STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of	Case 30 No. 38924 ME-190
CITY OF MILWAUKEE	Dec. No. 7432-A
Involving Certain Employes of	Case 3 No. 38922 ME-188
CITY OF MILWAUKEE	Dec. No. 6215-O

Appearances:

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

Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., by Ms. Marianne Goldstein Robbins, Attorneys at Law, 788 North Jefferson Street, P. O. Box 92099, Milwaukee, WI 53202, appearing on behalf of IUOE Local 139.

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

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER GRANTING MOTION TO DISMISS

On April 20, 1987, the City of Milwaukee having filed with the Commission a petition, requesting that the Commission issue an order including the equipment operator positions currently constituting a separate unit jointly represented by Milwaukee District Council 48, AFSCME, AFL-CIO and Local 139, IUOE, AFL-CIO, in an existing unit represented solely by Milwaukee District Council 48, AFSCME, AFL-CIO; and copies of said petition having been served on the City of Milwaukee, on Milwaukee District Council 48, AFSCME, AFL-CIO, and on Local 139, IUOE; and on September 24, 1987, the City having amended said petition; and on October 12, 1987, Local 139 having filed a Motion to Dismiss the City's amended petition, with supporting brief; and on October 13, 1987, AFSCME District Council 48 having advised the Commission in writing that it would neither appear at hearing nor enter any position in the instant matter; and Counsel for the City and Local 139 having agreed that the Commission should decide the preliminary motion to dismiss without need of a hearing; and briefing on said motion having been completed on November 9, 1987; and the Commission being fully advised in the premises, makes and issues the following Findings of Fact, Conclusions of Law and Order Granting Motion to Dismiss.

FINDINGS OF FACT

1. That the City of Milwaukee, herein City, is a municipal employer with offices at the Milwaukee City Hall, 200 East Wells Street, Milwaukee, Wisconsin 53202-3551.

2. That Local 139, International Union of Operating Engineers, AFL-CIO, herein Local 139, is a labor organization with offices at 7283 West Appleton Avenue, Milwaukee, Wisconsin 53216.

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

4. That on March 7, 1966, in City of Milwaukee, Dec. No. 7432, following a representation election conducted by it, the Wisconsin Employment Relations Commission (herein Commission) certified Local 139 and District Council 48 jointly as exclusive collective bargaining representative of a bargaining unit of City employes described in that certification as follows:

all regular employes employed by the City of Milwaukee in its various departments and divisions who are classified as Trench Machine Operator, Clamshell Operator, Crane Operator, Hoist Operator, Hydraulic Hammer Operator, Roller Engineman, Engineman (Asphault Plant), Roller Repairman, Tractor Operator, Bulldozer Operator, and End Loader (under 40 h.p.), and Tractor Operator, Bulldozer Operator (under 40 h.p.), excluding all other employes, supervisors and department heads;

that Local 139 and District Council 48 have jointly represented that bargaining unit at all times since the Commission's issuance of that certification; and that in its instant petition, the City further describes that jointly-represented bargaining unit as follows:

> . . . There are between 15 and 76 employees who at times occupy the (following) 2,080-hour equivalent positions . . .
>
> . . .

Positions	Number of 2,080-Hour Equivalent Employees *
Tractor Operator (under 40 H.P.)	2
Harbor Crane Operator	2
Asphault Plant Operating Engineer	1
Tractor, Bulldozer, End Loader or Grader Operator	13
Grad All Operator	1
Roller Operator	9
Crane Operator	2
Clamshell Operator	0

> * Represents total annual hours all employees worked in position divided by 2080. The actual number of employees working in a position at one time may be much greater than the number of 2,080-hour equivalent employees. The number of employees in the bargaining unit fluctuates between 15 and 76.
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> . . . This workforce is in a constant state of flux between the jointly represented unit described above (D.C. 48/Local #139) and units solely represented by Milwaukee District Council 48, AFSCME, AFL-CIO.
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> . . .

