STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

GREATER FOX RIVER VALLEY DISTRICT COUNCIL OF CARPENTERS, Complainant, vs. SCHOOL DISTRICT OF LA CROSSE, Respondent.	Case 58 No. 48972 MP-2708 Decision No. 27834-A

Appearances:

Mr. John J. Brennan, Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., Attorneys at Law, 155 North Rivercenter Drive, P.O. Box 12993, Milwaukee, Wisconsin 53212, appearing on behalf of Greater Fox River Valley District Council of Carpenters.

Mr. Stephen L. Weld, with Mr. William G. Thiel on the brief, Weld, Riley, Prenn & Ricci, S.C., Attorneys at Law, 715 South Barstow Street, P.O. Box 1030, Eau Claire, Wisconsin 54702-1030, appearing on behalf of School District of La Crosse.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The Complainant filed a complaint of prohibited practice with the Wisconsin Employment Relations Commission on March 15, 1993, alleging that the Respondent had committed prohibited practices within the meaning of Secs. 111.70(3)(a)1, 3 and 4, Stats. After attempts to resolve the matter informally proved unsuccessful, the Commission, on October 12, 1993, 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 Sec. 111.70(4)(a) and Sec. 111.07, Stats. Hearing on the matter was held on October 29, 1993, in La Crosse, Wisconsin. A transcript of that hearing was provided to the Commission on November 18, 1993. The parties filed briefs with the Commission by January 14, 1994.

FINDINGS OF FACT

1. The Greater Fox River Valley District Council of Carpenters, referred to below as the Union, is a labor organization which maintains its principal offices at 2845 County Road JJ, Neenah, Wisconsin 54956. Local 1143 is affiliated with the Union, and maintains a branch office at 1920 Ward Avenue, La Crosse, Wisconsin 54601. Brian Gentry is the Business Representative for Local 1143.

2. The School District of La Crosse, referred to below as the District, is a municipal employer which maintains its principal offices at Hogan Administration Center, 807 East Avenue South, La Crosse, Wisconsin 54601.

3. The District, at its January 28, 1993, School Board meeting, approved the creation of the position of Craftsperson. The job description for Craftsperson reads thus:

. . .

POSITION QUALIFICATIONS:

1. High School graduate. Apprenticeship or technical school desirable.

2. Read and write at level that enables employee to communicate effectively.

3. Demonstrate aptitude or competence for assigned responsibilities.

4. Physically and emotionally able to fulfill the job related responsibilities.

5. Able to read and interpret blueprints.

6. Carpentry skills and experience.

7. Cabinetmaker skills and experience.

8. Welding skills and experience.

9. Handyman skills and experience.

10. Valid driver's license.

POSITION RESPONSIBILITIES

1. Repair and weld playground equipment.

2. Layout, assemble and install playground equipment.

3. Small concrete projects.

4. Maintain and repair District shop equipment.

5. Make building repairs.

6. Construct and install shelves and small cabinets.

7. Repair and install door hardware.

8. Repair metal lockers.

9. Install chalkboards/bulletin boards.

10. Repair and weld furniture/furnishings.

11. Emergency repairs and enclosures as required due to vandalism, acts of God, etc.

12. Perform operations and maintenance activities on asbestos containing materials. District will provide training, certification, proper equipment and medical monitoring as required by EPA.

13. Other duties as deemed necessary by the

Supervisor.

Al Mehloff is the District's Buildings and Grounds Supervisor. He recommended the creation of this position after the District accepted the retirement of Joseph Potaracke, who served in a position known as Carpenter. Mehloff recommended the creation of the Craftsperson position because he felt the District needed less wood-working services and more welding, laminate, and mechanical services than it had when the Carpenter position was first created. The District posted the Craftsperson position, and interviewed interested applicants including plumbers, electricians and carpenters.

