

Step 1--The initial bargaining proposals of each party shall be exchanged at the last regularly scheduled meeting of the Personnel Committee in September of 1986.

Step 2--Negotiations to begin on or about October 1, 1986.

Step 3--Conclusion of negotiations December 1, 1986.

This timetable is subject to adjustment by mutual agreement of the parties consistent with the progress of negotiations.

5. That the parties have not agreed to any adjustment in the timetable set forth in Finding of Fact 4.

6. That on or about May 12, 1986 certain supervisors in the Respondent's Sheriff's Department petitioned for an election (Case 221, No. 36983, ME-0093).

7. That Respondent on June 24, 1986, in response to the petition referred to in Finding of Fact 6, sought to exclude certain positions from the petitioned-for unit, i.e. Deputy Sheriff Captain, Deputy Sheriff Deputy Inspector and Deputy Sheriff Sergeant.

8. That Deputy Sheriff Sergeants are currently represented by Complainant in the unit set forth in Finding of Fact 3.

9. That a hearing was scheduled on July 22, 1986 in Case 221, No. 36983, ME-0093 before Examiner Christopher Honeyman of the Commission's staff and that said hearing was adjourned on July 22 to September 19, 1986.

10. That on or about July 25, 1986, Complainant filed a petition seeking to include the Deputy Sheriff Lieutenants and Communications Supervisor in the unit described in Finding of Fact 3, but later withdrew said petition.

11. That there are approximately 400 employes in the collective bargaining unit set forth in Finding of Fact 3 currently being represented by the Complainant, 42 of which are Deputy Sheriff Sergeants; and that the Deputy Sergeants are the only employes in Complainant's bargaining unit which might be affected by the proceedings in Case 221, No. 36983, ME-0093; that the outcome of the proceedings will have no effect on Complainant's majority status; that neither party questions the overall appropriateness of the bargaining unit.

12. That on August 25, 1986, Complainant submitted to Respondent its initial bargaining proposals for the 1987 agreement as required by Section 2.01 of the present collective bargaining agreement.

13. That despite repeated requests by Complainant's representative, Gimbel, to Respondent's representative, Foster, to begin negotiations for the 1987 agreement, Respondent refuses to begin negotiations.

14. That on September 19, the hearing in Case 221, No. 36983, Me-0093 was reconvened but subsequently adjourned to October 27, 1986 for further hearing; that again on September 19, 1986, Complainant's representative asked Respondent's representative to schedule a date to begin negotiations on or before October 1, 1986 but Respondent's representative again refused to do so.

15. That at the time of hearing on the instant complaint on November 13, 1986, the evidentiary hearings on the petition in Case 221, No. 36983, ME-0093 still had not been concluded despite reconvening on October 27, 1986; that the parties had not received a transcript nor submitted briefs and did not anticipate a decision from the Commission prior to the end of the year 1986.

16. That the Respondent's position is that it has refused to bargain with the Complainant and will continue to refuse to bargain with Complainant until resolution of the unit clarification proceeding before the Commission because the status of the bargaining unit is in flux and negotiations would not be fruitful since the parties would not know with whom or for whom they are bargaining.

17. That Respondent's affirmative defense as set forth in Finding of Fact 16 is insufficient to excuse it from fulfilling its duty to meet and to bargain with the Respondent.

18. That neither party submitted the entire collective bargaining agreement into evidence but rather limited the evidence to the provision set forth in Finding of Fact 4.

19. That neither party either at hearing or in post-hearing briefs argued that jurisdiction by the Commission was inappropriate based upon the availability of a grievance and arbitration procedure to resolve said dispute.

Based upon the above and foregoing Findings of Fact, the Examiner makes the following:

CONCLUSIONS OF LAW

1. That by failing to submit evidence of the existence of available contractual mechanisms applicable to resolve the breach of contract claim and by failing to raise such an issue either at the evidentiary hearing or in its post-hearing brief, Respondent is deemed to have waived any claim that the Commission should not exercise jurisdiction over the allegation of a Section 111.70(3)(a)5 and 1 violation.

2. That Respondent Milwaukee County, by failing and refusing to commence negotiations with Complainant Milwaukee Deputy Sheriff's Association on or about October 1, 1986, without Complainant's agreement to an adjustment in the timetable, has violated Part 2, Section 2.01 of the parties' collective bargaining agreement and therefore committed a prohibited practice within the meaning of Section 111.70(3)(a)5 and 1 of the Municipal Employment Relations Act.

3. That Respondent Milwaukee County, by its conduct of failing and refusing to bargain with the Complainant Milwaukee Deputy Sheriff's Association until the resolution of a unit clarification proceeding affecting certain positions currently included in the collective bargaining unit represent by Complainant, has committed and continues to commit a prohibited practice within the meaning of Section 111.70(3)(a)4 and 1 of the Municipal Employment Relations Act.

