STATE OF WISCONSIN
CIRCUIT COURT
GRANT COUNTY

VILLAGE OF CASSVILLE,
Plaintiff,

vs.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION,
Defendant.

Decision re: 227.52
Judicial review

Case No. 93-CV-0378
Decision No. 27366-B

PROCEDURAL STATUS

This matter came before the Court on a petition for Judicial Review filed August 19, 1993. A counter petition was filed September 10, 1993 by the respondent. On December 17, 1993 a scheduling conference was held, briefs were filed and exchanged and a motion hearing was held April 7, 1994. At the April 7, 1994 hearing the petitioner appeared by its attorney David R. Freedman. The respondent appeared by its attorney John Niemisto. Intervenor Teamsters Local 579 appeared by its attorney Marianne Goldstein Robbins. Subsequently, further briefing was received with the last supplementary brief of the petitioner being received April 27, 1994.

CHRONOLOGY OF FACTS

April 22, 1992	Election petition filed
May 5, 1992	Village President signs stipulation
May 21, 1992	Commission received signed stipulation
June 2, 1992	Commission directed an election be held
June 2/June 18, 1992	Vote by mail (4 to 1 for union)
June 19, 1992	Ballots counted
June 24, 1992	5 day post-election per ERB 11.10
June 26, 1992	Union requests negotiations
July 1, 1992	Commission issues "Certification of Representation"
July 21, 1992	Meeting Cancelled
July 21, 1992	Employees Questioned
July 22, 1992	Commission received prohibited practice complaint
July 28, 1992	Amended complaint received
September 1, 1992	Notice of hearing date sent
October 22, 1992	Commission received Cassville's answer with affirmative defenses to complaint and amended complaint

October 30, 1992	Amended answer received
November 2, 1992	Hearing
March 15, 1993	ERC examiner dates WERC's "Findings of Fact conclusion of Law and Order" - Page 8 notifies parties they have 20 days to file a petition for review with the commission
March 30, 1993	Commission receives petition to set aside decision with affidavit of no authority of William H. Whyte
April 1, 1993	Examiner writes Cassville's attorneys and declines to rule on Petition to set aside decision and alternative to reopen hearing
April 1, 1993	Commission receives Petition to review examiner's decision from Cassville (within 20 days)
July 23, 1993	Order affirming examiner's finds of fact conclusions of law and affirming and modifying examiner's order date
August 19, 1993	Petition for judicial review filed

STATEMENT OF FACTS

This case concerns a union election in which municipal employees of the Village of Cassville (hereinafter called "Village") voted to join the Teamsters. Afterwards Village officials reportedly interrogated some employees and failed to bargain. In response the Teamsters sued the Village alleging violations of Wis. Stat. Sec. 111.70 (3)(a) 1, 2, 3 and 4.

The Examiner's March 15, 1993 Findings of Fact, Conclusions of Law and order found violations of Wis. Stats. Secs. 111.70(2) and 111. 70 (3) (a) 1 and 4. Within the 20 days allowed by Wis. Stat. Sec. 111.07(5) the Village petitioned the Wisconsin Employment Relations Commission (hereinafter called "Commission") to review the Examiner's decision.

The Petition to Review was not premised on any errors per se by the Examiner, but instead it was premised upon the theory that the Village had made a "mistake of fact" in that the Village President lacked authority to sign the Stipulation for Election as he had never obtained the Village Board's approval. It claimed that this was not discovered until March 12, 1993.

Without a fact finding hearing the Commission rendered its decision and reached the conclusion on July 23, 1993 that: The "lack of authority" defense should not be considered pursuant to Wis Stat Secs 111.70 (4) (a) and 111.07(5). It concluded its authority to take action "shall be based on a review of the evidence submitted" --- And as there was no such evidence the commission concluded that it could not consider the merits of the Village's position which it termed -- a new defense. Additionally, the Commission relied upon "strong policy reasons" which it concluded made consideration of the "new defense" -- inappropriate.

The Village's position is that the entire election is void since the Stipulation for Election was signed by the Village President without authority: The Village suggests the Court has the discretion to so order the election void.

To the contrary the Commission says the stipulation was not void or even, and if it was void it argues the administrative rule (ERB 11.10) limits the time to bring complaints concerning elections to a 5-day period following the election which has long past.

DECISION
Standards for Reopening ERC Hearing

The standards for reopening a hearing to receive additional evidence are located in Wis. Stat. Sec. 227.49(3), which says:

> "(3) Rehearing will be granted only on the basis of:
> (a) Some material error of law.
> (b) Some material error of fact.
> (c) The discovery of new evidence sufficiently strong to reverse or modify the order, and which could not have been previously discovered by due diligence."

In its order affirming the Examiner, the Commission refers to the information contained in the Petition to Review as a "defense." By using such language, the issue of where to classify the petition's information under Wis. Stat. Sec. 227.49(3) is skirted.

The Commission's decision by talking about a "defense" pegs the Village's petition into sub (c) of Sec. 227.49(3). Likewise, the union talks about "evidence" that could have been discovered thus, also pegging the Village's petition into sub (c). Yet, it is clear from the Village's petition and the accompanying affidavit that it was asking for a rehearing on the grounds of sec. 227.47(3)(b) - which is: "Some material error of fact."

