STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

LOCAL 1750A OF AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES OF SHEBOYGAN, WISCONSIN, Complainants, vs. CITY OF SHEBOYGAN, A MUNICIPAL CORPORATION, Respondent.	Case XVIII No. 17126 MP-276 Decision No. 12134-A

Appearances:

Rabinovitz & Sonnenburg, Attorneys at Law, by Mr. David Rabinovitz, and Wisconsin Council of County and Municipal Employees, by Mr. Michael J. Wilson, District Representative, appearing on behalf of the Complainant.

Mr. Clarence H. Mertz, City Attorney, City of Sheboygan, appearing on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Local 1750A of American Federation of State, County and Municipal Employees of Sheboygan, Wisconsin, having, on August 29, 1973, filed a complaint with the Wisconsin Employment Relations Commission wherein it alleged that the City of Sheboygan has committed prohibited practices within the meaning 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 Statutes; and, pursuant to notice, a hearing having been held in the matter at Sheboygan, Wisconsin on October 2, 1973, 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 Local 1750A of American Federation of State, County and Municipal Employees of Sheboygan, Wisconsin, hereinafter referred to as the Complainant, is a labor organization; that Ray Rothwell is President of the Complainant; and that Michael J. Wilson is the District Representative of the Wisconsin Council of County and Municipal Employees, AFSCME, AFL-CIO, assigned to the Complainant.

2. That the City of Sheboygan, hereinafter referred to as the Respondent, is a municipal employer having its principal offices at City Hall, Sheboygan, Wisconsin; that W. Thomas Zengler is the Director of Personnel of the Respondent; and that Clarence H. Mertz is City Attorney of the Respondent.

3. That, at all times since September 16, 1966 1/, the Respondent has recognized the Complainant as the exclusive collective bargaining representative of all regular full-time and part-time employes in the Street Department, Sanitation Department, Park Department, Municipal Auditorium and Armory, Tool House Office, Wildwood Cemetery and Sewage Treatment Plant of the Respondent, excluding elected officials, department superintendents, assistant superintendents, supervisors and City Hall employes; and that the Complainant and the Respondent have been parties to a series of collective bargaining agreements.

4. That the Complainant and the Respondent were parties to a collective bargaining agreement effective for the period from January 1, 1972 through December 31, 1973, which contained the following provisions pertinent hereto:

"AGREEMENT

This Agreement made and entered into and effective the 1st day of January, 1972, by and between the City of Sheboygan, hereinafter referred to as the Employer, and the Sheboygan Employees Local 1750-A affiliated with the American Federation of State, County and Municipal Employees, AFL-CIO, hereinafter referred to as the Union. The bargaining unit is composed of all regular full time and regular part time employees in the Street and Sanitation Department, Park Department, Municipal Auditorium and Armory, Wildwood Cemetery and Sewage Treatment Plant as certified by the Wisconsin Employment Relations Board September 16, 1966, pursuant to an election held September 7, 1966.

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ARTICLE I

MANAGEMENT AND UNION POLICY OF COOPERATION

SECTION 1. RECOGNITION

The Employer agrees that it will and does hereby recognize the Union as the sole collective bargaining agency for all employees of the City of Sheboygan in the above listed departments, exclusive of department superintendents and above, assistant superintendents, and supervisors. Recognition embodies and embraces collective bargaining in good faith, and the adjustment and settlement of grievances with authorized representatives chosen by the Union. The delineation of the Union herein shall not prevent the expansion of the Union and/or the addition of other departments or divisions of City employees.

SECTION 2. UNION ACTIVITIES AND DISCRIMINATION

(a) The Employer agrees that no employee will be discriminated against because of membership in or activity in connection with the Union, and the Employer will not interfere with the rights of the employees to become members of the Union. The Employer will not

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1/ On September 16, 1966, following an election conducted by it on September 7, 1966, the Wisconsin Employment Relations Commission issued its Certification of Representatives designating City of Sheboygan Employees Local 1750, Wisconsin Council of County and Municipal Employees, AFSCME, AFL-CIO, as exclusive representative. City of Sheboygan, Case III, Decision No. 7665.

discourage membership in the Union, and the Union agrees that it will not conduct Union activities on the Employer's time except as expressly provided for in SECTION 2. (b) and (c).

