STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

CLINTONVILLE UTILITY EMPLOYEES ASSOCIATION, FRANK SINKEWICZ, SPOKESMAN, Complainant, vs. CITY OF CLINTONVILLE, RALPH M. LAUER, CITY ATTORNEY, HARLAND KIRCHNER, MAYOR, Respondents.	:	Case X No. 28695 MP-1258 Decision No. 19858

Appearances:

Mr. Frank Sinkewicz, Spokesman, 65 East 12th Street, Clintonville, Wisconsin 54929, appearing on behalf of the Clintonville Utility Employees Association.

Mr. Ralph M. Lauer, City Attorney, 6 Tenth Street, P.O. Box 90, Clintonville, Wisconsin 54929, appearing on behalf of the City of Clintonville.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Clintonville Utility Employees Association, by Frank Sinkewicz, Spokesman, having, on October 9, 1981, filed a complaint with the Wisconsin Employment Relations Commission alleging that the City of Clintonville had committed prohibited practices within the meaning of Section 111.70(3)(a)4 of the Municipal Employment Relations Act, and hearing in the matter having been held on April 15, 1982 before Chairman Gary L. Covelli and Commissioners Morris Slavney and Herman Torosian; and a stipulation of facts having been entered into by the parties at said hearing, which was reflected in the transcript of said hearing; and the parties having submitted briefs by May 27, 1982; and the Commission having considered the evidence and arguments of the parties, and being fully advised in the premises, makes and issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. That Clintonville Utility Employees Association, hereinafter referred to as the Association, is a labor organization which has its mailing address in care of its Spokesman, Frank Sinkewicz, 65 East 12th Street, Clintonville, Wisconsin 54929.

2. That the City of Clintonville, hereinafter referred to as the City, is a municipal employer having its offices at 50 Tenth Street, Clintonville, Wisconsin 54929.

3. That in December, 1974, the City of Clintonville Utility Commission, hereinafter referred to as the Utility, took action to raise the wages of its employes by 10 percent; that said increase was put into effect without the approval of the City Council; that said increase came to the City Council's attention in April, 1975, at which time the Council voted to rescind the 10 percent wage increase established by the Utility and to grant Utility employes a 6 percent wage increase, which had been granted to other City employes; that the City made adjustments in the Utility employes' paychecks to make up for this 4 percent

variance; that the Utility employes filed a claim against the City for the additional 4 percent wage increase; that said claim was denied by the City; that said denial led to the commencement of a legal action which was eventually argued before the Wisconsin supreme court; that said court determined said action in a decision dated June 29, 1979; 1/ wherein the court stated:

> The commissioners are expressly granted the authority to employ and fix the compensation of such subordinates as shall be necessary to operate the utility. 2/

4. That on September 10, 1979, certain City employes employed in the City's Street Department, hereinafter referred to as the Street Association, filed a petition with the Wisconsin Employment Relations Commission, hereinafter referred to as the WERC, requesting that an election be conducted among all full-time and regular part-time employes of the Street Department of the City to determine whether said employes desired to be represented for the purposes of collective bargaining with the City; that on the date of the hearing on said petition the Street Association and the City executed a stipulation requesting such an election, and that in said stipulation the Street Association and the City agreed upon the list of employes, allegedly employed in the Street Department, who would be eligible to vote in said election; that included in said list were twenty-three named individuals, however nine of said individuals were in fact employed by the Utility Commission, a fact then unknown to the WERC; that, pursuant to said stipulation, the WERC on November 2, 1979 directed an election among the employes stipulated to as being employed in the Street Department of the City to determine whether they desired to be represented by the Street Association; that, however, the conduct of the election was delayed because of a protest by seven of the Utility employes contending that they should not have been included among the eligibles; that as a result, the WERC determined that should Utility employes present themselves to vote, they would vote by challenged ballot; that the election was conducted on April 9, 1980; that none of the Utility employes appeared to vote; and that nevertheless, thirteen of the eligible employes voting cast ballots in favor of being represented by the Street Association, while one employe voted against such representation; and that on April 24, 1980 the WERC certified the Street Association as the exclusive collective bargaining representative of the employes employed by the City in its Street Department.

