STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

TEAMSTERS LOCAL UNION NO. 579, Complainant, vs. VILLAGE OF CASSVILLE, Respondent.	Case 2 No. 47798 MP-2626 Decision No. 27366-A

Appearances:
Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., by Ms. Marianne Goldstein Robbins, 1555 North Rivercenter Drive, Milwaukee, Wisconsin, on behalf of the Complainant.
Attorney David R. Friedman and Attorney Thomas T. Schrader, 30 West Mifflin Street, Madison, Wisconsin, on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Teamsters Local Union No. 579, herein Complainant or Complainant Union, having on July 22, 1992, filed a complaint with the Wisconsin Employment Relations Commission, and thereafter, having on July 28, 1992, filed an amended complaint, alleging that the Village of Cassville, herein Respondent or Respondent Village, had violated Section 111.70 (3)(a) 1, 2, 3, and 4 of the Wisconsin Statutes by interrogating employes, by failing and refusing to respond to the Complainant's request to negotiate, and by failing and refusing to bargain in good faith with Complainant; and the Commission having appointed Mary Jo Schiavoni, a member of its staff, to act as Examiner and to make and issue Finding of Fact, Conclusions of Law and Order in this matter as provided in Sec. 111.07(5), Stats; and hearing on said complaint having been held on November 2, 1992, in Cassville, Wisconsin; and the transcript having been received on November 23, 1992; and the parties having completed their briefing schedule on January 29, 1993; and the Examiner, 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. Complainant, Teamsters Local Union No. 579, is a labor organization and has its offices at 2214 Center Avenue, Janesville, Wisconsin 53546. Brendan F. Kaiser is Secretary-Treasurer of said organization and at all times material herein has been a representative and agent of Complainant.

2. Respondent, Village of Cassville, is a municipal employer and has its offices at 100 W. Amelia Street, Cassville, Wisconsin 53806. At all times material herein Betty Nelson occupied the position of Village Clerk, William Whyte occupied the position of Village President, and Thomas Schrader occupied the position of Village Attorney. At all times material herein, they served as representatives and agents of Respondent.

3. The Union filed an election petition on April 22, 1992, requesting an election in a collective bargaining unit described as the following:

> All regular full-time and regular part-time employees of the Water/Sewer Department and the Street Department excluding managerial supervisor, etc. employed at the Village of Cassville, Wisconsin.

4. The Complainant received an initial eligible voter list dated May 5, 1992, along with a proposed stipulation from the Village. The names of seven individuals were on this list: Steven Kirschbaum, Todd Whyte, Elaine Wood, Nicholas Adrian, Michael Adrian, Dennis Heiligenthal, and Jamie Scholl. Union Business Representative Brendan Kaiser telephone Wood to inquire as to whether her duties were confidential in nature. He asked Wood whether or not she performed confidential work for the Village Board, such as typing things that are not normally put out to the public, executive minutes of Village Board meetings, etc. Wood indicated that she did type reports and documents of a confidential nature. He also spoke with Village Clerk Betty Nelson regarding the status of Wood and Nicholas Adrian, hereinafter referred to as N. Adrian, 3/ to ascertain whether or not they should be excluded as confidential or supervisory employes. He asked Nelson whether Wood was a confidential secretary and Nelson indicated that Wood was a confidential. He asked Nelson if N. Adrian had the authority to hire and fire. According to Kaiser, Nelson stated that N. Adrian can make recommendations to hire but the ultimate authority was retained by the Village Board. When Kaiser inquired as to whether N. Adrian had ever recommended discipline, Nelson said that he had. Kaiser then told Nelson, "because of this fact, he (referring to N. Adrian) would not be a person that would be qualified to be in the bargaining unit." Based upon this conversation with Nelson, Kaiser requested a revised eligibility list excluding Wood and Nicholas Adrian to be submitted with the stipulation for election.

5. On May 21, 1992, the Commission received a stipulation for election signed by William H. Whyte, Village President, and Brendan F. Kaiser, Secretary-Treasurer of Complainant, in which the parties stipulated to the following collective bargaining unit:

> All regular full-time and regular part-time employes of the Water/Sewer and Street Departments of the Village of Cassville, excluding supervisory, managerial and confidential employes.

Said stipulation noted that there were no craft or professional employes included in the bargaining unit. Attached and as a part of said stipulation were individuals listed on an Eligibility List. Five individuals were listed on this eligibility list: Steven Kirschbaum, Todd Whyte, Michael Adrian, Dennis Heiligenthal, and Jamie Scholl.

1/ The record reflects two individuals named Adrian are in the employ of the Village: Nicholas Adrian, the subject of a dispute over his alleged supervisory status, and Michael Adrian, who was party to a conversation with Village Clerk Nelson.

6. The Commission directed an election in the stipulated unit on June 2, 1992. Mail ballot election was conducted pursuant to said stipulation. The ballots were counted on June 19, 1992. Of the five employes voting, 4 voted for Complainant Union, 1 voted for no representation. The Commission issued a Certification of Representative on July 1, 1992, whereby it certified the Complainant as the exclusive representative of employes in the unit set forth in Finding of Fact 5, above. Neither party sought Commission reconsideration or judicial review of the Certification of Representative.

