STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

DISTRICT COUNCIL 48, AMERICAN FEDERATION OF STATE, COUNTY & MUNICIPAL EMPLOYEES, AFL-CIO, AND ITS AFFILIATED LOCAL 2, Complainant, vs. CITY OF GREENFIELD, Respondent.	Case 109 No. 48702 MP-2687 Decision No. 27606-A

Appearances:

Ms. Monica M. Murphy, Podell, Ugent & Cross, S.C., Attorneys at Law, 611 North Broadway Street, Suite 200, Milwaukee, Wisconsin 53202-5004, appearing on behalf of District Council 48, American Federation of State, County and Municipal Employees, AFL-CIO, and its affiliated Local 2, referred to below as the Union.

Mr. Robert W. Mulcahy, Michael, Best & Friedrich, Attorneys at Law, 100 East Wisconsin Avenue, Milwaukee, Wisconsin 53202-4108, appearing on behalf of the City of Greenfield, referred to below as the City.

ORDER HOLDING COMPLAINT IN ABEYANCE
PENDING COMMISSION DECISION ON UNIT CLARIFICATION PETITION

The Union filed, on January 25, 1993, a complaint of prohibited practice alleging that the City had violated Secs. 111.70(3)(a)1, 3, 4, and 5, Stats., by unilaterally changing the wages of the incumbents of two bargaining unit positions, and by seeking to remove those positions from the bargaining unit. Attempts to informally resolve the matter proved unsuccessful, and, on April 8, 1993, the Commission appointed Richard B. McLaughlin, a member of its staff, to act as an Examiner to make and issue Findings of Fact, Conclusions of Law and Order, as provided in Secs. 111.70(4), and 111.07, Stats. In a Notice of Hearing on Complaint sent to the parties on April 8, 1993, hearing was set for May 11, 1993. In its answer, the City asserted a number of affirmative defenses, including the following:

> The specific positions that were the subject of the unit clarification petition (Case 43 (sic) No. 48025, ME-598) were those of the Assistant Comptroller/Accountant and Court Administrator. This case has been briefed and is now ripe for a decision. This matter should be held in abeyance pending the outcome of this underlying matter.

In a letter to the parties dated May 3, 1993, I stated:

> I received the Respondent's answer on April 27, 1993. The answer contains a series of affirmative defenses, the first of which seeks that "(t)he matter should be held in abeyance pending the outcome of this underlying matter." We have discussed this point, in passing,

during the scheduling of the complaint.

I write to confirm that hearing on this matter will go forward on May 11, 1993. I take the affirmative defense to assert that any determination of the complaint should await determination of the merits of the unit clarification. Thus taken, the affirmative defense can await your arguments on the merits.

With this said, it is my understanding there are no motions requiring disposition prior to the hearing. If my understanding is incorrect, please advise me as soon as possible.

In a fax and a cover letter dated May 7, 1993, Robert Mulcahy stated:

. . .

I would like to set up a three-way conference call for sometime on Monday, May 10, 1993.

Please consider this to be a formal motion to hold the hearing in abeyance pending the outcome of the underlying unit clarification proceeding. It has become obvious to me in preparing for this case that the affirmative defense should be considered a motion and that we would like that ruled upon prior to the hearing on Tuesday, May 11, 1993.

It is our position that this would be a waste of the WERC resources to relitigate a case which would be rendered moot based upon the underlying decision in the unit clarification matter. For your information, the two positions in question are the subject of a proceeding in WERC Case 43 (sic) No. 48025 ME-598. In that case, the position of "Administrator" and "Assistant Comptroller" were fully litigated.

. . .

A conference call did take place on May 10, 1993. I confirmed during that call that the May 11, 1993, hearing would go forward. At the close of that hearing, the parties agreed to the post-hearing submission of certain exhibits, and the City renewed its motion to hold the complaint in abeyance. The submission of the post-hearing exhibits suspended the creation of a briefing schedule on the merits of the complaint, and I offered the parties the opportunity to submit any argument or authority on the City's motion concurrent with the submission of the post-hearing exhibits. The exhibits were submitted by the parties on July 9, 1993. Each party filed a brief on the City's motion by July 30, 1993.

