STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS BOARD

In the Matter of the Petition of APPLETON MUNICIPAL EMPLOYEES UNION, LOCAL 73, WISCONSIN COUNCIL OF COUNTY AND MUNICIPAL EMPLOYEES, AFSCME, AFL-CIO Involving Employes of CITY OF APPLETON Employed in the SEWERAGE DIVISION of the DEPARTMENT OF PUBLIC WORKS	Case VI No. 10454 ME-208 Decision No. 7423

Appearances:
Mr. Robert J. Oberbeck, Executive Director, for the Petitioner.
Mr. Dennis Herrling, Assistant City Attorney, for the Municipal Employer.
Goldberg, Previant & Uelmen, Attorneys at Law, by Mr. Gerry M. Miller, for the Intervenor.

DIRECTION OF ELECTIONS

Appleton Municipal Employees Union, Local 73, Wisconsin Council of County and Municipal Employees, AFSCME, AFL-CIO, having petitioned the Wisconsin Employment Relations Board to conduct an election, pursuant to Section 111.70 of the Wisconsin Statutes, among employes of the City of Appleton, employed in the Sewerage Division of the Department of Public Works; and hearing on such petition having been conducted at Appleton, Wisconsin, on November 16, 1965, by James L. Greenwald, Examiner; and during the course of the hearing, General Drivers & Dairy Employees Local 563, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America having been permitted to intervene in the instant proceeding on the basis of its claim that it represented the employes involved; and the Board having considered the evidence and arguments of Counsel, and being satisfied that questions have arisen concerning the appropriate collective bargaining unit, and concerning representation for certain employes of the City of Appleton;

NOW, THEREFORE, it is

DIRECTED

That elections by secret ballot shall be conducted under the direction of the Wisconsin Employment Relations Board within sixty (60)

days from the date of this Directive among all regular employes of the City of Appleton employed in the Sewerage Division of the Department of Public Works, excluding craft employes, professional employes, confidential employes, supervisors and department heads, who were employed by the City of Appleton on January 4, 1966, except such employes as may prior to the elections quit their employment or be discharged for cause, for the purposes of determining (1) whether a majority of the employes eligible to vote desire that the employes employed in the Sewerage Division of the Department of Public Works of the City of Appleton constitute a collective bargaining unit separate and apart from any other employes of the City of Appleton, and (2) whether a majority of the eligible employes voting desire to be represented by Appleton Municipal Employees Union, Local 73, Wisconsin Council of County and Municipal Employees, AFSCME, AFL-CIO, or by General Drivers & Dairy Employees Local 563, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, or by neither of such organizations, for the purpose of conferences and negotiations with the City of Appleton on questions of wages, hours and conditions of employment. The ballots cast by the employes for the unit determination shall be tallied first, and if the required number of employes fail to vote in favor of establishing the separate unit, then the ballots with respect to the selection of the bargaining representative shall be immediately impounded, and the results thereof not determined.

Given under our hands and seal at the City of Madison, Wisconsin, this 4th day of January, 1966.

WISCONSIN EMPLOYMENT RELATIONS BOARD

By _____
Morris Slavney, Chairman

_____
Arvid Anderson, Commissioner

_____
Zel S. Rice II, Commissioner

STATE OF WISCONSIN

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MEMORANDUM ACCOMPANYING DIRECTION OF ELECTIONS

Local 73, AFSCME, hereinafter referred to as the Petitioner, petitioned the Board to conduct an election among employes of the City of Appleton, employed in the Sewerage Division of the Department of Public Works, to determine what representation, if any, the employes therein desired for the purposes of collective bargaining, pursuant to Section 111.70 of the Wisconsin Statutes. At the hearing, Teamsters Local 563, hereinafter referred to as the Intervenor, was permitted to intervene on the basis of its claim to be the recognized representative for all hourly-paid employes employed in the Department of Public Works.

The Intervenor would have the Board dismiss the petition on two grounds, (1) that the unit sought by the Petitioner is inappropriate, and (2) that the petition was untimely filed.

Appropriateness of Unit

The Department of Public Works consists of five separate divisions, Street, Sanitation, Sewerage, Maintenance and Engineering. There are approximately 120 employes in the Department of Public Works, and 18 are employed in the Sewerage Division. The Intervenor, up until at least the date of the filing of the petition, September 27, 1965, has been recognized as the collective bargaining representative of all hourly-paid employes in the first four divisions.[1/]

1/ The Board so found in an Order Appointing Fact Finder issued by it on March 24, 1964 in Decision No. 6682, and during the year 1965, the Intervenor has submitted proposals on wages, hours and working conditions for said employes, which proposals have been considered by the Municipal Employer.