7. On June 26, 1992, Kaiser wrote to Whyte and requested to begin negotiations on behalf of the newly-certified bargaining unit. He offered June 29-30, July 2-3, July 6, 7, 8, 9, and July 13-17 as possible dates for negotiation. On July 7, l992, Attorney Thomas Schrader sent the following letter to Kaiser:

> Re: Village of Cassville Contract negotiations
>
> I represent the Village of Cassville and I will be handling the contract negotiations, at least initially.
>
> I am not available at the times you have given to Mr. White. I will be on vacation during the next ten days. Following that I must meet with the full board in closed session to discuss this new way of doing business with the Village employees. Please understand that this is new to most of us and we are not as prepared as you are to start negotiations.
>
> You can facilitate the process, however, by sending us a written proposal which we would consider at the closed session.
>
> I will be available on the following dates for a meeting with you:
>
> July 22nd and 23rd.
> July 28th, 29th, and 30th.
> August 3rd through 6th.
>
> Since the Board members are all employed during the day we ask that meetings be set for late afternoons, so as not to interfere with their employment.

8. Kaiser replied by letter dated July 9:

> Re: Village of Cassville - Labor Agreement Negotiations
>
> I received your July 7, 1992 letter on the above-referenced issue.
>
> Being that you and your client are not familiar with Collective Bargaining Agreement Negotiations, I feel it imperative that we "Meet and Confer" as provided for in Sec. 111.70 of the Wisconsin Stat. It is easier to understand the Union's proposal when I am present to read it to you and for explaining the intent of it's (sic) provisions. That is why it is required by the Statute to "Meet and Confer".

I would be available July 14, July 15, July 16, July 20, July 28, July 29, and July 30, 1992. I am not available on July 22, and July 23, 1992. If you cannot meet earlier as I offered, I will be in Cassville on July 28, July 29, and July 30, 1992 at a location that you designate.

I will be awaiting your reply.

9. Schrader then sent Kaiser the following in response on July 21, 1992:

Re: Village of Cassville Labor Negotiations

I have your letter of July 9, 1992 as I have just returned from vacation.

There is nothing in the statute which precludes the parties from submitting written proposals before the actual meetings. These negotiations will go much smoother if you can refrain from lecturing us on your opinion of the law -- and then equating that to what you consider "imperative". I see nothing in 111.70, Stats., with the "meet and confer" language you have quoted in your July 9th letter. Clearly the statute contemplates open, face to face meetings between the parties. But it does not preclude advance submission of written proposals.

We will be available for an initial meeting on Wednesday, July 29 at 5:30 p.m. We can meet at the conference room at the village hall.

10. Kaiser replied to Schrader in the following missive of July 22, 1992:

Re: July 21, 1992 - Correspondence

Your vacation is not and will not be my problem.

Your ineptness is exhibited in the second (2nd) paragraph of the above referenced. **"I see nothing in 111.70, Stats., with the "meet and confer" language you have quoted in your July 9th letter".** I direct your negative eyes to page 2282 of 1989-1990 WI Stats, Sub-chapter IV - Municipal Employment Relations 111.70 (1)(a) **"Collective Bargaining",** the twenty-sixth (26th), twenty-seventh (27th), and twenty-eighth (28th) words in that Sub-section are, **"Meet and Confer"** (see enclosed).

I STRONGLY suggest that you familiarize yourself with being able to READ the statute first, before you embarrass yourself any further. PRECLUSION(S) are not the practice or the procedure. Get Counsel if you need HELP to READ and COMPREHEND what you read.

The Union will be there at 5:30 P.M., Wednesday, July 29, 1992.

> Read the balance of the statute before then, and refrain from counseling your client to violate WI Statute 111.70(2),(3) 1, 2, & 3 as you have done.

11. Schrader responded as follows on July 24:

> Re: Village of Cassville
>
> I have your letter/tirade of July 22, 1992.
>
> We have consulted with and hired outside counsel as you suggested. He is unable to deal with this matter at this time and will not be available to advise us further for several weeks.
>
> The meeting set for next week is off. We will get back to you once we have had the opportunity to discuss this matter with him further.
>
> Now and in the future you will communicate only with me on this matter.

12. On or about July 21, 1992, Nelson phoned N. Adrian and requested him to ask three employes, Mike Adrian, Jamie Scholl, and Dennis Heiligenthal to stop into the office sometime during the day. Although two of the employes reported together, they were asked to come into the office separately. According to Mike Adrian who testified on behalf of the Union, Nelson "just asked me if we took another vote going for the Union, if I would vote for it, against it or just stay neutral". Mike Adrian testified that he replied "neutral" because that way he would not have to indicate a preference. He stated that he did not feel particularly threatened but he did not feel that the question was asked in a non-threatening manner either. Nelson admits making the inquiry but testified that she did not recall Mike Adrian saying anything in response to the question. Rather, according to Nelson, Adrian hesitated and she interceded by saying "You do not need to answer the question. It was just a question." The only employes interrogated were the three employes from the Street Department who had voted in the election. Nelson further testified that she was instructed to ask this question of the three employes by Attorney Schrader. She reported the employes' responses to the question to Attorney Schrader.

13. None of the five employes in the unit certified in Finding of Fact 5 occupies a position which is statutorily excluded from the bargaining unit. The unit certified is not repugnant to the Municipal Employment Relations Act.

14. The Respondent has refused and continues to refuse to bargain with the Complainant to the present.

15. No evidence was adduced to support allegations that the Village of Cassville violated Sections 111.70(3)(a)2 and 3, Stats.

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

CONCLUSIONS OF LAW

1. The Respondent Village of Cassville, by interrogating the Street Department employes, did interfere with, restrain, and coerce them in the exercise of their rights under Section 111.70(2) of MERA and therefore has committed a prohibited practice within the meaning of Section 111.70(3)(a) 1,

Stats.

2. The Respondent Village of Cassville, by cancelling the meeting on July 29, 1992, and thereafter categorically refusing to bargain, did violate and continues to violate Section 111.70(3)(a)4 and 1, Stats.