ORDER

1. The City's motion to hold the processing of the complaint in abeyance pending the Commission's determination in City of Greenfield, Case 63, No. 48025, ME(u/c)-598, is granted.

2. The City's motion to dismiss certain allegations of the complaint is denied.

Dated at Madison, Wisconsin this 24th day of August, 1993.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Richard B. McLaughlin /s/

Richard B. McLaughlin, Examiner

CITY OF GREENFIELD

MEMORANDUM ACCOMPANYING
ORDER HOLDING COMPLAINT IN ABEYANCE
PENDING COMMISSION DECISION ON UNIT CLARIFICATION PETITION

BACKGROUND

It is undisputed that the Commission is processing a Petition for Unit Clarification (Case 63, No: 48025, ME(u/c)-598) involving the positions subject to the complaint. It is also undisputed that the petition has been fully heard, and is ready for a Commission decision.

THE PARTIES' POSITIONS

The City's Position

The City notes that its motion should be considered both a motion "to defer briefing of the above-referenced matter until such time as the Commission issues a decision in the unit clarification proceeding" and a motion "to dismiss all other items contained in the complaint."

The City contends that the Union's evidence is directed solely to the claim that the City unilaterally implemented a dramatic wage increase for two positions. There was, according to the City, "no other evidence presented at the hearing by the Union on any other allegation." It follows, the City concludes, that any allegation not related to this claim should be dismissed.

The City contends any claim relating to its duty to bargain should be deferred until the Commission addresses the unit clarification. The City argues that the "establishment of bargaining unit positions, the number of classifications and the rate of pay accorded to those positions is undeniably a permissive subject of bargaining", and that it has no duty to bargain with respect to non-bargaining unit positions. From this it follows, the City concludes, that if the Commission rules the positions subject to the unit clarification petition are not included in the bargaining unit represented by the Union, the bargaining issues posed in the complaint are moot.

Beyond this, the City notes that parallel proceedings on unit placement issues risk not only waste of Commission resources, but conflicting results. It follows, the City contends, that the complaint should be "held in abeyance pending the decision in the unit clarification proceeding."

The Union's Position

The Union notes initially that the City's contention regarding the mandatory/permissive nature of bargaining on the establishment of unit positions etc., is irrelevant to this matter.

More specifically, the Union contends that the positions are established positions, and "continue to be within the bargaining unit . . . at least until the WERC rules that they are out of the bargaining unit which has not happened as of yet, and which may never happen." The positions at issue in the unit clarification noted by the City were, according to the Union, subject to a prior unit clarification, and were ruled appropriately included in the bargaining unit. This prior determination is, the Union asserts, "entitled to determinative weight absent a showing of material change of circumstances."

The Union contends that there is no need to hold the complaint in abeyance because "unless and until the WERC changes its mind about the positions they remain in the bargaining unit under the prior decision." Since they remain unit positions, according to the Union, "they are subject to the employer's duty to bargain and the employer cannot unilaterally increase wages."

The Union concludes that the complaint "is ripe for decision", and requests "a speedy briefing schedule and decision."

DISCUSSION

The City has asserted its motion before and after hearing on the merits of the complaint. Although essentially the same motion, the post-hearing motion must be assessed somewhat differently than the pre-hearing motion.

In both cases, the motion poses the City's concerns on administrative economy against the interests of the Union in its statutory right to a hearing. The weight to be afforded the competing interests has varied from before to after hearing.

Procedurally, the Commission is bound both by the provisions of Sec. 111.07, Stats., 1/ and by Chapter 227. Both tend to encourage the granting of hearing. Sec. 111.07(2)(a), Stats., pushes complaints toward a hearing "not less than 10 nor more than 40 days after the filing". Although this has been found to state a waivable right, the provision does point the Commission toward prompt hearings. Chapter 227 reinforces a statutory preference for the granting of a hearing. Complaints of prohibited practice are contested cases under Sec. 227.01(3), Stats. Sec. 227.44(1), Stats., states in such cases "all parties shall be afforded an opportunity for hearing". That Sec. 227.42, Stats., provides a right to hearing for certain cases not otherwise meeting the Sec. 227.01(3), Stats., definition of a contested case indicates a legislative intent in favor of processing matters such as the complaint toward