5. That on February 17, 1981, the Utility Association filed a petition with the WERC, seeking a representation election among employes of the Utility; that following a hearing in the matter, the WERC, on June 9, 1981, issued an opinion including a Direction of Election; that as a part of said opinion, the WERC issued the following "Conclusions of Law":

> 1. That the Clintonville Utility Employees Association is a labor organization within the meaning of Sec. 111.70(1)(j) of the Municipal Employment Relations Act.
>
> 2. That the City of Clintonville Utility Commission is a municipal employer within the meaning of Sec. 111.70(1)(a) of the Municipal Employment Relations Act, separate and apart from the City of Clintonville, for the purposes of collective bargaining on wages, hours and conditions of employment of employes in the employ of the City of Clintonville Utility Commission.
>
> 3. That all full-time and regular part-time employes of the City of Clintonville Utility Commission, but excluding all executives, managerial, supervisory, and confidential employes, constitutes an appropriate collective bargaining unit within the meaning of Sec. 111.70(1)(e) of the Municipal Employment Relations Act. 3/;

1/ Schroeder v. City of Clintonville, 90 Wis. 2d 457 (1979).

2/ Ibid., at 465.

3/ City of Clintonville (Utility Commission), (18747) 6/81, at 2.

that in the "Memorandum" accompanying said opinion, the WERC set forth:

> The record herein in no way contradicts that on which the Supreme Court made its decision in Schroeder; and authority to employ and to fix compensation being the hallmarks of the status of employer, the Supreme Court's decision referred to above can only be read as dispositive of the question of separate employer status of the Utility Commission. 4/;

that said election was conducted on July 6, 1981; that out of eight eligible voters, seven cast ballots at said election; that all of said seven eligible voters cast ballots in favor of being represented by the Utility Association; and that the WERC, on July 21, 1981, issued the following Certification:

> IT IS HEREBY CERTIFIED that the Clintonville Utility Employees Association has been selected by the required number of eligible employes of the City of Clintonville (Utility Commission) who voted at said election in the collective bargaining unit consisting of all full-time and regular part-time employes of the City of Clintonville Utility Commission, but excluding all executive, managerial, supervisory and confidential employes, as their representative; and that pursuant to the provisions of Section 111.70 of the Municipal Employment Relations Act, said labor organization is the exclusive collective bargaining representative of all such employes for the purposes of collective bargaining with the above named Municipal Employer, or its lawfully authorized representatives, on questions of wages, hours and conditions of employment. 5/

6. That by letters dated August 3, August 6, and September 2 of 1981, the Utility Association, by its Spokesman, Frank Sinkewicz, notified the President of the Utility Commission of the Utility Association's desire to commence negotiation of an agreement covering the wages, hours and conditions of employment of Utility employes represented by it; that the City's Common Council, by Ordinance Number 498, passed on September 8, 1981 and published on September 17, 1981, abolished the Utility Commission; that interim management of the Utility was vested in a Board of Public Works which said ordinance empowered to operate under the general control and supervision of the City's Common Council; and that the Utility Association, on September 11, 1981, submitted a request for collective bargaining concerning the wages, hours and conditions of employment of Utility employes to said Board of Public Works.

7. That on the invitation of the City's attorney and the City's Mayor, two meetings were held with the Utility Association during the period of September 11, 1981, to October 19, 1981; that at said meetings said attorney and mayor appeared as bargaining representatives for the City and its Board of Public Works, and that Frank Sinkewicz appeared as the spokesman of the Utility Association; that at each of said meetings the City representatives refused to recognize the Utility Association as the exclusive collective bargaining representative of the employes employed at the Utility; but that said City representatives did, at each of said meetings, agree to meet with Mr. Sinkewicz as the personal representative of certain employes of the Utility.

8. That the City has not, since the passage of Ordinance 498, established a new Utility Commission; that the Utility is presently operated by the aforementioned Board of Public Works; that the City continues to refuse to recognize and to bargain with the Utility Association as the exclusive collective bargaining representative of the employes of the Utility, despite consistent requests of the Utility Association that it do so.