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ARTICLE II

EMPLOYER-EMPLOYEE SECURITY POLICIES

SECTION 1. SENIORITY

(a) New employees shall be on a probationary status for a period of six (6) months from the date of hiring. If still employed after such date, their seniority shall date from the date of hire. The probationary period of an employee can be extended by mutual agreement.

A regular full time or regular part time employee is defined as a person hired to fill a continuing regular full time or part time position.

A temporary employee is one who is hired for a specified period of time and who will be separated from the payroll at the end of such time. The Union shall be notified of the status of the employee and the period of time shall be set at date of hire.

A seasonal employee is one on the payroll only during the season in which his services are required.

(b) Seniority shall prevail in promotions, demotions, transfers, layoffs, rehiring and filling vacant positions provided, however, that the qualifications of the employee, including character and compatability, shall be taken into consideration. Qualifications of the employee shall be defined only as the employee's ability to perform the duties of the job.

(c) The Employer shall furnish annually, on or about January 1st, a seniority roster of all employees to the Secretary of the Union. Such list shall be kept up to date and posted where it may be inspected by the employees.

(d) An employee shall lose his seniority rights for the following reasons only:

1. If he quits.

2. If he has been discharged for just cause.

3. If he fails to report for work after being recalled as hereinafter provided for.

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SECTION 2. LAY-OFFS AND ADDITIONS TO FORCES

In all matters involving increase or decrease of forces, length of continued service shall be given primary consideration. Skill and ability shall be taken into consideration where they substantially outweigh consideration of length of service or where the employee who might be retained or laid off because of length of continuous service is unable to do the work required.

Temporary or seasonal employees shall be laid off before any regular full time or regular part time employee is laid off.

Employees in the bargaining unit shall receive a minimum of two weeks notice prior to layoff. Upon recall, the employee shall notify the City within one week of his intentions. He shall have an additional week (or two (2) weeks) from notification of recall (by certified, return receipt mail) to report for work, unless illness or other justifiable circumstances prevent him from doing so.

SECTION 3. NOTICE OF TERMINATION OF EMPLOYMENT, RESIGNATION OR DISCHARGE

(a) The Employer agrees that it shall be its policy to maintain minimum of forty (40) hours of work per week for each regular full time employee except where unforeseen financial emergencies make such provision impossible. The Union shall be notified of all employees laid off and of all employees recalled to work.

(b) If a question arises concerning the discharge of any employee, the employee may or may not work at the discretion of the Employer until the question of the discharge has been fully adjusted according to the terms and conditions of this agreement. If he has been permitted to work, he shall not receive compensation unless it is proven that he was unjustly discharged, in which case, he shall be compensated at his regular rate of pay for the period during which the matter was pending.

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ARTICLE IV

GRIEVANCE PROCEDURE

The Employer representative and the Union representative shall from time to time designate the time and place of meetings for the purpose of the adjustment of grievances. The following procedure shall be used for the adjustment of grievances:

(a) Any employee having a grievance shall take up the matter with his Union Steward, whose duty it shall be to consult the supervisor and to attempt to reach an adjustment. All grievances must be presented to the proper Employer Representative within fifteen (15) days after the Union has knowledge of the occurrence of the grievance.

(b) In the event no satisfactory adjustment is reached as to the disposition of the case at this point, the matter shall be presented by the Steward to both the Bargaining or Grievance Committee of the Union and the Employer representative, and every effort shall be made so that disposition shall be made within five (5) working days from the time the grievance has reached this step.

