need for many of the provisions now included in Section 111.70. Such a request, if any, arising from a certification or order establishing the exclusive bargaining representative, does not include or imply an enforceable "duty" upon the municipal employer to bargain with said representative.

There is no doubt that the Statute is intended to encourage collective bargaining in municipal employment. This is reflected in the provisions providing for the selection of employe representatives, in provisions preventing certain practices which affect the rights of employes to engage in, or not to engage in activities with respect to self-organization, affiliation and selection of their representatives, and in provisions for mediation and for fact finding. The fact finding provision is significant of the intent to encourage collective bargaining in municipal employment in that it provides for recommendations to resolve deadlocks which the parties have been unable to resolve in the bargaining, and, further, when either of the parties has refused to bargain in good faith. While the statute encourages collective bargaining, it does not establish an enforceable duty that either a municipal employer or the representative of its employes must bargain in good faith.

As we interpret Section 111.70, the sole procedure under said section for a labor organization, which has been certified or recognized as the exclusive bargaining representative of the employes involved, for a municipal employer's refusal to bargain

in good faith is to initiate a fact finding proceeding, and attempt to persuade the municipal employer to accept the recommendations of the fact finder with regard thereto. Upon filing of the petition the Board's function is primarily an investigatory one, to determine whether the conditions for fact finding exist. To us, in light of the statutory language, the use of the words "may be initiated" merely permits the representative to utilize fact finding, or to seek the resolution through mediation, or perhaps to abandon its claim altogether.

We disagree with our colleague, further, where he concludes that an employe organization could not proceed to fact finding, where it was neither voluntarily recognized nor certified by the Board, after a municipal employer had "engaged in a campaign of threats and coercive conduct designed to undermine the union's majority status, and which conduct also made it impossible to conduct an election wherein the employes could express their free and uncoerced choice." Where an employer engages in such coercive conduct, and thus commits a prohibited practice under Section 111.70(3)(a)1, the Board could properly find that the organization represented an uncoerced majority of the employes in an appropriate bargaining unit and it could designate the organization as the exclusive representative of said employes, with all rights and privileges it would have been entitled to exercise had there been an election where the majority of the employes had selected such organization as their representative. Under such circumstances, we could properly entertain a petition for fact finding from such organization to determine if conditions precedent thereto had been established. If the legislature intended to grant the representative any relief from its share of the costs of fact finding under such circumstances, it could have provided for same.

Our colleague concludes that the conduct reflecting a violation of a duty to bargain constitutes a prohibited practice within the meaning of Section 111.70(3)(a)1. We agree with him that conduct which interferes with the rights established in Section 111.70(2) would constitute unlawful interference, restraint and coercion, pursuant to Section 111.70(3)(a)1. Our colleague discusses various activities of employers made specific unfair labor practices under the Wisconsin Employment Peace Act, and suggests that, in accordance with our logic, it might be argued that a municipal employer may engage in domination of an organization, may discharge an employe because he has filed charges, etc., may deduct labor organization dues without authorization, or may spy upon employes or their representatives, without committing prohibited practices. It is true that we have indicated that we will not tolerate domination

of employe organizations by any municipal employer. Our determinations as cited by our colleague affirm the fact that we have treated similar conduct as prohibited. We are not saying that because certain conduct is not expressly set forth and enumerated as a prohibited practice, that such conduct is permissible by the municipal employer. We agree that, in determining whether such conduct is prohibited, we must determine, as Section 111.70(3)(a)1 states, whether such conduct "interfered, restrained or coerced their employes in the exercise of their right provided in subsection (2)." It is clear that a municipal employer in initiating, creating, dominating or interfering with the formation or administration of a labor organization would be interfering with municipal employes in their "right of self organization". It is clear that a municipal employer, in discharging, or otherwise discriminating against an employe because of the use of the Board's processes, would also interfere, restrain and coerce a municipal employe in the exercise of his "right of self organization". It is also clear that to deduct labor organization dues from an employe without a proper authorization from such employe would also interfere with that right since it would interfere with his right to refrain from union membership. It is also clear that spying on an employe in his activity of self-organization and affiliation also interferes with the rights specifically set forth in Section 111.70(2). At this point, we wish to direct attention to our primary memorandum, where we have indicated the difference in the language of Section 111.04 of the Wisconsin Employment Peace Act, and Section 111.70(2), both dealing with rights of employes. Under the Wisconsin Employment Peace Act, the "rights" section specifically sets forth the right to bargain collectively. It further makes it an unfair labor practice for an employer to refuse to meet and negotiate in good faith with the representative of his employes. No similar right and no similar duty are expressed in Section 111.70. Much of our colleague's comments with respect to the broad powers given to the Board in fashioning remedial orders for prohibited practices is based on the conclusion that a refusal to bargain in public employment is a prohibited practice under Section 111.70(3)(a)1. There can be no remedy existing for the failure to perform a "duty" which does not exist.