1/ Sec. 111.70(4)(a), Stats., makes the procedures of Sec. 111.07 applicable "in all cases involving prohibited practices under this subchapter".

hearing. The Commission has itself noted it "is not well equipped under Chapters 227 or 111, Stats., or with the administrative resources to entertain or to encourage extensive pre-hearing motion practice". 2/

These general considerations do not establish that hearing cannot be denied through a pre-hearing motion, but that such motions must be granted with concern for the statutory rights to a hearing. 3/ The Union's complaint challenges the City's unilateral actions regarding the wages and conditions of employment of the incumbents of two positions. The complaint alleges violations of Sec. 111.70(3)(a)1, 3, 4 and 5, Stats. From a pre-hearing perspective, the complaint could be read to allege violations conceivably ranging from a good faith dispute on the unit status of two positions (i.e. a Secs. 111.70(3)(a)1 and 4, Stats., violation) to bad faith interference and discrimination against the rights of two or more unit employes (i.e. a Secs. 111.70(3)(a)1 and 3, Stats., violation).

From the pre-hearing perspective, the concerns of administrative economy raised by the City's motion were outweighed by the Union's interest in a prompt hearing on its allegations. A pre-hearing deferral to the unit clarification proceeding at most would have secured a definitive answer on the unit placement component of the complaint's allegations. The economy to be gained by such a deferral was outweighed by the risk of delaying hearing on those issues the unit clarification could not address.

The weight to be accorded the competing interests has, however, changed from the pre-hearing to the post-hearing motion. The record in the complaint is not yet complete, since the merit of the complaint has not been fully briefed by the parties. However, without intruding into those arguments, it can be said that the evidence concerning the potential violation of Sec. 111.70(3)(a)1 and 4, Stats., has predominated over evidence of interference or discrimination under Sec. 111.70(3)(a)1 and 3, Stats. There is no persuasive evidence indicating holding the complaint in abeyance will cause immediate and irreparable harm to the interests of the Union or of any employe. Since unit placement concerns have, to this point, been the focus of the litigation, the weight to be afforded the administrative economy concerns of the City must be reexamined.

The City persuasively contends that the Commission's decision will fully address the unit placement of the employes affected by the unit clarification petition and the complaint. It can be noted that the City and the Union differ on whether the City's unilateral actions should be characterized as the creation of two new positions or the removal of two existing positions from the unit. There is, however, no dispute that the Commission's unit clarification decision

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2/ State of Wisconsin, Department of Employment Relations, Dec. No. 24109 (WERC, 12/86) at 8.

3/ See Moraine Park Technical College et. al., Dec. No. 25747-B (McLaughlin, 3/89), aff'd Dec. No. 25747-D (WERC, 1/90).

will address the unit placement of the two incumbent employes directly affected by both proceedings. There can be no dispute that the Commission's decision would prevail over any decision I could issue as Examiner regarding the unit placement issues. Beyond this, it can be noted that holding the complaint in abeyance obviates the possibility of conflicting results. Conflicting results could necessitate a remand of the complaint for further proceedings. Holding the complaint in abeyance thus precludes unnecessary litigation.

More significantly here, what precedent there is on the points argued by the parties indicates the Commission does not accept the Union's assertion that the affected positions are unit positions until the Commission issues a contrary decision. In State of Wisconsin, Dec. No. 18696 (WERC, 5/81), the Commission confronted a situation in which the State, acting as an employer, created new classifications of employes known as State Patrol Trooper 1, 2 and 3, Confidential. The employes in the newly created classifications were assigned to protect the Governor and his staff, and were privy to confidential labor relations matters. Employes in the classifications of State Patrol Trooper 1, 2 and 3 were included in a bargaining unit of "security and public safety employes". One of the employes assigned to the new classifications, prior to the assignment, was a member of that unit. The reclassification was sought by the Department of Transportation, and approved by the State's Personnel Board. Once the "confidential" status of the classification was approved by the Personnel Board, the Department of Transportation ceased deducting union dues from the employe formerly assigned to the security and public safety bargaining unit.