9. That although the City has offered to unilaterally implement certain conditions of employment affecting the Utility employes, the City has indicated that it will not enter into a written collective bargaining agreement with the Utility Association.

4/ Ibid., at 4, citing Schroeder, supra, footnote 1.

5/ City of Clintonville (Utility Commission), supra, footnote 4.

10. That all of the Utility employes who were eligible to vote in the election involving the Utility employes are still employed at the Utility; and that in addition to said employes, the City has added one part-time custodial employe, who is the wife of an employe who was eligible to vote in the aforementioned election, and who was hired to perform work her husband was unable to perform due to a heart attack.

11. That although the City has abolished the Utility Commission, the Utility's method of operation has not changed in any substantial manner; that the employes of the Utility presently perform fundamentally the same work duties which were performed when the Utility was governed by the Utility Commission; and that the Utility presently offers the same service to the public that was offered when the Utility was governed by the Utility Commission.

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

CONCLUSIONS OF LAW

1. That all full-time and regular part-time employes of the City of Clintonville employed in its Water and Electric Utility, excluding executives, managerial, supervisory and confidential employes constitute an appropriate collective bargaining unit within the meaning of Secs. 111.70(1)(e) and (4)(d)2.a. of the Municipal Employment Relations Act.

2. That the Clintonville Utility Employees Association was, on September 11, 1981, and has been at all times thereafter, the exclusive representative of all of the employes in the above described unit for the purposes of collective bargaining within the meaning of Sec. 111.70(1)(d) of the Municipal Employment Relations Act.

3. That by refusing to recognize and bargain collectively with the above-named labor organization, as the exclusive representative of all the employes in the unit described above, the City of Clintonville has engaged in, and continues to engage in, prohibited practices within the meaning of Sec. 111.70 (3)(a)4 of the Municipal Employment Relations Act.

4. That by the aforesaid conduct, the City of Clintonville has interfered with, restrained and coerced employes in the exercise of rights guaranteed them in Sec. 111.70(2) of the Municipal Employment Relations Act, and has thereby engaged in and is engaging in prohibited practices within the meaning of Sec. 111.70(3)(a)1 of the Municipal Employment Relations Act.

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

ORDER 6/

IT IS HEREBY ORDERED that the City of Clintonville, its officers and agents, shall immediately:

6/ Pursuant to Sec. 227.11(2), Stats., the Commission hereby notifies the parties that a petition for rehearing may be filed with the Commission by following the procedures set forth in Sec. 227.12(1) and that a petition for judicial review naming the Commission as Respondent, may be filed by following the procedures set forth in Sec. 227.16(1)(a), Stats.

227.12 Petitions for rehearing in contested cases. (1) A petition for rehearing shall not be prerequisite for appeal or review. Any person aggrieved by a final order may, within 20 days after service of the order, file a written petition for rehearing which shall specify in detail the grounds for the relief sought and supporting authorities. An agency may order a rehearing on its own motion within 20 days after service of a final order. This subsection does not apply to s. 17.025 (3)(e). No agency is required to conduct more than one rehearing based on a petition for rehearing filed under this subsection in any contested case.
(Continued on Page 5)

1. Cease and desist from:

   (a) Refusing to recognize and bargain collectively with the Clintonville Utility Employees Association as the exclusive bargaining representative of all full-time and regular part-time employes employed by it in its Water and Electric Utility, excluding all executives, managerial, supervisory and confidential employes.

   (b) In any like or related manner, interfering with, restraining, or coercing employes in the exercise of rights guaranteed by Sec. 111.70(2) of the Municipal Employment Relations Act.

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

   (a) Upon request, bargain collectively with the Clintonville Utility Employees Association, as the exclusive representative of the employes in the appropriate unit set forth above, and, if an understanding is reached, embody such understanding in a signed collective bargaining agreement.

   (b) Post at its Water and Electric Utility a copy of the attached notice marked "Appendix A", which shall, after duly signed by an authorized representative, be posted by it immediately upon receipt of a copy of this decision, and be maintained by it for thirty (30) days thereafter, where notices to employes are usually posted. Reasonable steps should be taken by the City to insure that said notice is not altered, defaced or covered by other material.