3. The Respondent Village of Cassville has violated and continues to violate Section 111.70(3)(a)1 and 4, Stats., by failing and refusing to recognize Complainant Teamsters Local Union No. 579 as the exclusive bargaining representative of the unit certified by the Commission in Finding of Fact 5, and by failing and refusing to bargain with Complainant over the terms and conditions of employment for the employes in said unit.

4. That Respondent Village of Cassville did not violate Sections 111.70(3)(a)2 or 3, Stats.

Based on the above and foregoing Findings of Fact and Conclusions of Law, the Examiner makes and issues the following

ORDER 2/

IT IS ORDERED that:

1. The portions of the complaint alleging that Respondent Village of Cassville violated Sections 111.70(3)(a)2 and 3, Stats. are dismissed.

It is further ordered that the Village of Cassville, its officers, and agents, shall immediately

2. Cease and desist from:

> (a) Interrogating employes or in any other manner interfering with, restraining or coercing employees in the exercised of their right to engage in concerted activity on behalf of Teamsters Local Union No. 579 or any other labor organization.
>
> (b) Failing and refusing to bargain with Complainant Teamsters Local Union No. 579 over wages, hours, and conditions of employment for those employes in the certified bargaining unit set forth in Finding of Fact 5.

3. Take the following affirmative action designed to effectuate the policies of Section 111.70, Stats.:

> (a) Immediately commence good faith bargaining with Complainant Teamsters Local No. 579 over the terms and conditions of an initial collective bargaining agreement covering employes in the certified bargaining unit set forth in Finding of Fact No. 5.
>
> (b) Notify all of its employes by posting in conspicuous places on its premises, where notices to all its employes are usually posted, a copy of the Notice attached hereto and marked Appendix "A". Such copy shall be signed by the Chief Executive of Respondent Village of Cassville, and shall be posted immediately upon receipt of a copy of this Order, and shall remain posted for thirty (30) days after its initial posting. Reasonable steps shall be taken by said Chief Executive to insure that said Notices are

not altered, defaced or covered by other materials.

(Footnote 2/ appears on the next page.)

(c) Notify the Wisconsin Employment Relations Commission, in writing, twenty (20) days from the date of the receipt of this Order of what steps have been taken to comply herewith.

4. To further remedy the Respondent Village of Cassville's violation of Section 111.70(3)(a)4 and 1, Stats., it is further ordered

(a) that the certification period in Case 1, No. 47323, ME-3221, Decision No. 27281-A, be extended for one year, from the date that this Order becomes final,

and

(b) that the Commission will not process an election petition filed by Respondent for a period of one year from the date that this Order becomes final.

Dated at Madison, Wisconsin this 15th day of March, 1993.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Mary Jo Schiavoni /s/
Mary Jo Schiavoni, Examiner

2/ 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 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

(Footnote 2/ continues on the next page.)
(Footnote 2/ continues)

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 EMPLOYES

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

1. WE WILL NOT interrogate our employes or in any manner interfere with, restrain or coerce our employes in the exercise of their rights to self-organization, to form a labor organization, to join or assist Teamsters Local Union No. 579, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in other lawful, concerted activities for the purpose of collective bargaining or any mutual aid or protection.

2. WE WILL NOT violate our duty to bargain in good faith with Teamsters Local Union No. 579.

3. WE WILL meet and confer, upon request, at reasonable times with representatives of Teamsters Local Union No. 579 for purposes of collective bargaining with respect to wages, hours and conditions of employment.

Dated this 15th day of March, 1993.

By _____
Village of Cassville

THIS NOTICE MUST REMAIN POSTED FOR SIXTY DAYS FROM THE DATE HEREOF, AND MUST NOT BE ALTERED, DEFACED OR COVERED BY ANY MATERIAL.
VILLAGE OF CASSVILLE

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

BACKGROUND:

The Complainant Union filed a complaint and an amended complaint alleging an independent violation of Section 111.70(3)(a)(1) by the Village in

interrogating street department employes and a violation of Section 111.70 (3)(a)(2)(3) and (4), Stats. on the part of the Village in its refusal to meet and bargain with Complainant over the wages, hours, and working conditions of employes in the newly- certified bargaining unit. Respondent Village admits and stipulates that it is refusing to bargain with Complainant Union in order to test the certification of the bargaining unit. At this time, Respondent stipulates that it will continue to refuse to bargain with the Complainant until Complainant is certified in an appropriate collective bargaining unit. Respondent does, however, deny that its action of postponing the negotiation session constitutes an independent violation of Section 111.70(3)(a)(4). Although it admits that Village Clerk Betty Nelson did ask Street Department employes how they would vote if another election were held, it denies that such an inquiry constituted coercion and restraint under the circumstances.

Respondent at hearing sought to adduce evidence as to the impropriety of the newly certified unit and to submit evidence regarding other individuals whom it deemed to have been improperly excluded. The Examiner then inquired as to whether Respondent Village was contending that any of the individuals included by the parties' stipulation were claimed to be supervisory, confidential, or excluded based upon some other statutory criteria. Upon receiving a response indicating that none of those employes included by stipulation should have been statutorily excluded, the Examiner made an interim ruling that all such evidence challenging the propriety of the stipulated unit was excluded as irrelevant. She did, however, permit Respondent Village to make an offer of proof and directed the parties to make further arguments in their briefs.

The Examiner also asked the parties at hearing whether the parties wished to stipulate that the Commission consider the evidence adduced in the hearing for purposes of unit clarification. Complainant on the record and in its brief indicated that it was not interested in any such stipulation and believed that it would be improper for the Commission to take cognizance of such evidence in a unit clarification context given the Respondent's affirmative defense. In its brief, the Respondent also took the position that a unit clarification proceeding was inappropriate. It claims that the only appropriate unit is a unit consisting of all of the employes of the Village and will settle for nothing other than an election among all its employes.

