STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

NORTHWEST UNITED EDUCATORS, Complainant, vs. CHETEK JOINT SCHOOL DISTRICT NO. 5, Respondent.	Case II No. 17540 MP-315 Decision No. 12418-C

Appearances:
Mr. Wayne Schwartzman, Staff Counsel, Wisconsin Education Association Council, for the Complainant.
Coe, Dalrymple & Heathman, S.C., by Mr. Edward J. Coe, Attorney at Law, for the Respondent.

ORDER DENYING MOTION TO REOPEN HEARING AND DISMISSING COMPLAINT

Findings of Fact, Conclusions of Law and Order having been made and filed in the above entitled matter by the undersigned Examiner on March 28, 1974; and the same having been duly served upon the parties; and the above named Complainant having, on April 10, 1974, filed a Motion with the Examiner requesting that the Examiner reopen the hearing in the matter to permit the Complainant to introduce certain additional evidence, claimed to be newly discovered; and the Examiner having, on April 11, 1974, set aside the Order issued by the Examiner in the captioned matter on March 28, 1974, pending a determination on said Motion; and the Examiner having received from the parties written statements of their positions with respect to said Motion; and the Examiner having considered said Motion and the arguments with respect thereto, and being fully advised in the premises;

NOW, THEREFORE, it is

ORDERED

1. That the Motion of Northwest United Educators for reopening of the hearing in the above entitled matter be, and the same hereby is, denied.

2. That the complaint filed by Northwest United Educators to initiate the above-entitled matter be, and the same hereby is, dismissed.

Dated at Madison, Wisconsin, this 16th day of August, 1974.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Marvin L. Schurke
Marvin L. Schurke, Examiner

CHETEK JT. SCHOOL DIST. NO. 5, Case II, Decision No. 12418-C

MEMORANDUM ACCOMPANYING ORDER DENYING MOTION TO REOPEN HEARING AND DISMISSING COMPLAINT

The complaint filed on January 9, 1974, to initiate the instant proceeding alleged that the Respondent had violated Section 111.70(3)(a)(4) of the Wisconsin Municipal Employment Relations Act (MERA) by refusing to bargain with the Complainant. Hearing was held before the undersigned Examiner on February 5, 1974, and Findings of Fact, Conclusions of Law and Order were issued by the Examiner on March 28, 1974, wherein the complaint was dismissed on the basis that the Complainant had failed to give the Respondent sufficient notice to prevent the operation of an automatic renewal clause contained in the existing collective bargaining agreement between the parties. Since the existing agreement was found to have been renewed through at least June 30, 1975, it followed that the Respondent was relieved of any duty to bargain on a new agreement to take effect prior to that date.

Within 20 days following the issuance of the Examiner's Order, the Complainant filed with the Examiner a "Motion to Reopen Hearing For Introduction Of Newly Discovered Evidence And Request For Extension Of Time For Filing Petition For Review", the first aspect of which is made under Section ERB 12.08 of the Wisconsin Administrative Code. On April 11, 1974, the Examiner set aside the Order issued on March 28, 1974 pending a determination on the Motion, and established a schedule for the filing of written statements of position on the Motion. Written arguments on the motion were subsequently received from both parties.

GROUNDS FOR REOPENING OF A HEARING:

Section ERB 12.08, Wisconsin Administrative Code, sets forth only two bases upon which an Order of the Commission or an Examiner appointed by the Commission in a prohibited practice proceeding might be withdrawn, reversed or modified by the issuing authority, those being: "if any mistake is discovered therein or upon grounds of newly discovered evidence." In both caption and actual content, the Motion to Reopen Hearing before the Examiner at this time is clearly based only upon a claim of newly discovered evidence.

Neither party has cited cases interpreting the term "newly discovered evidence" in proceedings before the Commission. The Respondent admits in its brief that it was unable to find any cases defining that term in the context of proceedings under Section 111.07, Wisconsin Statutes, but proposes that the Examiner adopt the standards applied to motions for new trials in the civil courts, as set forth in Section 270.50, Wisconsin Statutes, and as applied by our Supreme Court in John Mohr & Sons, Inc. v. Jahnke, 55 Wis. 2d 402 (1972) and Bear v. Kenosha County, 22 Wis. 2d 92 (1963). The Complainant contends that those standards are inapposite, but cites no authority for its argument. However, the standards for determination of motions for reopening of hearings under Section 111.07, Wisconsin Statutes, are, in fact, well established in previous decisions of the Commission. See: Gehl Company (Examiner decision, 9474-D) 12/70, affirmed (9474-G) 5/71; Archdiocese of Milwaukee (6695) 4/64, citing Erickson v. Clifton, 265 Wis. 236 (1953); and Gilson Bros. (1831-B) 11/48, affirmed Ozaukee County Cir. Ct., 2/49, affirmed, 255 Wis. 316 (1949). As stated in the Examiner Decision in Gehl, in order for a hearing in an adversary proceeding before the Commission to be reopened, the moving party must show:

> "(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 that 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."

Also as stated in the Examiner decision in Gehl, such motions to reopen are not granted lightly. It is clear from the foregoing that the standard to be applied in determining the instant motion is similar, if not identical, to the standards cited by the Respondent.