6/ (Continued)
227.16 Parties and proceedings for review. (1) Except as otherwise specifically provided by law, any person aggrieved by a decision specified in s. 227.15 shall be entitled to judicial review thereof as provided in this chapter.

(a) Proceedings for review shall be instituted by serving a petition therefor personally or by certified mail upon the agency or one of its officials, and filing the petition in the office of the clerk of the circuit court for the county where the judicial review proceedings are to be held. Unless a rehearing is requested under s. 227.12, petitions for review under this paragraph shall be served and filed within 30 days after the service of the decision of the agency upon all parties under s. 227.11. If a rehearing is requested under s. 227.12, any party desiring judicial review shall serve and file a petition for review within 30 days after service of the order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. The 30-day period for serving and filing a petition under this paragraph commences on the day after personal service or mailing of the decision by the agency. If the petitioner is a resident, the proceedings shall be held in the circuit court for the county where the petitioner resides, except that if the petitioner is an agency, the proceedings shall be in the circuit court for the county where the respondent resides and except as provided in ss. 182.70(6) and 182.71(5)(g). The proceedings shall be in the circuit court for Dane county if the petitioner is a nonresident. If all parties stipulate and the court to which the parties desire to transfer the proceedings agrees, the proceedings may be held in the county designated by the parties. If 2 or more petitions for review of the same decision are filed in different counties, the circuit judge for the county in which a petition for review of the decision was first filed shall determine the venue for judicial review of the decision, and shall order transfer or consolidation where appropriate.

(c) Notify the Wisconsin Employment Relations Commission, in writing, within twenty (20) days from the date hereof as to what steps it has taken to comply herewith.

Given under our hands and seal at the City of Madison, Wisconsin this 25th day of August, 1982.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Gary L. Covelli /s/
Gary L. Covelli, Chairman

Morris Slavney /s/
Morris Slavney, Commissioner

Herman Torosian /s/
Herman Torosian, Commissioner

APPENDIX "A"

NOTICE TO ALL EMPLOYES

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

We will not refuse to bargain collectively with the Clintonville Utility Employees Association, as the exclusive bargaining representative of the employes in the following appropriate unit:

All full-time and regular part-time employes employed by the City in its Water and Electric Utility, excluding all executives, managerial, supervisory and confidential employes.

We will, upon request, bargain collectively with the Clintonville Utility Employees Association as the exclusive bargaining representative of the employes in said appropriate unit, and, if an understanding is reached, embody such understanding in a signed agreement.

We will not, in any like or related manner, interfere with, restrain or coerce employes in the exercise of the rights guaranteed them by Sec. 111.7(2) of the Municipal Employment Relations Act.

The City of Clintonville

By _____

Dated this _____ day of _____, 1982.

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

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The complaint filed herein by the Utility Association alleged that the City, through its agents, has committed a prohibited practice by refusing to bargain collectively with it as the exclusive collective bargaining representative of its employes employed in its Water Utility. The City, answered orally during the hearing in the matter, and denied that the Utility Association is the exclusive collective bargaining representative of the employes involved, and further denied committing any violation of the Municipal Employment Relations Act (MERA).

Background Facts

The facts are not in dispute, and they are set forth in the Findings. They are summarized as follows: In 1979 employes of the City employed in its Street Department organized an independent organization (the Street Association), for the purposes of collective bargaining, of certain employes of the City. Following the execution and filing of a stipulation by the City and Street Association with the Commission, an election was directed among "Street Department" employes to determine whether they desired to be represented by said organization in bargaining with the City. Included among the employes in said unit were employes of the Water Utility, a fact unknown to the WERC when it directed the election based on said stipulation. Prior to the conduct of the election, the employes of the Water Utility protested their inclusion in the City unit, contending that they were employed by a separate municipal entity, namely the Water Utility. Inasmuch as such protest was made after the direction had been issued, and after the election had been scheduled, the WERC directed that should any Water Utility employes present themselves to vote at said election, the ballots of said Water Utility employes would be challenged, and thereafter, if necessary, the WERC would determine whether said Water Utility employes were included or excluded from said City employe unit. No Water Utility employes presented themselves to vote at said election. The ballots cast by employes voting were tallied and the results, as certified by the WERC, disclosed that City employes had selected the Street Association as their collective bargaining representative.

