STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MILWAUKEE DEPUTY SHERIFF'S ASSOCIATION, Complainant, vs. MILWAUKEE COUNTY (SHERIFF'S DEPARTMENT), Respondent.	Case 229 No. 37644 MP-1892 Decision No. 24027-B

Appearances:

Gimbel, Reilly, Guerin & Brown, Attorneys at Law, by Mr. Franklyn M. Gimbel and Marna M. Tess-Mattner, One Plaza East, Suite 930, 330 East Kilbourn Avenue, Milwaukee, Wisconsin 53202, appearing on behalf of the Complainant.

Mr. Robert G. Ott, Deputy Corporation Counsel, Milwaukee County, Milwaukee County Courthouse, Room 303, Milwaukee, Wisconsin 53233, appearing on behalf of the Respondent.

ORDER AFFIRMING EXAMINER'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Examiner Mary Jo Schiavoni having issued on January 30, 1987, Findings of Fact, Conclusions of Law and Order with Accompanying Memorandum in the above-entitled proceeding wherein she concluded that Respondent had committed prohibited practices within the meaning of Sec. 111.70(3)(a)1, 4 and 5, Stats., by failing and refusing to bargain with the Complainant until the resolution of a unit clarification proceeding affecting certain positions currently included in the collective bargaining unit; and the Respondent having timely filed, on February 19, 1987, a Petition for Review of the Examiner's decision; and a briefing schedule having been completed on April 8, 1987; and the Commission having reviewed the record in this matter and having considered all of the parties' written arguments, and being satisfied that the Examiner's Findings of Fact, Conclusions of Law and Order should be affirmed.

NOW, THEREFORE, it is

ORDERED 1/

1. That the Examiner's Findings of Fact, Conclusions of Law and Order, are hereby affirmed and adopted by the Commission.

Given under our hands and seal at the City of Madison, Wisconsin this 18th day of June, 1987.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Stephen Schoenfeld
Stephen Schoenfeld, Chairman

Herman Torosian, Commissioner

Danae Davis Gordon
Danae Davis Gordon, Commissioner

1/ See footnote 1/ on page two.

1/ Pursuant to Sec. 227.48(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. 227.49 and that a petition for judicial review naming the Commission as Respondent, may be filed by following the procedures set forth in Sec. 227.53, Stats.

227.49 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. 227.53 Parties and proceedings for review. (1) Except as otherwise specifically provided by law, any person aggrieved by a decision specified in s. 227.52 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. 227.49, 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. 227.48. If a rehearing is requested under s. 227.49, 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. 77.59(6)(b), 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.

(b) The petition shall state the nature of the petitioner's interest, the facts showing that petitioner is a person aggrieved by the decision, and the grounds specified in s. 227.57 upon which petitioner contends that the decision should be reversed or modified.

. . .

(c) Copies of the petition shall be served, personally or by certified mail, or, when service is timely admitted in writing, by first class mail, not later than 30 days after the institution of the proceeding, upon all parties who appeared before the agency in the proceeding in which the order sought to be reviewed was made.

Note: For purposes of the above-noted statutory time-limits, the date of Commission service of this decision is the date it is placed in the mail (in this case the date appearing immediately above the signatures); the date of filing of a rehearing petition is the date of actual receipt by the Commission; and the service date of a judicial review petition is the date of actual receipt by the Court and placement in the mail to the Commission.

MILWAUKEE COUNTY (SHERIFF'S DEPARTMENT)

MEMORANDUM ACCOMPANYING ORDER AFFIRMING EXAMINER'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

BACKGROUND

The Complainant Labor Association has for some time been the exclusive bargaining representative of a unit consisting of all Deputy Sheriff I's, II's and Sergeants. The latest collective bargaining agreement between the parties contains a provision which establishes a timetable for exchanging bargaining proposals for the successor contract and for the commencement and conclusion of negotiations. In May of 1986 certain supervisors in the Respondent's Sheriff's Department petitioned for an election. In June of 1986 the Respondent filed a unit clarification petition seeking to exclude certain positions from the existing bargaining unit, including that of Deputy Sheriff Sergeant. There are approximately 400 employes in the collective bargaining unit represented by the Complainant, 42 of which are Deputy Sheriff Sergeants.

The essential facts underlying the complaint are undisputed, having been stipulated to by the parties at hearing. In August, 1986, the Complainant submitted to Respondent its initial bargaining proposals for the 1987 agreement in accordance with the timetable in the existing collective bargaining agreement. Complainant made repeated requests to begin negotiations for the 1987 agreement. Respondent's position was that it refused to bargain with the Complainant and will continue to refuse to bargain with the Complainant until resolution of the unit clarification proceeding before the Commission.

