STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

LOCAL 1561, Affiliated with DISTRICT COUNCIL 48 OF THE AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, Complainant, vs. WAUWATOSA BOARD OF EDUCATION, Respondent.	Case X No. 11844 MP-46 Decision No. 8319-B

Appearances:
Goldberg, Previant & Uelmen, Attorneys at Law, by Mr. John S. Williamson, Jr., for the Complainant.
Lamfrom, Peck, Ferebee & Brigden, Attorneys at Law, Mr. Willis B. Ferebee, for the Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

Complaint of prohibited practices having been filed with the Wisconsin Employment Relations Commission in the above entitled matter, and the Commission having appointed Byron Yaffe, a member of the Commission's staff, to act as Examiner and to make and issue Findings of Fact, Conclusions of Law, and Order, as provided in Section 111.07(5) of the Wisconsin Employment Peace Act, and hearing on such complaint having been held at Milwaukee, Wisconsin on January 16, 1968, before the Examiner, and the Examiner having considered the evidence, 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 the Complainant, Local 1561, affiliated with District Council 48, American Federation of State, County and Municipal Employees, hereinafter referred to as the Union, is a labor organization and has its offices at 615 East Michigan Street, Milwaukee, Wisconsin.

2. That Wauwatosa Board of Education, hereinafter referred to as the Respondent, is a Municipal Employer and has its principal offices at 1732 Wauwatosa Avenue, Wauwatosa, Wisconsin.

3. That the Union is the certified exclusive bargaining representative of certain employes of the Respondent, including custodial

and maintenance employes, the stock clerk, and all cooks, excluding the electrician, clerical employes, and all other employes, supervisors, professional employes and executives; and that on or about December 31, 1966, the Union and the Respondent entered into a collective bargaining agreement covering said employes.

4. That the Respondent, in early January 1967, after learning that one of its employes, Kenneth LaBlanc, a School Custodian Assigned, had become eligible for an Electrician's Aide position in the City of Wauwatosa, had a study made of the job duties of said employe and also had a survey made of rates paid elsewhere in the community for comparable work. On the basis of the job study and survey, the School Board established a classification entitled Electrician's Helper, and established a new salary range for said classification. Employe LaBlanc's classification was thereafter changed retroactively to January 1, 1967. The Union thereafter filed a grievance claiming that said action violated the collective bargaining agreement. The dispute ultimately was decided by an arbitrator who found that the Respondent, by taking said action, had violated the collective bargaining agreement, and who directed that the reclassification be withdrawn and cancelled. Subsequent to the arbitration award, employe LaBlanc's old rate was restored, and the parties thereafter agreed to negotiate the issues which caused the dispute over the reclassification. During said negotiations the Union attempted to negotiate, together with the reclassification of employe LaBlanc's position, the reclassification of other bargaining unit employes. The Respondent agreed to certain of the Union's demands; however, the parties were unable to agree upon all of the Union's requested reclassifications. The Respondent thereafter advised the Union that because it had reached an impasse in the negotiations, it intended to unilaterally re-establish the new classification and salary for employe LaBlanc. The Union filed an action in the Circuit Court, Milwaukee County, seeking a judgment confirming the arbitration award and directing the Respondent to abide by said award. On November 10, 1967, the Circuit Court rendered a judgment confirming the arbitration award and directing the Respondent to abide by it.

5. That there exists no clear and satisfactory preponderance of the evidence that the Respondent had any knowledge of the Union status or sympathies of Kenneth LaBlanc, and that the reclassification of said employe was for reasons other than his non-union status.

6. That during the negotiations in question, the Respondent

sent to the bargaining unit employes the following two undated letters:

"A Message From Your Board of Education:

"The recent performance of Local 1561 with regard to certain matters is somewhat confusing to us--and we think to you, too.

"Recently, the School Board and Local 1561 were in disagreement as to whether the School Board has the right to create a new classification--which right is pretty well spelled out in the contract under Section 6(a).

"Local 1561 said that the new classification was really only a change in job title and that if the School Board wanted to make any changes it would have to bargain with the Union.

"The disagreement went to arbitration and the arbitrator sided with Local 1561 and said that the School Board was required to negotiate with the Union.

"Immediately, the School Board, in compliance with the arbitrator's decision, requested negotiations on the classification involved--which was that of Electrician's Helper.

"But Local 1561 now refuses to agree to a new classification and an increase in salary which went along with it--even though it represents the employee involved--unless the School Board will also grant an increase to an employee in another job which is entirely different from the one involved here.

"In other words, Local 1561 says it will prevent an increase to one employee unless it can also get an increase for another employee. This is, indeed, a strange method of employee representation.

"In a recent article in a weekly newspaper, which reported on objections being voiced by skilled persons against 'mass unions' it was noted that what the 'men with skills are seeking is the special recognition, financial and otherwise, which mass unionism has long denied them.'

"The article explains this revolt by men with higher skills in this manner: 'In a society that still cherishes individual effort, the mass union...should have no place. Skilled labor also is worthy of its hire.'

"The School Board thinks so, too.

Wauwatosa Board of Education"

"Another Message from your Board of Education:

"In our last letter to you we indicated some confusion with regard to the activities of Local 1561.

"At this time we must admit we are now totally confused as to what Local 1561 is trying to do.

"At negotiations meetings held after our last letter to you, your School Board offered to increase the salary of one other employee -- in the amount requested by the union -- in order to get the Union to agree to the increase for the Electrician's Helper which we believe is certainly deserved.

"The Union now persists in demanding an increase for still another employee in a classification even further removed from that involved in the arbitration matter -- and insists that the School Board cannot put into effect either of the increases the School Board offered to provide unless it goes along with the request for the third employee.

"Since the School Board firmly believes that it has complied with the arbitration decision in all respects, it notified Local 1561 last Friday that it would make effective the increases offered by the School Board for the Electrician's Helper and one of the Maintenance Helpers.

"At the time of the writing of this letter, Local 1561 has indicated to us that it is going into circuit court to seek a temporary restraining order preventing the School Board from putting into effect the increases for the Electrician's Helper and the Maintenance Helper.

"Frankly, we have never seen or heard of any union so intent upon preventing wage increases from being put into effect for employees in the bargaining unit which it represents.

"Your School Board feels that Local 1561 ought to stop using our employees as pawns in whatever game it has in mind and instead, let the increases continue in effect without further ado.

"Your School Board is prepared to take any action open to it to keep such increases effective.

Sincerely yours,

WAUWATOSA BOARD OF EDUCATION"

That subsequent to the filing of a petition requesting the Wisconsin Employment Relations Commission to conduct another election among the employes in the certified bargaining unit, and prior to the Commission's determination with respect to said petition, the Respondent sent the following letters to the employes:

"October 4, 1967

"To All Employees:

"Almost two years ago, during a negotiation meeting, Local 1561 offered to give up any claim to represent the Supervisory Custodians in the Junior and Senior High

Schools, if the School Board would grant the request of Local 1561 in another matter.

