STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

NORTHWEST UNITED EDUCATORS, Complainant, vs. SHIRLEY MCGIFFIN, DIRECTOR, DEPARTMENT OF SOCIAL SERVICES, BARRON COUNTY, Respondent.	Case XLVI No. 30197 MP-1366 Decision No. 19883-A

Appearances:

Mr. Alan D. Manson, Executive Director, Northwest United Educators, 16 West John Street, Rice Lake, Wisconsin 54868, appearing on behalf of the Complainant.

Mulcahy & Wherry, S.C., Attorneys at Law, by Mr. Bruce A. Barker, 21 South Barstow, P. O. Box 1030, Eau Claire, Wisconsin 54702-1030, appearing on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

A complaint of prohibited practices having been filed with the Wisconsin Employment Relations Commission in the above-entitled matter, and the Commission having appointed Dennis P. McGilligan, 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 waived by the parties; 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 Northwest United Educators (NUE), hereinafter referred to as the Complainant, is a labor organization and the exclusive bargaining representative for all regular full-time and regular part-time social workers and all other regular full-time and regular part-time employes of the Barron County Department of Social Services, but excluding supervisors.

2. That Barron County, hereinafter referred to as the Respondent, is a municipal employer which maintains and operates a Department of Social Services; that the Respondent has its principal offices at Barron, Wisconsin 54812; and that at all times material herein, Shirley McGiffin, Director of the aforesaid Department, and hereinafter referred to as McGiffin, was employed by the Respondent and functioned as its agent.

3. That the Complainant and Respondent were parties to a collective bargaining agreement commencing on January 1, 1981 and extending through December 31, 1981; that Complainant and Respondent were actively engaged in negotiations for the 1981 collective bargaining agreement in July, August and September of 1981; and that the record does not indicate whether there was a predecessor agreement.

4. That on August 12, 1981, McGiffin sent a memorandum to the Barron County Social Services staff, including members of the certified NUE bargaining unit which read in part:

> In the not too distant future, perhaps, not until 1983, all social services staff will be on a permanent time study. All of your time will have to be logged and accounted for in relation to your work. This seems to be a requirement in most social work situations except in county departments. We are

learning that it is the only tool there is for accurate budgeting and accountability. It is also part of being a real professional social worker. I want to alert you to the fact that this is where many counties and the State are moving--in fact, some are already on a continuous time study. If you don't feel that it is a vital and important part of social work and that it shouldn't be done accurately and completely, then you will have a few months time to look around and get into a field which is of more particular interest to you. I just don't want any of you to say, "If I had only known----"!!

5. That the Respondent did not give a copy of the above memorandum to the Complainant; that the Respondent did not negotiate, at any time material herein, with the Complainant regarding the subject and/or contents of McGiffin's August 12th memorandum noted above; that the Complainant learned of the above memorandum after the bargaining for the 1981 agreement had been completed; that, however, the record does not reveal on what exact date Complainant learned of said memorandum; that the Complainant has not made a demand to bargain the subject of the memorandum or the impact of the time recording system referred to in said memorandum at any time material herein; and that the Respondent has yet to implement the time recording system referred to in the above memorandum.

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

CONCLUSIONS OF LAW

1. That the Complainant waived any right it may have had to bargain with the Respondent over the aforesaid memorandum dated August 12, 1981 concerning a time recording system because the Complainant never demanded to bargain with the Respondent over said memorandum after receiving notice of same.

2. That therefore Respondent did not commit a prohibited practice within the meaning of Section 111.70(3)(a)4 of the Municipal Employment Relations Act by sending the aforesaid memorandum dated August 12, 1981, as noted above, without first bargaining with the Complainant over same.

3. That Respondent interfered with its employes in the exercise of their rights under Section 111.70(2) of the Municipal Employment Relations Act by sending the aforesaid memorandum dated August 12, 1981 to members of the applicable bargaining unit represented by the Complainant; and therefore the Respondent has violated Section 111.70(3)(a)1 of the Act.

