STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of TEAMSTERS LOCAL UNION NO. 43 To Initiate Final and Binding Arbitration Between Said Petitioner and TOWN OF SALEM	Case VI No. 30602 MIA-696 Decision No. 20714

Appearances:

Goldberg, Previant, Uelmen, Gratz, Miller & Brueggeman, S.C., Attorneys at Law, 788 North Jefferson, Room 600, P.O. Box 92099, Milwaukee, Wisconsin 53202, by Mr. Frederick Perillo, filing a brief on behalf of the Union.

Schoone, McManus, Hankel and Ware, S.C., Attorneys and Counselors at Law, Racine Professional Center, 1300 South Green Bay Road, P.O. Box 97, Racine, Wisconsin 53401-0097 by Mr. Robert E. Hankel, filing a brief on behalf of the Town.

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER DENYING MOTION TO DISMISS PETITION FOR INTEREST ARBITRATION

Teamsters Local Union No. 43 having on November 3, 1982 filed a petition with the Wisconsin Employment Relations Commission requesting the Commission to proceed under Sec. 111.77, Stats. to determine whether final and binding interest arbitration should be initiated to resolve a dispute between the parties over the wages, hours and conditions of employment applicable to the law enforcement personnel employed by the Town of Salem and represented for the purposes of collective bargaining by Local Union No. 43; and the Town having on November 29, 1982 filed a Motion to Dismiss with the Commission and the parties having waived hearing and filed written arguments, the last of which was received by the Commission on January 26, 1983; and the Commission having considered the parties' positions and being fully advised in the premises, makes and issues the following

FINDINGS OF FACT

1. That Teamsters Local Union No. 43, herein the Union, is a labor organization which is the certified collective bargaining representative of all regular full-time and regular part-time employes of the Town of Salem who have the power of arrest, excluding all non-sworn supervisory, confidential and managerial employes 1/; and that Union has its offices at 1624 Yout Street, Racine, Wisconsin 53404.

2. That the Town of Salem, herein the Town, is a municipal employer having a population in excess of 2,500 people which at least as of November 3, 1982 maintained a police department employing certain law enforcement personnel represented by the Union; and that the Town has its offices at Salem, Wisconsin 53168.

3. That on November 3, 1982 the Union filed a petition for final and binding arbitration pursuant to Sec. 111.77, Stats.; that as of that date the parties had not reached agreement on a first contract; that on November 29, 1982, prior to the investigation of said petition, the Town filed a Motion to Dismiss asserting that Sec. 111.77, Stats. does not apply to law enforcement personnel employed by a town and that, in any event, the Union had not complied with Sec. 111.77(2), Stats. by giving the Commission notice of the dispute within 30 days after the first demand upon the Town; and that the investigation of the petition has been held in abeyance pending resolution of the Motion.

1/ (18484) 5/81.

4. That the Union did not timely file a notice advising the Commission pursuant to Sec. 111.77(2), Stats., that a dispute existed between the parties as to the terms of a first contract.

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

CONCLUSION OF LAW

1. That Sec. 111.77, Stats., is available for the settlement of a dispute between the Town of Salem and Teamsters Union Local No. 43 in a collective bargaining unit of law enforcement personnel.

2. That Teamsters Union Local No. 43's failure to comply with Sec. 111.77(2) does not bar use of Sec. 111.77, Stats. to settle the instant dispute.

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

ORDER

That the Town of Salem's Motion to Dismiss be, and the same hereby is, denied.

