

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

GENERAL DRIVERS, DAIRY EMPLOYEES	:	
and HELPERS LOCAL UNION 579	:	
affiliated with the INTERNATIONAL	:	
BROTHERHOOD OF TEAMSTERS, CHAUFFEURS,	:	
WAREHOUSEMEN & HELPERS OF AMERICA,	:	Case II
	:	No. 19807 MP-545
Complainant,	:	Decision No. 14141-B
	:	
vs.	:	
	:	
VILLAGE OF CLINTON,	:	
	:	
Respondent.	:	
	:	

Appearances:

Goldberg, Previant & Uelmen, Attorneys at Law, by Mr. Alan M. Levy, Esq., appearing on behalf of the Complainant.
Mr. Robert Elliot, Esq., Village Attorney, appearing on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

General Drivers, Dairy Employees and Helpers Local Union 579 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, having filed a prohibited practices complaint with the Wisconsin Employment Relations Commission, herein Commission, alleging that Village of Clinton has committed certain prohibited practices within the meaning of Section 111.70(3)(a)1, 3 and 4 of the Municipal Employment Relations Act, hereinafter MERA; and the Commission having appointed Amedeo Greco, 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 Statutes; and hearing on said complaint having been held at Clinton, Wisconsin, on January 6, 1976, before the Examiner; and the parties having thereafter filed briefs which were received by March 22, 1976; and the Examiner having considered the evidence and arguments of counsel, makes and files the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. That General Drivers, Dairy Employees and Helpers Local Union 579 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, herein Complainant, is a labor organization and is the exclusive bargaining representative of "all full-time and part-time police officers employed by the Village of Clinton, excluding office and clerical employees, cadets, supervisory employees and all other employees."

2. That Village of Clinton, herein Respondent, constitutes a Municipal Employer within the meaning of Section 111.70(1)(a) of the Wisconsin Statutes; that Respondent is engaged in the providing of police services in Clinton, Wisconsin; and that Rodger Bernstein is employed by Respondent as Chief of Police, and at all times material herein has acted as Respondent's agent.

3. That on October 24, 1975, 1/ the Commission conducted a representation election among the employes in the above-described unit; that the tally of ballots showed that there were five employes eligible to vote, that four employes voted in the election, three of whom voted in favor of having Complainant represent them, and one voting against such representation; that the "Tally Sheet" prepared at the conclusion of the election was signed Vi Schaffner, Respondent's Village Clerk; that immediately after the conclusion of said election, Schaffner communicated the results of the election to Chief Bernstein; that Respondent did not file any objections to the conduct of the election; and that the Commission on November 5, issued a "Certification of Representatives" wherein it certified that Complainant was the collective bargaining representative for the employes in the above described unit.

4. That on October 25, one day after the holding of the above noted election, Chief Bernstein announced a change in the police department's work schedule in a memorandum which read:

"ALL OFFICERS,

EFFECTIVE OCTOBER 26, 1975 THIS DEPARTMENT WILL BE USING A 12 HOUR SHIFT SCHEDULE. THIS SCHEDULE WILL BE SET UP ON A 4 DAYS ON, 2 DAYS OFF BASIS WITH SHIFT HOURS BEING 7AM to 7PM AND 7PM TO 7AM.

THIS CHANGE WILL BE IN EFFECT UNTILL [SIC] FURTHER NOTICE.

THIS CHANGE IS BEING NECESSITATED BY SEVERAL FACTORS, INCLUDING OFFICER KORTH BEING MOVED TO THE SEWER PLANT AND NECESSARY BUDGET CUTS DUE TO A LAW PASSED BY THE STATE OF WISCONSIN LIMITING TAX LEVY INCREASES FOR BUDGET YEAR 1976.

IF THIS CHANGE IN SHIFT SCHEDULING INVONVIENUNSES [SIC] ANYONE, I AM SORRY, BUT THERE IS VERY LITTLE I CAN DO AT THIS TIME.

I BELIEVE THE CITIZENS OF CLINTON NEED 24 HOUR POLICE PROTECTION, AND BECAUSE OF THE RASH OF BURGLARIES WE HAVE BEEN HAVING I BELIEVE WE MUST MAINTAIN THIS AROUND THE CLOCK PROTECTION.

OFFICER KORTH WILL CONTINUE AS THIS DEPARTMENTS [SIC] COURT OFFICER UNTIL OR AT SUCH TIME AS HE MAY BE APPOINTED AS FULL TIME SEWAGE TREATMENT OPERATOR. OFFICER KORTH WILL ALSO FILL IN AS A PATROL OFFICER WHEN NECESSARY."

5. That the foregoing shift change was effectuated on October 26, without any prior bargaining or consultation with Complainant; that previous thereto, the police department had been on a 8-9 hour shift from about July; and that before July, the department had been on a 10 hour shift.

6. That Fred Fuller, Complainant's business representative, by letter dated October 27, informed Leon Christiansen, President of Respondent's Village Board, that:

1/ Unless otherwise noted, all dates hereinafter refer to 1975.