4. The District hired Potaracke effective December 15, 1980. He retired from District service effective December 31, 1992. His last day of work was November 9, 1992. For roughly forty years preceding Potaracke's retirement, the District had at least one employe in the Carpenter position. At the time of Potaracke's retirement, he was the only employe in the Carpenter position. The District does not have a job description for the position of Carpenter. The Authorization Form noting his hire stated, under the heading "JOB DESCRIPTION," the following:

> District Carpenter to replace Robert Goschke, subject to Mr. Goschke's one year leave of absence.
>
> As per agreement with Local 1143.

This final paragraph reflects that Potaracke's hourly rate was based on the hourly wage rate set in the Union's collective bargaining agreement with the Associated General Contractors of America, Inc., (AGC). From this hourly rate, the District would make a deduction for its fringe benefit package. The fringe benefit package was drawn from the District's collective bargaining agreement with its custodial employes, and included life, health, dental and disability insurance, as well as a pension fund and social security payments. This means of calculating the Carpenter wage rate preceded Potaracke's hire. When Potaracke was first hired, a Union Business Representative met with him and District employes to discuss his wages and benefits. The meeting did not include the District's Personnel Director, and after the meeting, the District set Potaracke's wages and benefits using the calculation noted above. The District's Personnel Director serves as its chief spokesman for collective bargaining. No District Personnel Director has bargained with the Union concerning Potaracke's wages and benefits. From at least 1982 through 1993, Potaracke's wages and benefits were set by the District, using the calculation noted above, after receiving a letter from the Union stating the area rates paid Journeyman Carpenters under the AGC agreement. Letters stating the relevant area rates were sent from Union Business Representatives to the District on June 22, 1982; July 25, 1988; and June 5, 1990. The District would, periodically, adjust Potaracke's wage rate and would send a copy of a notice of such a change to Potaracke and a Union Business Representative. Such notices were issued on the following dates: December 21, 1984; June 9, 1986; August 5, 1988; May 31, 1989; June 11, 1990; May 23, 1991; and May 22, 1992. The December 21, 1984, memo, issued on behalf of the District by Woody Wiedenhoeft, read thus:

. . .

> What we found was that Joe was still underpaid in 1983 by 2.73 cents per hour. In 1984, Joe was overpaid 2.99 cents per hour. If everybody else agrees, I am willing

to call that one "a draw". Also please find enclosed the calculations for Joe's 1985 pay rate through May 31, 1985.

. . .

Gentry issued the June 5, 1990, memo, which reads thus:

As of June 1, 1990 our new contract for Wage & Benefit will become effective for Employee Joseph Potoracke (sic) . . .

	Rate	Vacation	Health	Pension	Apprenticeship
June 1 - 1990	16.05	.65	1.40	1.00	.10
June 1 - 1991	16.59	.65	1.60	1.05	.11
June 1 - 1992	17.13	.65	1.80	1.10	.12

. . .

None of the memos or letters noted above produced or reflected a meeting between Union and District representatives. The Union never asserted a grievance with the District on Potaracke's behalf. The Union and the District have never executed a collective bargaining agreement. When it hired Potaracke, the District offered to deduct Union dues for him. Potaracke declined, and personally paid dues to the Union throughout his tenure with the District.

5. Potaracke issued the following letter to the School Board, dated November 12, 1992:

. . .

I have been very fortunate to be quite healthy for the 12 years I worked as the school carpenter. When I left the school district job I had accumulated very close to 100 days of sick leave. Four or five months ago, I had Mr. C. Murray check with Mr. Wiedenhoeft if I could get some compensation for these days toward my health insurance. Mr. Wiedenhoeft said it was really hard to do because I received some of the custodians benefits and some I did not. You see, I only worked on a promise and a handshake back on Dec. 15, 1980.

I checked a different time with Candace when I became qualified and she said I do not get it. It really hurts if you work to achieve an extra amount of money in your pay check and come to find out that you don't qualify. I even mentioned to Curt Murray months ago that I could take off 2 days a week (over 2 days you need a doctors' (sic) excuse) and there would be no problem. Why didn't I do this? Because I hardly ever got sick or I worked with an ache or pain because I had a job to do and I was the only carpenter. Curt said I could do this because it was in the contract, which, as I stated before, I did not have a contract. Having no contract they still took out over $10,000 a year of my wages for benefits.