"The School Board declined to go along on both parts of the offer, first of all on the basis that these employees were supervisory and, therefore, not in the bargaining unit represented by Local 1561.

"In addition, however, the School Board felt that neither the School Board - nor Local 1561 - had any right to maneuver employees for bargaining purposes.

"Local 1561 then filed a petition with the Wisconsin Employment Relations Board claiming that such employees were not supervisory and should be in the bargaining unit.

"Last week, almost two years after the initial discussion and after considerable litigation, the Wisconsin Employment Relations Board handed down its decision agreeing with the School Board that these employees were supervisory and that they must be excluded from the bargaining unit.

"Why Local 1561 sought to downgrade these employees from a supervisory to a non-supervisory category, in the first place, is difficult for us to understand.

"To the School Board, at least, it appears to be another example - as in the Electrician's Helper situation - of Local 1561's tendency to use some employees in an effort to obtain something for other employees.

"Frankly, we don't look upon collective bargaining as a game of maneuvering people around.

"Our basic philosophy, in all our relations with our employees, is to give full recognition to an employee for the work he performs, and to give full recognition to an employee for the duties and responsibilities assigned to him in his work.

"While this seems to be at odds with Local 1561's concept that all employees should be more or less on the same level, we will continue to follow our basic policy in the future regardless of Local 1561's apparent efforts to have us deviate from such policy.

"We want you to know how we feel about these matters and we are sure that you want to know, too.

Sincerely,

Wauwatosa Board of Education"

"October 25, 1967

"To All Employees:

"In February, 1963 Local 1561 was certified as the collective bargaining agent for our custodial, maintenance and cafeteria employees.

"For several years, while both the School Board and Local 1561 directed their efforts to the interests of such employees, our relations with Local 1561 were reasonably effective and satisfactory.

"In the last year or so, however, Local 1561 seems to have become preoccupied in bringing the School Board to its knees rather than negotiating realistic and reasonable changes in salaries and working conditions for our employees.

"This attitude is illustrated by several phrases in a recent newsletter to employees issued by Local 1561 in which the Union says 'We expect to teach the School Board . . .' and'sooner or later the School Board is going to learn . . .'

"While this antagonistic attitude does not intimidate your School Board in any way, we are greatly concerned to note that this development of antagonism seems to have become more important to Local 1561 than its primary purpose of properly bargaining for those employees it represents.

"This antagonistic attitude on the part of the union has become so persistent that it has repeatedly taken inconsistent positions relative to the employees it is supposed to represent -- some of which we have told you about in our recent letters to you.

"Such inconsistencies not only make it difficult to bargain with the Union, but also make it difficult for your School Board to know just who the union chooses to represent.

"Because of this we have recently requested the Wisconsin Employment Relations Commission to conduct an election so that our employees may indicate at this time, by secret ballot, whether or not a majority wish to be represented by Local 1561.

"We feel that a determination on this question should be made. The Wisconsin Employment Relations Commission will, within a short time, decide whether another election would be appropriate at this time.

"We will, of course, let you know of its decision.

"Sincerely yours,

Armand G. Mueller /s/"

"December 1, 1967

"TO ALL EMPLOYEES:

"In a recent decision, the Circuit Court of Milwaukee upheld the Union's position with regard to the arbitration concerning the Electrician Helper.

"Despite its earlier insistence that it had the right to negotiate with us in regard to this classification, the Union's final position was that the Arbitration award didn't require it to negotiate on this matter and that if it didn't do so, the salaries set forth in the agreement would continue without change.

"So it all winds up that -- at least for the time being -- no one gets any salary increase.

"If this is what the Union was trying to accomplish, it should be pleased with the outcome of the court's decision.

"In the other matter of your School Board's request for a new election, the hearing before the Wisconsin Employment Relations Commission was had several weeks ago, and a decision on this matter should come from the Commission around the first of the year -- most likely early in January.

"We will keep you advised of further developments in this area.

"Sincerely yours,

"Armand G. Mueller /s/
"President -- Board of Education"

7. That said letters, when read in the context of the Respondent's overall conduct, impliedly promised improved benefits and working conditions based upon the employees' repudiation of the Union.

8. That during the Summer of 1967, the Respondent directed the Assistant to the School Superintendent to secure information relative to whether or not a majority of the employes in the bargaining unit desired to continue their representation by the Union, and that the Assistant to the Superintendent thereafter contacted the school principals and supervisors to determine whether, in their opinion, a majority of the bargaining unit employes at that time desired the Union to continue representing them.

9. That there exists no clear and satisfactory preponderance of the evidence that the Respondent or any of its supervisors interrogated any bargaining unit employes concerning their attitudes towards the Union.

10. That on September 26, 1967, the Respondent filed a petition for election with the Wisconsin Employment Relations Commission asserting that the certified bargaining unit was inappropriate in that it contained craft and supervisory employes, as well as certain employes constituting a separate department or division who did not have an opportunity to indicate whether they wished to be represented separately.

11. That on or about October 27, 1967, the Respondent refused to enter into negotiations with the Union, except with respect to the separate carpenters and plumbers bargaining units, until a determination was made by the Wisconsin Employment Relations Commission with respect to the Respondent's petition requesting a second representation election.

Upon the basis of the above and foregoing Findings of Fact the Examiner makes the following

CONCLUSIONS OF LAW

1. That the reclassification of Kenneth LaBlanc was not motivated by his non-union status, and that the Wauwatosa Board of Education, by attempting to reclassify said employe, has not committed prohibited practices within the meaning of Section 111.70(3)(a)1 and 2, Wisconsin Statutes.

2. That Wauwatosa Board of Education, by questioning its principals and supervisors to form an opinion as to whether a majority of the employes desired continued representation by the Union, did not interfere with its employes' rights under Section 111.70(2), Wisconsin Statutes, and, accordingly, did not commit a prohibited practice within the meaning of Section 111.70(3)(a)1, Wisconsin Statutes.

3. That Wauwatosa Board of Education, by sending letters to bargaining unit employes which were intended to coerce them in the choice of their bargaining representative, and which impliedly promised improved benefits and working conditions based upon the employes' repudiation of Local 1561, AFSCME, interfered with the rights of its employes under Section 111.70(2), Wisconsin Statutes, and accordingly committed prohibited practices within the meaning of Section 111.70 (3)(a)1 of the Wisconsin Statutes.

4. That Wauwatosa Board of Education, by refusing to continue negotiations with Local 1561, American Federation of State, County and Municipal Employes subsequent to the filing of an election petition with the Wisconsin Employment Relations Commission, did not and has not engaged in any prohibited practice within the meaning of Section 111.70, Wisconsin Statutes.

5. That Wauwatosa Board of Education, by its overall conduct, has been and is engaging in a campaign intended to interfere with, restrain, and coerce its employes in the exercise of their right to choose their representative for purposes of conferences and negotiations with the Municipal Employer guaranteed in Section 111.70(2), Wisconsin Statutes, and by such conduct has committed and is committing prohibited practices within the meaning of Section 111.70(3)(a)1.

