STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

GREEN BAY MUNICIPAL EMPLOYEES UNION, LOCAL 1672, AFSCME, AFL-CIO, Complainant, vs. VOCATIONAL, TECHNICAL AND ADULT EDUCATION DISTRICT #13, Respondent.	Case VI No. 16071 MP-177 Decision No. 11352-A

Appearances:
Lawton & Cates, Attorneys at Law, by Mr. Bruce M. Davey, for the Complainant.
Bittner, Petitjean & Hinkfuss, Attorneys at Law, by Mr. Robert L. Bittner, for the Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Green Bay Municipal Employees Union, Local 1672, AFSCME, AFL-CIO, having, on October 3, 1972, filed a complaint with the Wisconsin Employment Relations Commission wherein they alleged that Vocational, Technical and Adult Education District #13 had committed prohibited practices within the meaning of Section 111.70 of the Wisconsin Municipal Employment Relations Act; and the Commission having appointed Marvin L. Schurke, a member of its 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, pursuant to notice issued by the Examiner, hearing on said complaint having been held at Green Bay, Wisconsin, on November 15, 1972, before the Examiner; and the Examiner having considered the evidence and arguments 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 Green Bay Municipal Employees Union, Local 1672, AFSCME, AFL-CIO, hereinafter referred to as the Complainant, is a labor organization having offices at 1031 Chantel Drive, Green Bay, Wisconsin; that James Miller is the representative of said labor organization; and that Thomas VandeWalle is a member of said labor organization, and acts on its behalf.

2. That Vocational, Technical and Adult Education District #13, hereinafter referred to as the Respondent, is a municipal employer engaged in the operation of a vocational, technical and adult education school in a district in and about Green Bay, Wisconsin; that a Mr. Humphreys is employed by the Respondent as school administrator; and that Donald A. VanderKelen is employed by the Respondent as its labor negotiator.

3. That, at all times pertinent hereto, the Respondent has recognized the Complainant as the exclusive collective bargaining

representative of custodial and maintenance employes of the Respondent; that the Complainant and Respondent were parties to a collective bargaining agreement effective for the period from January 1, 1971 through December 31, 1971; that said agreement contained provision for the reopening of negotiations by notice given on or before July 1, 1971; and that, on July 1, 1971, the Complainant, by Miller, sent a letter to the Respondent as follows:

> "This letter is to advise you that Local 1672, Green Bay Municipal Employees Union, (VTA) AFSCME, AFL-CIO, desires to open the present Labor agreement for negotiations for the year 1972. The following requests are submitted on behalf of Local 1672.
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> 1. Additional Wisconsin Retirement contributions.
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> 2. Uniforms to be provided.
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> 3. Full pay of unused sick leave upon retirement or death.
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> 4. Fifteen percent across the board increase.
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> The Union reserves the right to make additions or deletions to the above proposals during negotiations. Please advise me as to a convenient date to begin negotiations."

4. That the Respondent accepted the Complainant's letter of July 1, 1971 as sufficient to reopen negotiations; that the Respondent made no written response to the Complainant's letter of July 1, 1971; that Miller and VanderKelen arranged for a meeting to be held on December 15, 1971; and that a meeting was held on December 15, 1971, at which time the Complainant was represented by Miller and VandeWalle and the Respondent was represented by VanderKelen and Humphreys.

5. That, during the course of the negotiations held on December 15, 1971, the Complainants' demand for additional contributions by the Respondent to the Wisconsin Retirement Fund was discussed; that the representatives of the parties determined that the contributions specified in the previous agreement of the parties were sufficient to cover all contributions required of employes; that the representatives of the parties reached the further conclusion that any attempt to alter the Respondent's Wisconsin Retirement Fund contribution would be tardy under applicable statutes; and that the Complainant withdrew its demand concerning contributions to the Wisconsin Retirement Fund from the issues in bargaining.

6. That, during the course of the negotiations held on December 15, 1971, the Complainant's demand for uniforms provided by the Employer was discussed; and that the representatives of the Respondent expressed favor with the proposals that employes wear uniforms.

7. That, during the course of negotiations held on December 15, 1971, the Complainant's demand for payment for unused accumulated sick leave on death or retirement was discussed; that the representatives of the Respondent indicated as the position of the Respondent that such demand be refused; and that the Complainant withdrew its demand concerning payment for unused sick leave from the issues in bargaining.

8. That, during the course of the negotiations held on December 15, 1971, the Complainant's demand for a 15 per cent wage increase

was discussed; that the representatives of the parties discussed the wage increase guidelines imposed by the Federal government under Phase II of the economic stabilization program; and that VanderKelen indicated, as a guideline imposed by the Board of the Respondent, that any wage increase be within Federal guidelines.