4. That Respondent has not dominated or interfered with the administration of the Complainant by sending the aforesaid memorandum dated August 12, 1981, as noted above; and therefore Respondent has not violated Section 111.70(3)(a)2 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 issues the following

ORDER 1/

IT IS ORDERED that, Respondent Barron County, its officers and agents, shall immediately:

1. Cease and desist from threatening any employe or in any other manner interfering with, restraining or coercing employes in the exercise of their rights as guaranteed in Section 111.70(2) of the Municipal Employment Relations Act.

1/ Any party may file a petition for review with the Commission by following the procedures set forth in Sec. 111.07(5), Stats.

Section 111.07(5), Stats.

(5) The commission may authorize a commissioner or examiner to make findings and orders. Any party in interest who is dissatisfied with the (Continued)

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

   (a) Notify all employes in the bargaining unit represented by the Complainant by posting in conspicuous places on the Department of Social Services premises where notices to employes are usually posted, copies of the notice attached hereto and marked Appendix "A". (Such copies shall bear the signature of Shirley McGiffin, Director, Department of Social Services, and shall remain posted for thirty (30) days after initial posting.) Reasonable steps shall be taken to insure that said notices are not altered, defaced or covered by other materials.

   (b) Notify the Wisconsin Employment Relations Commission in writing, within twenty (20) days of the date of service of this Order, as to what steps it has taken to comply herewith.

IT IS ALSO ORDERED that all remaining portions of the aforementioned complaint shall be, and hereby are, dismissed.

Dated at Madison, Wisconsin this 9th day of June, 1983.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Dennis P. McGilligan
Dennis P. McGilligan, Examiner

1/ (Continued)

findings or order of a commissioner or examiner may file a written petition with the commission as a body to review the findings or order. If no petition is filed within 20 days from the date that a copy of the findings or order of the commissioner or examiner was mailed to the last known address of the parties in interest, such findings or order shall be considered the findings or order of the commission as a body unless set aside, reversed or modified by such commissioner or examiner within such time. If the findings or order are set aside by the commissioner or examiner the status shall be the same as prior to the findings or order set aside. If the findings or order are reversed or modified by the commissioner or examiner the time for filing petition with the commission shall run from the time that notice of such reversal or modification is mailed to the last known address of the parties in interest. Within 45 days after the filing of such petition with the commission, the commission shall either affirm, reverse, set aside or modify such findings or order, in whole or in part, or direct the taking of additional testimony. Such action shall be based on a review of the evidence submitted. If the commission is satisfied that a party in interest has been prejudiced because of exceptional delay in the receipt of a copy of any findings or order it may extend the time another 20 days for filing a petition with the commission.

APPENDIX "A"

NOTICE TO ALL DEPARTMENT OF SOCIAL SERVICES EMPLOYES
REPRESENTED BY NORTHWEST UNITED EDUCATORS

Pursuant to an Order of the Wisconsin Employment Relations Commission, and in order to effectuate the policies of the Municipal Employment Relations Act, WE hereby notify the above employes that:

1. WE WILL NOT interfere with Department of Social Services Employes in the exercise of their rights under Section 111.70(2) of the Municipal Employment Relations Act with respect to the proposed implementation of a time recording system in the Barron County Department of Social Services.

2. WE WILL NOT in any other or related matter interfere with the rights of the aforesaid employes, pursuant to the provisions of the Municipal Employment Relations Act.

Dated this _____ day of _____, 1983.

By _____
Shirley McGiffin
Director, Department of Social Services
Barron County

THIS NOTICE MUST BE 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

Introduction:

The Complainant filed a complaint on August 5, 1982. The Respondent filed an Answer on October 6, 1982. The parties waived hearing in the matter, and completed their briefing schedule on February 2, 1983. The parties filed certain fact stipulations with the Examiner on May 12, 1983.

Complainant's Position:

The complaint alleges that the Respondent violated Section 111.70 (3)(a)1, 2 and 4 of the Municipal Employment Relations Act by sending the aforesaid memorandum.