Based upon the above and foregoing Findings of Fact, and Conclusions of Law, the Examiner makes and issues the follow

ORDER 1/

IT IS ORDERED that Milwaukee County, its officers, agents, and officials

1. Cease and desist from delaying negotiations and refusing to bargain while the unit clarification proceeding involving certain positions in the bargaining unit is pending.

2. Cease and desist from violating the collective bargaining agreement by refusing to commence negotiations pursuant to said agreement.

3. Take the following affirmative action to effectuate the purpose of the Municipal Employment Relations Act:

(a) Promptly commence bargaining in good faith with Complainant, specifically submitting to Complainant initial bargaining proposals and proposed dates for negotiation sessions.

(b) Notify bargaining unit employes by posting in conspicuous places on its premises, where notices to such employes are usually posted a copy of the notice attached hereto and marked "Appendix A". Such copy shall be signed by an authorized representative of the County and shall be posted immediately upon receipt of a copy of this Order, and shall remain posted for a period of thirty (30) days thereafter. Reasonable steps

(See Footnote 1 on Page 4)

shall be taken to insure that said notice is not altered, defaced or covered by other material.

- (c) Notify the Wisconsin Employment Relations Commission within twenty (20) days of the date of service of this order as to what steps have been taken to comply herewith.

Dated at Madison, Wisconsin this 30th day of January, 1987.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Mary Jo Schiavoni
Mary Jo Schiavoni, Examiner

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

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

Pursuant to an Order of the Wisconsin Employment Relations Commission, and in order to effectuate the policies of the Municipal Employment Relations Act, Milwaukee County hereby notifies its employes that:

1. Milwaukee County will not delay bargaining with Milwaukee Deputy Sheriff's Association pending the outcome of a unit clarification proceeding currently pending.
2. Milwaukee County will promptly commence negotiations and bargain in good faith with said Association.

Dated at _____, Wisconsin this ____ day of January, 1987.

By _____
for Milwaukee 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

The complaint and amendment to the complaint at hearing allege that the Respondent violated Sec. 111.70(3)(a)1, 4 and 5, Stats., by refusing to bargain with the Complainant during the pendency of a unit clarification hearing affecting certain members of the bargaining unit. The essential facts, underlying the complaint as outlined in the Findings, are undisputed having been stipulated by the parties at hearing. They need not be repeated here.

However, the question of the Commission's jurisdiction, must be addressed prior to any consideration of the merits. Generally speaking, where a labor organization has bargained an agreement with the employer which contains a procedure for final impartial resolution of disputes over contractual compliance, the Commission will not assert its statutory complaint jurisdiction over the breach of contract claims because of the presumed exclusivity of the contractual procedure and a desire to honor the parties' agreement. 2/ The Commission has, however, held that by waiting until after the evidentiary hearing to raise Complainant's failure to exhaust available contractual mechanisms applicable to breach of contract claims, the Respondent had waived any claim that the Commission should not exercise its jurisdiction over the alleged breach. 3/ In the instant case neither party introduced the entire agreement into evidence, but rather by stipulation limited the Examiner's consideration to the disputed provision. Moreover, Respondent has failed to raise any question relating to the Commission's jurisdiction over the Sec. 111.70(3)(a)5 allegation either at hearing or in its post-hearing brief. Accordingly, Respondent is deemed to have waived any claim that it is improper for the Examiner to consider the breach of contract allegation.

Breach of Contract

Part 2, Section 2.01 of the parties' agreement is clear and unambiguous on its face. It provides that negotiations for the period of time subsequent to the expiration of the agreement shall be carried out according to a specific time schedule in the absence of a mutually agreed-upon adjustment of that schedule. Initial bargaining proposals are to be exchanged at the last regularly scheduled Personnel Committee meeting in September of 1986. Negotiations are mandated to begin on or about October 1, 1986. The conclusion of negotiations is set for December 1, 1986.

The only rationale advanced by Respondent for its refusal to comply with said schedule is that negotiations would not be fruitful at the time the Complainant requested bargaining to commence and thereafter because the status of the bargaining unit was in flux as a result of the unit clarification proceedings. No evidence was introduced to establish whether or not Respondent exchanged initial proposals with Complainant. It is evident, however, that Respondent did refuse to commence bargaining on or about October 1, 1986 and continued to so refuse as of the date of the hearing in this matter on November 13, 1986. No provision is made under the applicable language of Part 2, Section 2.01 for extenuating circumstances for deviation from said schedule or for exceptions to compliance with the schedule by either party absent mutual consent to adjust the time frame. Accordingly, it must be concluded that Respondent's reason for failing to comply with the schedule set forth in Part 2, Section 2.01 is insufficient in light of the clear contract language. Thus, Respondent, by refusing to commence negotiations on or about October 1, 1986 has violated the parties' agreement and therefore violated Sec. 111.70(3)(a)5 and 1, Stats.