POSITIONS OF THE PARTIES:

Complainant

Complainant Union alleges that the Village violated Section 111.70(3)(a)1. and 4 when it interrogated employes and refused to bargain with the Union. Citing Green Lake County 4/, it argues that Betty Nelson interrogated employes unlawfully when she called employes into her office individually and asked each how he would vote if there were a second election. The fact that she performed the interrogation at the request of Village Counsel does not mitigate against the intimidation. The Union submits that a fair inference to be drawn from the question is that the Village instead of bargaining with the certified representative is attempting to remove the Union through a re-run election. Such an action, it asserts, constitutes interference.

In support of its contention that the Respondent was refusing to bargain, the Complainant also points to the Employer's refusal to meet and confer which was occurring at the same time. Stressing that the Union repeatedly requested the Village to meet and negotiate on June 26 and July 9, 1992, only to receive a response that it forward its proposals prior to the initial meeting. It

3/ Dec. No. 6061 (WERC, 7/1962).

points out that when the Village finally proposed a date, the Village cancelled the meeting. This conduct, the Union alleges, constitutes a refusal to bargain. It notes that the Village has continued and indeed stipulated to its continuous refusal to bargain premised upon a claim of impropriety in the composition of the bargaining unit. According to the Union, the Village cannot avoid liability by claiming in its initial response that it did not refuse to meet but only delayed the time for meeting. According to the Complainant Union, the Village's request for delay in the meeting when combined with the interrogation makes it clear that the Village did not intend to recognize the Union and negotiate a contract in good faith, but rather, sought to undermine the existing certification. This conduct, it submits, violated Sections 111.70(3)(a)1, and 4, of MERA.

The Complainant strenuously avers that the Village cannot challenge the propriety of the stipulated bargaining unit through these proceedings. Claiming that there are no WERC cases in which the Commission has recognized an employer's refusal to bargain as a vehicle for seeking a review of a unit determination, it alleges that there is no reason to permit such an action because direct review of the representational unit determination decision may be obtained under the Wisconsin Administrative Procedure Act, Chapter 227. Because of the existence of Chapter 227 as an avenue for direct review, the National Labor Relations Board case law which permits a refusal to bargain defense to an unfair labor practice complaint as a means of obtaining judicial review because no other procedure is available, should be rejected.

Even were this defense permitted, Complainant points out that this defense has never allowed a party to relitigate issues that "were or could have been litigated in a prior representation proceeding." Citing Saginaw Education Association 5/, the Complainant contends that the NLRB had held that "in the absence of newly discovered and previously unavailable evidence or special circumstances, a respondent in a proceeding alleging a violation of Section 8(a)5 of the National Labor Relations Act is not entitled to relitigate issues that were or could have been litigated in a prior representation proceeding." Complainant asserts that the offer of proof made at the prohibited practice hearing was readily available at the time the parties stipulated to the appropriate unit and that there is no newly discovered evidence, thus no basis for relitigating the issues which could have been litigated in the prior representation proceeding.

Stressing that there is no claim that the presently constituted unit contains supervisors or others who are statutorily excluded, Complainant suggests that the Village's position appears to be that the stipulated unit is under-inclusive and that under the anti-fragmentation policy, a larger unit should be established. This argument does not provide a basis for attacking an existing bargaining unit. Citing Milwaukee County Sheriff's Department, 6/ the Complainant Union maintains that even if the two additional street department positions were appropriate for unit inclusion, a petition to include them would not require a revote of the entire unit where the majority status of the Union was unaffected nor would it excuse the Village from negotiating in the interim.

According to Complainant, any remaining employes are not properly included in the existing unit. It stresses that the unit stipulated by the parties and certified by the Commission encompasses employes in the Street, Water and Sewer Departments of the Village. It argues that the doctrine of anti-fragmentation cannot be used to merge additional departments into the existing unit. Furthermore, the Complainant maintains that the Harbor and the Housing Commissions which employ one of the disputed employes are separate

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4/ 298 NLRB, No. 36, 134 LRRM 1072 (1990).

5/ Dec. No. 24027-B (WERC, 1/87).

entities. The Director of Tourism is a seasonal employe and a likely confidential employe. The Librarian is a professional employe. Other part-time employes such as the Janitor do not share a community of interest with bargaining unit employes. The Union asserts that the claim for inclusion of these additional employes is evidence of the Village's motivation to dilute union support and to defeat the union in any new election.

In response to the Respondent's assertions that the Village Clerk was substantially misled by the Complainant's Business Agent, the Union asserts that the evidence revealed that Nelson agreed to the exclusions of Wood and N. Adrian after a substantive honest discussion with Kaiser of the characteristics and authority which would render an individual to be found supervisory or confidential. If the parties are not held to their stipulations even after such thorough discussion, virtually every WERC stipulation would be subject to challenge. Even if there were some basis for clarifying Wood and N. Adrian, there is no request for such clarification. Pointing to the fact that the Village clearly indicates that the entire purpose of its refusal to bargain is to obtain the inclusion of additional individuals in the existing unit, the Complainant stresses that essentially the Village's position is that it should be entitled to refuse to bargain with a certified unit in order to avoid unit clarification proceedings which might involve the inclusion of additional individuals by accretion or an accretion election. In other words, the Union submits, the Village urges that it should be permitted to refuse to bargain in order to defeat the prior election and obtain another one in an overall unit to overcome the overwhelming union support within the previously stipulated unit. The Village cannot refuse to bargain to obtain a remedy it could not obtain through the unit clarification process.

The Complainant requests that the Commission order the Village to cease and desist from its unlawful conduct and order the Village to immediately commence bargaining in good faith with respect to the previously certified unit and to post a notice informing employes that it will not interrogate them or otherwise violate their rights and will negotiate in good faith.