Given under our hands and seal at the City of Madison, Wisconsin this 1st day of June, 1983.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Herman Torosian, Chairman

_____
Gary L. Covelli, Commissioner

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Marshall L. Gratz, Commissioner

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER DENYING PETITION FOR INTEREST ARBITRATION

POSITIONS OF THE PARTIES

The Town initially argues that as Sec. 111.77, Stats. applies by its own terms only to "city and county law enforcement agencies," a town's police department is not covered by the statute. It contends that given the clear and unambiuous language, resort to tortuous statutory construction to reach a different conclusion is inappropriate. As to the impact of Sec. 111.77(8), Stats., the Town asserts that no statutory inconsistency is created because the statutory exclusion of towns of under 2,500 inhabitatants only reflects an exclusion from the statute's general coverage of "fire departments" in towns. Thus it believes the Union's reliance upon the exclusionary clause to establish coverage of town police departments is not persuasive. The Town further contends that as towns must have fire departments but need not have police departments, the legislature could well have made a distinction in coverage under the statute. Indeed the Town asserts that a tracing of the statute's history reveals no statement of explicit coverage of town policemen. The Town contends that past WERC processing of arbitration petitions involving town police departments is irrelevant to the resolution of the issue of coverage because prior erroneous applications of the law do not modify the statute. It further asserts that the cases recited in the Union's brief all involve villages which are structurally and statutorily different from towns and which, if over 5,000 in population, must have a police department. Thus even if villages are deemed covered, the Town argues that coverage of towns does not naturally follow.

The Town also alleges that the Union failed to comply with Sec. 111.77(2), Stats. and that said failure bars invocation of the statutory procedure. It asserts that had the Union met the notice requirement, thus activating the informal resolution procedures in Sec. 111.77(1)(b)(e) and(f), Stats., the parties' dispute may have been settled at considerable savings to the Town. Thus it contends that both the Town's and the Commission's problem solving interests have been prejudiced. As to the Union's argument that compliance would have been futile given the related prohibited practice litigation, the Town argues that it does not concede any refusal to bargain with the Union and asserts that bargaining has in fact occurred during the pendency of the prohibited practice proceedings. For the above reasons, the Town seeks dismissal of the petition.

The Union asserts that the statutory language, the legislative history and the interpretation of the statute by the Commission all support coverage of the Town of Salem police department. It contends that a plain reading of Sec. 111.77(8), Stats., contemplates application of the statute to towns with populations in excess of 2,500. It notes the reference to "municipal employers" in the preamble to Sec. 111.77, Stats., and asserts that use of that phrase, which by definition includes towns, is indicative of coverage. The Union argues that the reference to "city and county law enforcement agencies" is likely an attempt to distinguish state law enforcement personnel rather than an effort to exclude towns. It further asserts that as the statutory definition of "town" includes "cities," the proper construction of "city" may include a "town."

The Union asserts the Town's argument that Sec. 111.77(8), Stats. only serves to exclude coverage for fire departments in certain small towns is not supported by the legislative history. Indeed it believes that the statutory history demonstrates that the legislature knew how to specifically exclude certain police departments in 1971 (i.e., Milwaukee) but chose not to do so any longer in 1973 when the statutory language changed. Instead, the Union contends that the legislature chose to establish a new exclusion based entirely on size and drew no distinction between police and fire departments. The Union also cites the analysis of the Legislative Reference Bureau, vis-a-vis Assembly Bill 614, and the title of Chapter 27, Laws of 1971 as supporting coverage of all law enforcement personnel employed by municipal employers of any kind. The Union additionally argues that the WERC's historical application of Sec. 111.77, Stats. to the police departments of towns and villages is supportive of the strong public policy in Wisconsin favoring peaceful resolution of labor disputes.

As to the Town's argument regarding Sec. 111.77(2), Stats., the Union initially argues that the notice requirement is not jurisdictional but merely serves to notify the Commission that the potential for interest arbitration exists. The Union also alleges that given the history of the Town's conduct, as found by Examiner Crowley in Decision No. 18812-A, the Commission has had actual notice of the dispute. It also contends that bargaining between the parties did commence in March 1982 and no party has been prejudiced by any technical non-compliance with a notice requirement. The Union thus asserts that the Motion to Dismiss should be denied.