(c) Grievances not disposed of at this step shall be submitted to arbitration upon request of either party. The request for arbitration shall be made within fifteen (15) days after the breakdown of the adjustment process.

ARBITRATION

Should any controversy arise concerning the interpretation of the Articles of this agreement or the parties are unable to

agree on hours or other conditions of employment, either party may request arbitration in which event an Arbitration Board shall be set up as follows:

The Employer and the Union shall each designate an Arbitrator within five (5) days, such two (2) Arbitrators shall designate an impartial Arbitrator within five (5) days. In the event the two (2) Arbitrators are unable to agree upon the selection of the third impartial Arbitrator, such third Arbitrator shall be appointed by the Wisconsin Employment Relations Board.

Failure of either party to appoint its Arbitrator shall nevertheless give to the Wisconsin Employment Relations Board the power to appoint an impartial Arbitrator.

The Arbitration Board appointed shall hear the dispute and the determination of the majority of the Board shall be final and binding upon the parties.

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ARTICLE XVIII

This agreement shall be effective as of January 1, 1972 and shall remain in full force and effect to and including December 31, 1973, and shall be automatically renewed from year to year unless negotiations are instituted by letter on or before June 1, 1973, or any anniversary date thereof.

IN WITNESS WHEREOF, THE PARTIES HAVE EXECUTED THIS AGREEMENT ON THIS _____ DAY OF _____, 1972, by

FOR THE CITY OF SHEBOYGAN:

By W. T. Zengler /s/
W. T. Zengler, Chairman

By Clarence H. Mertz /s/
Clarence H. Mertz

By Robert C. F. Kuhlmann /s/
Robert C. F. Kuhlmann

By Archie C. Kuntze /s/
Archie C. Kuntze
Chairman, Salary & Grievance Committee

FOR LOCAL 1750-A, A.F.S.C.M.E.:

By Robert Glaeser /s/
Robert Glaeser, President

By Ernest L. Rose /s/
Ernest L. Rose

By Kenneth Ruppel /s/
Kenneth Ruppel

By Raymond Rothwell /s/
Raymond Rothwell"

5. That, on various dates during 1971, the Respondent hired Ralph Beniger, Mark Schild, Robert Kerwin, Joseph Killnas, Roger Jurk and Donald Graf; that all such employes were classified by the Respondent as "temporary" employes; that a dispute arose concerning the classification of employes as temporary employes; that a grievance of Ralph Beniger was processed to final and binding arbitration under the terms of the collective bargaining agreement between the Complainant and the Respondent; and that on July 10, 1972, Arbitrator Robert M. McCormick issued an Arbitration Award, wherein said Arbitrator sustained the grievance of Ralph Beniger, found Beniger to be a regular part-time employe covered by the collective bargaining agreement, and ordered Beniger made whole for any loss he may have suffered by reason of his exclusion theretofore from the coverage of the collective bargaining agreement.

6. That, on August 4, 1972, the Respondent terminated the employment of Schild, Kerwin, Killnas, Jurk and Graf; that, on August 24, 1972, Attorney David Rabinovitz, acting on behalf of Schild, Kerwin, Killnas, Jurk and Graf and with their written consent, filed a grievance with the Respondent alleging that the terminations of the above named grievants violated the collective bargaining agreement between the Complainant and the Respondent; that, on September 5, 1972, said grievance was referred to the Mayor and Common Council of the Respondent; that the Respondent gave no immediate response to said grievance; and that, on September 20, 1972, Wilson directed a letter to Mertz seeking action on the aforesaid grievance.