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

> all regular employes employed in the various bureaus in the Department of Public Works of the City of Milwaukee excluding engineers and architects, craft employes receiving prevailing construction and building trade rates, confidential employes, supervisors and executives and also excluding natatorium supervisors, firemen (natatoria), natatorium assistants, bridgetenders and boat operators in the Bureau of Bridges and Public Buildings; clerks II - field (who are scalemen), cranemen, furnacemen, incinerator plant maintenance workers, garbage disposal laborers, garbage collection laborers, machinery operators, maintenance mechanics, maintenance

mechanic foreman and boiler repairmen employed in Incinerator Plants of the Disposal Division of the bureau of Garbage Collection and Disposal; and garbage collection laboreres employed in the Collection Division of the Bureau of Garbage Collection and Disposal; and machinists, blacksmiths, laborers (Electrical Services), mechanic helpers and city laborers employed in the Machine Shop of Shops and Yard in the Division of Street Services of the Bureau of Traffic Engineering and Electrical Services.

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

> This petition is filed for the purpose of seeking implementation of the antifragmentation statute, i.e., Sec. 111.70(4)(d)2.a.-d., Stats. Joint District Council #48/ Local #139 was certified prior to the enactment of the anti-fragmentation statute and as such is an accident of history.
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> The 2.080-hour equivalent positions (listed above) . . . share a primary community of interests with Department of Public Works employes and Harbor Commission employees solely represented by District Council #48, AFSCME, AFL-CIO, and have no basis for continuing to exist as a separate bargaining unit.

7. That on June 24, 1987, in City of Milwaukee, Dec. No. 24602 et al., the Commission issued an Order Pursuant to Stipulations Amending Certifications and Clarifying Bargaining Units providing, among other things, that the certification of representatives described in Finding of Fact 5, above, was superceded by the City and District Council 48's agreement to restructure several certified and recognized bargaining units into four agreed-upon units, to wit, Blue-collar, Professional, Technical, and White Collar; and that the Blue-collar unit was described in said order as follows:

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

8. That on September 16, 1987, pursuant to a Commission request that the City make its petition more definite and certain in light of the development noted in Finding of Fact 7, above, the City amended its petition herein so as to request that the Commission issue an order clarifying the jointly-represented bargaining unit described in Finding of Fact 4 and the District-Council 48 represented blue-collar unit described in Finding of Fact 7 in such a way that all of the positions in the former would be unconditionally included in the latter, without a representation election being conducted.

9. That on October 12, 1987, Local 139 filed a Motion to Dismiss the City's amended petition, asserting that:

> the grounds alleged in the petition do not state a cognizable basis for unit clarification and . . . a petition for unit clarification is not a proper or available means by which to seek the results set forth in the petition.

10. That the City's amended petition seeks, by unit clarification, to incorporate one existing unit into another, on no other grounds than anti-fragmentation and a claimed community of interest between the positions in the jointly-represented unit described in Finding of Fact 4 and the District Council 48-represented blue-collar unit described in Finding of Fact 7.

CONCLUSIONS OF LAW

1. That the anti-fragmentation and community of interest grounds upon which the City bases the instant amended petition amount only to a claim that a combined unit would be more appropriate than the unit for which Local 139 and District Council 48 were jointly certified as exclusive representative on March 7, 1966; and that a post-certification petition for unit clarification is not proper or available means of obtaining Commission adjudication of that claim.

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

ORDER GRANTING MOTION TO DISMISS 1/

That the Motion filed by Local 139 that the amended petition in the above matter be dismissed is hereby granted, and the Petition for Unit Clarification filed by the City in the above matter, as amended, shall be and hereby is dismissed.

Given under our hands and seal at the City of Madison, Wisconsin this 3rd day of December, 1987.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Stephen Schoenfeld
Stephen Schoenfeld, Chairman

Herman Torosian, Commissioner

Danae Davis Gordon, Commissioner

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

227.49 Petitions for rehearing in contested cases. (1) A petition for rehearing shall not be prerequisite for appeal or review. Any person aggrieved by a final order may, within 20 days after service of the order, file a written petition for rehearing which shall specify in detail the grounds for the relief sought and supporting authorities. An agency may

Footnote 1 continued on Page 4.)

Footnote 1 contiued from Page 3.)

order a rehearing on its own motion within 20 days after service of a final order. This subsection does not apply to s. 17.025(3)(e). No agency is required to conduct more than one rehearing based on a petition for rehearing filed under this subsection in any contested case.