DISCUSSION

When resolving the issues presented by the parties' dispute herein, the initial question to be resolved is whether the statutory provision at issue (Sec. 111.77, Stats.) clearly defines its coverage or whether the statute is ambiguous, thus requiring an effort to discern the legislative intent. Given the arguably conflicting provision of the preamble to Sec. 111.77, Stats. and the exclusionary language set forth in Sec. 111.77(8), Stats., the Commission concludes that the statute is capable of being reasonably interpreted to either include or exclude the law enforcement personnel of a town of more than 2,500 people. Thus, the statute is found to be ambiguous and the Commission must resort to the tools of statutory construction to discover the legislative intent. 2/

When construing an ambiguous statute, the paramount purpose is to ascertain legislative intent. When seeking legislative intent, the statute in question may be analyzed by reference to its scope, history, purpose or object and subject matter. 3/ The statute's title or the analysis of the Legislative Reference Bureau may be useful indices of legislative intent. 4/ With these factors in mind, the Commission proceeds to a resolution of the ambiguity before it.

Prior to November of 1971, the definition of "municipal employe" found in Sec. 111.70(1)(b), Stats. specifically excluded "city and village policemen, sheriff's deputies and county traffic officers." Towns were specifically included in the definition of a "municipal employer" set forth in Sec. 111.70(1)(a), Stats. Section 111.70(4)(j), Stats., gave "members of a police or sheriff or county traffic officer department" access to fact finding as a procedure to resolve deadlocks in negotiations.

While the absence of "town policeman" from the specific exclusion found in Sec. 111.70(1)(b), Stats. allows one to argue that prior to November 1971 the legislature intended that town law enforcement employes were "municipal employes," such a conclusion flies in the face of an apparent intent to exclude law enforcement personnel of all municipal employers from the statutes' protection. One can conceive of no rational basis for a legislative purpose to treat town policemen different from their city or village brethren. Indeed, the availability of fact finding to members of any police department, presumably including a town police department, gives evidence of a legislative desire to treat all law enforcement personnel consistently. Fact finding also evidences a legislative sensitivity to the need to provide a mechanism for resolving deadlocks in negotiations involving employes who provide protective services. In sum, one must conclude that town policemen were on equal footing with their village and city counterparts prior to 1971.

With the passage of Chapter 124, Laws of 1971, published November 10, 1971, the definition of "municipal employe" was modified as follows:

> "Municipal employe" means any ~~employe of a municipal employer except city and village policemen, sheriffs deputies, and county traffic officers~~ individual employed by a municipal employer other than an independent contractor, supervisor, or confidential, managerial or executive employe.

2/ State ex rel Gutbrod v. Wolke, 49 Wis. 2d 736, 742 (1971).

3/ In re Estate of Haese, 80 Wis. 2d 285, 295 (1977).

4/ Tanck v. Clerk, Middleton Joint School Dist., 60 Wis 2d 294, 305 (1973), State v. Mohaney, 55 Wis. 2d 443 (1972).

Thus, law enforcement personnel were now included within the definition of "municipal employe."

In April 1972, Chapter 247, Laws of 1971, which originated from Assembly Bill 614, established binding arbitration as a mechanism to resolve potential impasses in negotiations involving certain law enforcement personnel and firefighters. The analysis by the Legislative Reference Bureau included in AB 614 was as follows:

> Analysis by the Legislative Reference Bureau
>
> This bill includes law enforcement personnel and firefighters under the definition of "municipal employe" in the laws governing municipal employment relations. Under the bill, the parties to labor disputes involving law enforcement personnel or firefighters would have the duty to bargain in good faith. Fact-finding would not be a method used to resolve such disputes. But there would be specific notice procedures and possible binding arbitration. Binding arbitration under the bill could take one of 2 forms: 1) the arbitrator or board of arbitration could determine all issues regardless of the parties' proposals or 2) the proposal of one side would be adopted.
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> This bill would not apply to the Milwaukee police department.