The Commission addressed the issues posed thus:

> Sole reliance on change in classification by the Personnel Board as a basis for the unilateral removal from, or addition to, a bargaining unit without agreement of the employe organization involved, as the bargaining representative, subjects the State to a possible unfair labor practice proceeding, as in the instant matter, and to a possible conclusion that the State committed an unfair labor practice should the Commission arrive at an opposite conclusion with respect to the classification involved. No unfair labor practice was committed herein since the evidence adduced at the hearing established that the two individuals occupying the newly established classification were indeed confidential employes . . . 4/

It must be noted that this case involved the State Employment Labor Relations Act, not the Municipal Employment Relations Act, which governs this matter. However, the unilateral actions of the State, acting as an employer in that case, parallel the unilateral actions of the City in this case. The rights afforded employes under each act are virtually identical. 5/ The prohibited practices which enforce those rights under MERA are, for the purposes of this case, substantially the same as the unfair labor practices which enforce those

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4/ Dec. No. 18696 at 4.

5/ Cf. Sec. 111.70(2), Stats., to Sec. 111.82, Stats., and see Employment Relations Dept. v. WERC, 122 Wis.2d 132, 143, 361 N.W.2d 660 (1985).

rights under SELRA. 6/ The Commission has often cited cases developed under one law as authority in cases arising under the other. 7/ The case is, then, persuasive authority in this matter.

The significance of the State case to the motion posed here is that the Commission conditioned a finding of a prohibited practice on a difference of opinion between the employer and the Commission, and not on the Employer's unilateral actions standing alone. Having determined that the employes involved were confidential, the Commission concluded the employer's unilateral treatment of the employes as non-unit employes did not constitute an unfair labor practice. That the Commission took no action to remedy the employer's unilateral actions which preceded the Commission's ultimate determination is applicable to the motion posed here.

At a minimum, this case establishes that the ultimate decision reached by the Commission on unit placement issues has a significant bearing on the finding of a related prohibited practice. Beyond this, the case establishes that it cannot be assumed that the City's unilateral actions toward the positions involved here are, standing alone, violations of its duty to bargain with the Union.

In sum, since the Union has, through the denial of the pre-hearing motion to hold the complaint in abeyance, secured an evidentiary hearing, the weight to be afforded the statutory bias toward a prompt hearing has been recognized. The post hearing motion impacts the statutory interest in a prompt hearing less than the pre-hearing motion, since the unit clarification and complaint proceedings pose overlapping issues. Because evidence at hearing clarified that duty to bargain type issues are the principal thrust of the complaint, the motion, at the post hearing stage, does not significantly pose the risk that allegations beyond those at issue in the unit clarification will go unaddressed. Since there is no persuasive evidence of City conduct which poses immediate or irreparable harm to the Union or to individual employes it represents, the delay inherent in holding the complaint in abeyance poses less of a concern than it did at the pre-hearing stage of the proceeding. These considerations make the

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6/ Cf. Secs. 111.70(3)(a)1, 3, 4 and 5, Stats., to Secs. 111.84(1)(a), (c), (d) and (e), Stats.

7/ See, for example, Employment Relations Dept., cited at footnote 5/; The State of Wisconsin, Dec. No. 26959-C (WERC, 12/92); State of Wisconsin, and Oakhill Correctional Institution, Dec. No. 25978-D (WERC, 2/92); and State of Wisconsin, Department of Employment Relations, Dec. No. 23161-C (WERC, 9/87).

administrative economy contentions of the City more weighty now than as a pre-hearing consideration. On balance, the City's post-hearing motion to hold the complaint in abeyance pending the Commission's determination of the unit placement issues is persuasive.

The City's motion to dismiss the allegations of the complaint not questioning its duty to bargain is unpersuasive. The transcript of the evidentiary hearing has not been prepared pending a decision on the motion, and the parties have briefed the allegations of the complaint only to the extent necessary to address this motion. The City's motion to dismiss is, then, premature, seeking a determination on a record which is not yet complete. To fully address the City's motion, I would have to direct the transcript to be prepared and seek the parties' full arguments on the merits of the complaint. This flies in the face of the administrative economy concerns which make the City's motion to hold the complaint in abeyance persuasive.

Dated at Madison, Wisconsin this 24th day of August, 1993.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Richard B. McLaughlin /s/

Richard B. McLaughlin, Examiner