Respondent

Respondent Village maintains that the prohibited practice proceeding is an appropriate forum in which to challenge the composition of the bargaining unit. It is also its contention that a unit covering all employes employed by the Village is a more appropriate unit given the anti-fragmentation policy set forth in MERA. It strenuously asserts that the unit should consist of all ten Village employes. Respondent Village argues that this is not a voluntarily recognized unit but rather a unit certified by the Commission. As such, the Commission has a responsibility to insure that the unit is a proper one.

In attempting to refute a case cited by the Complainant regarding the Commission's policy towards stipulations, City of Sheboygan, 7/ Respondent Village stresses that this case dealt with a request to clarify a bargaining unit and not with a refusal to bargain. It also points out that the present factual situation is very different from that posed by the Sheboygan case. It attempts to distinguish the Saginaw Education Association 8/ case as differing from the case at bar by arguing that the employer in Saginaw never appealed the decision of the NLRB's regional director where in the present case there has been no finding by the WERC as to the appropriate bargaining unit.

Noting that there is no question that if a petition asking for all of the employes employed by the Village had been filed, the Commission would have

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6/ Dec. No. 7378-A (WERC, 5/89).

7/ Saginaw Education Association, supra.

found it to be appropriate, the Village alleges that the real question is whether or not such a determination can be made in this proceeding. Pointing to Stevens Point Board of Education, 9/ the Respondent maintains that it is clear from this case that the Commission prefers where there is an existing unit, to either have an election of all employes who appropriately would be in the unit or to seek a residual unit election and then merge it into an existing unit. Because it is difficult for the employer to file an election petition, according to the Respondent, raising the appropriateness of the unit in this context is the only practical means available to resolve the issue.

The Village argues that it was not for Village Clerk Nelson and the Union's representative to make the determinations as to supervisory and confidential status of Wood or Adrian but for the Commission to ascertain whether these exclusions were proper.

The Village maintains that a unit clarification proceeding is not proper. It has a straightforward position on this issue. It believes that all the employes of the Village should have been included in the bargaining unit and should have been entitled to vote. It will settle for nothing other than an election among all of its employes. In support of this position, it argues that all of the employes belong in the same bargaining unit and makes several legal arguments to this effect.

Respondent stresses that the questioning of employes by Village Clerk Nelson did not violate Section 111.70(3)(a)1, Stats. In this vein, it points to Michael Adrian's testimony that he felt neutral regarding Nelson's interrogation. According to Adrian, "I didn't feel threatened, but it didn't feel non-threatening." Pointing to the circumstances under which the employes were questioned, i.e., the door being open, the lights being on, Nelson sitting behind her desk, and the conversation lasting only a few seconds, and Nelson's assurances that you don't need to answer the question, the Village maintains that the questioning was in no way coercive. There was, it submits, no violation of 111.70(3)(a)(1), Stats.

Respondent Village also stresses that it has not failed to bargain with the Complainant by merely cancelling one negotiation session. It notes that the exchange of letters prior to July 21, 1992 indicates that the Village representative promptly responded to Complainant's agent's request. The Village argues that the Union is unfamiliar with the real world of establishing negotiation session dates. It disputes that the cancellation of the July 29, 1992 date without offering a new date constitutes a refusal to bargain. It stresses that in rather pejorative terms Kaiser told Schrader to seek legal assistance and when he did so, the Union filed a refusal to bargain charge.

In conclusion, the Respondent's position on the election issues is straightforward. It refuses to bargain because it believes the currently certified unit to be inappropriate. According to the Respondent, all the employes listed in the affirmative defenses with the exception of Ruth Houghton are Village employes and should have been eligible to vote in an election. The unit in question should have encompassed all of the employes of the Village. It asserts that since the Village was misled with respect to two employes who clearly belong in the bargaining unit, a unit clarification proceeding would not be appropriate. Rather the Village believes that all of the employes should be entitled to vote in a new election to determine whether or not they wish representation. If such an election is not ordered, then the Respondent requests that there should be no change in the unit certified or in the people covered by the bargaining unit.

Respondent Village claims that it would have been preferable to raise

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8/ Dec. No. 7713-A (WERC, 8/89).

these representation issues in a representation proceeding, but before the Respondent had the opportunity to do so, the Complainant filed the instant complaint. According to the Respondent, it makes no sense in terms of procedure or efficiency to force the parties to resolve this issue in another forum. It avers that the matter has been fully litigated in this proceeding.

Respondent Village emphasizes that Wood is not a confidential employe. It also claims that Nick Adrian is not a supervisor but rather a leadperson.

The Village respectfully requests that the certification of the past election be set aside and that a new election in a unit consisting of all employes of the Village be directed. It further requests that the prohibited practice complaint and amended complaint be dismissed in their entirety.

DISCUSSION:

Refusal to Bargain:

Respondent Village stipulates that it has and will continue to refuse to bargain with Complainant Union over the wages, hours and working conditions of employes in the collective bargaining unit certified by the Commission in order to challenge the certification of the unit as it is presently comprised. It argues that a prohibited practice proceeding is an appropriate vehicle to challenge the bargaining unit composition pointing to federal labor law as precedent.

This is a case of first impression under the Municipal Employment Relations Act. There are some important distinctions between MERA and federal labor law with respect to the parties' ability to secure judicial review and therefore raise representation issues in an unfair labor or prohibited practice context.