> . . . What I am asking of you people on the board is that if something could be done to receive something for some financial return towards my health insurance. I retired at age 62 so I will have to pay the full health insurance price until I'm 65.
>
> I honestly feel that I should get all, part or some of these days towards my health insurance. If you want me to come before you I will.
>
> . . .

The Board responded in a letter dated January 4, 1993, which reads thus:

> The Personnel Committee of the Board of Education discussed your letter . . . dated November 12, 1992, in which you requested payment for your unused sick leave. The Personnel Committee felt that it would be appropriate to provide you with the early retirement pay that a custodian with your longevity and vacation would receive. This amounts to $2070.50 . . .

The Union played no role in the process by which Potaracke secured a sick leave pay out.

6. In a letter to the President of the School Board dated December 8, 1992, Gentry stated the following:

> The Carpenters Local 1143 of La Crosse would like to express our concerns with the attempt to change the Job Description to that of Custodian. This Local has served the La Crosse Area School System for over Two Decades, with Joe Potaracke serving the last twelve years.
>
> The Membership of this Local can handle any task put before them, each Apprentice to reach Journeyman status will experience 6240 hours of on the Job Training, 400 hors of day related Schooling, and 120 of Night related Schooling which includes, Welding, Furniture Construction, Construction Safety, First Aid and C.P.R. Training. We also have continuous upgrading for our Journeymen to keep up with the ever changing Technology.
>
> Therefore, I am requesting your Assistance for allowing your area Carpenters Local to continue to serve The La Crosse Area School System, and if further need be, to express these concerns to the Full Board.

7. The District's represented employes are placed in five bargaining units. The District has bargained with the majority representative of each of these bargaining units, and has ratified collective bargaining agreements covering each unit of employes.

8. By not filling the position of Carpenter and by creating the position of Craftsperson, the District did not commit any act having a reasonable tendency to interfere with the exercise of lawful, concerted activity. By not filling the position of Carpenter and by creating the position of Craftsperson, the District did not act in part based on hostility toward the Union. The District has not voluntarily recognized the Union as the exclusive collective bargaining representative of employe(s) in the position of Carpenter.

CONCLUSIONS OF LAW

1. Potaracke, while a District employe, was a "Municipal employe" within the meaning of Sec. 111.70(1)(i), Stats.

2. The Union is a "Labor organization" within the meaning of Sec. 111.70(1)(h), Stats.

3. The District is a "Municipal employer" within the meaning of Sec. 111.70(1)(j), Stats.

4. By not filling the position of Carpenter and by creating the position of Craftsperson without collectively bargaining with the Union, the District did not commit any violation of Secs. 111.70(3)(a)1, 3 or 4, Stats.

ORDER 1/

1/ 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 orders. Any party in interest who is dissatisfied with the findings or order of a commissioner or examiner may file a written petition with the commission as a body to review 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

The complaint filed by the Union on March 15, 1993, is dismissed.

Dated at Madison, Wisconsin, this 9th day of March, 1994.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Richard B. McLaughlin /s/
Richard B. McLaughlin, Examiner

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reversed or modified by the commissioner or examiner the time for filing petition with the commission 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.

This decision was placed in the mail on the date of issuance (i.e. the date appearing immediately above the Examiner's signature).

SCHOOL DISTRICT OF LA CROSSE

MEMORANDUM ACCOMPANYING
FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

BACKGROUND

The complaint alleges District violations of Secs. 111.70(3)(a)1, 3 and 4, Stats. The parties agreed that unit placement issues are secondary to the resolution of the complaint. A Local affiliated with Service Employees International Union represents District employes, and may have an interest in the unit placement of the Craftsperson position. Representatives of SEIU were served with the complaint, but declined to participate in this matter. This underscores that the issues posed here are threshold to any issue of unit placement. The complaint questions whether the District has improperly withdrawn recognition of the Union as the majority representative of the Carpenter position.