The Engineering Division consists of professional engineers and clericals.

While the Intervenor claims that it has been recognized as the representative of the employes in the Department of Public Works and that such a Department is an appropriate unit, it should be noted that the clerical employes in the Engineering Department have not been included as part of that departmental-wide unit.

The Sewerage Division is physically and functionally located separate and distinct from the remainder of the functions and divisions of the Municipal Employer. Its employes primarily carry out their functions at the Sewage Disposal Plant. It has its own Superintendent, who is in charge of the entire Division, and the employes in said Division are not subject to the supervision of any other agent or officer of the Municipal Employer. The employes perform duties which, except for the Laborer I and II classifications, of which there are four positions, are distinct from the duties performed by employes of the Municipal Employer employed in other divisions or departments. There are very few temporary transfers either to or from the Sewerage Division.

The Board's function with respect to the establishment of an appropriate collective bargaining unit of municipal employes is governed by the following statutory provisions:

> "Section 111.70(4)(d). 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."
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> "Section 111.02(6). The term 'collective bargaining unit' shall mean all of the employes of one employer . . . , except that where a majority of such employes engaged in a single craft, division, department or plant shall have voted by secret ballot as provided in Section 111.05(2) to constitute such group a separate bargaining unit they shall be so considered, ..."

> "Section 111.05(2). Whenever a question arises concerning the determination of a collective bargaining unit as defined in Section 111.02(6), it shall be determined by secret ballot, and the board, upon request, shall cause the ballot to be taken in such manner as to show separately the wishes of the employes in any craft, division, department or plant as to the determination of the collective bargaining unit."

Whenever a petition for an election is filed with the Board, and wherein the petitioner requests an election among certain employes not constituting all of the employes of the employer, the Board has no power, except if the employes constitute a single craft, to determine what constitutes an appropriate collective bargaining unit. It does determine whether the group of employes set out as being an appropriate bargaining unit does in fact constitute a separate craft, division, department or plant. The employes involved, if they do constitute a separate division, department, or plant, are given the opportunity to determine for themselves whether they desire to constitute a separate collective bargaining unit.2/

The Intervenor contends that the statutes should be interpreted to give weight to past bargaining history to determine whether a non-craft group should be permitted to establish itself as a separate unit, whether for the purpose of decertification or for substituting another union for its current bargaining agent. It emphasizes the bargaining history between the Intervenor and the Municipal Employer, and argues that the unit established through bargaining history should not be disturbed.

The bargaining and negotiations in the past have been conducted by the City's Personnel Committee for all of the employes in the Department of Public Works, with the City Personnel Committee consulting with and receiving the advice of the Director of Public Works. The wage increases, fringe benefits and work rules negotiated for the Department of Public Works have been applied to all the employes in the Department and, in some instances, on a City-wide basis. The recommendations made by the Sewerage Division Superintendent with respect to promotions, transfers, discipline and individual wage

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2/ Appleton Water Commission, (6075) 8/62; County of Milwaukee, (7135) 5/65.

adjustments, are subject to the approval of the Director of Public Works, and are not made independently by the Superintendent of the Sewage Disposal Plant.

The Intervenor would have the Board establish an appropriate collective bargaining unit on criteria considered by the National Labor Relations Board in establishing appropriate units under the federal labor law. The National Labor Relations Board considers the following factors:

(1) Duties, skills and working conditions of the employes.
(2) History of collective bargaining.
(3) Extent of union organization among the employes.
(4) Desires of the employes where one or two units may be equally appropriate.3/

Similarly, in recently adopted labor laws applying to public employes, the Connecticut State Board of Labor Relations and the Michigan Labor Mediation Board determine appropriate collective bargaining units with due consideration to ". . . a clear and identifiable community of interest to employes concerned . . .".4/

However, the criteria established in the Wisconsin Employment Peace Act, as quoted above, do not permit the Board to rely on the bargaining history as grounds for denying elections among employes in a separate division to determine for themselves whether they desire to constitute a unit separate and apart from the other employes of the municipal employer.5/