Subsequently, the Water Utility employes formed an organization known as the Clintonville Water Utility Association. Said organization filed a petition with the WERC seeking an election to determine whether the employes of said Utility desired to be represented for bargaining purposes. During the hearing on that petition an issue arose as to whether said employes constituted an appropriate collective bargaining unit within the meaning of the provisions of MERA. The WERC, after considering the evidence and arguments of the parties, issued its decision wherein it concluded that the Water Utility was a municipal employer within the meaning of MERA, separate and distinct from the City of Clintonville, and also that all otherwise eligible employes of the Water Utility constituted an appropriate collective bargaining unit. The WERC directed an election among the employes of said unit and the results thereof indicated that said employes selected the Utility Association as their exclusive collective bargaining representative. The WERC certified such results on July 21, 1981.

Within forty-five days of said certification, the Utility Association, on three separate occasions notified the President of the Utility Commission of the desire to commence negotiations on wages, hours and working conditions relating to the employes represented by such labor organization. On September 8, 1981 the Clintonville City Council, pursuant to its statutory authority, adopted an ordinance abolishing the Utility Commission, and upon publication of said ordinance, assumed the operation of the Utility through its Board of Public Works. Having knowledge of the adoption of said ordinance, and the resultant change in the management of the Utility, the Utility Association, on September 11, 1981, in a request to said Board of Public Works, requested that the City commence bargaining on matters relating to the Utility employes. At no time herein has the City recognized the Utility Association as the bargaining representative of said employes, and as a result the City has refused to engage in the requested negotiations.

Positions of the Parties

Basically the positions of the parties can be characterized as follows. The Utility Association relies on the Commission's certification, reflecting that it is the certified bargaining representative of the employes of the Utility, and that the City cannot avoid its collective bargaining responsibility by abolishing the separate "municipal employer" status of the Utility and by assuming the responsibility of operating same as a "department" of the City, under the management of the Board of Public Works. It claims that the status of the Association continues and survives the change in municipalities, the City being the successor.

The City argues that the employes of the Utility are now employed by the City, and since the City employes in the City Street Department unit selected their representative and entered into a collective bargaining agreement with the City, the Utility employes are subject to the terms of said agreement. The City offers to negotiate with the Street Association on conditions peculiar to the Utility employes, not reflected in said agreement. In effect, the City does not accept the doctrine of successorship as requiring the City to recognize the Utility Association as the bargaining representative of said Utility employes. It argues that in doing so, it would violate MERA, since the Street Association is the certified bargaining representative of City employes.

Discussion

The issue presented in the instant matter is whether the City has the duty to recognize and bargain with the Utility Association as the exclusive collective bargaining representative of the Utility employes in light of the change of their "municipal employer" from the Utility, formerly separate and distinct from the City, to that of being employed by the City. Based on the Supreme Court decision in Schroeder v. City of Clintonville, 7/ the Commission concluded that the Utility was a separate municipal employer and that a unit of Utility employes was appropriate under MERA.

The City argues that its action in abolishing the Utility Commission and by replacing it with a Board of Public Works operated to make the WERC's prior certification of the Utility Association irrelevant to the issue of the City's present duty to bargain with said Association. From this assumption, the City concludes that Utility employes were accreted into the Street Association without any intervening action by the WERC, by the Utility Association, or by the Street Association.

The City's argument must be rejected as a matter of law. The City has not shown any language, any legislative history, or any case law, which would indicate that Sec. 66.068 applies to those collective bargaining rights set forth in the MERA. To read the silence of Sec. 66.068 to imply that a municipal employer can use said statutory provision to unilaterally determine the appropriate unit for collective bargaining would eviscerate the unambiguous language of Sec. 111.70 (4)(d)2.a., which provides that "The Commission shall determine the appropriate bargaining unit for the purpose of collective bargaining . . ." In addition, the City's argument would pose the provisions of Sec. 66.068 against those of Sec. 111.70(4)(d)2.a., and there is no reason to conclude that said sections cannot both be given effect without conflict. The City's argument is especially unpersuasive since the relevant provisions of Sec. 66.068 antedate the enactment of MERA. The legislature is, then, presumed to have enacted MERA with full knowledge of the provisions of Sec. 66.068, and thus the two statutes should be harmonized. 8/ In this case, there is no reason why they cannot be. Sec. 66.068 applies to the form of management by which municipalities may operate a public utility. Sec. 111.70(4)(d)2.a. applies to the collective bargaining relationship that may exist between the form of public utility management adopted by a municipality and the employes of the utilities. The City's attempt to pose the provisions of Sec. 66.068 against those of the MERA must, then, be rejected as a matter of law.