9. That, during the course of the negotiations held on December 15, 1971, the representatives of the Respondent made a proposal to the representatives of the Complainant that the wage rates of the previously existing collective bargaining agreement be modified by the addition of $31.00 per month to all wage rates, and that the Employer provide three uniforms per year to each employe; that, following further bargaining, the representatives of the Respondent modified the Respondent's offer to reflect an across-the-board pay increase of $32.00 per month, with the same provision for three uniforms per employe per year; that the representatives of the Complainant agreed to take the Respondent's proposal to the membership of Complainant for ratification; that the representatives of the Complainant agreed to prepare a collective bargaining agreement in accordance with said proposal, for presentation and ratification by the Board of the Respondent; and that no other issues were raised, negotiated about, or left unresolved by the parties at the conclusion of the meeting on December 15, 1971.

10. That, at the conclusion of the meeting held on December 15, 1971, there was a meeting of the minds between the representatives of the parties, and a total tentative agreement reached over the wages, hours and working conditions for the calendar year 1972; and that it was the intention of the participants at said meeting to proceed forthwith with the preparation of and ratification of a collective bargaining agreement to succeed the 1971 agreement with an agreement effective for 1972.

11. That Miller prepared a document in conformity with the tentative agreement reached by the representatives of both parties on December 15, 1971; that said document was presented to the Respondent; that, thereafter, a conversation took place between Miller and VanderKelen wherein they agreed to delete from said agreement one of two redundant clauses having to do with maintenance of benefits; and that no other issues were raised or remained outstanding at such time.

12. That, on or about March 18, 1972, VanderKelen presented the proposed collective bargaining agreement to the Board of the Respondent; that members of the Board of the Respondent thereupon engaged in discussions concerning the possibility that cleaning services in a new building then under construction might be contracted out; that the Board of the Respondent instructed VanderKelen to renegotiate the collective bargaining agreement with the Complainant, reserving to said Board the right to employ a cleaning service when the move was made into the new building, with the provision that present custodial employes not be laid off because of the employment of a cleaning service; that the Board of the Respondent failed and refused to ratify or implement the tentative agreement reached between the representatives of the parties on December 15, 1971.

13. That VanderKelen communicated his instructions concerning renegotiation of the contract to Miller; that Miller refused to renegotiate said contract; that meetings between representatives of the parties occurred on April 24, 1972, August 7, 1972 and August 14, 1972 concerning ratification of, implementation of, or renegotiation

of said collective bargaining agreement; that correspondence has been exchanged between the parties concerning the same issues; that the Respondent continued to refuse, and continues to refuse, to ratify or execute the collective bargaining agreement previously tentatively agreed upon; and that the Respondent continued, and continues, to condition its ratification of and implementation of said agreement on the making of further concessions by the Complainant on the question of contracting out of custodial services.

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

CONCLUSIONS OF LAW

1. That a unit of all custodial and maintenance employes of the Respondent Vocational, Technical and Adult Education District #13 is a unit appropriate for the purposes of collective bargaining within the meaning of Section 111.70(4)(d) of the Municipal Employment Relations Act; and that the Complainant is the exclusive collective bargaining representative of the employes in said unit.

2. That, at the conclusion of the meeting held on December 15, 1971, the bargaining committee of the Complainant and the bargaining committee of the Respondent reached a tentative collective bargaining agreement covering the wages, hours and conditions of employment for employes in the aforesaid bargaining unit; and that said tentative agreement included the complete resolution of all issues which had been raised by the parties in collective bargaining for a contract for the year 1972.

3. That the Respondent, Vocational, Technical and Adult Education District #13, by refusing to act on the ratification of and implementation of the tentative collective bargaining agreement reached between Complainant Green Bay Municipal Employees Union Local 1672, AFSCME, AFL-CIO and said Respondent, and by conditioning its ratification of said agreement on the renegotiation of said agreement on issues which had never previously been advanced by said Respondent, and by the introduction of new issues into the scope of collective bargaining after tentative agreement had been reached on all issues existing between the parties, has acted, and continues to act, in bad faith towards and has refused, and continues to refuse, to bargain collectively with the Complainant within the meaning of Section 111.70(1)(d) and has committed, and is committing, prohibited practices in violation of Sections 111.70(3)(a)4 and 1 of the Municipal Employment Relations Act.

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 Vocational, Technical and Adult Education District #13, its officers and agents, shall immediately:

1) Cease and desist from:

   a) Refusing to bargain collectively, within the meaning of Section 111.70(1)(d) and 111.70 (3)(a)4 of the Municipal Employment Relations Act, with Green Bay Municipal Employees Union Local 1672, AFSCME, AFL-CIO, by the untimely

introduction of issues in bargaining between said parties following the adoption of a tentative agreement by the negotiators for said parties.

b) Refusing to bargain collectively, within the meaning of 111.70(1)(d) and 111.70(3)(a)4 of the Municipal Employment Relations Act, with Green Bay Municipal Employees Union Local 1672, AFSCME, AFL-CIO, by refusing to act on the ratification of the tentative agreement reached between Complainant and representatives of the Respondent or conditioning such action on the making of concessions by the Complainant on issues covered by a), above, and by refusing to take all necessary steps to have said tentative agreement approved and adopted.

