STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

DRIVERS, SALESMEN, WAREHOUSEMEN, MILK PROCESSORS, CANNERY, DAIRY EMPLOYEES AND HELPERS UNION LOCAL NO. 695, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, Complainant, vs. CITY OF PORTAGE, Respondent.	Case VI No. 11147 MP-34 Decision No. 8378

Appearances:
Goldberg, Previant & Uelmen, Attorneys at Law, by Mr. Gerry M. Miller and Mr. David Loeffler, for the Complainant.
Mr. Francis W. Murphy, City Attorney, and Mr. Charles J. Drury, City Attorney, for the Respondent.

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

The above entitled matter having come on for hearing before the Wisconsin Employment Relations Commission on December 19, 1966, February 22, 1967 and June 22, 1967 at Portage, Wisconsin, Howard S. Bellman, Examiner, being present; and the Commission having considered the evidence, arguments and briefs of Counsel, and being fully advised in the premises, makes and files the following Findings of Fact, Conclusion of Law and Order.

FINDINGS OF FACT

1. That Drivers, Salesmen, Warehousemen, Milk Processors, Cannery, Dairy Employees and Helpers Union Local No. 695, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, hereinafter referred to as the Complainant, is a labor organization having offices at 1314 North Stoughton Road, Madison, Wisconsin.

2. That the City of Portage, hereinafter referred to as the Respondent, is a municipality in the County of Columbia, duly incorporated under the laws of the State of Wisconsin.

3. That on February 11, 1963 and pursuant to an election conducted by the Commission and petitioned for by the Complainant, the Complainant was certified by the Commission to represent all employes

of the Respondent in the Department of Public Works, excluding clerical employes, department heads and supervisors, for the purposes of conferences and negotiations on wages, hours and conditions of employment, as provided in Section 111.70, Wisconsin Statutes.[1/]

4. That after three meetings between the Complainant and the Respondent, held subsequent to the aforementioned issuance of the Certification of Representatives, the Complainant, petitioned for fact-finding pursuant to Section 111.70 (4)(e), Wisconsin Statutes; that the Commission upon informal investigation of such petition for fact-finding found that the Complainant and the Respondent were deadlocked and on January 13, 1964 appointed a fact-finder;[2/] that said fact-finder, Robert J. Mueller, after conducting a hearing issued a report and recommendations on March 31, 1964; and that the Complainant accepted said fact-finder's recommendation whereas the Respondent did not, but rather, enacted its previous proposals for the year 1964.

5. That following the issuance of the aforementioned fact-finder's report and recommendations, the Complainant and the Respondent resumed meeting with regard to wages, hours and conditions of employment; that again, and after several of such meetings, the Complainant petitioned for fact-finding; that the Commission, after conducting an informal investigation, found that the Complainant and the Respondent were deadlocked and, on January 8, 1965, appointed Gordon Haferbecker to act as fact-finder in the matter.[3/]

6. That after a hearing conducted by said fact-finder, he issued, on March 16, 1965, his report and recommendations which recommendations were accepted by the Complainant and rejected by the Respondent; and that during 1965 the employes in the aforementioned bargaining unit, unlike other city employes and for the first time in many years, received no wage increase.

7. That representatives of the Complainant and the Respondent held further meetings with regard to wages, hours and conditions of employment from September 1965 through January 1966; that during said meetings the parties agreed to a wage increase and an improvement in insurance benefits for the employes in said bargaining unit which the Respondent enacted for 1966, but they failed to achieve an entire agreement on wages, hours and working conditions, and on February 22, 1966 representatives of the Complainant expressed to

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1/Dec. No. 6210, 2/63

2/Dec. No. 6609, 3/64

3/Dec. No. 7000, 3/65

employes in said bargaining unit that continuing to meet with the Respondent would probably be fruitless; that during March, 1966 the employes in said bargaining unit who were members of the Complainant ceased paying dues to Complainant.

