

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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

Appearances:

Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C.,
Attorneys at Law by Ms. Marianne Goldstein Robbins, 1555 North
Rivercenter Drive, Milwaukee, Wisconsin, on behalf of
the Complainant.
Mr. David R. Friedman, Attorney at Law, 30 West Mifflin Street,
Suite 202, Madison, Wisconsin, on behalf of the Respondent.

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

On March 15, 1993, Examiner Mary Jo Schiavoni issued Findings of Fact, Conclusions of Law and Order with Accompanying Memorandum in the above matter wherein she concluded that Respondent Village of Cassville had committed prohibited practices within the meaning of Secs. 111.70 (3)(a) 1 and 4, Stats., by certain conduct and wherein she further concluded that the Village had not committed prohibited practices within the meaning of Secs. 111.70 (3)(a)2 or 3, Stats., by other conduct.

On April 1, 1993, the Village of Cassville filed a petition with the Wisconsin Employment Relations Commission pursuant to Secs. 111.70(4)(a) and 111.07(5), Stats., as to a portion of the Examiner's decision which found that the Village had committed prohibited practices. The parties thereafter filed written argument in support of and in opposition to the petition, the last of which was received June 1, 1993.

Having considered the Examiner's decision, the record, and the parties' positions on review, the Commission makes and issues the following

ORDER 1/

- (1) The Examiner's Findings of Fact and Conclusions of Law are affirmed.
- (2) The Examiner's Order is affirmed in all aspects with the exception of Paragraph 4 which is modified to read:
 4. To further remedy the Respondent Village of Cassville's violation of Section 111.70(3)(a)4 and 1, Stats., it is ordered
 - (a) that the certification period in Case 1, No. 47323, ME-3211, Decision No. 27281-A commences on the date that the Village notifies the Commission and Teamsters' Local Union No. 579 that it will comply with the Commission's Order, and
 - (b) that the Commission will not process an election petition filed by Respondent Village of Cassville for a period of one year from the date of such notification.

Given under our hands and seal at the City of Madison, Wisconsin this 23rd day of July, 1993.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By A. Henry Hempe /s/
A. Henry Hempe, Chairperson

Herman Torosian /s/
Herman Torosian, Commissioner

William K. Strycker /s/
William K. Strycker, Commissioner

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 (Footnote is continued on page 3)

1/ (Footnote continued from page 2)

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 therefore 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,

(Footnote is continued on page 4)

1/ (Footnote continued from page 3)

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.

VILLAGE OF CASSVILLE

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

THE PLEADINGS

In its complaint filed July 22, 1992, and amended July 28, 1992, Complainant Teamsters asserted that the Village of Cassville had violated Sec. 111.70(3)(a)(4), Stats., by refusing to bargain and had violated Secs. 111.70(3)(a)1, 2 and 3, Stats., by interrogating employees.

In its answer, the Village of Cassville denied that it had committed any prohibited practices and further asserted that the certification of election by which the Teamsters became the bargaining representative for certain Village employes should be vacated.

THE EXAMINER'S DECISION

As to the refusal to bargain allegation, the Examiner rejected the Village's assertion that it could challenge the validity of the certification of the bargaining unit in the refusal to bargain prohibited practice proceeding. She concluded in this regard that the certification of election is a final order subject to judicial review and because the Village had not contested the certification through judicial proceedings, it could not now litigate the allegedly inappropriate bargaining unit composition. The Examiner also rejected the Village's argument that it had been misled by the Teamsters when it entered into a stipulation for the election. Thus the Examiner found the Village's refusal to bargain to be violative of Secs. 111.70(3)(a)4 and 1, Stats. She further found additional violations of Secs. 111.70(3)(a)4 and 1, Stats., based upon the Village's cancellation of a scheduled bargaining session.

To remedy these prohibited practices, the Examiner ordered the Village to commence bargaining with Teamsters and further directed that the Commission would not process an election petition filed by the Village for a period of one year from the date that her Order became final.