THE PARTIES' POSITIONS

The Union's Brief

After a review of the facts, the Union contends that "(t)he bottom line issue for determination is whether the school district of La Crosse had recognized the Carpenters Union as the bargaining representative for its carpenter position." Both the Commission and the NLRB have held, the Union asserts, that voluntary recognition, once given, "cannot be unilaterally ignored." Recognition can, the Union argues, be informal, and in this case "(t)here is no question but that the union was recognized and was continually consulted regarding the terms and conditions of employment for the school district carpenter over a lengthy period of time." The Union acknowledges that the recognition here was informal, and that negotiations were "unusually smooth." The fact remains, the Union asserts, that there has been "repeated contact between the parties" related to the carpenter position. This fact manifests, according to the Union, "much more than an innocuous statement of recognition." Voluntary recognition, once established, cannot be withdrawn unilaterally "without a lawful reason." Nor can it be shown, the Union contends, that it has waived bargaining rights, since such a waiver can "only be found in clear and unmistakable conduct." Arguing that the record shows the parties "actually met and had bargaining sessions for a period of time," the Union concludes no waiver has been proven. The Union concludes the complaint must be sustained, and the relief requested in the complaint be granted.

The District's Position

After a review of the facts, the District asserts that it did not violate Sec. 111.70(3)(a)3, Stats., by eliminating the position of Carpenter and creating the Craftsperson position. Noting that the four elements of proof to this section are well established, the District argues that there is no persuasive proof on any of the elements. The Union's recourse in this case, according to the District, is a unit clarification petition, not a complaint.

The District denies that it committed any violation of Sec. 111.70(3)(a)4, Stats., since that section requires a Commission-certified election before a refusal to bargain can occur, and there has been no such election. Beyond this, the District argues that it has never recognized the Union as the representative of the Carpenter position; that no bargaining has ever occurred regarding the Carpenter; and that no written collective bargaining agreement exists between the District and the Union. Nor can a labor agreement be implied, based on letters exchanged between the Union and the District, since Sec. 241.02(1)(a), Stats., precludes such a result. That Potaracke testified that some meetings may have occurred early in his employment demonstrates, according to the District, only that "the District utilized the Union's wage rate as its basis for establishing Mr. Potaracke's remuneration for services rendered."

The District's next major line of argument is that it did not commit any violation of Sec. 111.70(3)(a)1, Stats., since "no threats were made nor benefits promised either to the Union or any employee." The record establishes, the District contends, that it "simply eliminated the last remaining position in one classification and replaced it with a position in a newly created classification." The District avers that not only is "the record . . . bereft of any evidence whatsoever of either a threat of a reprisal or promise of benefit," the record shows "no contact whatsoever between the Union and the District . . . (f)or a number of years."

Contending that the Union "appears to be alleging that the District violated (a) statutory obligation by failing to refill the carpenter position and by failing to bargain . . . regarding the creation of the craftsperson position," the District asserts that the "elimination of a position is a decision vested in management." The right is recognized by arbitrators as a matter of contract and the Commission as a permissive subject of bargaining, according to the District. In any event, the District argues that the creation of the "wage scale for the craftsperson was not bargained with the Union" but "adopted by the District." This was, the District concludes, its right.

Noting that it does not take the complaint lightly, the District argues that the record supports a dismissal of the complaint and the award of attorney's fees to deter "frivolous complaints" such as that posed here.

DISCUSSION

To demonstrate an independent violation of Sec. 111.70(3)(a)1, Stats., the Union must establish, by a clear and satisfactory preponderance of the evidence, the existence of conduct having "a reasonable tendency to interfere with the (employe's) right to exercise MERA rights." 2/ It "is not necessary to prove that Respondent intended to interfere with or coerce employes or that there was actual interference." 3/

2/ Beaver Dam Unified School District, Dec. No. 20283-B (WERC, 5/84) at 5.