8. That on June 13, 1966 the Respondent filed with the Commission a petition for a representation election among the employes in the aforementioned bargaining unit; that in response to said petition the Complainant, on June 24, 1966, notified the Commission that it no longer claimed to represent said employes; and that on the basis of said disclaimer the Commission, on June 27, 1966, set aside the abovementioned Certifications of Representatives and dismissed the Respondent's petition for a representation election.[4/]

9. That on July 5, 1966 a Special Committee of the Common Council of the Respondent met with certain employes who were members of the bargaining unit formerly represented by the Complainant and received from said employes a proposal concerning wages, hours and working conditions; that on July 1, 1966 the employes in the aforesaid bargaining unit received a twenty cent per hour wage increase pursuant to the recommendation of said Special Committee; and that on January 1, 1967 said employes received another twenty cent per hour wage increase.

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

CONCLUSION OF LAW

That the City of Portage, by the conduct of its representatives, in its negotiations with Drivers, Salesmen, Warehousemen, Milk Processors, Cannery, Dairy Employees and Helpers Union Local No. 695, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, as the representative of all employes of the City of Portage in the Department of Public Works, excluding clerical employes, department heads and supervisors, and by its failure to implement fact finding recommendations, as found in the foregoing Findings of Fact, did not and is not committing prohibited practices within the meaning of Section 111.70, Wisconsin Statutes.

Upon the basis of the above and foregoing Findings of Fact and Conclusion of Law, the Commission makes the following

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4/ Dec. Nos. 7635, 6/66 and 6210-A, 6/66

ORDER

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

Given under our hands and seal at the City of Madison, Wisconsin, this 29th day of January, 1968.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Morris Slavney, Chairman

_____
Zel S. Rice II, Commissioner

_____
William R. Wilberg, Commissioner

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

DRIVERS, SALESMEN, WAREHOUSEMEN, MILK PROCESSORS, CANNERY, DAIRY EMPLOYEES AND HELPERS UNION LOCAL NO. 695, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, Complainant, vs. CITY OF PORTAGE, Respondent.	Case VI No. 11147 MP-34 Decision No. 8378

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

The Complaint that initiated this proceeding was filed by the Union on November 9, 1966. Hearings were held on December 19, 1966, February 22, 1967 and June 22, 1967. Postponements requested by Counsel for both parties account for the amount of time which elapsed while the hearings were being completed. At the close of the hearing both parties requested an opportunity to file briefs after the receipt of a copy of the transcript. Following a number of time extentions for the submission of briefs Counsel for the City filed its brief. However, no brief was filed by Counsel for the Union, although it was expected, thus causing some delay in the issuance of this decision.

On February 11, 1963 the Union, pursuant to a Commission conducted election, was certified (Dec. No. 6210) to represent all employes of the City employed in the Department of Public Works, excluding clerical employes, department heads and supervisors, for the purposes of conferences and negotiations on wages, hours and conditions of employment.

Following a Petition by the Union for fact-finding and an informal investigation by the Commission, the Commission, on January 13, 1964, issued Findings of Fact, Conclusion of Law, Certification of Results of Investigation and Order Appointing Fact-Finder (Dec. No. 6609). The Commission found therein that the parties had met three times subsequent to the Certification of Representatives

and had reached a deadlock within the meaning of Section 111.70 (4)(e) on about November 21, 1963 with respect to wages and payment for hospital and surgical insurance. The Fact-Finder appointed was Robert J. Mueller.

Fact-Finder Mueller conducted a hearing on February 3, 1964 and issued his report and recommendations on March 31, 1964. The deadlock found by the Commission arose out of the Union's request for a ten cent per hour wage increase and for the City to assume the full cost of the insurance. The City had offered a five cent increase and had made no offer to assume the full cost of the insurance. Mueller recommended an eight cent increase and that "the City give very serious consideration to implementing single employe hospital and surgical insurance coverage." On January 1, 1964 the employes had begun to receive the five cent increase offered to the Union.

On April 9, 1964 the Special Committee of the City's Council, which was charged with representing the Council in these matters, recommended to the Council that the Fact-Finder's recommendations not be adopted and, in fact, they were not. The Union, however, determined to accept such recommendations as the basis for a settlement.