> It is well settled that Board rulings in representation proceedings are not reviewable by federal district courts, but may be reviewed only in Courts of Appeals under Sections 10(e) and (f) of the National Labor Relations Act, if and when they form the basis of a subsequent unfair labor practice proceeding. This policy of "non-reviewability" is based upon the explicit Congressional mandate that representation proceedings be expeditiously resolved and that employee collective rights attendant thereto be effectuated free of time-consuming delays which would necessarily flow from direct judicial review. 10/
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> An aggrieved party may, of course, obtain ultimate review of the representation issues, but only after the election proceedings have terminated and the orders issued therein have given rise to a subsequent related unfair labor practice case. Boire v. Greyhound, supra, 376 U.S. at 476-477; S.D. Warren v.

9/ Boire v. Greyhound, 376 U.S. 473, 476-479, 55 LRRM 2694 (1969); S.D. Warren v. N.L.R.B., 353 F.2d 494, 496, 60 LRRM 2384 (C.A. 1, 1965), cert. denied, 383 U.S. 958, 61 LRRM 2596; N.L.R.B. v. Athbro Precision Engineering Corp., 423 F.2d 573, 574-575, 73 LRRM 2355 (C.A. 1, 1970); Suprenant Mfg. Co., 318 F.2d 396, 399, 53 LRRM 2405 (C.A. 1, 1963); William P. LaPlant et.al. v. McCulloch, 382 F.2d 374, 65 LRRM 3049 (C.A. 3, 1969), cert. denied, 389 U.S. 1039, 67 LRRM 2231; Modern Plastics Corp. v. McCulloch, 400 F.2d. 14, 69 LRRM 2133 (C.A. 6, 1968); Star Market v. Alpert, v. 227 F.Supp. 459, 55 LRRM 2782 (D. Mass., 1964), vacated as moot, 56 LRRM 2638 (C.A. 1, 1964).

> N.L.R.B., supra, 353 F.2d at 189. Thus, any objection an employer may have regarding the Board's handling of a representation proceeding. . .may be raised by refusing . . .to bargain with the certified union. For such a refusal is presumptively unlawful under Section 8(a)(5) and (1) of the Act, and under Sections 8 and 10, would trigger an unfair labor practice proceeding in which the primary issue for both the Board and the reviewing Court of Appeals would be the validity of the certification. Although this "indirect method of obtaining judicial review imposes significant delays upon attempts to challenge [representation rulings]. . .it is obvious that Congress intended to impose precisely such delays" 11/ in order to provide a speedy resolution of employee choice.

Therefore, the sole and usual means of challenging a National Labor Relations Board representation decision made pursuant to Section 9 of the NLRA regarding bargaining unit composition is by way of affirmative defense to an unfair labor practice charge of refusing to bargain.

Such is not the case under applicable state law. The Supreme Court of Wisconsin, in West Allis v. WERC, 12/ expressly found the certification of election results to be judicially reviewable. In that case, the municipal employer sought judicial review of a Commission order determining the appropriate bargaining unit composition and directing an election. The court made it clear that such an order is not judicially reviewable. It said, "It is the Commission's certification of election results that is reviewable under Sec. 111.70(4)(d)3, Stats. . ." 13/ The Court continued to state: "We see the statutory procedure for determination of the unit and direction of election as integral and necessary parts of the Commission order for an election. Directing the election includes setting forth who is to vote in such election. The election is to be held, and the Commission is to certify the results in writing to the Employer, labor organization and interested parties. Then, and only then, under Sec. 111.70(4)(d)3, may the Commission findings on which certification is based, be taken to court and reviewed." 14/ (Emphasis added).

Therefore, in Wisconsin, it is clear that the certification of the results of an election is a final order subject to judicial review and challenge in the courts of this state should a party wish to contest the bargaining unit composition or any other pre- and/or post-election determinations made in connection with the representation proceeding.

Because Sec. 111.70(4)(d)3 specifies when judicial review is available, i.e., upon certification of election results; it is a fair inference that then and only then may judicial review, i.e., challenge to the bargaining unit composition, be sought. It should also be noted that challenges are available to Commission eligibility determinations within the representation proceeding itself and that dissatisfied parties are free to request that the Commission reconsider its certification or amend such certification at the time of issuance.

10/ Boire v. Greyhound, supra, 376 U.S. at 477-478.

11/ 72 Wis. 2d 268 (1975).

12/ 72 Wis. 2d at 272.

13/ Ibid. at 274.

While federal law should not be applied to the instant case because state law provides a direct vehicle to appeal, even under federal National Labor Relations Board precedent, parties are not permitted to relitigate issues that were or could have been litigated in the prior representation proceeding, in the absence of newly-discovered or previously unavailable evidence of special circumstance as the Complainant correctly points out. 15/ This is to avoid duplicative proceedings delaying the commencement of collective bargaining. There is no merit to the distinction Respondent Village wishes to draw between the certification in the Saginaw case and the instant case. Respondent had the opportunity to raise all of its present arguments in the prior representation proceeding.

Sound public policy is also best served by limiting challenges to Commission determinations to the final order in the representation proceedings. To permit an additional "kick at the cat" delays collective bargaining. It is important that the bargaining relationship commence promptly without the obstacle of an additional layer of litigation.

For these reasons, the Examiner rejects the Village's affirmative defense. A claim of inappropriate bargaining unit may not serve as a defense to a refusal to bargain allegation, especially under these circumstances, where the party advancing such a defense has not sought reconsideration of the certification by the Commission or judicial review of the final order in the representation proceeding. Because Respondent did not contest the certification in a timely manner, it may not raise the appropriateness of the certification in the prohibited practice case at this late date.