Wisconsin Statutes.

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

ORDER

IT IS ORDERED that the complaints alleging that Wauwatosa Board of Education has committed prohibited practices within the meaning of Section 111.70, Wisconsin Statutes, by reclassifying and increasing the salary of Kenneth LaBlanc, based upon said employe's non-union status, and by interrogating employes concerning their union membership, attitudes and sympathies, be and the same hereby are dismissed.

IT IS FURTHER ORDERED that the Respondent, Wauwatosa Board of Education, its officers and agents, shall immediately:

1. Cease and desist from:
   (a) Interfering with, restraining or coercing its employes in the exercise of their right to choose their representative for purposes of conferences and negotiations by sending letters to its employes which attempt to alienate the employes from their chosen representative.
   (b) Engaging in any other conduct which interferes with, restrains or coerces its employes in the exercise of their right to affiliate with or be represented by Local 1561, American Federation of State, County and Municipal Employees, in conferences and negotiations with Wauwatosa Board of Education on questions of wages, hours and conditions of employment.
2. Take the following affirmative action which the Examiner finds will effectuate the policies of Section 111.70 of the Wisconsin Statutes.
   (a) Notify all of its employes by posting in conspicuous places in its facilities where all employes may observe them, copies of the notice hereto attached and marked Appendix "A". A copy of such notice shall be signed by the President of the Wauwatosa Board of Education and shall be posted immediately upon receipt of a copy of this Order and shall remain posted for thirty (30) days thereafter; reasonable steps shall be taken by Wauwatosa Board of Education to insure that said notice is not altered, defaced or covered by any other material;
   (b) Notify the Wisconsin Employment Relations Commission in writing within ten (10) days of the receipt of a

copy of this Order what steps Wauwatosa Board of Education has taken to comply therewith.

Dated at Madison, Wisconsin this 14th day of June, 1968.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Byron Yaffe, Hearing Examiner

APPENDIX "A"

NOTICE TO ALL EMPLOYES

Pursuant to an Order of an Examiner of the Wisconsin Employment Relations Commission, and in order to effectuate the policies of Section 111.70 of the Wisconsin Statutes, we hereby notify our employes that:

The Wisconsin Employment Relations Commission, by an Examiner, has found that Wauwatosa Board of Education has committed prohibited practices within the meaning of Section 111.70, Wisconsin Statutes, by sending letters to employes which were intended to coerce employes in their choice of their bargaining representative and which impliedly promised improved wages and working conditions based upon repudiation of Local 1561, AFSCME, as their bargaining representative, and by engaging in a campaign which was intended to interfere with, restrain and coerce employes in the exercise of their right to choose their representative for purposes of conferences and negotiations with Wauwatosa Board of Education, and therefore;

WE WILL NOT interfere with, restrain or coerce our employes in the exercise of their right to choose their representative for purposes of conferences and negotiations by issuing letters which attempt to alienate our employes from their chosen representative.

WE WILL NOT in any other manner interfere with, restrain or coerce our employes in the exercise of their right to affiliate with or be represented by Local 1561, AFSCME, in conferences and negotiations with Wauwatosa Board of Education on questions of wages, hours and conditions of employment.

Our employes are free to become, remain, or refrain from becoming and remaining members of Local 1561, AFSCME, AFL-CIO, or any other labor organization.

WAUWATOSA BOARD OF EDUCATION

By_____

Dated_____

THIS NOTICE MUST REMAIN POSTED FOR THIRTY (30) DAYS FROM THE DATE HEREOF AND MUST NOT BE ALTERED, DEFACED OF COVERED BY ANY OTHER MATERIA

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

LOCAL 1561, Affiliated with DISTRICT COUNCIL 48 OF THE AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, Complainant, vs. WAUWATOSA BOARD OF EDUCATION, Respondent.	Case X No. 11844 MP-46 Decision No. 8319-B

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Statement of Facts

Local 1561, American Federation of State, County and Municipal Employees, hereinafter referred to as the Union, is the certified collective bargaining representative in a bargaining unit which consists essentially of custodial and maintenance employes and cafeteria employes employed by the Wauwatosa Board of Education, hereinafter referred to as the Respondent. In late December 1966, the Union and Respondent entered into a one-year collective bargaining agreement covering said employes.

In early January 1967, the Respondent learned that one of its employes, Kenneth LaBlanc, who was a School Custodian Assigned, had become eligible for an Electrician's Aide position in the City of Wauwatosa. The Respondent thereafter had a study made of said employe's job duties and also had a survey made of rates which were paid elsewhere in the community for comparable work. After having received the results of the job study and survey, the Respondent reclassified employe LaBlanc in a new classification entitled Electrician's Helper and established a new salary range for said classification. The Union filed a grievance based upon the Respondent's action, asserting that it could not unilaterally take such action under the collective bargaining agreement. The issue was ultimately brought to arbitration, and the arbitrator decided that the Respondent, by unilaterally reclassifying employe LaBlanc, had violated the collective bargaining agreement, and further directed that the reclassification be cancelled. Subsequently the parties entered into negotiations to attempt to

resolve the issues which were causing the dispute over the reclassification, and when these negotiations broke down, the School Board again attempted to unilaterally re-establish the new classification for employe LaBlanc. The Union thereafter filed an action in the Circuit Court of Milwaukee County seeking a judgment confirming the arbitration award and directing the Respondent to abide by the arbitration award, and ultimately prevailed in said action.

During the course of the negotiations over the reclassification of employe LaBlanc, the Respondent sent to the bargaining unit employes the first two letters quoted in the Findings of Fact.

In late September 1967, the Respondent filed a petition requesting the Commission to conduct a representation election, said petition being based upon the Respondent's assertion that the bargaining unit was inappropriate, and that certain employes in the bargaining unit who constitute a separate department or division did not have an opportunity to indicate whether they wished to be represented in a separate bargaining unit.

Prior to the filing of the representation petition, the Respondent questioned the principals and supervisors of the bargaining unit employes in order to determine whether in their opinion a majority of the employes desired continued representation by the Union.

After filing the election petition, the School Board sent three additional letters to the bargaining unit employes which are quoted in the Findings of Fact. Subsequent to the filing of the petition, the Respondent refused to enter into negotiations with the Union, except with respect to the separate carpenters' and plumbers' bargaining units, until the pending question of representation raised by its petition was determined by the Wisconsin Employment Relations Commission.

Reclassification and Salary Increase Of Kenneth LaBlanc

The first issue presented to the Examiner for determination is whether the School Board, by increasing the salary of Kenneth LaBlanc, a School Custodian Assigned, and by giving LaBlanc a new job title has violated Sections 111.70(3)(a)1 and 2, Wisconsin Statutes. The Union asserts that the action taken by the School Board relating to employe LaBlanc was based upon the fact that he was not a Union member. The School Board, on the other hand, contends that it learned in early January, 1967, that LaBlanc had taken and passed an Electrician's Aide examination given by the City of Wauwatosa. Upon learning of LaBlanc's eligibility for this position, the School Board had a study made of

LaBlanc's job duties, and in addition, it had a survey made of wages and salaries paid for comparable work in the area. After having received the results of the job study and the survey, the School Board created an Electrician's Helper classification, established a new wage structure for that classification, and reclassified LaBlanc. The School Board contends that the only criteria it used in reclassifying LaBlanc were the job description and the salary comparisons which were submitted to it. There is no evidence, it is contended, that the employe's Union affiliation or lack thereof played any role in the School Board's determination to reclassify him.