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

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

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

. . .

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

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

CITY OF MILWAUKEE

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER GRANTING MOTION TO DISMISS

The background facts and procedural development of the case are as stated in the preface and Findings of Fact. All parties have had the opportunity to submit written arguments in support of and in oppostion to the motion to dismiss.

POSITION OF LOCAL 139 IN SUPPORT OF ITS MOTION TO DISMISS

The petition, as amended, seeks to merge a separate and long-existing bargaining unit into the recently voluntarily-recognized District Council 48 blue-collar unit which by its own description expressly excludes all craft employes and all other employes of the City represented by a collective bargaining representative other than District Council 48. Essentially, the City seeks to merge the jointly-represented unit into a unit represented exclusively by District Council 48 on the basis of the statutory anti-fragmentation policy enacted many years after the unit was certified and on the basis of a claimed community of interest. The Commission has previously squarely ruled that a unit clarification peition is not an available means by which to merge one bargaining unit into another. Citing, Shawano County (Maple Lane Health Care Center, Dec. No. 22382 (WERC, 2/85). The NLRB has ruled similarly in U.S. Postal Service, 256 NLRB No. 95, 107 LRRM 1249, 1253 (1981).

The City's petition is not based on a claim that changed circumstances have rendered particular positions inappropriately included in the present unit or that the present unit as constituted is in any way unlawful. Rather, the City relies soley on claims that another unit is more appropriate on anti-fragmentation and community of interests grounds. Just such claims were squarely rejected in Shawano County, supra. The fact that the present bargaining unit has enjoyed a successful bargaining relationship for some 20 years further shows that to process petitions like the City's herein would undercut existing certified bargaining units and the stability of on-going labor-management relationships.

Accordingly, the Commission should dismiss the amended petition forthwith.

POSITION OF THE CITY IN OPPOSITION TO THE MOTION TO DISMISS

The City's petition, as amended, seeks to rectify an accident of history whereby a fragmentary unit created and certified in 1966 prior to the enactment of the anti-fragmentation provisions of MERA, has continued to exist as a separate unit contrary to the anti-fragmentation requirements of Sec. 111.70(4)(d)2, Stats. The employes in that fragmented unit share a community of interest with the District Council 48 blue-collar unit and should therefore be placed in that unit by the Commission.

Local 139's reliance on the Shawano County decision is misplaced. There the employer sought to assert its anti-fragmentation contention after failing to do so only months before in the representation election proceeding. Here, the City of Milwaukee had no opportunity in the 1966 election proceedings to raise anti-fragmentation considerations because they were not then a part of the law.

In that case we rejected a petition for unit clarification which sought - without an election - to include all of the employes in one unit in a different bargaining unit on grounds of anti-fragmentation and community of interest. The Commission stated:

> The issue of unit appropriateness is properly one for determination in a representation election proceeding such as was conducted in advance of the vote leading to the certification of United Professionals as representative herein. Once an appropriate unit is established, it may be that a clarification proceeding is needed from time to time if positions are eliminated or new positions are created or there are other material changes in circumstances. In those cases, additions to or deletions from the established unit--with or without need of amendment of the unit description and with or without need of a self-determination vote--are made not on the basis that the existing unit is inappropriate, but rather on the basis that the positions in question belong in or out of the existing unit.
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> The Commission does not consider the unit clarification procedure a proper means of securing a combination of two existing bargaining units into one combined unit. This is especially so where, as here, the two units are currently represented by different labor organizations. The County has cited no previous Commission case in which a unit clarification petition to such end was entertained or granted. (footnote omitted)
>
> The unit clarification process is not an available means of attacking the appropriateness of a collective bargaining unit except where there is a claim that an existing unit is unlawful, that is, contrary to an unequivocal statutory requirement.
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> The County's contentions do not amount to a claim that the unit is in conflict with an unequivocal requirement of the statute, as would be the case, for example, if a claim were made that a certified unit included professional employes with non-professionals without the vote of a majority of the professionals in favor of such inclusion required by Sec. 111.70(4)(d)2.a., Stats. Although the County's anti-fragmentation argument is phrased in terms of the unit's alleged repugnance to the statute, that argument amounts only to a claim that the combined unit would be more appropriate than the unit for which the United Professionals is now certified to represent. While the above-noted requirement for a self-determination vote among professionals constitutes an unequivocal statutory requirement before a combined professional-nonprofessional unit can be certified, the anti-fragmentation provision of the statute is a less absolute, general statement of unit determination policy 6/ which the Commission has, with judicial approval, historically included as one of several factors considered in resolving appropriate unit disputes. 7/
>
> It should be clear, not only from the nature of the representation election process itself, but also from Commission case law, that the unit clarification process is not an available means of attacking the appropriateness of an existing collective bargaining unit on anti-fragmentation, community of interest, or any other grounds short of a direct conflict of the unit composition with a specific requirement of MERA.
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> The representation election proceeding that led up to the certification of United Professionals as representative of the unit in question provided the County with an opportunity to make anti-fragmentation, community of interest, or other relevant arguments regarding the appropriateness of the