DISCUSSION:

Paragraph 4a. of the complaint sets forth, in their entirety, the provisions of Article IV of the existing collective bargaining agreement between the parties. This dispute has its roots in a disagreement between the parties as to compliance with Section A of Article IV, and evidence and argument were directed to those issues during the hearing held on February 5, 1974, supplemented by arguments in the briefs which followed. Section B of Article IV calls for negotiations to commence within 60 days of the notice called for in Section A. It is acknowledged on both sides that negotiations did not so commence, and that the dispute over the adequacy of notice was the reason for the lack of compliance with Section B. There was no evidence or argument offered concerning Section C of Article IV prior to the instant motion for reopening of the hearing. Section C calls for an "informal" meeting between representatives of the parties on the third Thursday in October, a date within the timely period for a party to serve notice on the opposite party to prevent operation of the automatic renewal clause contained in Section A of Article IV. In Findings of Fact paragraph 5, the Examiner noted that there was no evidence of record that a meeting was held pursuant to Section C of Article IV, nor any evidence of action by either party to effect the scheduling of such a meeting.

In its "Motion to Re-Open Hearing", the Complainant alleges that it is prepared to adduce evidence that, pursuant to Section C of Article IV of the agreement, an informal meeting was held between representatives of the parties on October 18, 1973, at which time 6 members of the Respondent's Board of Education and 14 members of the Complainant were present. The Respondent's initial written response to the Motion at hand was supported by an affidavit of the Clerk of the Respondent's Board of Education, wherein the affiant confirmed that a meeting had been held between representatives of the parties on October 18, 1973. Thus, while there may be some slight discrepancy as to the number of representatives attending from each side, it appears that the evidence would establish that the meeting in question was held and that representatives of both sides attended. The real question before the Examiner here is whether that information, and perhaps further information concerning the content of discussions which occurred at the October 18, 1973 meeting, are newly discovered within the meaning of the cases cited above, so as to warrant reopening of the hearing.

The Respondent alleges in its written statement on this Motion and in the supporting affidavit thereto that 3 of the NUE members who were in attendance at the October 18, 1973 meeting between the parties were also in attendance at the February 5, 1974 hearing before the Examiner. One of the individuals so named by the Respondent was sworn as a witness and testified before the Examiner, but his testimony did

not touch upon the subject of the October 18, 1973 meeting. The Complainant does not deny any of those allegations, and alleges only that the Executive Secretary of NUE was informed by certain witnesses (presumably after the issuance of the Examiner's decision on March 28, 1974) of the occurrence of the October 18, 1973 meeting, and that Wisconsin Education Association Council Organizational Specialist Robert West, who appeared for the Complainant at the February 5, 1974 hearing before the Examiner, was without knowledge of those facts prior to the hearing and prior to the decision in the instant matter. The Complainant would also have the Examiner mitigate shortcomings in the presentation of its case, on the basis that West is not an attorney and was not aware of legal issues joined in the case.

A labor organization must be imputed to have knowledge of relevant collective bargaining information within the knowledge of its leadership. The Commission's docket records for a mediation case closed on September 19, 1973 indicate that the bargaining unit involved here included approximately 65 employes. The 14 or 15 NUE members who attended the October 18, 1973 meeting constitute a significant portion of the membership of NUE in this bargaining unit, and they apparently include at least one member of the Board of Directors of NUE. Accepting as true the assertion that the knowledge possessed by others within the organization was not imparted to West or to NUE Executive Secretary James Guckenberg until after the issuance of the Examiner's decision, the situation is, at best, within the rule of Bear v. Kenosha County, supra, cited by the Respondent. It is apparant that it is not the existence of the potential evidence, but rather its potential relevance, which has been discovered following the close of the hearing. The examiner has considered the argument of the Complainant that West is not an attorney, but finds no basis therein for mitigation of any negligence in the preparation for or presentation of the Complainant's case at the hearing held on February 5, 1974. There is no requirement that all representatives of parties appearing before the Commission be attorneys, and that practice has undoubtedly been maintained at least in part in recognition of the fact that many highly sophisticated and knowledgeable union and management representatives are not attorneys. That the Commission should maintain such an open practice, and then hold to a double standard wherein parties represented by an attorney would be held to a different standard of proof or competence than would be parties not represented by an attorney, is inconceivable. Under these circumstances, the Motion to reopen the hearing must be denied.

Pursuant to Section 111.07(5), Wisconsin Statutes, the status of the case following the Examiner's Order of April 11, 1974 setting aside the Examiner's Order of March 28, 1974 is the same as prior to the issuance of the Order set aside. The Findings of Fact and Conclusions of Law issued by the Examiner on March 28, 1974 were not affected by the Order of April 11, 1974, and need not now be repeated. With the disposition of the "Motion To Re-Open Hearing", no further issue is pending in the matter before the Examiner and, accordingly, the Examiner has ordered dismissal of the complaint. That Order, taken together with the Findings of Fact and Conclusions of Law previously issued, is the final Order of the Examiner. The Examiner has made a technical modification of the form of the Order to ensure that, as stated in the Memorandum Accompanying the Order issued on April 11, 1974, the time for filing of a petition for review with the Commission

will be a twenty day period following the date hereof.

Dated at Madison, Wisconsin, this 16th day of August, 1974.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Marvin L. Schurke
Marvin L. Schurke, Examiner