The Examiner's Decision

The Examiner noted that the essential facts were undisputed. With regard to any question of the Commission's jurisdiction, the Examiner concluded 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, the Respondent was deemed to have waived any claim that the Commission should not exercise jurisdiction over the allegation of Sec. 111.70(3)(a)5 and 1, Stats., violations. She noted that the parties' contract was clear and unambiguous in establishing a specific timetable by which negotiations were to begin on or about October 1st and conclude on December 1, 1986. She noted that there was no contractual provision under the existing applicable language for extenuating circumstances for deviation from the schedule or for exceptions to compliance with the schedule by either party absent mutual consent to adjust the time frame. Therefore she concluded that the Respondent's reason for failing to comply with the timetable set forth in the contract was insufficient in light of the clear contract language. The Examiner concluded that the Respondent had violated the parties' collective bargaining agreement by refusing to commence negotiations on or about October 1, 1986 and thus had violated Sec. 111.70(3)(a)5 and 1, Stats.

In evaluating the allegation of violation of the duty to bargain in good faith, the Examiner stated that the general test of good faith at the bargaining table is the totality of conduct of the parties involved. According to the Examiner, the instant case revolves around a determination as to whether the 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 Examiner noted that 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 Examiner instead relied upon several NLRB decisions in evaluating the Respondent's refusal to bargain on the grounds that further bargaining would not be appropriate or practical until the unit clarification petition was resolved. 2/ The Examiner found the NLRB rationale to be sound in concluding that the filing of a unit clarification petition does not justify a refusal to bargain in the appropriate certified unit. The Examiner quoted from one of the NLRB decision as follows:

2/ National Press, Inc., 241 NLRB 1000, 1978-79 CCH NLRB 15,774 (4/19/79); Houston Chronical Publishing Company, 130 NLRB 1243, 1961 CCH NLRB 9752 (1961).

> That additional fact (the filing of a unit clarification petition) 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. . . . 3/

The Examiner ordered the Respondent to cease and desist from delaying negotiations and refusing to bargain, to cease and desist from violating the collective bargaining agreement, to "promptly" commence bargaining in good faith, and to post a notice regarding its actions.

POSITION OF THE PARTIES

The Complainant

In its brief before the Examiner, the Complainant noted that Sec. 111.70(1)(a), Stats., requires an employer representative to meet and confer at a reasonable time. Sec. 111.70(3)(a)4, Stats., makes it a prohibited practice for an employer to refuse to bargain collectively with a representative of a majority of its employes in an appropriate collective bargaining unit. In Complainant's view, the only basis upon which a municipal employer may legitimately refuse to bargain is when "the employer has a good faith doubt as to whether a labor organization claiming the support of a majority of its employes in an appropriate bargaining unit does in fact have that support. . . ." Complainant notes that the Respondent has not petitioned for an election but merely for a unit clarification to exclude Sergeants from the Association. In Complainant's view, clarifying the bargaining unit is not a specified basis justifying a refusal to bargain. Even if a petition to clarify the bargaining unit is somehow construed to fall within the statutory exception to the duty to bargain, the number of employes being questioned here is only 42, or approximately 10 percent of the entire bargaining unit.

The Complainant contends that failure to respond to a timely request to negotiate constitutes a refusal to bargain collectively in violation of Sec. 111.70(3)(a)4, Stats. 4/ Complainant notes that the resolution of the unit clarification petition has already taken months and may take most of 1987. Complainant contends that the passage of time in commencing labor negotiations causes employes to be "disaffected and impatient at their designated bargaining agent's failure to report progress." 5/ As a result, such a delay "weakens the unity and economic power of the group, and impairs the union's ability to secure a beneficial contract." 6/

The Complainant acknowledges that a delay in bargaining is not an automatic, per se violation of MERA if the delaying party can show a substantial and sufficient reason for the delay, but argues that a dispute over the inclusion or

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

4/ Town of Salem, Dec. No. 18812-A (Crowley, 12/82).

5/ Milwawukee Board of School Directors, Dec. No. 15197-B, 15203-A (Yaeger, 12/81), citing J.H. Rutter-Rex Manufacturing Co., Inc., 86 NLRB 470, 1948.

6/ Id.

exclusion of 10 percent of the bargaining unit is not a substantial or sufficient reason to refuse to negotiate the 1987 successor agreement. In Complainant's view, if the County is allowed to evade its duty to bargain by filing a Petition for Unit Clarification, employers could regularly delay bargaining by filing such petitions shortly before the scheduled commencement of negotiations.

The Complainant urges the Commission to affirm the Examiner's Conclusions of Law that the Respondent's refusal to bargain constituted both a violation of the collective bargaining agreement and an example of bad faith bargaining. It requests that the Commission affirm the Examiner's Order that the County submit its initial bargaining proposals to Complainant within "a specified time", and order the County to refrain from any further delays in bargaining for the 1987 agreement.