Even assuming that such an affirmative defense could be raised in the present context, the Commission has traditionally honored the stipulations of parties with few exceptions. Respondent admits to having executed the stipulation in a bargaining unit comprised of all regular full-time and regular part-time employes of the Water/Sewer and Street Departments of the Village of Cassville. What it is now arguing, however, is that it was not for Nelson and Kaiser to make this unit determination by stipulation and to decide upon employe eligibility; but rather, for the Commission to ensure that the unit is the most appropriate unit and that all employes are properly included. In effect, Respondent is asking the Commission to render the stipulation of the parties null and void and to intervene in all unit determination and eligibility decisions.

The Commission should decline to adopt such a policy. While the Commission will review stipulations to make sure that the stipulated unit is not repugnant to the Act and that individuals who are statutorily excluded as supervisory, managerial, or confidential employes are not included in the unit, the Commission encourages voluntary agreement among the parties with respect to bargaining unit composition, employe eligibility to participate in the election, and other matters relating to the conduct of the election.

Respondent Village makes no claim here that the stipulated unit is repugnant to the Act. Nor does Respondent claim that the stipulated unit, as it was constituted, contained supervisory, managerial, or confidential employes. Rather, it argues that the agreed-to unit is not the most appropriate unit and that the only appropriate unit is a wall-to-wall unit consisting of all Village employes.

There is, however, no reason why those arguments could not have been advanced in the original representation proceeding. Nelson, the Village's representative, was clearly aware of the existence of other Village employes but neither she, nor the Village's attorney, Thomas Schrader, insisted that

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14/ Saginaw Education Association, supra.

these other employes be included in the stipulation. Likewise, the Village possessed, or had access to information permitting it to form an opinion as to Wood's and N. Adrian's eligibility. In the absence of fraudulent representations on the part of the Complainant Union, which is not the case here, there is no reason to permit the Respondent to disavow its agreement.

In any event, the Commission has provided for a mechanism to rectify errors of bargaining unit placement when said errors were premised upon statutory exclusions. Having stated its strong policy of honoring stipulations and refusing to alter the voluntarily agreed-upon composition of a bargaining unit over the objection of one of the parties, the Commission has held that it will make an exception and entertain a petition for unit clarification where "the position(s) in dispute were voluntarily included or excluded from the unit because the parties agreed that the position(s) were or were not supervisory, confidential, etc." 16/ Neither party, however, requests that the Commission consider the status of Wood and N. Adrian as a unit clarification matter, both claiming that such consideration would be inappropriate under the circumstances.

Moreover, Respondent's reliance upon unit clarification determinations to stand for the proposition that it can modify the existing certification by this proceeding is misplaced. In the Stevens Point Board of Education case 17/ cited by Respondent Village, the Commission declined to allow an accretion election where the parties had previously agreed to exclude certain existing positions from the unit, absent a showing that the agreed-upon unit was repugnant to MERA or that material changes in the status of the positions had occurred. It found that the Union requesting the inclusion of said positions in that case "was obligated to timely file a petition for election in the overall unit it seeks to represent to achieve the desired expansion." Contrary to Respondent's assertions, this case stands for the proposition that the municipal employer must timely file a petition for election provided it meets the requisite standard for an employer-filed petition.

Respondent Village also points to DePere School District 18/ in support of its contention that all parties must fully understand the scope of their agreement before the Commission will honor such an agreement. Said case, however, supports the Complainant's position rather than the Respondent's. The Commission, at page 19, said:

> When reaching our decision in this regard, it is important to note that Sec. 111.70(4)(d)2.a, Stats., gives the Commission the statutory obligation to determine 'the appropriate bargaining unit for the purpose of collective bargaining.' However, to accommodate the parties' interests, we have been willing to honor parties' agreements regarding composition of bargaining units, but only if the integrity of the Municipal Employment Relations Act (MERA) is not compromised and only so long as we are satisfied that all parties clearly understood the scope of their agreement. If the unit agreement compromises MERA rights or was not clearly understood by all parties, we proceed to meet our statutory obligation under Sec. 111.70(4)(d)2.a. Stats.

15/ City of Cudahy, Dec. Nos. 19451-A, 19452-A (WERC, 12/82); City of Sheboygan, supra.

16/ Dec. No. 7713-A (WERC, 8/89).

17/ Dec. No. 25712-A (WERC, 10/90).

Respondent Village makes no claim that it misunderstood or was fraudulently induced to agree to a unit consisting of only the regular full-time or regular part-time employes of the Water/Sewer Department and Street Departments. Thus, the scope of the bargaining unit was clearly understood by both parties. Nor is there any contention that such a unit compromises the integrity of MERA.

Respondent's sole argument is that Kaiser misled Nelson to exclude N. Adrian and Wood from the employes eligible to vote in the election. First, it must be pointed out that their inclusion would not have materially affected the outcome of the election. Second, although Kaiser may not have informed Nelson as to the comprehensive legal standards which the Commission applies in making supervisory and confidential determinations, his definitions were not so inaccurate as to mislead Nelson, and there was nothing to prevent Nelson from investigating further had she so desired, as noted above. Accordingly, it is reasonable to conclude under the circumstances that the parties clearly understood the scope of their agreement and the stipulation herein should be honored.

Because Respondent continues to refuse to bargain over the wages, hours and working conditions of employes in the unit set forth in Finding of Fact 5, it has violated and continues to violate Section 111.70(3)(a)4 and 1 of the Municipal Employment Relations Act. Remedy for this violation will be addressed below.

Complainant further asserts that Respondent, by its express conduct of cancelling a negotiation meeting and not offering a new date independently violated Section 111.70(3)(a)4. Both parties direct the Examiner to the same case 19/ to support their respective positions. That case, Jerome Fillbrandt Plumbing, is factually distinguishable from the instant case. It does, however, provide some instruction as to how the Commission views negotiation tactics and behavior.