2/ Waupun School District, Dec. No. 22409 (WERC, 3/85); Monona Grove School District, Dec. No. 22414 (WERC, 3/85).

3/ Milwaukee Board of School Directors, Dec. No. 20139-D (WERC, 6/85).

Bad Faith Bargaining

Complainant without objection by Respondent amended its complaint at hearing to allege a Sec. 111.70(3)(a)4 and 1, Stats., violation of the duty to bargain in good-faith. Complainant asserts that Respondent's statutory duty to bargain is not stayed pending resolution of the Respondent's petitions for unit clarification. In support of this argument it points out that Respondent has not petitioned for an election but rather to clarify the unit and that even if a petition to clarify is somehow construed as falling within the statutory exception to the duty to bargain, the number of employees whose status is being questioned is 42 or approximately ten percent of the bargaining unit as a whole. While noting that delaying bargaining is not an automatic, per se violation of MERA if the delaying party can show a substantial, sufficient reason for the delay, 4/ Complainant argues that no such reason has been shown here by the Respondent. Complainant avers that there is no reason why negotiations cannot begin as to matters affecting the ninety per cent of the bargaining unit whose inclusion is not disputed.

The sum and substance of Respondent's argument is that until a decision is reached by the Commission determining whether or not the sergeants are to be included or excluded from the bargaining unit, it is not obligated to bargain with Complainant. In support of this argument, it also points to the fact that there are approximately 460 members of the bargaining unit of which approximately 42 are sergeants. These sergeants, it stresses, are the highest paid of the bargaining unit employees excluding overtime and their exclusion or inclusion is a major factor which must be determined before it is compelled to bargain with Complainant.

The general test of good faith at the bargaining table is the totality of conduct of the party involved. 5/ While delay can violate the statutory requirement "to meet and confer at reasonable times", the reason for the delay must be considered in determining whether a violation has occurred. 6/ Therefore the instant case revolves around a determination as to whether Respondent's defense for delaying commencement of negotiations is sufficient to excuse its admitted refusal to meet and concur upon the Complainant's request. The Commission has not yet directly addressed the issue of whether an employer may lawfully refuse to bargain during the pendency of a unit clarification proceeding. The NLRB has, however, considered the issue. 7/ In that case, as here, there was no claim that the disputed employees, department heads, could somehow affect the Union's majority status or that the overall unit was somehow inappropriate. Moreover, the employer sought to justify its refusal to bargain solely on the grounds that further bargaining would not be appropriate or practical until the unit clarification petition was resolved. The NLRB said "...

"where, during the course of bona fide collective bargaining, the parties are unable to resolve (unit placement) issues in conformity with the Act and the Board's decisions thereunder, then either one or both have a continuing right to seek clarification from the Board. The availability of such recourse is not, of course, to be construed as a license for the abandonment of orderly collective bargaining on all other points that may then be open before the parties." 8/

4/ Milwaukee Board of School Directors, Dec. No. 15197-B, 15203-A (Yeager, 12/81).

5/ City of Green Bay, Dec. No. 18731-B (WERC, 6/83) and cases cited therein at fn. 14; City of Janesville, Dec. No. 22981-A (Honeyman, 3/86).

6/ Milwaukee Board of School Directors, supra.

7/ National Press, Inc., 241 NLRB 1000, 1978-79 CCH NLRB 15,774 (4/19/79).

8/ National Press, Inc., supra at 1001; Houston Chronical Publishing Company, 130 NLRB 1243, 1245, 1961 CCH NLRB 9752 (1961).

Although it was the Union in that case which sought the unit clarification, this fact did not dissuade the Board from finding a violation of the duty to bargain in good faith. It held

"That additional fact does not provide Respondent with any more right to refuse to bargain with the Union concerning the acknowledged unit employees than if the Union had not raised the unit clarification issue until after an agreement was reached. This is so because most if not all of the issues pertaining to the terms and conditions of employment of the unit employees are unrelated to the matter of the 13 department heads and thus can be resolved without regard to that matter. Consequently, the unresolved status of the department heads does not prevent meaningful bargaining from occurring. Furthermore, even related bargainable matters, if such exist, would be subject to resolution if the parties were to meet and bargain. But Respondent by foreclosing bargaining has prevented agreement on any issues. We find, therefore, that the filing of the unit clarification petition and the issue it raises do not justify Respondent's refusal to bargain with the Union in the appropriate certified unit ..." 9/

The NLRB's rationale is sound. Moreover, were a party permitted to delay bargaining during the pendency of a unit clarification which it had filed, bargaining could be delayed indefinitely by such a tactic. Such a result clearly contravenes the "meet and confer" requirements of the statute. According, Respondent has violated and continues to violate Section 111.70(3)(a)4 and 1, Stats., by refusing to commence negotiations until the Commission resolves the unit clarification issue with respect to the sergeants.

Dated at Madison, Wisconsin this 30th day of January, 1987.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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9/ National Press, Inc., supra at 1001.