7. That, on September 29, 1972, Mertz directed a letter to Wilson, as follows:

> "Re: Shild (sic), Kerwin, Killnas, Jurk, and Graf Grievances
>
> Dear Mr. Wilson:
>
> This will acknowledge receipt of your September 20th, 1972, correspondance (sic) relative to the above referenced matter.
>
> After reviewing this matter, I have recommended to the Common Council that the document filed with such body by Atty. David Rabinovitz be placed on file for the following reasons:
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> 1. In my opinion, there is a procedural defect since Atty. Rabinovitz's procedure does not comply with the grievance procedure process as set forth in Article IV of the contract.
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> 2. It is my further opinion that there is a jurisdictional error since the proceedings were instituted by Atty. Rabinovitz rather than the Union. The basis for this opinion is Article I, Section 1, of the Contract.";

that Wilson responded thereto in a letter dated October 2, 1972, wherein he initiated an Arbitration Board pursuant to Article IV of the collective bargaining agreement between the Complainant and the Respondent; that, on October 6, 1972, Mertz directed a letter to Wilson, wherein he stated that the Respondent did not recognize the Complainant's appointment of an arbitrator in the matter; and that, on October 10, 1972, Wilson directed a letter to the Wisconsin Employment Relations Commission, wherein he requested the appointment of an arbitrator to hear and determine the grievance of Schild, Kerwin, Killnas, Jurk and Graf.

8. That on or about October 12, 1972, a regular meeting of the membership of the Complainant was held; that, during the course of such meeting, the grievance of Schild, Kerwin, Killnas, Jurk and Graf was a subject of discussion; that a vote of the membership of the Complainant was taken on the question of processing said grievance; that the membership of the Complainant voted unanimously against further processing of said grievance; and that, on or about October 13, 1972, Rothwell, acting in his capacity as President of the Complainant, informed the Respondent of the decision of the membership of the Complainant not to process the grievance of Schild, Kerwin, Killnas, Jurk and Graf.

9. That on October 13, 1972, Mertz directed a letter to the Executive Secretary of the Wisconsin Employment Relations Commission, wherein he related the information concerning action of the membership of the Complainant, as previously given to the Respondent by Rothwell, and wherein he declined to give the Respondent's concurrence in the appointment of an Arbitrator to hear and determine the grievance of Schild, Kerwin, Killnas, Jurk and Graf; and that, at all times subsequent

thereto, the Respondent has refused, and continues to refuse, to proceed to arbitration on the grievance of Schild, Kerwin, Killnas, Jurk and Graf.

10. That the discharges of Schild, Kerwin, Killnas, Jurk and Graf on August 4, 1972 constitute the operative facts giving rise to any allegation that the Respondent violated Section 111.70(3)(a)(3) and (1) of the Municipal Employment Relations Act; and that the complaint of prohibited practices filed to initiate the instant proceeding was filed with the Wisconsin Employment Relations Commission on August 29, 1973.

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

CONCLUSIONS OF LAW

1. That, insofar as the complaint of prohibited practices filed in the instant matter alleges that the Respondent, City of Sheboygan, engaged in acts of discrimination and interference with respect to Schild, Kerwin, Killnas, Jurk and Graf by discharging them on August 4, 1972, said complaint is not timely filed within the meaning of Section 111.07 (14) of the Wisconsin Employment Peace Act.

2. That the Respondent, City of Sheboygan, by questioning the authority of Attorney David Rabinovitz to file and process grievances under the grievance procedures set forth in the collective bargaining agreement between said Respondent and Complainant, Local 1750A, American Federation of State, County and Municipal Employees, has not refused to bargain with said Complainant, and has not committed prohibited practices within the meaning of Section 111.70(3)(a)(4) and (1) of the Municipal Employment Relations Act.

3. That the Complainant, Local 1750A, American Federation of State, County and Municipal Employees, has, through action of its membership and officers, authority to settle grievances arising under its collective bargaining agreement with the Respondent, City of Sheboygan, without the concurrence of the Wisconsin Council of County and Municipal Employees, AFSCME, AFL-CIO; that the grievance filed by Attorney David Rabinovitz on behalf of Schild, Kerwin, Killnas, Jurk and Graf concerning their discharge was withdrawn by said Complainant from the grievance procedure; and that, there being no grievance in existence subsequent to the notice given by said Complainant to the Respondent that the grievance had been withdrawn, no arbitrable issue existed on and after October 13, 1972.