The Board has also today issued a Direction of Elections in a case involving the City of Kenosha. Another local of the Teamsters filed a petition with the Board requesting the Board to conduct an election among employes in the Waste Division of the Department of Public Works. In that proceeding, another local of the AFSCME has been historically recognized as the representative of all civil service employes of that community, with the exception of uniformed employes. In the instant proceeding, the intervening Teamster's local objects to the fragmentation of an existing unit. In the City of Kenosha case, the petitioning Teamster's local would fragmentize

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3/ Para. 2605, CCH, Labor Law Reporter.
4/ Laws of Connecticut; P.A. 159, Laws of 1963; Laws of Michigan, Public Act 336 of 1947 as amended by House Bill No. 2953, 1965.
5/ Milwaukee Board of Vocational and Adult Education, (6343) 5/63; City of Milwaukee (6476) 8/63.

the existing unit. The Intervenor AFSCME Local in the City of Kenosha case would retain the overall unit and opposes fragmentation of an existing unit, while in the instant proceeding, the petitioning AFSCME Local would fragmentize the existing unit. The position of the parties in said two proceedings are inconsistent and demonstrate the problems faced by the Board in establishing units as required by the Statute. Fragmentizing of larger units of employes may result in requiring a municipal employer to engage in conferences and negotiations with more than one labor organization representing the same general category of employes on wages, hours and working conditions of its employes, may encourage needless rivalry among labor organizations, and may disturb an existing legitimate relationship and tend to delay the collective bargaining process. However, these factors must be weighed against the rights of the employes, where they constitute a separate department or division, to determine for themselves whether they desire to constitute a separate appropriate collective bargaining unit and, further, what representation, if any, they desire for the purposes of conferences and negotiations with their municipal employer. It is interesting to note that there has been an insignificant number of cases where the Board has observed fragmentation of bargaining units, in accordance with the statutory requirements, among employes of private employers. Apparently, the employes, labor organizations and employers alike, at least in private employment, have recognized that an effective collective bargaining relationship is best maintained in the absence of fragmentizing an over-all collective bargaining unit. This observation is not intended to apply to those smaller units consisting of craft employes or employes with specialized skills.

Timeliness of Petition

The Intervenor argues that the petition filed on September 27, 1965, is untimely. The Intervenor contends that the Intervenor and Municipal Employer have agreed that when they did reach an agreement, they would reduce such an agreement in a written collective bargaining agreement, and further, that said negotiations have been carried on between the Intervenor and the Municipal Employer with the understanding that any wage increase resulting from their negotiations would be retroactive for the year 1965 and would also cover matters pertaining to wages for the year 1966. The Intervenor

further contends that the filing of the petition, and the instant election proceeding has resulted "in upsetting the understandings previously reached in negotiations as to the scope of the unit and the submission of a revised proposal by the Union . . . , all of which has delayed the negotiations."

In the City of Green Bay[6/] the Board considered the issue of timeliness in the filing of a petition for election in municipal employment, and in that case the Board expressed its policy as follows:

> "In determining whether petitions for elections in municipal employment are 'timely' filed, the Board will examine existing ordinances affecting the period in which to initiate conferences and negotiations with respect to wages, hours and conditions of employment, the budgetary deadline and collective bargaining history if any, and other factors which affect the stability of the relationship between the employes, their bargaining agent, and the employer. In the event the Board conducts an election during the term of an ordinance or collective bargaining agreement, and therein the employes select a representative other than the one previously recognized in the ordinance or agreement, the newly selected representative normally will be obligated to enforce and administer the substantive provisions therein inuring to the benefit of the employes. Any provisions running to the benefit of the former bargaining agent normally will be considered extinguished and unenforceable."

The Intervenor contends that the factual situation existing in the instant situation differs "radically" from that in the above cited case in that "No one has raised a question concerning Local 563's majority status in the departmental unit." The question of representation has been raised in this proceeding. While there may not be a question of representation concerning the entire Department of Public Works, a question of representation has arisen concerning the Sewerage Division in that Department. The distinction is insufficient to persuade the Board to dismiss the petition on such basis. There is a factor in the instant proceeding which did not exist in the City of Green Bay, and that is that there presently exists no binding agreement between the Intervenor and the Municipal Employer. In City of Green Bay such an agreement did exist, and the Board was

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6/ (6558) 11/63.

concerned with the administration of that agreement following the conduct of an election to determine bargaining representatives.