The portions of AB 614 pertinent herein are the following

> AN ACT to repeal 111.70 (4) (j); to amend 111.70 (1) (b) and (4) (b); and to creat 111.77 of the statutes, relating to settlement of municipal labor disputes involving certain law enforcement personnel and firefighters.
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> . . .
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> SECTION 3. 111.77 of the statutes is created to read:
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> 111.77 SETTLEMENT OF DISPUTES IN COLLECTIVE BARGAINING UNITS COMPOSED OF LAW ENFORCEMENT PERSONNEL AND FIREFIGHTERS. In fire departments and city and county law enforcement agencies municipal employers and employes have the duty to bargain collectively in good faith including the duty to refrain from strikes or lockouts and to comply with the procedures set forth below:
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> . . .
>
> (6) This section shall not apply to police departments in cities having a population of 500,000 or more.
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> . . .

As ultimately passed, Chapter 247 retained the Sec. 111.77, Stats. title and preamble set forth above. However, the exclusionary language set forth in AB 614 as Sec. 111.77(6), Stats. was modified and became then Sec. 111.77(8), Stats. as follows:

> (8) This section shall not apply to police departments in cities having a population of 500,000 or more or municipalities having a population of 5,000 or less.

Sec. 990.01(22), Stats. defined "municipality" as follows:

> "Municipality" includes city and villages; it may be construed to include towns.

Analysis of the foregoing vis-a-vis legislative intent yields the following conclusion. Since the title to Sec. 111.77, Stats. makes a general reference to "Settlement of disputes in collective bargaining units composed of law enforcement personnel and firefighters," one can find a legislative purpose of attempting to ensure peaceful resolution of all labor disputes involving the protective services

given the potentially dramatic impact of a strike or lockout. It seems unlikely that the legislature would apply this policy only to cities and counties but not to villages and towns since the desirability of avoiding strike or lockout in any dispute involving law enforcement personnel is equally applicable. Reference to Sec. 111.77(8), Stats. supports this intent of equal treatment with its use of the term "municipality" which covers cities, villages, and towns. Only population is utilized to distinguish among municipalities. 5/

5/ As to the then existing obligation of villages and towns to provide police and fire protection the statutes provided the following:

> **60.29 Town boards; powers.** The supervisors of each town shall constitute a board to be designated the "Town Board of . . ." any two of whom shall constitute a quorum, except when otherwise provided by law, and the chairman may administer oaths and affidavits in all matters pertaining to the affairs of the town. Meetings of the board shall be held in the town or in any village or city within or adjoining the town. Such board is empowered and required:
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> . . .
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> (7) VILLAGE POLICE. To appoint, when the public good requires it, not exceeding three policemen, one superintendent of police and one night watchman, for service in the village.
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> (8) POLICE. To appoint policemen, a superintendent of police and a night watchman for service at any other place in the town when needed to protect persons or property or to preserve order at any assemblage for moral, religious or educational purposes.
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> . . .
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> (18) FIRE DEPARTMENT, FIRE LIMITS, EXPLOSIVES, FIREWORKS, FIRE WARDEN. (a) To establish fire departments in any town or any part of the town, or join the town or a part thereof with a neighboring town, group of towns, parts of towns, cities or villages in establishing joint fire departments, and to join the town or a part thereof with a group of towns, parts of towns, cities or villages in the joint acquisition and ownership of fire fighting equipment and to appropriate the proportionate share of the town or parts of a town of the cost of purchasing and maintaining such equipment, when authorized by resolution adopted at any town meeting; to appoint the officers and members thereof, and prescribe and regulate their duties; to provide such compensation for the members of the fire departments as the town board determines; to purchase workmen's compensation insurance covering such firemen; to provide protection from fire by the purchase, use and maintenance of fire engines and other necessary apparatus for the extinguishment of fire and by the erection and construction of cisterns and reservoirs; to erect fire engine houses; to enter into agreements with any town, group of towns, part of a town, city or village in which a fire department is established, or with any fire association, corporation or individual for the maintaining, housing and manning of the fire fighting equipment of such fire departments; and to levy tax upon all real and personal property in the town, or that part of the town receiving protection from the contract, or equipment or jointly owned equipment for the purpose of purchasing and maintaining or manning the same:
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> . . .
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> **61.65 Police and fire departments; pension funds.** (1) Every village having a population of 5,000 or more, according to the last federal census, shall have a police department, and every village having a population of 5,500 or more shall have a fire department, with chiefs and subordinates;
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> . . .