2) Take the following affirmative action which the Examiner finds will effectuate the policies of the Municipal Employment Relations Act:

a) Pursuant to Section 66.77, Wisconsin Statutes, hold an open Board meeting and place the subject of the ratification of a tentative collective bargaining agreement reached on December 15, 1971 on the agenda for said meeting.

b) At such open meeting, act on the ratification of the aforesaid tentative agreement in conformance with the obligations imposed by the Municipal Employment Relations Act and this Order.

c) Notify the Wisconsin Employment Relations Commission within twenty (20) days of the date of this Order as to what action has been taken to comply herewith.

Dated at Madison, Wisconsin, this 27th day of September, 1973.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Marvin L. Schurke
Marvin L. Schurke, Examiner

MEMORANDUM ACCOMPANYING
FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The so-called anti-secrecy law injects a factor of formal ratification by the Employer into collective bargaining under the Municipal Employment Relations Act. Such ratification procedures are not present in private sector collective bargaining. Prior to the enactment of the Municpal Employment Relations Act, our Supreme Court said:

> "Sec. 14.90, Stats. (the Anti-Secrecy Act) [subsequently renumbered as Section 66.77, Wisconsin Statutes] provides that no formal action of any kind shall be introduced, deliberated upon or adopted at any closed executive session or closed meeting of any state and local governing and administrative bodies. Certain exceptions are provided to that act.
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> An attorney general's opinion (54 Op. Atty. Gen. (1965), Introduction, vi) found one of the exceptions sufficiently broad to cover the negotiations between a municipality and a labor organization. However, it is clear that the formal introduction, deliberation and adoption by the elected body of the bargaining recommendations must be at open meetings.
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> "'Whether the teacher salary proposals submitted by the teachers' committee and the counter proposals made by the school board are preliminary in nature and for bargaining reasons need to be discussed in a closed session is basically a question of fact to be decided by the school board. If the board finds that the bargaining process can best be carried on in private, the meeting may be closed. If the board finds no necessity for bargaining in private, the meeting should be open to the public. In any event, when the bargaining period is past, no final action should be taken on the teachers' salary schedule until they are made public and discussed in an open public meeting.'" 54 Op. Atty. Gen. (1965), Introduction, vi. (Emphasis supplied).
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> The open meeting is the necessary and final step in the "negotiation" process between the school board and the majority teachers' union.
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> The proposed agreement submitted by the school board's bargaining committee does not have to be accepted by the school board. If the recommendations of the committee automatically were approved by the school board, then the anti-secrecy law has been violated and the open meeting is nothing but a sham." Milwaukee Board of School Directors vs. WERC, 42 Wis. 2d 637, 652 (1969).

The legislature subsequently expanded the duties imposed on municipal employers, with respect to collective bargaining. Section 111.70 (1)(d) states:

"111.70 Municipal employment. (1) DEFINITIONS. As used in this subchapter:

. . .

(d) 'Collective bargaining' means the performance of the mutual obligation of a municipal employer, through its officers and agents, and the representatives of its employes, to meet and confer at reasonable times, in good faith, with respect to wages, hours and conditions of employment with the intention of reaching an agreement, or to resolve questions arising under such an agreement. The duty to bargain, however, does not compel either party to agree to a proposal or require the making of a concession. Collective bargaining includes the reduction of any agreement reached to a written and signed document. The employer shall not be required to bargain on subjects reserved to management and direction of the governmental unit except insofar as the manner of exercise of such functions affects the wages, hours and conditions of employment of the employes. In creating this subchapter the legislature recognizes that the public employer must exercise its powers and responsibilities to act for the government and good order of the municipality, its commercial benefit and the health, safety and welfare of the public to assure orderly operations and functions within its jurisdiction, subject to those rights secured to public employes by the constitutions of this state and of the United States and by this subchapter."

Section 111.70(3)(a)4 states:

"(3) PROHIBITED PRACTICES AND THEIR PREVENTION. (a) It is a prohibited practice for a municipal employer individually or in concert with others:

. . .