The dissenting Commissioner equates the policy and provisions of Section 111.70 with the policy and provisions of the Wisconsin Employment Peace Act. We are satisfied that the legislature did not so intend. Such intent is not only reflected in the fact that many of the provisions of the Wisconsin Employment Peace Act have been omitted from Section 111.70, but also in the fact that there is a lack of identity in the basic terms used in both pieces of legislation. The rights expressed in the Wisconsin Employment Peace Act refer to the right to "bargain collectively" and in addition, the

right of employes to engage in lawful concerted activities for the purpose of "collective bargaining". The rights expressed in Section 111.70(2) refer to "conferences and negotiations". Unlawful activity by employes and employers in the Wisconsin Employment Peace Act are identified as "unfair labor practices", while unlawful activity in Section 111.70 are identified as "prohibited practices". In our opinion, had the legislature intended to equate any rights and duties in Section 111.70 with certain other rights and duties contained in the Wisconsin Employment Peace Act, it would have been convenient to use the same terms as used in the latter statute. The use of other terms supports the conclusion that the intention was otherwise.

Our colleague further cites the legislative history of the Railway Labor Act, the Wagner Act, and our own Wisconsin Employment Peace Act in an effort to establish the intent of the legislature in enacting Section 111.70 of the Wisconsin Statutes. It would appear to us that the legislative history of Section 111.70 would be the proper source for determining the intent of the legislature in enacting said Section. Be that as it may, it should be noted that the Railway Labor Act, the National Industrial Recovery Act, the National Labor Relations Act, and the Wisconsin Employment Peace Act contain provisions which are not contained in Section 111.70. The "fourth" paragraph of section 2 of the Railway Labor Act commences with the following sentence:

> "Employes shall have the right to organize and bargain collectively through representatives of their own choosing."[26]

Said paragraph sets forth certain practices by carriers which are unlawful. Interference with the organizational rights of employes, as well as the use of carrier funds in assisting employe organizations are prohibited, as is any carrier influence or coercion of employes in an effort to induce them to join or remain in, or not to join or remain in any employe organization, as well as the deduction of dues or other payments to labor organizations from the wages of the employes.

The "tenth" paragraph of section 2 provides in part as follows:

> "The willfull failure or refusal of any carrier, its officers or agents, to comply with the terms of the third, fourth,...fifth, seventh or eighth paragraphs of this section shall be a misdemeanor, upon conviction thereof, the carrier, its officers, or agents offending shall be subject to a fine...or imprisonment...or both fine and imprisonment for each offence..."

26/ Emphasis added.

While the "fourth" paragraph does not specifically identify certain actions by carriers as being unfair labor or prohibited practices, they are considered illegal and are considered misdemeanors.

The comments of our colleague with reference to the first National Labor Board decisions is interesting, but not persuasive. It should be remembered that these decisions were rendered under the first labor law enacted on the federal level, and for that matter, there was no active state labor law in effect at the time. It is significant that the federal labor relations statutes, following the National Industrial Recovery Act, which established the first National Labor Board, specifically provided that the failure to negotiate in good faith by an employer, because such activity was not in derrogation of the rights established in said legislation, was specifically included as unfair labor practices, and that the Garrison testimony before the Senate Committee which was considering the Wagner Act, indicated that it was necessary to specifically spell out that an employer's refusal to bargain in good faith constituted an unlawful act.

In the "rights" section of both the original Wagner Act and the present federal labor relations law, the right of employes to bargain collectively through representatives of their own choosing, was and is reflected in the "rights" section of those pieces of legislation, and both acts specifically provide that the failure of an employer to bargain collectively in good faith with representatives of his employes was and is prohibited as an unfair labor practice. It is also significant that Section 8(b)(3) of the present federal labor relations act specifically provides that it is an unfair labor practice for a labor organization or its agents "to refuse to bargain collectively with an employer, provided it is the representative of his employes..."

Our colleague has quoted the remarks of Robben W. Fleming and Justice Brennan in support of his position. We respect the ability and knowledge of Mr. Fleming and Justice Brennan, and we find that their remarks do not, in fact, support the minority opinion. On the contrary, we wish to adopt them in support of our opinion. At the outset of Mr. Fleming's statement he refers to the fact that the National Labor Board attempted "to define the right thus conferred..." There has been no similar "right" conferred in Section 111.70.

In citing a portion of the Senate Report on the Wagner Act, Justice Brennan concluded that

> "it was desirable to include a provision making it an unfair labor practice for an employer to refuse to bargain collectively in order to assure that the Act would achieve its primary objective of <u>requiring</u> an employer

> to recognize a union selected by his employes as their representative. It was believed that other rights guaranteed by the Act would not be meaningful if the employer was not under obligation to confer with the union in an effort to arrive at the terms of an agreement."27/

Previously, in our Memorandum, we have gone into detail with respect to the fact that the Wisconsin Employment Peace Act specifically confers the right upon employes to bargain collectively, and with respect to the fact that the employer unfair labor practice section provides it to be an unfair labor practice to refuse to bargain collectively with the representative of the majority of the employes in a collective bargaining unit.