Chapter 64, Laws of 1973 brought the only other modification of Sec. 111.77(8), Stats. into being and left that statutory provision in its current form as follows:

> (8) This section shall not apply to cities having a population of 500,000 or more nor to cities, villages, or towns having a population of less than 2,500.

That change incorporated the first mention of towns in the Section.

Review of the foregoing persuades the Commission that the original and ongoing legislative intent was to provide law enforcement personnel employed by towns of more than the specified population level with the opportunity to utilize Sec. 111.77, Stats. to ensure peaceful resolution of bargaining disputes without risk of service interruption. While the statute can, as the Town argues, plausibly be interpreted to the contrary, the legislative purpose, statutory title, and analysis of the Legislative Reference Bureau all combine to yield a contrary and more persuasive result.

Turning to the Town's argument regarding the Union's compliance with Sec. 111.77(2), Stats., 6/ the Commission hereby reaffirms its prior conclusion that compliance with the notice requirement contained therein, while desirable, is not a statutory prerequisite to the ultimate resort to compulsory interest arbitration to resolve an impasse. In City of Eau Claire (11573) 1/73, the Commission resolved the issue in the following manner:

. . .

> The issue boils down as to whether such notice requirement is directory or mandatory. If it is directory, the failure to serve the notice does not preclude the Commission from ordering arbitration. On the other hand, if it is mandatory, the Commission would not have jurisdiction to order arbitration.
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> Our Supreme Court in Worachek v. Stephenson Town School District. 1/ articulated the following test as to whether a stautory provision is mandatory or directory:
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> > " 'There is no well-defined rule by which directory provisions in a statute may, in all circumstances, be distinguished from those which are mandatory. In the

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6/ **111.77 Settlement of disputes in collective bargaining units composed of law enforcement personnel and firefighters.** In fire departments and city and county law enforcement agencies municipal employers and employes have the duty to bargain collectively in good faith including the duty to refrain from strikes or lockouts and to comply with the procedures set forth below:

(1) If a contract is in effect, the duty to bargain collectively means that a party to such contract shall not terminate or modify such contract unless the party desiring such termination or modification:

(a) Serves written notice upon the other party to the contract of the proposed termination or modification 180 days prior to the expiration date thereof or, if the contract contains no expiration date, 60 days prior to the time it is proposed to make such termination or modification. This paragraph shall not apply to negotiations initiated or occurring in 1971.

(b) Offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications.

(c) Notifies the commission within 90 days after the notice provided for in par. (a) of the existence of a dispute.

(Continued on Page Eight)

determination of this question, as of every other question of statutory construction, the prime object is to ascertain the legislative intention as disclosed by the terms of the statute, in relation to the scope, history, context, provisions, and subject matter of the legislation, the spirit or nature of the act, the evil intended to be remedied, and the general object sought to be accomplished.' "

In Muskego-Norway vs. WERB 2/ our Supreme Court stated as follows:

"The overall purpose of ch. 111, Stats., which must be given overriding consideration, is the promotion of industrial peace through the maintenance of fair, friendly and mutually satisfactory employment relations. This purpose is to be accomplished by the maintenance of suitable machinery for the peaceful adjustment of controversies."