4. To refuse to bargain collectively with a representative of a majority of its employes in an appropriate collective bargaining unit. Such refusal shall include action by the employer to issue or seek to obtain contracts, including those provided for by statute, with individuals in the collective bargaining unit while collective bargaining, mediation or fact-finding concerning the terms and conditions of a new collective bargaining agreement is in progress, unless such individual contracts contain express language providing that the contract is subject to amendment by a subsequent collective bargaining agreement. Where the employer has a good faith doubt as to whether a labor organization claiming the support of a majority of its employes in an appropriate bargaining unit does in fact have that support, it may file with the commission a petition requesting an election to that claim. An employer shall not be deemed to have refused to bargain until an election has been held and the results thereof certified to the employer by the commission. The violation shall include, though not be limited thereby, to the refusal to execute a collective bargaining agreement previously agreed upon. The term of any collective bargaining agreement shall not exceed 3 years."

Previous cases have recognized the need for harmonization between the duty to bargain set forth in the Municipal Employment Relations Act and the anti-secrecy law. 1/ The parties to this proceeding have not made argument on the basis of the Supreme Court decision in the Milwaukee case cited, above. Instead, they have concentrated their arguments on the question of VanderKelen's authority to bind the Board of the Respondent. The argument advanced by the Respondent to excuse its refusal to ratify can be interpreted as a contention that VanderKelen was sent to the bargaining table without authority even to reach a tentative agreement on behalf of the Respondent. If condoned by the Examiner here, such a position would make a sham out of the duty to bargain imposed on municipal employers by the Municipal Employment Relations Act. It is crucial to the process established by the MERA that both parties send representatives to the bargaining table with authority to engage in the give and take of collective bargaining and to come to a tentative agreement. Accordingly, if the Examiner were to take the Respondent's arguments to the extreme previously suggested, the Examiner would conclude at this point that the Respondent had refused to bargain in good faith with the Complainant and had committed prohibited practices. The Examiner assumes, however, that the Respondent did not intend its argument as a confession of wrong-doing. The Respondent's brief places emphasis on a theory of agency, while the Complainant's brief points to evidence of implied authority. Any implication of authority to VanderKelen must be considered in the light of the Supreme Court's decision in Milwaukee, supra, and the Examiner concludes that VanderKelen did not have authority to bind the Respondent in such a manner as to dispense with the requirements for ratification by the Board of the Respondent in an open meeting.

The violation, if any, in this case occurred at the March 18, 1972 meeting of the Board of the Respondent, and thereafter. The evidence of record leaves little doubt that VanderKelen, Miller and their respective associates met and negotiated in complete good faith on December 15, 1971, and reached a tentative agreement mutually satisfactory to the representatives of both parties. The Union had presented relatively narrow issues, and the scope for bargaining had been severely narrowed by the imposition of the President's wage-price freeze in August of 1971 and the imposition of mandatory Phase II economic controls in November of 1971. The subsequent conduct of the parties also indicates that an amicable agreement had been reached. Miller was ill and hospitalized early in 1972, so that preparation of the draft was somewhat delayed. Nevertheless, VanderKelen reported having reached a tenative agreement which he was prepared to present to the Board of the Respondent and to recommend, as soon as the written materials were received. When the proposed draft was transmitted, VanderKelen inspected it and discovered that it, like the previous agreement of the parties, contained two maintenance of benefits provisions. VanderKelen's contact with Miller was in terms of "which one do you want?". Miller made his choice, and no further disagreement resulted on this issue. VanderKelen presented the proposed agreement to the Board, as he had agreed to do.

The record indicates that, coincidental to the negotiations between the parties, the Employer was building a new school facility. The question of the provision of custodial services in that new facility had never been raised previously with the Union, and clearly was not raised by the Respondent in bargaining with the Union for the 1972 collective bargaining agreement. The Union filed its demands

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1/ Whitehall School District (10812-A) 9/73; Adams County (11307-A) 4/73; (11307-B) 5/73.

on July 1, 1971 and a period of five and one-half months elapsed between the filing of demands and the one and only negotiations meeting between the parties. There is no question that the Respondent would have been entitled to raise the issue of subcontracting with the Union on a timely basis, up to the time that tentative agreement was reached between the parties on all issues existing between them. The refusal to ratify the tentative agreement was, and is, tied directly to the new issue tardily introduced into the process. The duty to bargain includes specifically and inherently the intention of reaching agreement and resolving issues. To permit the Respondent to inject the subcontracting issue into the process, after tentative agreement had been reached, would be counter-productive and contrary to the statutory purpose for narrowing issues and reaching agreements. As a remedy for the violation found here, the Respondent has been ordered to cease and desist from advancing the subcontracting issue or other similar tardy issues, and to consider the tentative agreement reached between the parties for ratification. In order to effectuate the policies of the Municipal Employment Relations Act compatiability with the requirements of 66.77, Wisconsin Statutes, any disapproval of the tentative agreement by the Board of the Respondent must be consistent with the Respondent's statutory obligation to bargain in good faith.

Dated at Madison, Wisconsin, this 27th day of September, 1973.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Marvin L. Schurke
Marvin L. Schurke, Examiner