Later in 1964 the parties met on several occasions, including twice with a Commission mediator. During these meetings attention was turned to providing for 1965, and a deadlock was again reached. The Union again petitioned for fact-finding, and the Commission, on January 8, 1965, appointed Gordon Haferbecker Fact-Finder (Dec. No. 7000).

On January 1, 1965 the bargaining unit employes, unlike the other City employes and for the first time in many years, received no wage increase.

The report and recommendations of Fact-Finder Haferbecker were issued on March 16, 1965. He recommended a five cent per hour increase, that the City pay the full insurance premium for single employes, and that such improvements be retroactive to January 1, 1965. These terms were accepted by the Union, but the City rejected them pursuant to its Special Committee's Report of April 20, 1965.

From about Thursday, May 13, 1965 to Monday, May 17, 1965, a period inclusive of two working days, a majority of the employes in the bargaining unit engaged in a refusal to work. The evidence

indicates that this refusal was not authorized or stimulated by the Union but, rather, was precipitated by the employes' loyalty to a foreman who had a dispute with a superior.

At any rate, the parties met on May 18, 1965 with Fact-Finder Haferbecker acting as a mediator. As a result of that meeting and agreements reached there, the individuals who had engaged in the sork stoppage resumed their employment.

In September 1965 the parties resumed meeting, and during that month and October, according to the Union, they reached an agreement with respect to wages, hours and working conditions for 1966. This included a seven cent per hour wage increase and City payment of the single employe insurance premium. These items were enacted by the City Council in November, and the wage increase became effective on January 1, 1966. The employes had voted to accept the entire proposed agreement at a meeting on October 10, 1965.

During October, November and December the parties continued to exchange drafts and proposals for the 1966 agreement. Then at a meeting on January 20, 1966 the Union was told by the City that the employes who had resumed work in May had done so as new employes with no seniority and, thus, would not receive the anticipated amount of certain seniority-determined benefits, such as sick-leave and vacations.

The City, contrary to the Union, contends that the new-hire status of these employes was clear when they resumed work, at the meeting with Haferbecker and throughout the subsequent discussions. It is also the City's allegation that, in fact, no complete agreement was reached by the parties in September or October 1965, but that some key proposals remained unresolved through January, 1966.

On February 22, 1966 Union officials informed the employes of the City's position with respect to seniority. The employes determined that they were unable to accept the agreement on such terms. The Union officials then predicted continued frustration for the Union in its attempts to represent the employes. In March 1966 the employes, a majority of whom had been members of the Union since early in 1963, ceased paying dues.

Considerable testimony and other evidence was produced at the hearings with respect to the resumption of work by the employes in May, 1965. Such evidence may be construed to indicate that the employes knowingly resigned and were subsequently rehired anew. A further complicating factor was that the meeting at which Fact-Finder Haferbecker mediated the resumption of work discussions was

conducted by him with the parties separated, which may have accounted for some communication difficulties. At any rate, there is no need, due to reasons explained below, to determine herein whether the employes were, in fact, rehired anew or whether the City changed its position in that respect when confronted with otherwise agreed-upon terms and conditions of employment.

On June 13, 1966 the City filed a Petition for a new representation election among the pertinent employes. The Union, on June 24, 1966, notified the Commission in writing that it no longer claimed to represent the employes. On the basis of such disclaimer the Commission, on June 27, 1966, dismissed the City's Petition and set aside the February 1963 Certification of Representatives (Dec. Nos. 7635 and 6210-A).

Robert A. Mael had become Mayor of the City on April 19, 1966. In June 1966 he was contacted by certain of the pertinent employes who asked for a meeting with the City Council to discuss their wages, hours and terms and conditions of employment. Apparently, this request precipitated the City's Petition for an election. The origins of this employe action are vague, however, as is the precise sequence of these events. On July 5, 1966, not long after the Union's Certification was set aside, a committee of the Council met with some of the employes and received a list of demands from them. After some caucusing and modification of positions, the Committee agreed to recommend a twenty cent per hour increase for the employes. The Committee's recommendation was adopted by the Council two days later.

The increase in July 1966 was extraordinary in that it was effective at that time, whereas it was practically a rule that wage increases be included in budgets passed in November and effective in January. When added to another twenty cent per hour increase effective in January 1965, it amounts to a 17% to 20% improvement.