7/ See footnote 1.

8/ See Mack v. Joint School District No. 3, 92 Wis. 2d 476, 489 (1979) and cases cited therein.

Therefore, we turn to the next issue in the instant matter. Namely, whether the City, by action of its Council in abolishing the Utility Commission, and thus converting the employes thereof to "City" employes, is bound by the certification of representative, as a result of the election among Utility employes, and thus whether it is obligated to bargain with their certified bargaining representative. In other words, is the City, as the successor employer, bound by the certification issued when the employes involved were employed by the previous municipal employer? The issue of successorship in municipal employment has not previously been presented to the WERC. We have been confronted with such an issue in cases arising under the Wisconsin Employment Peace Act. 9/ Our decisions in said regard, including a decision of our Supreme Court, 10/ have been consistent with NLRB and federal court decisions involving issues arising from a successor relationship.

Under the National Labor Relations Act, the National Labor Relations Board has held, with the endorsement of the Supreme Court, that "a mere change of employers or of ownership in the employing industry is not such an 'unusual circumstance' as to affect the force of the Board's certification (of an exclusive bargaining representative) . . ." 11/ Under private sector successorship law, a successor's duty to bargain with its predecessor's employes' bargaining representative can survive whether the successor is the sham "alter ego" of its predecessor, or is the result of a bona fide business transaction. 12/

We conclude that it is appropriate to incorporate certain aspects of private sector successorship law into the application of the provisions of MERA. Thus, in this case, if there is substantial continuity in the City's operation of the Utility by its Board of Public Works, then the City's duty to bargain with the Utility Association may have survived the City's abolition of the Utility Commission. 13/ The determination of whether "substantial continuity" exists is guided by the following criteria:

> (1) the presence of substantial continuity of business operations (including management and ownership); (2) the new employer's use of the same physical facilities; (3) the new employer's use of the same or substantially the same work force; (4) the continued existence of substantially the same jobs under the same working conditions; (5) the new employer's use of the same supervisors; (6) the new employer's use of the same machinery, equipment and methods of production and (7) the new employer's provision of the same service as its predecessor. 14/

9/ Albert J. Janich (8165-A, B) 1/68; Spencer Frank Food Service, Inc. (11774-C) 12/74.

10/ Drivers, Warehouse and Dairy Employees Local 75 v. WERB, 29 Wis. 2d 272 (1965).

11/ NLRB v. Burns International Security Services, Inc., 406 U.S. 272, 279 (1972), 80 LRRM 2225, 2227.

12/ See e.g., J. M. Tanaka Construction v. NLRB, 110 LRRM 2296 (9th Cir., 1982); Chippewa Motor Freight, Inc., and Action Carrier, Inc. and Local 100 Teamsters, 261 NLRB No. 66 (1982), 110 LRRM 1140.

13/ See Saks & Co., d/b/a Saks Fifth Avenue, 247 NLRB No. 128 (1980) at 1050-1051. The NLRB has variously stated the rule guiding its analysis of successorship. This variance is, in part, dependent on the NLRB's view of the underlying transaction, cf. Chippewa Motor Freight, ibid., to Premium Foods Inc. 260 NLRB No. 92 (1982). In alter ego type cases, the Board determines whether two employers should be treated as one for purposes of defining the duty to bargain. In cases involving an arms length transfer, the Board analyzes whether an independent employer has succeeded to another employer's duty to bargain. The instant matter is arguably analogous to either transaction. The "substantial continuity" test is, however, the most appropriate guide for the present matter.

14/ See Premium Foods, Inc. Ibid., at 12-13.