Although the Union attempted to show that LaBlanc's supervisor, Mr. Heinlein, recommended LaBlanc's salary increase to the School Board, and that the recommendation was based upon LaBlanc's non-union status, the School Board contends that the Union has failed to demonstrate by a preponderance of the evidence that Mr. Heinlein made any recommendation to the School Board to reclassify LaBlanc, and furthermore, even if the recommendation were made by Heinlein, the School Board contends that it caused to be made an exhaustive survey of LaBlanc's duties and of comparative wages and salaries before it determined what action it would take with respect to LaBlanc.

Assuming again that Heinlein made a recommendation to reclassify LaBlanc, the School Board asserts that there is no evidence in the record that Heinlein ever knew whether LaBlanc was or was not a Union member, nor is there any evidence that he ever tried to ascertain LaBlanc's union status. It is further pointed out that there is no evidence in the record that any members of the School Board were aware of LaBlanc's union status at the time the decision to reclassify him was made.

The School Board notes that the record indicates that the first mention of LaBlanc's non-union status was made by the Union in Union newsletters sent to the employes in April and May, 1967, some two or three months after the School Board made its determination.

The issue with respect to the right of the School Board to reclassify LaBlanc under the collective bargaining agreement was ultimately decided by an arbitrator, and although it was concluded by the arbitrator that the School Board's action with respect to LaBlanc was not permissible under the agreement, the School Board argues that the Arbitrator's finding is not a basis for concluding that the School Board took such action because of anti-union sentiments, nor that the action was based upon LaBlanc's non-union status.

In summary, the School Board submits that there is nothing in

the record to establish that it was motivated by anything other than LaBlanc's job description, the comparative salaries for similar work, and his eligibility for the position of Electrician's Aide in the City of Wauwatosa, at the time it concluded to change LaBlanc's salary and reclassify him. Accordingly, it is argued that the record clearly establishes the fact that the School Board did not engage in any prohibited practice in taking such action.

Although the Union asserts that the reclassification of LaBlanc was granted because of the employe's non-membership in the Union, there is no evidence in the record that the School Board had any knowledge of LaBlanc's status in the Union at the time it decided to reclassify him. Even if the Union's assertion is accepted that the action was taken pursuant to the recommendation of LaBlanc's supervisor, Mr. Heinlein, there is no evidence that Mr. Heinlein had knowledge of LaBlanc's status in the Union at the time the recommendation was made, nor is there any evidence, even circumstantial, that his recommendation was based upon LaBlanc's non-union status. The only testimony in the record related to the School Board's knowledge of the union status of specific employes at the time of LaBlanc's reclassification was that Mr. Heinlein had at some time prior to the dispute referred to Union members as "your guys" and to non-Union members as "my guys".

A complaint alleging interference and discrimination based upon the union status of an employe must be supported by a clear and satisfactory preponderance of the evidence that the action taken with respect to the employe was motivated by the employer's anti-union animus, and that the employer had knowledge of the employe's union status and attitudes.[1/] In the absence of such evidence, the complaint must be dismissed, since the Complainant would fail to sustain its burden of proof. In this instance, the Union has failed to demonstrate by a preponderance of the evidence that either Mr. Heinlein or the School Board had any knowledge of LaBlanc's status

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1/ Section 111.07(3) of the Wisconsin Employment Peace Act provides: "the party on whom the burden of proof rests shall be required to sustain such burden by a clear and satisfactory preponderance of the evidence." See Charles Bakke, d/b/a Lakeside Industries, Dec. No. 4508, 4/57; Dorothy Utschig, d/b/a Utschig Dairy, Dec. No. 5194, 5/59; See also NLRB v. Whitfield Pickle Co., C.A. 5(1967), 37 F 2d 576; Riggs Distler & Co., Inc. v. NLRB, C.A. 4 (1963), 55 LRRM 2145; Sage Nursing Home, Dec. No. 8179-C, 4/68.

in the Union at the time the School Board took the action in question with respect to LaBlanc, and absent such evidence, the complaint alleging that the reclassification of LaBlanc was based upon his non-union status must be dismissed.

Interrogation of Employes

Secondly, the Union asserts that the School Board violated Section 111.70(3)(a)1 by interrogating bargaining unit employes respecting their union sentiments for the purpose of determining whether a question of representation existed prior to filing a representation petition with the Wisconsin Employment Relations Commission. The School Board denies that it ever interrogated any employes, and submits that there is no evidence in the record that any employes were ever interrogated by any member of the School Board or by any supervisors. Instead, it is argued, the evidence clearly demonstrates that the only interrogation made by the School Board was of its own supervisory group. The purpose of this interrogation was to get a "rough estimate" of the attitude of the employes towards the Union, based upon the opinions of the supervisors. It is argued that questioning supervisors as to what they believe to be the attitude of the employes regarding the union cannot be construed in any manner as interference with the rights of employes under Section 111.70(2), Wisconsin Statutes, and, therefore, the Union's charge that such interrogation constituted a prohibited practice must be dismissed.

Although the Union asserts that the School Board engaged in a prohibited practice by interrogating employes respecting their Union sentiments, the record indicates that the School Board only interrogated the supervisors of the employes. Although this survey appears to have been part of an overall campaign by the School Board to undermine the Union and to coerce the employes in the choice of their bargaining representative, which will be discussed hereinafter, there is no evidence in the record that any employe was directly interrogated by any representative of the School Board or by any supervisors. The Union would have the Examiner infer that because certain supervisors did not immediately reply when asked by the Assistant Superintendent about the sentiments of the employes concerning the Union, that these supervisors must have interrogated the employes respecting their sentiments. Even if this inference could be made, the Union has failed to demonstrate by a clear and satisfactory preponderance of the evidence that any employes were

directly interrogated, and accordingly, it has also failed to meet its burden of proof with respect to the alleged prohibited practice. Accordingly, the complaint that the School Board has violated Section 111.70(3)(a)1 by interrogating bargaining unit employes respecting their Union sentiments will also be dismissed.

The Allegedly Coercive Letters Which Were Sent To The Employes

Thirdly, the Union asserts that certain letters which were sent to the employes by the School Board interfered with the employes' rights under Section 111.70(2), Wisconsin Statutes, and the School Board thereby committed prohibited practices under Section 111.70 (3)(a)1 by sending said letters. The Union asserts that the letters mailed to the employes were intended to prevent the Union from enforcing the collective bargaining agreement, and furthermore were intended to encourage employes to believe that by repudiating the Union, certain employes would receive wage benefits which they could not receive with the Union representing them.