Witnesses for the City testified that these unusually large wage increases were given to nearly all City employes in January 1967 and that they were stimulated by a particularly competitive labor market created in the Portage area by the opening of the Badger Ordinance operation. It was also testified that the employes involved herein threatened, in June 1966, to leave their employment with the City in favor of Badger Ordinance positions.

Apparently, the Union construes the 1966 wage raises as the final step in a scheme to make it clear to the City's employes that they would do better without the Union. The Union understands the

record to disclose a three-year effort by the City to frustrate any agreement with the Union even through the fact-finding and mediation procedures. The record is long and filled with testimony elicited by both parties with respect to efforts to bring about meetings, conduct at meetings, proposals and counterproposals, the exchange of drafts, willingness to employ mediation, apathy and energy of Union officials, arbitrary withdrawals of proposals and the like. There is creditable and persuasive evidence herein to support more than a suspicion that the City's conduct belied bad faith.

However, this Commission in City of New Berlin (Dec. No. 7293) held that it is not a prohibited practice for a municipal employer to fail or refuse to meet and negotiate in good faith, but rather that such conduct is a basis for ordering parties to fact-finding. It was further held that such conduct does not constitute unlawful interference under Section 111.70 (3)(a)(1). Twice the Commission had before it petitions for fact-finding is this matter. In both instances fact-finding was ordered because a deadlock existed and not because either party had refused or failed to negotiate in good faith. In fact, in neither of its two fact-finding petitions did the Union allege that the City had failed or refused to engage in bona fide negotiations.

Furthermore, the unilateral granting of benefits, and the withholding of benefits extending to City employes outside of the bargaining unit, during the course of negotiations is conduct which is part and parcel of the negotiation process and thus does not constitute prohibited discrimination within the meaning of Section 111.70 (3)(a)(2) or any other prohibited practice.

In the absence of specific argument by the Union, it is unclear what particular references were intended by the allegation of its Complaint that Sections 111.70 (3)(a)(1) and (2) had been violated. We discern no such violations in the record.

All of the foregoing history, no matter which version of controverted assertions is accepted, is a history of negotiations and intentions of the parties who engaged in them. All of the above recited facts relate to bargaining-table progress, or the lack of it, and therefore cannot constitute prohibited practices. Of course, fact-finding recommendations are not binding upon the parties, and failing to adopt them is not a prohibited practice.

The Wisconsin Supreme Court in Joint School District No. 8, City of Madison v. W.E.R.B. ____Wis. 2d____(December 29, 1967) approved of the New Berlin decision cited above. The court also

noted an argument, implicit in the instant case, that fact-finding with its expenses is an inadequate response to such conduct. The Court replied, as do we, "If the fact-finding technique is not in the public interest in this area of labor relations . . . then the legislature should be so informed."

There was also some testimony that Alderman Kenneth E. Scherbert, who was at certain times on the relevant Special Committee and also was the individual whose dispute with the foreman precipitated the work stoppage on May 1965, had advised employes that they would receive improved wages if they abandoned the Union and to form a union of their own. This testimony is extremely vague and self-contradictory, particularly as to when the alleged statements were made. In view of this vagueness and Scherbert's contrary testimony, it is not found that such alleged acts were committed.

The City, in its brief, raises several legal arguments. Inasmuch as no violations of Section 111.70 have been found, it is not necessary to apply the one-year limitation applicable to prohibited practices actions as the City suggests. The City also argues that having disclaimed representative status the Union was not a proper party in interest to bring the instant Complaint. It is our determination that the Union was a proper party in that it did have representative status when the acts alleged in the Complaint occurred, except the 1966 wage increase, which may be construed as a part of a continued scheme.

Finally, the City contends that the work stoppage of May 1966 put the employes in a position of having unclean hands, and therefore without standing to complain. We do not apply the unclean hands' doctrine as a defense to prohibited practices, however.

Dated at Madison, Wisconsin, this 29th day of January, 1968.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Morris Slavney
Morris Slavney, Chairman

Zel S. Rice II, Commissioner

William R. Wilberg
William R. Wilberg, Commissioner