"It has been brought to my attention that a change in the work schedule of the Village Police Officers is being contemplated.

You are advised that if the schedule is put into effect without the matter being negotiated it will be necessary for this Local Union to file an unfair labor practice charge against the Village;"

that by letter dated November 3, Complainant's Attorney, Alan Levy, advised Bernstein that Complainant wished to negotiate the impact of the shift changes noted above; and that Respondent never responded to either that letter or Fuller's October 27 letter.

7. That on December 15, Bernstein unilaterally reduced the work day from 12 to 10 hours, without any prior bargaining with Complainant.

8. That full-time employes in the police department are paid a fixed salary; that Respondent did not alter those salaries when it effectuated the shift changes herein; that part-time employes are paid on an hourly basis; and that such part-time employes were paid when they were required to work the changed hours herein.

9. That James Korth is a part-time police officer in Respondent's Police Department, and he is also a part-time employe in Respondent's Public Works Department; that Korth finished one year's employment with Respondent in November; that Respondent in the past has had a policy under which merit raises can be given to employes who complete one year's service; that Respondent in November unilaterally granted Korth a merit raise, without any prior bargaining with Complainant.

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

CONCLUSIONS OF LAW

1. That Respondent has violated Section 111.70(3)(a)1 and 4 of MERA by unilaterally establishing hours of unit employes without any prior consultation or negotiation with Complainant.

2. That Respondent's unilateral grant of a wage increase to James Korth, which partly covered Korth's employment as a police officer, without any prior consultation or negotiation with Complainant, was violative of Section 111.70(3)(a)1 and 4 of MERA.

3. That Respondent's unilateral establishing of hours and unilateral granting of a merit increase was not violative of Section 111.70(3)(a)3 of MERA.

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 Respondent, Village of Clinton, its officers and agents shall immediately:

1. Cease and desist from unilaterally establishing hours of employment for unit employes.

2. Cease and desist from unilaterally granting merit raises which cover work performed by unit employes.

3. Take the following affirmative action which the undersigned finds will effectuate the purposes of MERA.

- (a) Re institute the shifts which existed immediately before October 26, 1975, and, upon request, bargain with Complainant over whether employes should be paid additional compensation for working the hours which were implemented on October 26, 1975 and December 15, 1975.
- (b) Upon request, bargain with Complainant before granting any further merit increases and before changing the hours of unit employes.
- (c) Notify all employes by posting in conspicuous places in its offices where employes are employed copies of the notice attached hereto and marked "Appendix A". That notice shall be signed by Respondent 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 the Respondent to insure that said notices are not altered, defaced or covered by other material.
- (d) Notify the Wisconsin Employment Relations Commission, in writing, within twenty (20) days following the date of this Order, as to what steps have been taken to comply herewith.

Dated at Madison, Wisconsin this 30th day of June, 1976.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Amedeo Greco
Amedeo Greco, Examiner

APPENDIX "A"

NOTICE TO ALL EMPLOYEES

Pursuant to an Order of the Wisconsin Employment Relations Commission, and in order to effecutate the policies of the Municipal Employment Relations Act, we hereby notify our employes that:

1. WE WILL, upon request, reinstate the work shifts which existed before October 26, 1975, and WE WILL bargain with General Drivers, Dairy Employees and Helpers Local Union 579 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America over whether employes should be paid additional compensation for working the hours which were implemented on October 26, 1975 and December 15, 1975.
2. WE WILL, upon request, bargain with General Drivers, Dairy Employees and Helpers Local Union 579 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America before changing shift hours and before granting merit increases to unit employes.

By Village of Clinton

Dated this _____, day of _____, 1976.

THIS NOTICE MUST BE POSTED FOR THIRTY (30) DAYS FROM THE DATE HERETO AND MUST NOT BE ALTERED, DEFACED OR COVERED BY ANY MATERIAL.

MEMORANDUM ACCOMPANYING FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

Complainant primarily contends that Respondent has unlawfully refused to bargain by: (1) unilaterally increasing the hours of unit employes on October 26; (2) unilaterally decreasing those hours again in December; and (3) unilaterally granting a merit increase to employe Korth.

As to the October 26 change in hours, the record shows, as noted in paragraphs 4 and 5 of the Findings of Fact, that Respondent prior thereto required its employes to work an 8-9 hour shift and that it unilaterally established a 12 hour shift effective as of October 26.

In its defense, Respondent claims in essence that it was free to make such a unilateral change in hours after the October 25 representation election because, in its words, Chief Bernstein made a "judgement call" that budgetary and manpower problems necessitated the change. Respondent also argues in its brief that it "did not receive notice of the results of the election until the Wisconsin Employment Relations Commission's letter of November 4th was received on November 5, 1975 " and that, as a result, it was not under any legal duty to bargain with Complainant until it received such notification.