With respect to this issue the School Board contends that it is protected by the Constitutional proviso guaranteeing freedom of speech, and also since the letters in question do not contain threats of reprisal or promises of benefits, they do not interfere with the employes' Section 111.70(2) rights.

The Union replies that by raising the defense of free speech, the School Board has acknowledged its interference with the employes' Section 111.70 rights, but that such interference was privileged because of the free speech proviso. The Union also asserts that the School Board does not possess the privilege of free speech since it is a political subdivision and thereby has no constitutional rights. Accordingly, the Union argues that the School Board has no privilege under the Constitution, as do private employers, to use the free speech argument to interfere with its employes' statutory rights. Similarly, since Section 111.70 does not confer upon municipal employers a statutory free-speech privilege, as does Section 8(c) of the National Labor Relations Act, the Union also argues that the School Board does not have a statutory "free speech" privilege.

Assuming, for the sake of argument, that the School Board has the same free-speech right that private employers have under Section 8(c) of the National Labor Relations Act, the Union contends that the School Board still committed a prohibited practice by sending the letters to the employes. The letters, it is asserted, are not

privileged since they were intended to prevent the Union from enforcing the collective bargaining agreement and furthermore were intended to subvert the loyalty of the Union's members.

The Union submits that the letters are unlawful because when read in the context of the School Board's campaign to undermine the Union, they imply promises of benefits contingent upon employe repudiation of the Union. It is asserted that the first undated letter implied that the Union, because it is a "mass union" as opposed to a craft union, was denying employes with special skills the financial recognition which the School Board wanted to grant them, and which they would receive if they rejected the Union. The second undated letter it is asserted, impliedly promised increases to certain employes contingent upon their repudiation of the actions of the Union with respect to the negotiation of the reclassification of certain skilled employes. The letter of October 4, 1967, it is argued, implies that the Union is powerless to affect the School Board's policy of upgrading certain non-union employes. The Union further argues that the letter of October 25, 1967, alludes to the Union's refusal to permit the School Board to single out non-union employes for pay increases, and also infers that the employes would receive financial benefits by repudiating the Union in the representation election which the School Board petitioned the Wisconsin Employment Relations Commission to conduct. Lastly, the Union submits that the letter of December 1, 1967, clearly infers that with the Union representing the employes, no salary increases were possible.

It is the School Board's position that the record fails to demonstrate that the School Board has in any way interfered with, restrained or coerced the employes in their right of self-organization, or their right to affiliate with a labor organization of their own choosing by sending the letters in question; nor did such letters discourage membership in the Union by discriminating against employes in regard to hire, tenure or other terms or conditions of employment.

The School Board notes Paragraph 7 of the complaint, which states by such letters: "a) the School Board was undermining the Complainant's status as a representative for the employes in the bargaining unit; b) the School Board discredited the Complainant in the eyes of employes in the unit; and c) prevented the Union from enforcing its contractual rights." It is submitted that none of these allegations fall within the prohibited practices set forth in Section 111.70(3)(a), and accordingly, even if they were established as true, they do not violate any section of the Statute.

The School Board notes that Section 8(c) of the National Labor Relations Act, as amended, provides "the expressing of any views, arguments or opinions, or the dissemination thereof...shall not constitute nor be evidence of an unfair labor practice...if such expression contains no threat of reprisal or force or promise of benefit." This concept of free speech, it is argued, has been adopted by the Wisconsin Employment Relations Commission in many determinations where the question of the employer's right to communicate its opinion respecting the bargaining representative to its employes has been challenged as constituting an unfair labor practice or a prohibited practice within the meaning of the Wisconsin Statutes.[2/] In these decisions the Commission has required threats of reprisal or promises of benefit before finding that an employer's expression of his opinion regarding a union constitutes an unfair labor practice or prohibited practice within the meaning of the Statute.

The letters in question, the School Board contends, neither threaten the employes with reprisals nor do they promise any benefits to employes represented by the Union. They instead "merely express the views and opinions of the Board of Education with respect to certain activities taken by the Complainant Union," which expression does not violate Section 111.70(3)(a). Since it is clear that the mere expression of opinion does not constitute a prohibited practice, absent threats of reprisal or promise of benefit, and since the letters in question do not contain such threats or promises, the School Board asserts that the complaint that the letters constitute a prohibited practice is without merit.

Essentially the issue before the Examiner with respect to the allegation by the Union that the School Board has committed a prohibited practice by sending letters to the employes which were critical of the Union's actions during the negotiations of the reclassification of certain skilled employes and which advised the employes that the School Board had petitioned for a new representation election, is whether the letters contained implied threats of reprisal or promise of benefits when viewed in the context of the School Board's overall conduct. The free-speech argument which has been raised by both parties is not, in the Examiner's opinion, determinative of this

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2/ St. Lukes Hospital, Dec. No. 7007-C, 9/65; Misericordia Hospital, Dec. No. 7106-D, 9/65.

issue. Even if a municipal employer is not protected by the free-speech provision of the Federal Constitution, in the Examiner's opinion under Section 111.70(3)(a)1, Wisconsin Statutes, a municipal employer does not interfere with employes' Section 111.70(2) rights by merely expressing an opinion to the employes critical of their bargaining representative, if in the expression of such opinion the municipal employer does not at least impliedly threaten or promise benefits to the employes.

The Union contends that although the letters do not contain any express threats of reprisal or promises of benefits, when viewed in the context of the School Board's overall conduct, the employes could reasonably be expected to have construed the letters in a manner which would infer that the School Board was assuring them that they would be financially better off without the Union. It is asserted that this inference is sufficient to find that the letters do constitute interference within the meaning of Section 111.70(3)(a)1 of the Statute.

The right of municipal employes to choose their representatives for purposes of conferences and negotiations is distinct from the right of employes in the private sector to engage in collective bargaining. In the private sector, both under the National Labor Relations Act, as amended, and the Wisconsin Employment Peace Act, an employer commits an unfair labor practice by refusing to bargain with the certified bargaining representative. However, this conduct also constitutes interference with the rights of employes under both Statutes to choose their own bargaining representatives, and accordingly, such conduct also violates the provisions in both Statutes prohibiting interference, restraint and coercion of employes in the exercise of their statutory rights. It does not necessarily follow that all acts which are in the nature of a refusal to bargain in good faith necessarily constitute both a refusal to bargain and interference. Under some circumstances such acts may constitute an independent act of interference.[3/]

In the private sector the National Labor Relations Board has found that an employer commits an unfair labor practice in the nature of a refusal to bargain where in the midst of a stalemate in negotiations with the certified bargaining representative, the employer commences a campaign to discredit the certified bargaining representative and infers that more benefits could be obtained by the

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3/ Harcourt & Co., Inc., 98 NLRB 892.

employes without the Union.[4/] In the Examiner's opinion, conduct by a Municipal Employer intended to have a similar coercive effect, even though Section 111.70 prescribes no specific duty to bargain enforceable through a prohibited practice proceeding, may constitute an independent prohibited practice under Section 111.70(3)(a)1. Thus, where a municipal employer agrees to enter into collective bargaining with a certified bargaining representative and subsequently commences a campaign to undermine the Union by ridicule, derision and statements discrediting the union, under certain circumstances such conduct may be construed as interference with the employes' Section 111.70 rights to choose their representative for purposes of conferences and negotiations with their municipal employer.