As has been noted previously in this Memorandum, Section 111.70 sets forth the policy of the State in municipal employment labor relations, as does the Commission's rules set forth in ERB 30.02. If the Commission were to adopt the Municipal Employer's rationale that the notice requirements set forth in Section 111.77 are mandatory, the application of such a principle would conflict with the policy of the State with respect to the resolution of disputes arising in municipal employment bargaining, and especially those involving law enforcement and firefighter personnel. The notification period set forth in the statute is intended to apprize the Commission of the dispute existing between law enforcement or firefighter personnel and their municipal employer of a dispute in collective bargaining, and thus such notices would afford the Commission an opportunity to proffer its mediation services to the parties in order to resolve the dispute in the most expeditious and desirable means possible. The parties may not desire, or may waive mediation by the Commission, where they file a stipulation requesting arbitration under the statute. Where neither party requests mediation, after a petition for arbitration has been filed, the

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6/ (Continued)

(d) Continues in full force and effect without resorting to strike or lockout all terms and conditions of the existing contract for a period of 60 days after such notice is given or until the expiration date of the contract, whichever occurs later.

(e) Participates in mediation sessions by the commission or its representatives if specifically requested to do so by the commission.

(f) Participates in procedures, including binding arbitration, agreed to between the parties.

(2) If there has never been a contract in effect, the union shall notify the commission within 30 days after the first demand upon the employer of the existence of a dispute provided no agreement is reached by that time, and in such case sub. (1)(b),(e) and (f) shall apply.

(3) Where the parties have no procedures for disposition of a dispute and an impasse has been reached, either party may petition the commission to initiate compulsory, final and binding arbitration of the dispute. If in determining whether an impasse has been reached the commission finds that any of the procedures set forth in sub. (1) have not been complied with and that compliance would tend to result in a settlement, it may require such compliance as a prerequisite to ordering arbitration. If after such procedures have been complied with or the commission has determined that compliance would not be productive of a settlement and the commission determines that an impasse has been reached, it shall issue an order requiring arbitration.

. . .

Commission conducts an informal investigation on said petition, as it did in this matter, during which it attempts to mediate the dispute.

Unless the parties agree otherwise, the Commission's policy is not to order such a dispute to final and binding arbitration until it has attempted to mediate the dispute involved, and has determined that the parties are at impasse, for the best resolution of such disputes are those which the parties themselves resolve rather than having a settlement imposed upon the parties through final and binding arbitration. Where mediation is not successful, the legislature has seen fit to permit the parties to proceed to final and binding arbitration for the final resolution of the dispute rather than permitting either of the parties to engage in self-help, which may result in a violation of the statute and which would, no doubt, create issues which were not present at the time of impasse.

To conclude that the notice requirements set forth in Section 111.77(1)(c)(2) were mandatory rather than directory would not effectuate the policy of this State to promote peaceful labor relations in collective bargaining involving law enforcement and firefighter personnel, nor would a determination that the rules established by the Commission, as set forth previously herein with reference to notice requirements and reference thereto in the petition requesting arbitration are mandatory, effectuate the policies of the Act or of our own rules. We conclude that such notice requirements in the rules are directory rather than mandatory. Therefore, the failure to give notice to the Commission as set forth in Section 111.77(1)(c) and (2), or in the Commission's rules, does not deprive the Commission of its jurisdiction to issue an order requiring arbitration to resolve impasses in collective bargaining involving law enforcement and firefighter personnel, . . .

1/ 270 Wis 116 (1955)

2/ 32 Wis 2d 478 at page 485c (1967)

Further support for this conclusion is derived by reference to that portion of Sec. 111.77(3), Stats. which provides:

> If in determining whether an impasse has been reached the Commission finds that any of the procedures set forth in sub (1) have not been complied with and that compliance would tend to result in a settlement, it may require such compliance as a prerequisite to ordering arbitration.

Having found the instant dispute to be covered by Sec. 111.77, Stats. and having found that non-compliance with Sec. 111.77(2), Stats. does not unconditionally bar use of the procedures contained therein for dispute resolution, the Commission has denied the Town's Motion to Dismiss and instructed its Investigator to proceed with the investigation of the petition.

Dated at Madison, Wisconsin this 1st day of June, 1983.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Herman Torosian, Chairman

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Gary L. Covelli, Commissioner

_____
Marshall L. Gratz, Commissioner