As to the first point, the record does indicate, as Respondent points out, that Bernstein may have faced budgetary and manpower problems which necessitated the change to a 12 hour shift. Nonetheless, while that may be so, the fact remains that a municipal employer is required under MERA to bargain over certain subjects, irrespective of whether the Employer has justification for seeking the change in issue under other statutory authority 2/. One such area which is subject to the bargaining process is a proposed change in the hours of unit employes. Accordingly, it is immaterial as to whether Respondent has acted in good faith 3/ in effectuating the changes herein.

Turning to Respondent's second assertion, the record shows that Vi Schaffner, Respondent's Village Clerk, acted as Respondent's representative at the October 24 election, that Schaffner knew the results of the election, and that she immediately communicated that information to Bernstein, before he implemented the October 26 changes in issue. Thus, there is no question but that Bernstein knew of the election results at the time he unilaterally increased the shift hours. Furthermore, there is no evidence that either Bernstein or any other Respondent representative questioned the results of the October 24 election. As to the subsequent certification, issued on November 5, the Commission as a matter of policy withholds issuing such certifications for at least five days after the holding of an election, so that a party to the election proceeding has an opportunity to file objections pursuant to ERB rule 11.10 which provides that objections must be filed within "5 days after the tally of ballots has been furnished" However, an employer is precluded from unilaterally acting on matters affecting hours, wages, or conditions of employment during the period that

2/ See, for example, City of Wisconsin Dells, IV, Decision No. 11646 (3/73) and cases cited therein.

3/ Inasmuch as the record fails to establish that Bernstein bore any union animus in effectuating the changes in issue, this complaint allegation is dismissed.

objections can be filed. 4/ By unilaterally changing shifts on October 26, after Complainant had been selected as the collective bargaining representative of the employes herein, Respondent thereby violated its statutory duty to bargain over that issue.

Respondent similarly breached its bargaining duty which it unilaterally decreased the number of hours for each shift on December 15. At that time, of course, the Commission had certified the election results and Respondent knew that it was required to bargain with Complainant over matters affecting hours, wages, and working conditions. By refusing to bargain over the reduction of hours 5/ Respondent violated Section 111.70(3)(a)4 of MERA.

Left for resolution is the issue relating to Respondent's unilateral grant of a merit increase to employe Korth who, as noted above, is a part-time employe in Respondent's Public Works Department and a part-time officer in Respondent's Police Department. Since Complainant represents "all full time and part time officers", and inasmuch as Korth is a part-time officer, Complainant represents Korth for that period of time that Korth serves as a part-time police officer. Accordingly, Respondent is under a legal duty to bargain with Complainant on matters affecting Korth's hours, wages, and other conditions of employment for the time that Korth serves as a police officer. Here, inasmuch as Respondent unilaterally granted Korth a merit raise which partly covered his duties as a police officer, and because Respondent was required to bargain about the granting of such a merit increase as it related to Korth's work as a police officer, 6/ Respondent's failure to bargain about that increase was violative of Section 111.70 (3)(a)1 and 4.

As a remedy, Complainant requests in its brief that "the Commission should calculate the differences in wage rates caused by the increase in annual hours while the original rate was retained, and this figure should be awarded as backpay". To grant this request would in effect mean that the employes herein should be paid the same hourly rate which they had been paid previously for the hours in question. Since the Commission does not normally establish such wage rates in refusal to bargain cases such as the one herein, and as there is no indication that a standard bargaining order will be insufficient to rectify the conduct herein, this request is denied. However, so as to restore the status quo ante which preceded the initial October 26 change in hours, Respondent will be required to reinstate the shifts which existed immediately prior to October 26. Furthermore, Respondent is required to bargain with Complainant regarding the compensation, if any, which is to be paid to the employes herein for working any additional hours in question. Moreover, Respondent shall also bargain with Complainant

4/ This principle is also well recognized in cases arising under the National Labor Relations Act, as amended. See, for example, F. W. Woolworth, 188 NLRB 941, 948, and cases cited therein.

5/ Since the duty to bargain exists independently of whether a certain term of the employment contract is decreased or increased, an employer can violate its duty to bargain by unilaterally increasing and then unilaterally decreasing the hours of unit employes. That is the case here. See, for example Goodyear Tire and Rubber Co., 170 NLRB 539, enforced as modified, 413 F. 2d 158 (C.A. 6, 1969), wherein the National Labor Relations Board held that an employer acted unlawfully by first granting a wage increase and by then withholding another wage increase.

6/ It is axiomatic that an employer is required to bargain before granting merit increases to unit employes. See, for example, NLRB v. Katz, 369 U.S. 736 (1962).

before it implements any such changes in the future. With respect to the unilateral merit increase granted in Korth, the Examiner finds that it would be inappropriate to order Respondent to take away that increase, as such an order would be unfair to Korth. Instead, Respondent in the future shall bargain with Complainant regarding the granting of any merit increases to unit employes.

Dated at Madison, Wisconsin this *30th* day of June, 1976.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By *Amedeo Greco*
Amedeo Greco, Examiner