Turning to the interrogation allegation, the Examiner concluded that the Village violated Sec. 111.70(3)(a)1, Stats., by interrogating employes as to how they would vote if another election were to be conducted. The Examiner dismissed the allegations as to Sec. 111.70(3)(a)2 and 3, Stats., based on her conclusion that evidence to support these allegations had not been presented.

POSITIONS OF THE PARTIES:

The Village

On review, for the first time in this proceeding, the Village asserts that its refusal to bargain is not inappropriate because its President acted in excess of his authority when he signed the Stipulation for Election which ultimately resulted in Teamsters becoming the collective bargaining representative of certain Village employes. The Village argues that the signing of the Stipulation is akin to execution of a contract and that Wisconsin law clearly provides that a Village President cannot enter into a contract without the express authority of the governing body. Here, the Village asserts that the Village President acted in excess of his authority by signing the Stipulation.

Given the foregoing, the Village respectfully requests that the Commission reverse the Examiner's decision as to the Village's refusal to

bargain or, in the alternative, reopen the record to take testimony as to the extent of the Village President's authority.

Teamsters

Teamsters initially assert that because the issue now raised by the Village could have been previously litigated, the Village should now be precluded from litigating that issue before the Commission. Should the Commission review the merits of the Village's argument, Teamsters assert that the Village has presented no evidence or persuasive legal precedent indicating that the Village President was not authorized to sign the Stipulation for Election. Teamsters further argue that there is no basis for a contention that any claimed infirmity in the underlying Stipulation in any way alters the Village's obligation to bargain with the certified representative of its employes.

Given the foregoing, Teamsters ask the Commission to affirm the Examiner.

DISCUSSION:

The threshold question before us is whether we can or should consider the merits of the Village's "lack of authority" defense. No evidence as to the Village President's authority, or lack thereof, was presented to the Examiner nor was the defense in question raised before her.

Pursuant to Secs. 111.70(4)(a) and 111.07(5), Stats., our authority to take action on review of an Examiner's decision "shall be based on a review of the evidence submitted." Here, no evidence as to the defense in question was presented. Thus, we conclude that we cannot consider the merits to the Village's new defense.

We further conclude that there are strong policy reasons which make consideration of the new defense inappropriate. At the time of hearing, the Village obviously was in "possession" of the evidence it now wishes to present. Principles of due process, fundamental fairness and the desirability of having an endpoint for litigation all warrant denial of the Village's attempt to raise a new defense. 2/

2/ See generally General Electric v. WERB, 3 Wis.2d 227 (1957); Racine Schools, Dec. No. 15915-E (WERC, 3/78).

Lastly, the application of the doctrine of estoppel by record supports our refusal to consider the Village's belated defense. This rule prevents a party from relitigating what could have been litigated in a former proceeding. Acharya v. AFSCME Council 24, WSEU, 146 Wis. 2d 693 (1988). Here, the Village could have, but did not, litigate its "lack of authority" defense before the Examiner.

Given the foregoing, we have rejected the Village's basis for its appeal and conclude it is inappropriate to otherwise reopen the record.

We have reviewed the existing record and are satisfied that the Examiner's Findings of Fact and Conclusions of Law should be affirmed. We are also persuaded her Order should be affirmed with the exception of the modification we have made as to the period of time within which the Village is barred from filing an election petition. The Examiner began the certification year 3/

3/ Village of Deerfield, Dec. No. 26168 (WERC, 9/89).

on the date her Order would become final. We have modified the starting date of the certification year to the date on which the Village advises the Commission and Teamsters that it will comply with our Order.

Dated at Madison, Wisconsin this 23rd day of July, 1993.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By A. Henry Hempe /s/
A. Henry Hempe, Chairperson

Herman Torosian /s/
Herman Torosian, Commissioner

William K. Strycker /s/
William K. Strycker, Commissioner