In support thereof the Respondent primarily argues that the Respondent interfered with the collective bargaining process by sending the memorandum while negotiations were going on. In this regard, the Complainant maintains that the Respondent should have brought the matter up at the bargaining table instead of attempting a unilateral change in working conditions without agreement by NUE. The Complainant also argues that by dealing directly, and exclusively, with the employes in a threatening manner the Respondent violated the protected rights of said employes. Finally, the Complainant contends that the Respondent undermined the authority of NUE by giving the appearance that NUE acquiesced in the changes described in the aforesaid memorandum.

For a remedy, the Complainant asks that the Examiner order the Respondent to cease and desist from refusing to bargain with NUE by sending memorandums on changes in wages, hours and working conditions to individual bargaining unit members; to retract the portions of the memorandum of August 12, 1981, which dealt with negotiable matters; to post appropriate compliance notices and to reimburse the Complainant for its attorney's fees and other costs of this action.

Respondent's Position:

The Respondent asserts that the correspondence was merely a function of its inherent management rights pursuant to Section 111.70(1)(d), Wisconsin Statutes. The Respondent also asserts that the August 12 memorandum was a permissive subject of bargaining according to the Wisconsin Supreme Court's "primary relationship test" because said memorandum did not relate primarily to the wages, hours or conditions of employment, rather, it related primarily and directly to the Employer's responsibility to formulate and manage services for the public. In this regard, the Respondent claims that merely changing the manner of recording or documenting the work performed by the staff is a function of management. This constitutes a change in policy regarding organizational data which relates to the management or governance of the department. It has no direct relation to the employes' current wages, hours or conditions of employment in the opinion of the Respondent.

The Respondent next maintains that its actions were permissible pursuant to the negotiated management rights clause contained within the parties' collective bargaining agreement.

The Respondent further contends that establishing methods of recording employe time is a management right citing several arbitration awards in support thereof.

Finally, the Respondent argues that the complaint fails to state a cause of action for which relief can be granted. In this regard, the Respondent maintains the cause of action does not meet the test for ripeness established by the United States Supreme Court in Abbott Laboratories vs. Gardner 386 U.S. 136 (1967). Specifically, the Respondent alleges that the challenged action has no "immediate and practical impact". The Respondent also claims that by filing the prohibited practice complaint, the Complainant has attempted to entangle the Commission in an abstract disagreement regarding an intended change. As such, it is not an issue fit for determination according to the Respondent citing Sewerage Commission of

the City of Milwaukee (17302) 9/79. The Respondent concludes that the appropriate time for the Commission to intervene is when the rights and positions of the parties are concrete and in final form. The Respondent argues that a perspective memorandum which attempts to appraise employes of potential future changes in methods of timekeeping does not constitute a violation of Section 111.70(3)(a)1, 2 or 4 of Act.

Based on all of the above, the Respondent requests that the prohibited practice complaint be dismissed.

Discussion:

Assuming, arguendo, that the Respondent's memorandum dated August 12, 1981, and its impact was a subject about which the Respondent had a duty to bargain and that the substantive issues herein are ripe for adjudication, points which need not be resolved because of the ultimate disposition herein, the record discloses the Complainant nevertheless waived any right it may have had to bargain about the memorandum.

Thus, the record, as stipulated to by the parties, indicates that after the Complainant learned of the aforesaid memorandum the Complainant never made a demand to bargain over the time recording system referred to in the memorandum or the impact of same at any time material herein. The Commission has found waiver by inaction in other cases involving issues of bargainability. In School District of Green Bay 2/, for example, the Commission found that the Association waived any right it may have had to bargain the employer's decision to change insurance carriers during the term of the agreement and the impact of that decision because the Association never demanded to bargain over same once it had knowledge that a change in carrier was being considered. The Commission noted that the Association had objected to the identity of the new carrier once that became known but said that was not enough absent a demand to bargain. Applying the above principle to the instant case, the Examiner finds that the Respondent did not commit a prohibited practice when it sent the aforesaid memorandum to bargaining unit employes without first bargaining with Complainant because the Complainant waived any right it may have had to bargain over same.