4. That the Respondent, City of Sheboygan, by its refusal on and after October 13, 1972, to proceed to arbitration on the grievance of Schild, Kerwin, Killnas, Jurk and Graf, which grievance had previously been withdrawn by the Complainant herein from the grievance procedure contained in the collective bargaining agreement between the Complainant and the Respondent, has not violated, and is not violating, the terms of said collective bargaining agreement and, therefore, has not committed, and is not committing, prohibited practices within the meaning of Section 111.70(3)(a)(5) of the Municipal Employment Relations Act.

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

ORDER

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

Dated at Madison, Wisconsin this 24th day of July, 1974.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Marvin L. Schurke
Marvin L. Schurke, Examiner

MEMORANDUM ACCOMPANYING
FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The allegations of the complaint filed in the instant matter on August 29, 1973 are, in many respects, identical to the allegations of the grievance filed with the City on August 24, 1972 protesting the August 4, 1972 discharge of the five named grievants from employment with the City. In addition thereto, the complaint alleges a refusal to proceed to arbitration on the grievance. In its Answer filed on September 20, 1973, the City responded to certain of the allegations of the complaint relating to the "merits" of the grievance dispute, but also stated affirmative defenses relating to procedural arbitrability, prior settlement of the dispute in the grievance procedure, and the statute of limitations. The collective bargaining agreement between the City and the Union clearly provides for final and binding arbitration of disputes concerning interpretation or application of that agreement. Prior to the opening of the hearing on October 2, 1973, both parties were reminded of the policy favoring arbitration as a means for settlement of such disputes. During the course of the hearing, relying upon the decisions in Rodman Industries (9650-A) 9/70, Seaman-Andwall Corp. (5910) 1/62, and Monona Grove Jt. School Dist. No. 4 (11614-A) 7/73, the Examiner excluded evidence concerning the merits of the grievance and concerning issues of procedural arbitrability; thereby limiting the inquiry in the instant proceeding to the question of whether there is a dispute in existence which, on its face, is covered by the collective bargaining agreement, and to the issue raised concerning the statute of limitations on the filing of complaints of prohibited practices. At the close of the hearing, both parties indicated a desire to file post-hearing briefs, and briefs were filed, the last one being received by the Examiner on May 2, 1974.

THE UNION'S POSITION:

The Union contends that the evidence demonstrates an employment relationship between the City and the five individual grievants. The Union also asserts that the previous arbitration proceeding concerning Ralph Beniger demonstrates the arbitrability of the grievance concerning the discharge of the five named grievants. The Union alleges in its brief that the evidence demonstrates bad faith and an anti-union animus on the part of the City with respect to the grievants.

THE EMPLOYER'S POSITION:

The City contends here that there is presently no dispute in existence which, on its face, is subject to arbitration. In this regard, the City points particularly to the testimony of Rothwell, the President of the Union, who testified that he advised the City that the membership of the Union had voted not to process the grievance involved in this case. The City contends that, on the basis of such information, it had a right to assume that the dispute no longer existed. Further, the City points to the recognition clause of the collective bargaining agreement, contending that it had a right and obligation to bargain only with the Union regarding the adjustment and settlement of the grievance. The City also contends that the remedy requested in the complaint cannot be granted in this case, since it goes to the merits of the controversy, and that the only relief which could be granted in this proceeding would be an Order to proceed to arbitration. Secondly, the City contends that the complaint is untimely in that it was filed more than a year after the discharge of the employes involved.