The grounds stated in 227.47(3) are not "defenses" which would normally be raised as affirmative defenses. These are sole grounds for a rehearing. Their information would naturally not be part of the evidence at the first hearing.

The information in the petition clearly falls properly into Section 227.49(3)(b): Some material error of fact.

In general, a material error of fact is a fact that is either unknown or erroneously supposed. A "Mistake of fact" exists when a person understands the facts to be other than they are: Baratti v. Baratti, 242.P.2d 22.24, 109 Cal. App. 2d 917 (Cal. Ct. App. 1952) Therefore, in the present matter, although the fact that the village president had no authority to sign the stipulation was available on May 5, 1992, it was in error at that time according to the petition for review.

Therefore, the hearing examiner needs to have a fact finding hearing to take evidence to determine if a "mistake of fact" actually existed.

VILLAGE PRESIDENT'S PRESUMED AUTHORITY

The long standing rule is that signing the document raises a presumption that the signer understood

its contents. Stockinger v. Central National Insurance Co., 24 Wis. 2d 2451 252, 128 *N.W.* 2d 433.437(Wis. 1964). However, if a "mistake of fact" existed then it is irrelevant as to whether the Village President understood the stipulation. That is because the statutory language of Wis. Stat. Sec. 61.24 intervenes. It requires authorization by the Village Board. Especially, when Sec. 61.24 is read with 61.50 which says:

> "Ordinances; Contracts; Other Instruments; How Executed. Every contract, conveyance, commission, license or other written instrument shall be executed on the part of the Village by the president and clerk, sealed with the corporate seal, and in pursuance only of authority sealed with the Corporate seal, and in pursuance only of authority from the village board." Emphasis added.

These statutes likewise negate the possible application of the doctrine of apparent authority and estoppel.

Therefore, if the Village President truly was not authorized to sign the Stipulation for Election, and the Village made a mistake of fact that he was so authorized, then it is likely that a different result will be reached -- for this reason, it is crucial that the record reflect all the evidence on this issue. Remand to the Commission will achieve this result.

ERB 11.10 DOES NOT APPLY

> ERB 11.10 OBJECTION TO ELECTION. (1) Filing; form; copies. Within 5 days after the tally of ballots has been furnished, any party may file with the commission objections to the conduct affecting the results of the election ... (Emphasis added.)

Reliance on ERB 11.10 is misplaced. This rule does not control every objection to an election. Instead, it only controls objections concerning the conduct of elections. (i.e. interfering with employees voting rights - or voting twice). Each case concerning this rule is distinguishable from the case at hand.

Here, there is no issue of election misconduct. Instead, the pertinent issue is whether the election was void from its conception as the statutory authorization necessary to hold it was purportedly never given.

DEFERENCE TO WERC

Section 111. 07, Wis. Stats,. gives the Court the power to modify the Commission's orders. Yet, the appropriate standard for review must be applied. WERC v. Teamsters Local No. 563, 250 *N.W.* 2d 696.75 Wis. 2d 602.610 (Wis., 1977).

Great weight is to be given to the WERC in collective bargaining matters where a legal question is intertwined with factual determination or with value or policy determinations or where the agency's interpretation and application of the law is long standing. See West Bend Education Association v. WERC, 121 Wis. 2d 1, 357 N.W. 2d 534 (Wis. 1984). But, this is not the case in the present matter. WERC's interpretation and application of Wis. Stat. Sec. 227.49(3) is not long standing,

nor is there anything in this case to suggest it has special competence over the Court's competence regarding rehearings. Additionally, deference is particularly unwarranted in cases based upon a characterization of the case that was neither presented to nor addressed by the WERC during its original determination.

The black-letter rule is that a court is not bound by an agency's conclusion of law. West Bend Education Association v. WERC, 121 Wis. 2d 1, 11, 357 N.W. 2d 534 (Wis. 1984). Wis. Stat. Sec. 227.49(3) was written in plain language, it was not technical, therefore, the Court has equal competence to interpret it. The WERC here acted outside of its discretion when it characterized the Village's information in the petition for review as a "defense". A remand is in order here, mandating the case be reopened to admit the additional, necessary evidence, to determine if a "mistake of fact" existed.

POLICY CONSIDERATION

Strong policy reasons exist for not remanding this case, and the Court agrees with the WERC's arguments that were made - the Court agrees there is a need for finality in this matter. However, the Court agrees with the Village that such finalizing must be based on proper legal authority, not merely convenience or expedience. No evidence was taken to determine if there was a "mistake of fact" which existed and which permeated itself throughout all the procedures in this case. So, the case must be remanded to the WERC to determine that question of fact. The issue of ratification needs to be considered by the WERC when deciding that fact.

Both the Village and the Union have a duty to see that proper step by step procedures are followed by the other. Neither should just assume the other follows the correct procedures, since in reality the Village accounts to its citizens and the union to its members.

ORDER

IT IS HEREBY ORDERED that the case be remanded to the Wisconsin Employment Relations Commission (WERC) to take further testimony and make a determination as to whether a "mistake of fact" existed as contended in the Petition for Review with respect to the issue of whether or not the Village President had authority to sign the Stipulation for Election.

Dated: July 15, 1994

By the Court:

/s/ George S. Curry
George S. Curry
Circuit Judge, Branch II
Grant County, WI