3/ Ibid.

The record shows no interference with any municipal employe. That the District chose not to fill Potaracke's position after his retirement has, standing alone, no significance. There is no persuasive evidence to establish this act does not stand alone. No District conduct toward Potaracke or the Union can be considered to manifest a threat of reprisal or promise of benefit which might interfere with employe exercise of protected rights. Nor has the Union demonstrated any conduct on the District's part which might have a reasonable tendency to interfere with employe exercise of protected rights. It is apparent that the Union wants the District to fill the Carpenter position, but there is no demonstrated link between the Union's desire and Sec. 111.70(3)(a)1, Stats.

Sec. 111.70(3)(a)3, Stats., makes it a prohibited practice for a municipal employer to "encourage or discourage a membership in any labor organization by discrimination in regard to . . . tenure or other terms or conditions of employment." To prove a violation of this section the Complainants must, by a clear and satisfactory preponderance of the evidence, establish that: (1) a municipal employe was engaged in activity protected by Sec. 111.70(2), Stats., (2) the District was aware of this activity; (3) the District was hostile to the activity, and (4) the District acted, at least in part, based upon its hostility to the employe's exercise of protected activity. 4/

None of these elements of proof are established on this record. The Union points to no exercise of protected activity by any employe which the District was aware of and acted in hostility to. Even if it is assumed that the Union's attempt to protect the AGC area rate is protected activity, there is no evidence of anti-Union hostility on the District's part. The District bargains with employe representatives of five bargaining units, and the Union offers no basis to conclude the District is hostile to Local 1143. The District's conduct toward the Union demonstrates that it does not believe the Union is the majority representative of the Carpenter position. This indicates only that issues under Sec. 111.70(3)(a)4, Stats., are posed, not that anti-union discrimination is at issue. The District has demonstrated that its work requirements have changed over time, and that the woodworking skills possessed by Potaracke are less needed than welding and laminate working skills. This is not to say a journeyman carpenter could not fill the Craftsperson position, or that the position does not warrant the AGC area rate. Such points, however, are a matter for bargaining, and there is no evidence the District is unwilling to bargain with a union who represents the Craftsperson position. This underscores that the complaint poses bargaining issues, not anti-union discrimination issues.

The complaint focuses, then, on Sec. 111.70(3)(a)4, Stats., and on whether the Union is the voluntarily recognized representative of the Carpenter position. The Union persuasively argues that voluntary recognition, once afforded, cannot be withdrawn at the District's sole discretion. An employer cannot, for example, seek an election where it has recognized a majority representative in a bargaining unit unless it can "demonstrate to this agency . . . by objective considerations, that it has reasonable cause to believe that the incumbent organization has lost its majority status since . . . the date of voluntary recognition." 5/

4/ The "in-part" test was applied by the Wisconsin Supreme Court to MERA cases in Muskego-Norway C.S.J.S.D. No. 9 v. WERB, 35 Wis.2d 540 (1967) and is discussed at length in Employment Relations Dept. v. WERC, 122 Wis.2d 132 (1985).

5/ Wauwatosa Board of Education, Dec. No. 8300-A (WERC, 2/68) at 14. See also Village of Deerfield, Dec. No. 26168 (WERC, 9/89).

The issue underlying the Sec. 111.70(3)(a)4, Stats., violation is, however, whether the District has voluntarily recognized the Union as the representative of the Carpenter position. Determination of this issue has a specific statutory background. Sec. 111.70(3)(a)4, Stats., states:

> An employer shall not be deemed to have refused to bargain until an election has been held and the results thereof certified to the employer by the commission.