The determination of "substantial continuity" between employers must turn on the facts of each case, and the WERC will neither accord controlling weight to any single factor, nor require the presence of each factor noted above. 15/

Analysis of the facts of the instant matter in light of the above-noted criteria demonstrates there is substantial continuity of the operation of the Utility by its Board of Public Works. The City has not changed the Utility's method of operation, and the same employes who were employed by the Utility Commission are still employed in the same operation. Said employes perform fundamentally the same duties as they performed while working for the Utility Commission. In addition, the City presently offers the same service as it offered under the Utility Commission. In sum, the record indicates that only the form of management changed when the Utility Commission was abolished.

Having determined that the change in circumstances resulting from the City's abolition of the Utility Commission is insufficient, in itself, to extinguish the City's duty to bargain with the Utility Association, we must determine if a separate unit of Utility employes remains appropriate. Sec. 111.70(4)(d)2a of the MERA provides:

> The Commission shall determine the appropriate unit for the purposes of collective bargaining and shall whenever possible avoid fragmentation by maintaining as few units as practicable in keeping with the size of the total municipal work force. In making such determination, the Commission may decide whether, in a particular case, the employes in the same or several departments, divisions, institutions, crafts, professions or other occupational groupings constitute a unit.

In applying this section, the Commission considers the following factors:

1. Whether the employes in the unit sought share a "community of interest" distinct from that of other employes.

2. The duties and skills of employes in the unit sought as compared with the duties and skills of other employes.

3. The similarity of wages, hours and working conditions of employes in the unit sought as compared to wages, hours and working conditions of other employes.

4. Whether the employes in the unit sought have separate or common supervision with all other employes.

5. Whether the employes in the unit sought have a common workplace with the employes in said desired unit or whether they share a workplace with other employes.

6. Whether the unit sought will result in undue fragmentation of bargaining units.

7. Bargaining history. 16/

As indicated herein, the WERC previously certified the Clintonville Street Department Association as the representative of City employes in a unit of "Street Department" employes. Said certification was issued on April 24, 1980, and therein said bargaining unit was described as follows:

> All full-time and regular part-time employes of the City of Clintonville (Street Department), but excluding all supervisory employes, clerical employes and employes of the Police and Fire Departments and the Library.

15/ On the importance of a case by case approach to successorship issues see Howard Johnson Co. v. Detroit Joint Board, 417 U.S. 249, 256 (1974), 86 LRRM 2449, 2452.

16/ City of Madison (Water Utility), (19584) 5/82.

Thus, the unit represented by the Street Association does not include all the otherwise eligible employes of the City of Clintonville. In addition to the employes employed in the Water Utility, employes in City departments other than the Street Department are not included in that unit. Thus, the unit represented by the Street Association is not the "most appropriate collective bargaining unit" of City employes. Further, MERA does not require the establishment of the "most appropriate unit". Sec. 111.70(4)2.a. permits the WERC to establish appropriate units consisting of single departments. The Utility is a department separate and apart from other departments of the City.

Further, to require the Utility employes to be accreted to the Street Department unit, during the term of an existing collective bargaining agreement, and to be covered thereby, which agreement was executed by a labor organization in an election in which the Utility employes played no part in the selection of that organization as the bargaining representative of the employes covered by said agreement, nor did they play any role in the formulation of any demands presented by said organization leading to said agreement, would constitute an effective denial of the rights guaranteed the Utility employes in the MERA provisions.

In light of the circumstances involved herein, the certification of the Utility Association remains valid and the unit is appropriate. The change in the "employer" status does not affect the majority status of said Association as the exclusive bargaining representative of the employes employed in the Water Utility, and, accordingly the instant complaint has been found meritorious, and we have issued an Order deemed appropriate to remedy the violation found to have been committed. In addition, we are also today issuing an amendment of the Certification of Representatives, reflecting the change in the name of the municipal employer involved.

Dated at Madison, Wisconsin this 25th day of August, 1982.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Gary L. Covelli /s/
Gary L. Covelli, Chairman

Morris Slavney /s/
Morris Slavney, Commissioner

Herman Torosian /s/
Herman Torosian, Commissioner