instant unit of the sort it now seeks to advance in the unit clarification proceeding. Were the Commission to now entertain such a contention, the unit clarification proceedings would significantly undercut certification election processing and the stability of labor-management relationships.

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

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

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

> 1. Whether the employes in the unit sought share a "community of interest" distinct from that of other employes.
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> 2. The duties and skills of the employes sought as compared with the duties and skills of other employes.
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> 3. The similarity of wages, hours and working conditions of employes in the unit sought as compared to wages, hours and working conditions of other employes.
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> 4. Whether the employes in the unit sought have separate or common supervision with all other employes.
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> 5. Whether the employes in the unit sought have a common work place with the employes in said desired unit or whether they share a work place with other employes.
>
> 6. Whether the unit sought will result in undue fragmentation of bargaining units.
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> 7. Bargaining history.

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

Shawano County, supra. at 5-6, aff'd Case No. 85-CV-86 (CirCt Shawano, 7/22/85).

As in Shawano County, the City seeks herein by unit clarification (and hence without a vote among the affected employes) to merge two existing units based on alleged anti-fragmentation and community of interest considerations, with no claim or showing that the nature and/or continued existence of the jointly-represented unit is contrary to an unequivocal statutory requirement.

The City is, of course, correct that unlike Shawano County the City did not have an opportunity to assert its anti-fragmentation and other arguments concerning appropriateness of the jointly-represented unit as compared with some other possible unit structure because the jointly-represented unit came into being under the substantially different legal standards and procedures for determining bargaining units that existed in 1966 as compared to those enacted in 1971.

Nevertheless, the City's amended petition seeks, by unit clarification (and hence without a vote among the affected employes) to alter both the bargaining unit structure and the identity of the representative for the positions now included in the jointly-represented unit. Granting the City's petition would deprive the employes both of the fruits of the free choice exercised in the 1966 election and of any free choice in the matter of their current representation. Section 111.70(6), Stats., declares that "it is in the public interest that municipal employes so desiring be given an opportunity to bargain collectively with the municipal employer through a labor organization or other representative of the employes' own choice." Balancing the interests of the instant employes in freedom of choice against those of the employer in streamlining its unit structure to avoid undue fragmentation, we find that in the context of the instant amended petition, the former considerations outweigh the latter.

Our decision herein does not mean that the existing unit arrangements are not subject to challenge through other means. A timely-filed and properly supported employe or labor organization petition for a representation election in an appropriate unit including the positions currently included in the jointlyrepresented unit with other positions would be a valid means by which the unit issue could be litigated on its merits. A material change in the City's organizational structure might also permit the City to initiate a petition for election raising the unit issue. See, e.g., Portage County, Dec. No. 18792-A (WERC, 7/81) and Green County, Dec. No. 21453 (WERC, 2/84).

In the instant circumstances, however, the City seeks to eliminate an existing unit, merge it with another represented by another union, without any opportunity for employe expression of choice, and without the impetus of a presently unlawful unit structure. We have therefore concluded that the City's unit clarification petition is not an appropriate means of achieving the ends sought by the City herein, and we have accordingly granted Local 139's motion for dismissal.

Dated at Madison, Wisconsin this 3rd day of December, 1987.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Stephen Schoenfeld
Stephen Schoenfeld, Chairman

Herman Torosian, Commissioner

Danae Davis Gordon, Commissioner