The Respondent

The Respondent County admits all of the complaint allegations except the allegation that its conduct constituted prohibited practices under MERA. As an affirmative defense, Respondent claims that it is refusing to bargain because "the status of the bargaining unit is in flux" so that negotiations would not be fruitful. The County contends that this defense for delaying commencement of negotiations is sufficient to excuse its refusal to meet and bargain with the Complainant.

The Respondent generally submits that in addressing this question for the first time, the Commission should balance the pros and cons of an order mandating bargaining with one which would stay the bargaining until a unit is clarified. The Respondent notes that the general test of good faith at the bargaining table is the totality of conduct of the party involved; while a delay may violate statutory requirements, the reason for the delay must be considered in determining whether a violation has occurred. In this case, the Sergeants form approximately 10 percent of the bargaining unit, and are also the highest paid members of the bargaining unit, excluding overtime compensation. To attempt to arrive at an agreement which either included or excluded the Sergeants without knowing what the order of the Commission would be would result in an exercise in futility. If the Sergeants were removed from the bargaining unit, the entire tenure of the County's negotiations would change. Also, the Respondent contends that if negotiations were to end at an impasse and interest arbitration was sought, it would be impossible for the County to submit a final offer without knowing the makeup of the bargaining unit. The Respondent notes that in the National Press, Inc. decision relied upon by the Examiner, the Board found that most of the issues pertaining to the terms and conditions of employment of the unit employes were unrelated to the matter of the 13 department heads. In contrast, almost all issues on the bargaining table in this instance would relate equally to Deputy Sheriff I's, II's, and Sergeants. The Respondent requests the Commission to consider the practical implications of the current situation: if the County were ordered to bargain with the petitioner herein, and then the Sergeants were ultimately removed from the unit and put in the supervisory union, what would be the effect of the bargaining on them at this point? Would the County be forced to bargain again? Will the Sergeants be able to retain whatever benefits they won in the bargaining process?

The County requests the Commission to reverse the findings of the Examiner and to direct that the complaint be dismissed.

DISCUSSION

The basic approach adopted by the NLRB, as articulated by the Examiner, with regard to pending unit clarification petitions is sound to us. The NLRB case law has been consistent in rejecting claims that an unresolved unit clarification issue constitutes an adequate defense to a refusal to bargain charge where the majority status of the exclusive bargaining representative is not in doubt. 7/ As the NLRB stated in the National Press, Inc. decision:

7/ See National Press, Inc., 241 NLRB 1000, 1978-79 CCH 15, 774 (1979); May Department Store, 186 NLRB 86, 1970 CCH 22,385 (1970); Mar Salle Inc., 173 NLRB 429, 1968-2 CCH 20,273 (1968).

> The Board has long held that where, as here, a union has demonstrated its majority and a question of unit placement of certain individuals is still unresolved, the final resolution of that question does not affect the basic appropriateness of the certified unit, the union's majority, or the obligation of the parties to bargain with respect to that unit.

Here, as in National Press, Inc., the Union's majority status is not in question.

We have considered Respondent's arguments that whatever the law in the private sector, the Commission should balance the pros and cons of requiring parties to negotiate in these circumstances. After reviewing both the benefits and costs of allowing some or all pending unit clarification petitions to block the parties' obligation to bargain, we still conclude that the NLRB standard is valid. We do not consider that bargaining in such a context is an "exercise in futility." Bargaining gives the parties an opportunity to resolve all of their disputes, including the inclusion or exclusion of certain positions. If the bargaining results in a successor agreement and certain employes are subsequently excluded from the unit, the terms and conditions of the agreement do not automatically continue to apply to the excluded employes. If the parties end up in final offer arbitration, then their final offers and the costing of those offers can be structured on the assumption that the status quo is maintained (i.e., the disputed positions continue to be included or excluded) until the Commission issues its unit clarification decision. Furthermore, because the status of 90 percent of the bargaining unit is not in question, meaningful bargaining can take place. In weighing all of these considerations against the delay in negotiating inherent in Respondent's arguments, we conclude that the purposes of MERA are best served by requiring parties to continue negotiations even if a unit clarification petition is pending.

The Respondent has not raised on review any independent arguments pertaining to the Examiner's finding of a Sec. 111.70(3)(a)5, Stats., contract violation. Therefore, we affirm the Examiner's Findings of Fact, Conclusions of Law and Order in their entirety, including her Order that the Respondent "promptly (immediately) commence bargaining in good faith with Complainant, specifically submitting to Complainant initial bargaining proposals and proposed dates for negotiation sessions."

Dated at Madison, Wisconsin this 18th day of June, 1987.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Stephen Schoenfeld
Stephen Schoenfeld, Chairman

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