In this instance, in the midst of negotiations between the School Board and the Union over the reclassification of certain bargaining unit employes, the School Board commenced a campaign which was, in the Examiner's opinion, intended to undermine the employes' chosen bargaining representative. The School Board sent letters to the employes discrediting their bargaining representative and inferring that certain employes in the bargaining unit could obtain more benefits without the Union's intervention; furthermore, the School Board, in the midst of this campaign, filed an election petition with the Wisconsin Employment Relations Commission to give the employes an opportunity to repudiate the Union. In the opinion of the Examiner, the letters, when construed in the context of the School Board's overall conduct, constitute unlawful coercion and interference with the employes' free choice of their bargaining representative. Although the letters which were mailed to the employes during the course of this campaign did not contain specific threats of reprisal or promise of benefits, the School Board's conduct demonstrated clearly that the School Board intended to convey to the employes the impression that it would be more willing and able to improve the working conditions and benefits of the employes if they chose to repudiate the Union, and that the School Board, by filing the election petition with the Wisconsin Employment Relations Commission, would provide them the opportunity to do so.

In the first two undated letters the School Board inferred that the Union was a "mass union" which failed to recognize the financial and other needs of the skilled employes in the bargaining unit, and

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4/ Union Mfg. Co., 76 NLRB 322, affd. (C.A. 5) 179 F 2d 511.

that the skilled employes in the unit, because of the Union's failure to recognize or fight for their needs, were suffering. This impression is supported by the second letter in which the School Board stated that the Union was "intent upon preventing wage increases from being put into effect for employes in the bargaining unit which it represents." In the same letter it asserted that the Union was "using our employes as pawns," and implied that the Union clearly was not working in the interest of all of the employes in the bargaining unit. Both of these communications, it would appear, were intended to persuade the employes that had it not been for the obstructionist tactics of the Union during negotiations, the School Board would have been willing and able to improve the working conditions and benefits of certain employes represented by the Union.

These letters were critical of the Union because it refused to negotiate the increase of a skilled employe the School Board wanted to reclassify, without negotiating the increase of other skilled employes. In the Examiner's opinion, the School Board in these letters has gone beyond merely criticizing the Union for its position with respect to the reclassification of the skilled employe by inferring that those employes in the bargaining unit with skills are being deprived of benefits because of their union representation. Certainly an employe who felt his job was "skilled" could reasonably construe these letters as implying that his economic benefits would improve if he repudiated the "mass union" which was representing him. The letters were not only critical of the Union, but inferred that the employes have chosen their bargaining representative incorrectly and to their own financial detriment. Such an inference, in the Examiner's opinion, clearly interferes with the employes' right to choose their own bargaining representative, and accordingly, constitutes a prohibited practice within the meaning of Section 111.70 (3)(a)1.

In the letter of October 4, 1967, the School Board again inferred that the Union was not working in the interest of all the employes, and specifically charged that the Union, in a dispute over the appropriate bargaining unit, sought to "downgrade" employes from supervisory to non-supervisory categories. In this letter the School Board also charged that the Union had the "tendency to use some employes in an effort to obtain something for other employes."

In the letter of October 25, 1967, the School Board again advised the employes that the Union appeared not to be interested in the employes' salaries and working conditions, but instead was "preoccupied

with bringing the School Board to its knees." In this letter the School Board advised the employes that it had filed a representation petition with the Wisconsin Employment Relations Commission to determine whether the employes wished the Union to continue as their bargaining representative. Lastly, in the letter of December 1, 1967, the School Board inferred that it was the Union's ultimate decision that the employes involved in the dispute between the School Board and the Union would not get any salary increase, and, furthermore, that the employes would have a chance to again determine in a secret-ballot election whether they wished to continue to be represented by an organization that was not working in their interest.

As has been noted above, although the letters in question do not contain specific threats of reprisal or promise of benefit, they must be construed in the context of the School Board's overall conduct.

The School Board voluntarily entered into negotiations with the Union for several years. When the bargaining relationship became somewhat strained and ultimately broke down because of the dispute which arose between the parties over the reclassification of certain employes, the School Board commenced a campaign which it claims merely attempted to convey to the employes its opinion of the Union's activities regarding the dispute in question. The issue then appears to be whether the letters in question merely constitute an expression of the School Board's opinion regarding the Union's position in the dispute, or whether the letters constitute unlawful coercion in that they were intended to persuade the employes to repudiate their bargaining representative, which had become, in the School Board's opinion, "antagonistic" and "difficult", and which was no longer representing the employes' interests.

In the Examiner's opinion, the School Board was engaged in a campaign which was intended to persuade the employes that their chosen bargaining representative was not working in their interest, but instead was more concerned with "bringing the Employer to its knees". Because of the Union's attitude and demands during the negotiations, the School Board attempted to undermine the Union's authority to represent the employes in the negotiations by a protracted campaign terminating in the filing of a representation petition.

The letters which were sent to the employes during the campaign were intended to persuade the employes that their bargaining representative was not acting in their interest, and that, because of the Union's conduct, the School Board was unwilling to grant employes improved benefits and working conditions unless it could determine

the employes eligible for such benefits and the conditions for granting such benefits without the Union's intervention. The employes could reasonably infer from such letters that the School Board would only grant improved benefits and working conditions under the conditions which it chose to designate, and as long as the Union was representing said employes, such benefits would not be granted. Because the letters contained such an inference, in the Examiner's opinion, they were coercive in nature and were intended to intimidate and restrain the employes in the exercise of their right to choose their representative for purposes of conferences and negotiations with the Municipal Employer. Accordingly, the Examiner finds that the School Board, by sending the letters quoted in the Findings of Fact, has interfered with, restrained and coerced the employes in the exercise of their right to choose their bargaining representative in violation of Section 111.70(3)(a)1, Wisconsin Statutes.

Refusal To Bargain

Lastly, the Union contends that the School Board's refusal to confer and negotiate with the Union also violates Section 111.70(3)(a)1, Wisconsin Statutes. The Union submits that the decision of the Commission in the City of New Berlin[5/] should not be interpreted expansively by the Examiner, but instead should be limited to the factual circumstances which were before the Commission in that case. It is argued that the decision in City of New Berlin should be limited to the conclusion that a municipality is not required to bargain "subcontracting decisions". The Union notes that in the City of New Berlin the Commission asserted that "the Municipal Employer, if it chooses to bargain, cannot reject the designated representative of its employes as their bargaining agent".[6/] Applying this principle, the Union argues that had the Municipal Employer in that case chosen to bargain over subcontracting, it could not have discontinued or aborted negotiations with the chosen bargaining representative of the employes without committing a prohibited practice. Applying this principle to the facts in this case, the Union submits that the School Board, because it has chosen and agreed to bargain with the Union, cannot now argue that it has the right to go back on this

5/ Dec. No. 7293, 3/66.