Our colleague refers to the decision of the Board in Universal Foundry Company, issued in 1946. It should be noted that the Board concluded that the union therein committed an unfair labor practice within the meaning of Section 111.06(2)(c) of the Wisconsin Employment Peace Act, which provides that it is an unfair labor practice for an employe individually or in concert "to violate the terms of a collective bargaining agreement..." Nowhere in the decision did the Board refer to the violation by the union as a "refusal to bargain" with the employer. The conclusion of Judge Hughes in supporting the Board's decision in that case does not appear to us to be based on the union's refusal to bargain in good faith. If such was his intent, we disagree therewith.

In his dissent our fellow Board member also quotes the Board in a fact finding proceeding involving the City of Milwaukee. In that matter the labor organization which had initiated the fact finding proceeding, engaged in a strike three days prior to the filing of its petition for fact finding, which strike continued up until the time of the Board's hearing on the petition. The language used by the Board with respect to responsibilities and obligations of municipal employers and municipal labor organizations, was in no way intended to imply that there was an enforceable duty upon either to bargain collectively with each other. Had the Board intended otherwise, we would have concluded that the failure to confer and negotiate in good faith in itself constituted activity which was prohibited by the Statute. As we have emphasized throughout our Memorandum, the Statute encourages collective bargaining and it encourages the acceptance of such responsibilities and obligations by the parties. In addition, in order to avoid a fact finding proceeding based on the ground that either of the parties have refused to meet and negotiate in good faith, both of the parties have the responsibility and obligation to confer and negotiate in good faith on questions of wages, hours and conditions of employment. If either of them avoid or neglect to assume such

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27/ Emphasis added.

responsibility and obligation, they subject themselves to a fact finding proceeding.

We wish to make it clear that where we have stated that the statute has not established a duty upon the municipal employer to bargain collectively with the majority representative, we mean to say that there is no such duty which can be enforced by the Board in a prohibited practice proceeding. The provisions of the statute with respect to fact finding create some type of duty upon both the municipal employer and the majority representative to meet and negotiate in good faith and if they fail to do so, the Board, in the exercise of its function, certifies such matter to fact finding.

Our colleague characterizes our position with respect to this issue as "a negative attitude toward the basic premise of the Statute." It is for the legislature to determine the basic purpose of the statutes which it enacts. It is the function of this Board to administer labor relations statutes in this state as enacted by the legislature. The State of Wisconsin has charted a new course in municipal employer-employe labor relations. It was the first state to adopt a law establishing certain rights in the labor relations area for municipal employes, their representatives, and municipal employers. The journey to a full and complete labor relations statute has not been completed.

Opposition to the philosophy of collective bargaining in municipal employment has been based primarily on the fact that the rights and procedures normally established in labor relations laws in the private sector interfere with "home rule" and the inherent powers and rights of municipalities.

The legislature's enactment of the first three subsections of Section 111.70 was an attempt to constitute a change in the manner in which many municipal employers in this state were conducting their employe relations. Provisions subsequently added in 1961 created additional changes in that regard. This new venture by the State of Wisconsin has made inroads in the area of "home rule" of municipal employers. That the legislature was conscious of the principle of "home rule" of the municipal employers is amply demonstrated by the fact that Section 111.70(4)(k) provides a limitation on fact finding cases involving the discipline or discharge of employes under civil service provisions of state or local ordinance, and subsection (m) is a limitation, to some extent, upon the Board

in fact finding proceedings where the municipality involved has established fact finding procedures substantially in compliance with the statute.

To adopt the reasoning of our colleague that municipal employers have an enforceable duty to bargain collectively and that this Board can enforce such duty in a prohibited practice proceeding, would, in our opinion, go beyond the intent of the legislature. We are convinced that in 1961 the legislature was not ready to establish a labor relations law in public employment as effective as the Wisconsin Employment Peace Act in the private sector of our economy. Apparently it was satisfied that many municipalities were not ready or willing to accept the principle of collective bargaining, except on a voluntary basis. Our experience in administering the statute has demonstrated that a majority of municipal employers have engaged in good faith bargaining with the certified or recognized representatives of their employes. However, the members of the Board, as well as the majority of the parties affected by Section 111.70 and its administration, and others having an interest in municipal employer-employe labor relations, agree that the present law leaves much to be desired. While the law specifically provides that strikes in public employment are illegal, such provision is not administered by the Board, and it has not deterred public employes from striking on four separate occasions since the enactment of the present law. Representatives of certain municipal employers have not accepted the principle of collective bargaining in public employment, and they have rejected the "voluntary" approach to collective bargaining.

While the Board does not wish to infer that the four strikes which have occurred in public employment since the enactment of this law resulted from a refusal to bargain in good faith, the Board is of the opinion that if Section 111.70(2) of the statute specifically set forth the right of public employes to bargain collectively, and further set forth, as a corollary of that right, the duty to bargain collective specifically enforceable in a prohibited practice proceeding, such amendments should deter municipal employes and their representatives from engaging in self help by illegal strike activity.