As noted above, this section does not operate as a license for an employer to unilaterally withdraw voluntary recognition. In recognition of this background, however, the Commission has required proof of the voluntary recognition sufficient to overcome the statutory directive. For example, to address a situation where an employer recognized one of two unions competing for the same employes, the Commission stated:

> However, any recognition, valid or otherwise, granted Teamsters by the Mayor and/or the City Council . . . did not constitute such recognition which this agency will recognize as barring a question concerning representa-tion for any of the employes employed in any of the alleged units. 6/

Similarly, the Commission thus addressed an allegation of voluntary recognition arising before a Commission certification:

> While it is true that where voluntary recognition has been established a question of representation no longer exists and therefore an employer cannot insist on an election as a condition precedent to bargaining, we nonetheless conclude that the standard of proof of the extension of voluntary recognition necessary to overcome the quoted portion above has not been met herein. 7/

6/ City of Appleton, Dec. No. 8430-A, 8431-A (WERC, 5/68) at 10-11.

7/ New Richmond Joint School District No. 1, Dec. No. 15172-B (WERC, 5/78) at 4.

In sum, the Union must establish voluntary recognition with proof sufficient to overcome the admonition of Sec. 111.70(3)(a)4, Stats., that a refusal to bargain cannot be found where a question concerning representation exists.

A question concerning representation does exist on these facts. The Union notes that the letter confirming Potaracke's hire alludes to an agreement with Local 1143; that the parties appear to have met at one point to discuss Potaracke's wages; that the District offered, at one point, to deduct dues from his check; and that the parties have corresponded regarding his wage rate. These facts do point toward voluntary recognition, but ultimately show only that the District determined to pay its Carpenter at the AGC area rate. The Union neither asked for, nor received, a collective bargaining agreement. The Union never sought to address any condition of Potaracke's employment other than the AGC rate, and never undertook any effort on his behalf other than to supply the District with the AGC rate.

The Union acted less as a bargaining agent than as the source of information concerning the AGC rate for the District, which is not an AGC member. The June 5, 1990, letter from the Union to the District underscores this. The letter breaks out the wage rate from a series of benefits. The District, in response, added three of the four listed benefits to the hourly rate before deducting its own benefit package. This was done with no apparent input from the Union, other than to supply the underlying data.

This point is decisively posed by Potaracke's request for a sick leave pay out. Neither Potaracke nor the District involved the Union in any way. Potaracke's November 12, 1992, letter states he "only worked on a promise and a handshake back on Dec. 15, 1980." More significantly, if the Union was Potaracke's representative at this time, his request for the pay out and the District's action to grant it constitute individual bargaining. The Union does not, however, seek to undo this individually done deal and bargain the point. Rather, the Union seeks to have the deal acknowledged, but have the Carpenter position continued, with the Union as its representative. This conduct underscores the weakness of its position. It has acted only as the supplier of wage rate information to the District. This is not sufficient to make it the voluntarily recognized representative of the Carpenter position.

In sum, the Union seeks to prevent the elimination of the Carpenter position and the creation of the Craftsperson position by claiming to be the voluntarily recognized representative of the Carpenter position. The record will not, however, support its claim. If the Union wishes to preserve the Carpenter rate, it must claim to represent occupants of the Craftsperson position. This claim raises a question concerning representation, resolvable by a unit clarification or request for election, but not resolvable through the complaint process.

The District has asked for attorney's fees. To grant this request requires labelling each of the Union's allegations frivolous and not debatable. 8/ If the Union's allegation of an independent violation of Sec. 111.70(3)(a)1, Stats., and a violation of Sec. 111.70(3)(a)3, Stats., stood alone, the District's claim would have considerable persuasive force. These allegations do not, however, stand alone. The longstanding exchange of wage rate information cannot be dismissed as a "frivolous" claim to voluntary recognition. The Sec. 111.70(3)(a)4, Stats., allegation was debatable, and thus the District's request cannot be granted.

8/ Wisconsin Dells School District, Dec. No. 25997-C (WERC, 8/90).

Dated at Madison, Wisconsin, this 9th day of March, 1994.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Richard B. McLaughlin /s/
Richard B. McLaughlin, Examiner