The Examiner, 20/ and by implication the Commission, 21/ adopted the "totality of conduct" standard for evaluating bad faith bargaining cases. Both the Examiner and the Commission note in Fillbrandt that "the Company's request to postpone the initial bargaining session is, standing alone, unremarkable." 22/ Certainly had the Village, in the instant case, postponed or cancelled the initial session but then continued to reschedule and meet with the Union, no bad faith would be inferred. However, here, Respondent Village cancelled the meeting, has never offered to reschedule, and has followed its cancellation with a categorical refusal to bargain with Complainant Union. To date, the parties have not met on any occasion to bargain. Accordingly, the Village's cancellation of the one agreed-to bargaining session accompanied by its general refusal to meet and confer with Complainant constitutes a violation of Section 111.70(3)(a)4 and 1, Stats. under these circumstances.

Interrogation

18/ Jerome Fillbrandt Plumbing and Heating, Inc., Dec. No. 27045-C (WERC, 9/92).

19/ Dec. No. 27045-B (McLaughlin, 3/92). See also, Frank Carmichael, d/b/a Old Market Square Theatre, Dec. No. 22243-C, 22244-C (WERC, 12/86).

20/ Dec. No. 27045-C.

21/ Ibid. at pages 5-7.

An independent violation of Section 111.70(3)(a)1, Stats., occurs when employer conduct has a reasonable tendency to interfere with, restrain or coerce employes in the exercise of Section 111.70(2) rights. 23/ If, after evaluating the conduct in question under all circumstances, it is concluded that the conduct had a reasonable tendency to interfere with the exercise of Section 111.70(2) rights, a violation will be found even if the employer did not intend to interfere and even if the employe(s) did not feel coerced or was not in fact deterred from exercising Section 111.70(2) rights. 24/

With respect to interrogation, it has been a long-established rule that an employer may not make an inquiry of employes concerning the exercise of rights protected by MERA, except under exceptional circumstances. 25/

The Wisconsin Supreme Court set out those circumstances as follows:

> "* * *[T]he polling of employees in respect to union membership would be considered a restraint upon the employees' right to organize and [is] considered coercive unless the following safeguards [are] observed:
>
> "(1) the purpose of the poll is to determine the truth of a union's claim of majority, (2) this purpose is communicated to the employees, (3) assurances against reprisal are given, (4) the employees are polled by secret ballot, and (5) the employer has not engaged in unfair labor practices or otherwise created a coercive atmosphere.'" 26/

The Commission, in a subsequent case then held that:

> The Supreme Court's holding cannot be confined to employer inquiries about unions. It includes inquiries concerning the exercise of any right protected by sec. 111.70(2), MERA, which includes the right:
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> > ". . .to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection. . ." 27/

Polling an employe as to how he would vote in a rerun election conducted by the Commission is an exercise of the rights protected by section 111.70(2).

The Village admits interrogating the three Street Department employes as

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22/ City of Evansville, Dec. No. 9440-B (WERC, 3/71), aff'd, WERC v. Evansville, 69 Wis. 2d 140 (1975).

23/ Jefferson County, Dec. No. 26845-B (WERC, 7/92); Beaver Dam Unified School District, Dec. No. 20283-B (WERC, 5/84); City of Brookfield, Dec. No. 20691-A (WERC, 2/84). See also, Juneau County, Dec. No. 12593-B (WERC, 1/77).

24/ City of Evansville, supra.

25/ Ibid.

26/ Juneau County (Pleasant Acres Infirmary), Dec. No. 12593-B (WERC, 1/77).

to how they would vote were the election to be rerun. Where discrepancies in the testimony of Nelson and Mike Adrian occur, I have credited Mike Adrian because he had better recall of the conversation. Being summoned individually to the Village Clerk's office was an event out of the ordinary and Mike Adrian testified in forthright fashion with specific recollection as to the content of his conversation with Nelson.

His testimony that he indicated "neutral" to Nelson's inquiry because he did not wish to state a preference for unionization and that subjectively he did not feel that the question was posed threateningly or nonthreateningly demonstrates the coercion inherent in the situation.

No exceptional circumstances as set out by the Supreme Court existed here. The Village was fully aware of the Union's majority status having received the certification of election results. Even crediting Nelson's version of the conversation where she allegedly told Mike Adrian that he did not have to answer, no assurances against reprisals were given to him. Furthermore, given the fact that at the same time the Village was making such queries of its employes, it was also postponing negotiations with the Union, it is concluded that Respondent Village was considering the possibility of having the original election set aside and requesting that a new one be conducted. Under these circumstances, Nelson's interrogation, even if it was performed at the request of the Village attorney, is found to have had a reasonable tendency to interfere with the exercise of employe MERA rights and constitutes an independent violation of Section 111.70(3)(a)1, Stats.

Remaining Allegations

Although Complainant Union in its initial complaint alleged violations of Sections 111.70(3)(a)2 and 3, it did not provide evidence at the hearing to support same, nor did it make arguments to this effect in its briefs. Accordingly, these allegations are dismissed.

Remedy

In addition to ordering the Respondent to post a notice and immediately commence good faith bargaining with Complainant Union, an additional remedy is warranted. Because there has been a categorical refusal to bargain during the certification year which has extended well into the year, this Examiner feels it is appropriate to extend the certification period and to refuse to permit the Respondent to file an election petition within a 12 month period from the date this Order becomes final to compensate for the period of time that the Respondent has refused to bargain. There is precedent to do so. 28/

Dated at Madison, Wisconsin this 15th day of March, 1993.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Mary Jo Schiavoni /s/
Mary Jo Schiavoni, Examiner

27/ Jerome Fillbrandt Plumbing and Heating, Inc., Dec. No. 27045-C (WERC, 9/92).