Although not specifically raised, the Board has considered whether the fact finding proceeding involving the Intervenor and the Municipal Employer has any possible effect on the timeliness of the election petition. The fact finder was appointed by the Board in March, 1964, to make recommendations with regard to a deadlock existing between the Intervenor and the Municipal Employer on questions of wages, hours and conditions of employment of employes in the Department of Public Works. The fact finder issued his recommendations on November 20, 1964, and therein made recommendations with respect to wages for the year 1964. The Intervenor and the Municipal Employer could not agree on all the recommendations of the fact finder. Subsequent to the issuance thereof, said parties engaged in collective bargaining, as previously described, concerning wages for the years 1965 and 1966. While the Board, in future cases, may refuse to process an election petition filed after the issuance of a fact finder's recommendations, the time lag between the fact finder's recommendations issued in November, 1964, and the filing of the petition herein is such that there has been a reasonable time for said parties to consider the implementation of the fact finder's recommendations, and therefore, in that regard, the petition herein is not untimely filed.

The Board, therefore, is today issuing a Direction of Elections wherein the employes in the Sewerage Division will be given an opportunity to determine for themselves whether they desire to constitute a collective bargaining unit separate and apart from other employes of the Municipal Employer, and what, if any, representation they desire for the purposes of conferences and negotiations with the Municipal Employer on questions of wages, hours and conditions of employment.

The results of the unit vote will be tabulated first, and if there is no question that the required number of employes vote in favor of the separate unit, then the ballots with respect to the selection of the bargaining representative will be tallied. However, if the result of the vote on the unit determination does not establish a separate unit, the Board agent conducting the elections will immediately impound the ballots on the question of representation and the results thereof will not be determined.

Eligibility Issues

The Petitioner contends that all classifications employed in the Sewerage Division, with the exception of the Superintendent, be included in the Sewerage Division voting group. The Municipal Employer and Intervenor contend that the Chief Operator, Robert D. Thompson, is a supervisory employe and that the Laboratory Technician, Rita Wurdinger, is a technical and confidential employe and, therefore, both should be excluded from eligibility.

Thompson, who is responsible to the Division Superintendent, has supervisory responsibility for all employes engaged in the sewage plant operation, sewer maintenance, and the laboratory. He assigns, instructs, and supervises the work of all the employes. He receives $2.97 per hour, while the employes he supervises receive $2.47 per hour or less, except the Sewage Plant Mechanic, who receives $2.75. Although Thompson has limited authority regarding personnel action, which is handled by the Superintendent, we consider his supervisory responsibilities involving employes in the maintenance and operation of the sewage system of the Municipal Employer to be of sufficient responsibility that he is properly classified as a supervisor. Since supervisors are agents of the municipal employer, the Board has excluded them from the eligibles in elections conducted among municipal employes for the reason that their inclusion would conflict with their responsibility in performing their management function and would deprive employes of their protected rights free from interference by agents of the municipal employer.[7/] Therefore, Thompson is excluded from the eligibles.

Wurdinger, the Laboratory Technician, is neither a craft nor a confidential employe. She has neither an academic degree, nor has she undergone any substantial period of training, comparable to an apprenticeship, in order to perform her work. She does not perform any work as a private secretary to the Division Superintendent, even though in the past she occasionally did so. Therefore, she is not a confidential employe, and we have included her among the eligibles.

On May 13, 1964, the Intervenor filed a complaint with the

7/ City of Wausau (6276) 3/63; City of Milwaukee (6960), 12/64.

Board, wherein it alleged that the Municipal Employer had committed a prohibited practice by discontinuing the check-off of dues in favor of the Intervenor. On June 8, 1964, the Intervenor advised the Board that it had reached an understanding with the Municipal Employer in regard to the matter, and it requested an indefinite adjournment. On January 3, 1966, the Intervenor, in writing, requested the Board to dismiss said complaint proceeding, and the Board shall issue an Order dismissing same. Therefore, said complaint proceeding cannot constitute a bar to an election.[8/]

Dated at Madison, Wisconsin, this 4th day of January, 1966.

WISCONSIN EMPLOYMENT RELATIONS BOARD

By _____
Morris Slavney, Chairman

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Arvid Anderson, Commissioner

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Zel S. Rice II, Commissioner

8/ Had not the request to dismiss the complaint proceeding been received, the Board would have reached the same conclusion for the reason that the complaint matter had been held in abeyance for over a year and a half at the request of the Intervenor.