DISCUSSION:

The discrimination and interference allegations of the complaint and the timeliness defense asserted by the City frame an issue which must be disposed of by the Examiner in this matter. There is no dispute about the date of the discharges or about the date of the filing of the complaint. Although the complaint is identical word-for-word to the grievance in certain paragraphs, the complaint was not filed until more than a year after the grievance was filed. A period of 20 days had passed between the date of the discharges in question and the date of the filing of the grievance, so that it is readily apparent that the complaint was not filed until more than a year after the operative facts giving rise to the allegations of discrimination and interference. The conclusion that the allegations concerning Sections 111.70(3)(a)(3) and (1) are time-barred does not, however, lead to the conclusion that the refusal to proceed to arbitration allegations under Section 111.70(3)(a)(5) are similarly time-barred. The City's initial refusal to recognize the appointment of an arbitrator was made clear in Mr. Mertz' letter of October 6, 1972 to Union District Representative Wilson. Although the basis for the refusal changed somewhat, the refusal continued on the basis of the City's present defense in Mr. Mertz' letter to the Commission under date of October 13, 1972. Both of the latter dates are well within the one-year period of limitations set forth in Section 111.07(14) of the Statutes. There is a question to be determined here as to whether, on the date of the filing of the complaint, there existed between the parties a grievance which, on its face, stated a claim requiring interpretation of the collective bargaining agreement.

It is uncontroverted that the membership of the Local Union voted unanimously against further processing of the grievance filed on behalf of Schild, Kerwin, Killnas, Jurk and Graf. It is also uncontroverted that the results of that membership vote were communicated to the Employer. The Complainant now appears to contend that the Local Union could not settle or withdraw the grievance in question without the authority of the District Representative of the WCCME or the attorney representing the five named grievants. The Complainant in this case is, so far as the evidence would indicate, a local union composed of employes of the City of Sheboygan. As indicated in the preamble to the collective bargaining agreement, Local 1750A is affiliated with the American Federation of State, County and Municipal Employees, AFL-CIO. The Examiner takes notice of the Commission's records in City of Sheboygan, Case III, which indicate that Local 1750A is also affiliated with the Wisconsin Council of County and Municipal Employees. Examination of the signature page of the collective bargaining agreement clearly indicates that the agreement is between the City of Sheboygan and Local 1750A. No representative of the WCCME is a signatory thereto and the WCCME is not named as a party. The grievance procedure contained in Article IV of the agreement makes reference to a Union Steward and to the bargaining or grievance committee of the Union, but imposes no requirement of discussion or authorization of settlement of grievances by the WCCME or its representatives. It has previously been recognized that a collective bargaining representative must be allowed a wide range of reasonableness in serving the unit it represents. See Ford Motor vs. Huffman, 345 U.S. 330, 31 LRRM 2548 (1953). The instant proceeding does not raise an allegation of denial of fair representation by the Union, but, rather, an issue of authority. The Examiner concludes that the Local Union, through its membership and officers, had authority to settle the grievance in question and that such authority was not limited by any requirement of consent by or on behalf of the Union's state or national affiliates. The Union, and not the five named grievants or their attorney, is the party to the collective bargaining agreement having authority to settle and dispose of grievances. The individual grievants and their attorney have no right independent of the Local Union to demand or obtain

arbitration under the terms of the collective bargaining agreement. See Milwaukee Board of School Directors (11280-B) 12/72. Bargaining with a minority representative is clearly prohibited by Section 111.70(3)(a)(4) of MERA and the City is correct in its assertion that it had both a duty to bargain with Local 1750A and a right to rely on the settlement information given the City by the President of Local 1750A.

While the grievance filed on behalf of the five named grievants undoubtedly stated a claim which, on its face, was arbitrable within the meaning of the cases cited above, the settlement of that grievance by the Local Union removed their claim from the grievance procedure contained in the collective bargaining agreement and absolved the City of any further obligation to process that grievance. See Ozite Corporation (10298-A) 11/71. The Examiner therefore concludes that the City was within its rights when, on and after the date it was notified of the withdrawal of the grievance by the Local Union, it refused to proceed to arbitration on the grievance at hand.

Dated at Madison, Wisconsin this 24th day of July, 1974.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Marvin L. Schurke
Marvin L. Schurke, Examiner