6/ Ibid.

commitment.

In sum, it is argued that the decision of the Commission in the City of New Berlin, as well as the Commission's subsequent decisions in Milwaukee Board of School Directors[7] and LaCrosse County[8] do not preclude the Examiner from holding that the refusal of the School Board to meet and negotiate with the Union, after it has chosen to enter into negotiations, constitutes a prohibited practice within the meaning of Section 111.70, Wisconsin Statutes, particularly because the facts in this case involve not only a refusal to confer and negotiate, "but also other actions designed to discredit, weaken, and destroy Local 1561".

The Union sets forth five reasons why the Examiner should not interpret the City of New Berlin decision expansively:

(1) An expansive interpretation would create serious constitutiona questions, since Section 111.70(4)(1) expressly prohibits strikes, and such express prohibition, absent reciprocal duties by municipal employers to bargain collectively, would violate both the Federal and Wisconsin constitutions.[9]

(2) In the City of New Berlin the majority of the Commission recognized that Section 111.70 "leaves much to be desired", and the Commission could hardly intend its examiners to extend such an "unsatisfactory state of affairs" by broad interpretation and application.

(3) The Commission does not normally "make sweeping interpretation on the basis of a single, or even a few situations," and accordingly, it did not intend that the principles set forth in the City of New Berlin should apply to a variety of situations which were not before it in that case. Therefore, the Examiner must in this case, and under these circumstances determine whether a municipal employer commits a prohibited practice within the meaning of Section 111.70 by refusing to negotiate with a certified union with which it has agreed to enter into collective bargaining.

(4) Fact finding would be a "totally inadequate remedy" where a municipal employer engages in many types of activities which constitute a refusal to bargain under the National Labor Relations Act, as amended, including for example, a municipality's direct negotiation

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7/ Decision No. 6833-A, 3/66.

8/ Decision No. 7707-A, 6/67.

9/ Cox & Bok, Labor Law Cases and Materials, pp. 660-661; Cox, Strikes, Picketing and the Constitution, 4 Vanderbilt Law Review 574, 1951.

with its employes; unilateral action altering wages, hours and conditions of employment during negotiations; unilateral increases during the term of a collective bargaining agreement, ordinance or resolution; refusal to provide the certified union with information it needs to enforce a collective bargaining agreement, ordinance or resolution; and a refusal to recognize a union which represented a majority of the employes, but which lost its majority status before certification because of a municipal employer's direct negotiations with its employes.

(5) Although the Commission, in City of New Berlin, did specifically state that there is no duty to bargain collectively in municipal employment which is specifically enforceable in a prohibited practice proceeding, it is submitted that the Commission did not find that a municipal employer has no duty to refrain from interfering with the employes' "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", after the Municipal Employer has agreed to enter into "conferences" and "negotiations" with the employes' certified bargaining representative.

In response to the Commission's argument in City of New Berlin, the Union submits that the Legislature did not use the phrase "collective bargaining" in Section 111.70, Wisconsin Statutes, for the following reasons:

(1) Collective bargaining has been interpreted to require an execution of a written contract where agreement is reached, and since municipal employes may reduce such agreements to written form in many variations, including ordinances and rules, the Legislature did not adopt the phrase.

(2) Collective bargaining normally is construed to include resort to economic warfare, and since Section 111.70 "as originally written, did not expressly prohibit strikes, the Legislature was obviously reluctant to use a phrase that would imply public employes had such a right".

(3) Since the term "collective bargaining" in the private sector is a dynamic one, the Legislature was reluctant to use it in the public sector because of possible future interpretations of the term which, if automatically applied to the public sector, might lead to "unfortunate results."

With respect to the assertion by the Commission in the City of New Berlin that "it would appear illogical for the Legislature to have established two types of procedures to cover such a matter, (a refusal to bargain) since to do so would have established inconsistent

remedies", the Union notes that the Commission stated in City of Milwaukee[10] "The Legislature in adopting Section 111.70, authorized fact finding...as a substitute for the strike weapon utilized in private employment"; and assuming that fact finding is a remedy which substitutes for the economic power-play which occurs in the private sector, there is nothing illogical in construing the statute as providing two types of procedures to remedy interest disputes. In support of this argument, the Union notes that the National Labor Relations Act, as amended, has provided alternative procedures and remedies for prohibited secondary activities in Section 8(b)(4) and Section 303. Similarly, the Wisconsin Legislature has, in the Wisconsin Employment Peace Act, established alternative procedures, as well as possibly inconsistent remedies, for violations of collective bargaining agreements.

The School Board, on the other hand, contends that its "postponement" of negotiations until its petition for election had been determined was justified and authorized by decisions of the Commission to the effect that where a question concerning the appropriate bargaining unit exists, an employer cannot be found to have failed to bargain within the meaning of Chapter 111, Wisconsin Statutes, which is applicable to private employers.[11]

The School Board, in its petition for election, asserted that the collective bargaining unit was not appropriate and accordingly contends that as long as the question of the appropriateness of the unit is before the proper administrative or judicial tribunal, the School Board is justified in refusing to bargain with the certified representative, even under Subchapter I of the Act governing employes in the private sector.

Furthermore, in view of the fact that the Commission has held that under Subchapter IV, covering municipal employment, the refusal to bargain on the part of a municipal employer is not a prohibited practice, and in view of the affirmation of this position by the Wisconsin Supreme Court,[12] the School Board submits that this charge of prohibited practice must be dismissed.

In the Examiner's opinion, the Commission clearly and unequivocally interpreted Section 111.70, Wisconsin Statutes, as not imposing any statutory duty, enforceable in a prohibited practice proceeding, upon

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10/ Decision No. 6575-B, 12/63.

11/ YMCA of Milwaukee, Decision No. 4465, 2/57.

12/ Joint School District No. 8, City of Madison v. WERB, 37 Wis. 2d 483

a municipal employer to bargain in good faith with the representative of its employes over wages, hours and conditions of employment.[13/] The Commission does not appear to have reached this conclusion based upon a unique set of circumstances, but instead has applied it to a variety of situations where municipal employers have been accused of breaching their duty to negotiate in good faith with certified bargaining representatives. In view of the Commission's clear and unequivocal language in these decisions, as well as the supporting dicta in the recent Supreme Court decision in which the Court stated:

> "Because of these differences in language, we do not think the legislature intended in Section 111.70, Stats. that a school board should be under a duty to collectively bargain,"[14/]

the Examiner is compelled to find that Section 111.70, Wisconsin Statutes, does not create a "duty to bargain" enforceable in a prohibited practice proceeding, similar to the duty in the private sector prescribed in the National Labor Relations Act, as amended and the Wisconsin Employment Peace Act.