It should be cautioned that a decision by the undersigned with respect to the refusal to bargain issue is limited to the specific facts of this case. In this regard, the Examiner notes that unlike Green Bay the record herein as stipulated to by the parties is incomplete as to the exact identity of the proposed time recording system and its impact on the employes' wages, hours and conditions of employment. Also unlike Green Bay the Respondent has not implemented the time recording system referred to in the memorandum. Accordingly, the Examiner's decision in the instant case on the refusal to bargain issue turns only on the subject of the aforesaid memorandum and it does not address any problems which may arise in the future, if and when, the Respondent actually decides on a particular time recording system and attempts to install same in the Barron County Department of Social Services.

The Examiner next turns his attention to the interference claim. To sustain its burden of proof with respect to the alleged interference, the Complainant must demonstrate by a clear and satisfactory preponderance of the evidence that the Respondent's memorandum dated August 12, 1981, tended to interfere with, restrain or coerce employes in the exercise of rights guaranteed by Section 111.70(2) of the Municipal Employment Relations Act. 3/

Section 111.70(2) of the Municipal Employment Relations Act states:

> RIGHTS OF MUNICIPAL EMPLOYES. Municipal employes shall have the right of self-organization, and the right to form, join or assist labor organizations, to bargain

---

2/ (16753-A, B) 12/79.

3/ Drummond Jt. School District No. 1, (15909-A) 3/78; Lisbon-Pewaukee Jt. School District No. 2, (14691-A) 6/76; Ashwaubenon School District, (14774-A) 10/77.

collectively through representatives of their own choosing, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection.

Applying the above standards to the instant dispute, there can be no doubt that one of the rights protected by Section 111.70(2) of the Act is the ability of municipal employes to request bargaining through their collective bargaining representative over at least the impact of the time recording system referred to in the aforesaid memorandum dated August 12, 1981. However, Social Services Director Shirley McGiffin in announcing the pending implementation of such a system told employes if they didn't like it they could get a new job. Her actual words were as follows: "If you don't feel that it (the time study) is a vital and important part of social work and that it shouldn't be done accurately and completely, then you will have a few months time to look around and get into a new field which is of a more particular interest to you." Clearly, a reasonable tendency from the Respondent's course of conduct would be a chilling effect on the Complainant and its members to assert potential bargaining rights over the proposed time recording system in the future since according to the memorandum their only alternative would be to quit their job and seek employment elsewhere. Therefore, the Examiner finds Respondent's action to be in violation of Section 111.70(3)(a)1 of the Municipal Employment Relations Act.

Complainant alleged that Respondent's memorandum dated August 12, 1981, interfered with Complainant's administration of its own organization. Apparently, 4/ Complainant argues that Respondent by unilaterally attempting to impose a change in working conditions on employes without authorization from NUE wanted to weaken Complainant's status by falsely portraying to employes the Complainant's inability to respond to the proposed change. However, the statutory proscription against Employer domination contemplates an Employer's active involvement in creating and supporting a labor organization which is representing its employes. The wording of the aforesaid memorandum certainly does not rise to the level of domination or interference with the internal administration of Complainant's organization contemplated by the Municipal Employment Relations Act. Therefore, the Examiner concluded that Respondent did not violate Section 111.70(3)(a)2 by distributing the August 12 memorandum.

For the foregoing reasons the Examiner has found that the Respondent's memorandum dated August 12, 1981 violated Section 111.70(3)(a)1 of the Act, and ordered appropriate remedial action. Also, for the foregoing reasons, the Examiner has dismissed all other allegations made in the complaint filed herein.

Dated at Madison, Wisconsin this 9th day of June, 1983.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Dennis P. McGilligan
Dennis P. McGilligan, Examiner

4/ The Complainant did not specifically argue the merits of this allegation in its brief.