However, as has been noted by the Union, the Commission stated in City of New Berlin

> "The pertinent language therein (referring to Section 111.70(2)) establishes that employes have the right to be represented in conferences and 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."[15/]

In this instance the School Board voluntarily entered into negotiations with the Union for several years, and in the words of the School Board, the relationship between the School Board and the Union during this period was "reasonably effective and satisfactory". When, however, the negotiations between the parties became strained, and eventually broke down over a dispute regarding the reclassification of certain employes in the bargaining unit, the School Board commenced a campaign which was intended to coerce the employes in the choice of their bargaining representative, and which constituted unlawful interference within the meaning of Section 111.70(3)(a)1 of the Statute. During the course of this campaign, the School Board filed a

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13/ City of New Berlin, Dec. No. 7293, 3/66; Milwaukee Board of School Directors, Dec. No. 6833-A, 3/66; La Crosse County, Dec. No. 7707-A, 6/67.

14/ Joint School District No. 8 vs. WERB, 37 Wis. 2d 483, 12/67.

15/ Supra.

representation petition with the Wisconsin Employment Relations Commission requesting the Commission to conduct an election, and subsequent to the filing of the petition, the School Board refused to continue negotiations with the Union.

In the Examiner's opinion, in view of the School Board's coercive campaign to persuade the employes to repudiate their bargaining representative, the School Board's petition does not appear to have been based upon a good faith doubt of the Union's majority status in an appropriate bargaining unit, but instead, appears to have been filed as part of the campaign to undermine the Union by persuading the employes to repudiate it in the election in order to obtain improved benefits and working conditions from the School Board which they could not obtain with the Union representing them.

The Commission's Memorandum accompanying the Order Dismissing the Petition for Election clearly supports this conclusion. In the Memorandum the Commission stated:

> "It appears to us that the timing of the filing of the petition, and the basis on which it was filed indicates an attempt by the School Board to frustrate the rights of its employes and the collective bargaining process." (emphasis added)

Although Section 111.06(1)(d) of the Wisconsin Employment Peace Act provides:

> "...where an employer files with the board a petition requesting a determination as to majority representation, he shall not be deemed to have refused to bargain until an election has been held and the result thereof has been certified to him by the board,"

it is well settled that this proviso applies only where an employer has a "good faith doubt" of the Union's majority status.[16/] If the School Board were an employer in the private sector, the Examiner would clearly find a refusal to bargain based upon such conduct, and the School Board would be ordered to bargain with the Union. However, this is not the private sector, and if the Examiner is correct in his interpretation of the Commission's construction of Section 111.70, a municipal employer cannot be compelled to bargain with the employes' certified bargaining representative in a prohibited practice proceeding even if the municipal employer had already commenced negotiations with the certified representative.

16/ Chuck Wagon Industrial Catering Service, Dec. No. 7093-B, 8/66.

Utilizing the Commission's interpretation of Section 111.70, it would appear that the only statutory relief available to the certified representative under these circumstances is the filing of a petition for fact finding under Section 111.70(4)(e), based upon the School Board's refusal to bargain. Under these circumstances, the Commission could determine that the School Board refused to meet and negotiate in good faith and could thereafter initiate a fact finding proceeding and appoint a fact finder. Although this form of statutory relief is not as desirable as a duty to bargain in good faith specifically enforceable in a prohibited practice proceeding, the Commission and the Wisconsin Supreme Court, in construing Section 111.70 have clearly stated that the Legislature did not intend to create an enforceable duty to bargain in the prohibited practice procedure established in the Statute. Accordingly, the Examiner must find in this instance that the School Board has not committed a prohibited practice by specifically refusing to continue negotiations subsequent to the filing of the representation petition, even though the petition was not, in the Examiner's opinion, based upon a good faith doubt of the Union's majority status in an appropriate unit.

The Examiner does find, however, that the overall conduct of the School Board, including the coercive letters sent to the employes, the filing of the election petition which does not appear to have been based upon a good faith doubt of the Union's majority status in an appropriate bargaining unit and its subsequent refusal to bargain, does constitute interference within the meaning of Section 111.70 (3)(a)1, Wisconsin Statutes, because such conduct was intended to coerce the employes into repudiating their chosen bargaining representative. Accordingly, the Examiner, although he cannot find a specific prohibited practice based upon the School Board's refusal to continue negotiations, does find that the School Board's overall conduct merits a broad cease and desist order requiring the School Board to cease and desist from engaging in any manner in activities intended to interfere with the employes' choice of their bargaining representative for purposes of conferences and negotiations with the Municipal Employer.

Subsequent to the close of the hearing, the Union filed a motion with supporting affidavit requesting the reopening of the hearing to introduce additional evidence relative to the position of the Respondent towards negotiations with the Union subsequent to the Commission's dismissal of the Respondent's petition, and on April 18, 1968, the

Examiner denied said motion.[17] On April 23, 1968, the Union filed a Motion For Reconsideration, And Alternatively For Amendment Of Complaint and Reconsideration. The Union asserts that the matters raised in its motion are relevant to the issues which were presented to the Examiner in the original proceeding, and although such matters could be raised by the filing of a new complaint, it would be more reasonable for the Examiner to consider this "continuing cause of conduct" in one proceeding so that the entire matter could be disposed of at one time. The Respondent, in writing, objected to the Union's motion on the basis that such motion does not set forth a different allegation of prohibited practice against the Respondent, but instead only alleges that the Respondent has continued its alleged "refusal to bargain".

The Wisconsin Employment Relations Commission, utilizing criteria set forth by the Wisconsin Supreme Court[18], has established certain grounds for the reopening of adversary hearings before administrative agencies:[19]

> "a) That the evidence is newly discovered after the hearing; b) that there was no negligence in seeking to discover such evidence; c) that the newly discovered evidence is material to the issue; d) that the newly discovered evidence is not cumulative; e) that it is reasonably possible that the newly discovered evidence will affect the disposition of the proceeding; and f) that the newly discovered evidence is not being introduced solely for the purpose of impeaching witnesses."

Applying these criteria to the instant proceeding, the Examiner is of the opinion that although evidence with respect to the Respondent's conduct subsequent to the dismissal of its election petition by the Wisconsin Employment Relations Commission may be relevant and material

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17// Decision No. 8319-A, 4/68.

18/ Erickson vs. Clifton, 265 Wis. 236.

19/ Archdiocese of Milwaukee, Decision No. 6695, 4/64.

to the issues raised in the initial complaint, such evidence is cumulative in view of the Examiner's finding that the election petition was not based upon the Respondent's good faith doubt of the Union's majority status in an appropriate bargaining unit, and in addition, such evidence could not affect the disposition of the issue with respect to the Respondent's alleged "refusal to bargain." Accordingly, the Union's Motion For Reconsideration And, Alternatively For Amendment Of Complaint And Reconsideration is hereby denied.

Dated at Madison, Wisconsin this 3rd day of June, 1968.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Byron Yaffe
Byron Yaffe, Hearing Examiner