STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 150, Complainant, vs. VILLAGE OF STODDARD, Respondent.	Case 3 No. 49113 MP-2720 Decision No. 27970-B

Appearances:

Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., by Ms. Marianne Goldstein Robbins, 1555 North Rivercenter Drive, Suite 202, Milwaukee, Wisconsin 53212, on behalf of the Complainant.

Klos, Flynn and Papenfuss, Attorneys at Law, by Mr. Jerome Klos, 318 Main Street, P.O. Box 487, LaCrosse, Wisconsin 54602-0487, on behalf of the Respondent.

ORDER AFFIRMING IN PART AND MODIFYING IN PART EXAMINER'S FINDINGS OF FACT, AND REVERSING EXAMINER'S CONCLUSION OF LAW AND ORDER

On June 30, 1994, Examiner Lionel L. Crowley issued Findings of Fact, Conclusion of Law and Order in the above matter wherein he concluded that the Village of Stoddard had committed prohibited practices within the meaning of Secs. 111.70(3)(a)4 and 1, Stats., by failing to bargain with the Service Employees International Union, Local 150, over installation of a time clock and required employe use of same. He therefore ordered the Village to take certain remedial action.

On July 20, 1994, the Village timely filed a petition with the Wisconsin Employment Relations Commission seeking review of the Examiner's decision pursuant to Secs. 111.70(4)(a) and 111.07(5), Stats. The parties thereafter filed written argument in support of and in opposition to the petition, the last which was received on August 25, 1994.

Having considered the parties' positions and the record, the Commission makes and issues the following

ORDER 1/

A. Examiner's Findings of Fact 1 - 5 are affirmed.

B. Examiner's Finding of Fact 6 is modified through the addition of the underlined language.

> 6. The time clock was installed and beginning on March 18, 1993, employes were required to use it. The employes, prior to the installation of the time clock, filled out a written timesheet with the hours worked each day and the work hours broken down for Street, Shop, Snow

Removal, Water and Sewer. Prior to the installation of the time clock, employes were required to begin and end their work day at specific times but were not required to record the actual time they began and ended their work day.

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 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

(footnote 1 continued on page 3)

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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, 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.

C. Examiner's Finding of Fact 7 is set aside and the following Finding is made:

7. The decision of the Village to install a time clock and require employes to use same primarily relates to the management and direction of the Village workforce.

D. Examiner's Conclusion of Law is reversed and the following Conclusion of Law is made:

By its refusal to bargain with Local 150 over the installation of a time clock and the employes' required use of same, the Village of Stoddard did not violate its duty to bargain and therefore did not commit prohibited practices within the meaning of Secs. 111.70(3)(a)4 or 1, Stats.

E. Examiner's Order is reversed and the following Order is made:

The complaint is dismissed in its entirety.

Given under our hands and seal at the City of Madison, Wisconsin this 15th day of November, 1994.

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

VILLAGE OF STODDARD

MEMORANDUM ACCOMPANYING ORDER AFFIRMING
IN PART AND MODIFYING IN PART
EXAMINER'S FINDINGS OF FACT, AND REVERSING
EXAMINER'S CONCLUSION OF LAW AND ORDER

THE PLEADINGS

In its complaint, Local 150 asserted:

> 4. Since on or about March 18, 1993, the Employer unilaterally changed the terms and conditions of employment by requiring employees to punch in and out of work using a time clock which procedure had never previously been utilized.

Local 150 asserted that this action by the Village of Stoddard violated Secs. 111.70(3)(a)4 and 1, Stats.

At hearing, the Village answered the complaint by denying that it had committed the prohibited practices alleged.

THE EXAMINER'S DECISION

The Examiner concluded that the installation and use of the time clock was a mandatory subject of bargaining because the Village was seeking to verify the starting and ending times of the employes' work day and thereby modify past flexibility as to hours of work. He therefore concluded that the Village's refusal to bargain over the installation and use of the time clock violated the Village's duty to bargain and thus constituted prohibited practices within the meaning of Secs. 111.70(3)(a)4 and derivatively 1, Stats. He ordered the Village to cease requiring use of the time clock by bargaining unit employes.

POSITIONS OF THE PARTIES

The Village

The Village asks that the Commission reverse the Examiner's decision and dismiss the complaint. It argues that the Examiner's decision is based on an assumption that employes had flexibility as to their work schedule. The Village contends that the Examiner's finding in this regard is not supported by the record. The Village asserts that before and after the installation and use of the time clock, employes were required to begin and end their shifts at specific times. Thus, the Village argues that the installation and use of the time clock had no impact on employe wages, hours and conditions of employment, but rather involves the management right of supervision and the enforcement of pre-existing daily work schedules. The Village therefore argues that its action primarily relates to the management and direction of the workforce and as such is not a matter as to which the Village was obligated to bargain with

Local 150.

Local 150

Local 150 urges the Commission to affirm the Examiner's decision. Local 150 asserts that the decision to install and require use of a time clock is a mandatory subject of bargaining because the change altered the terms and conditions of employment under which employes could be disciplined. Local 150 contends the installation of the time clock has more implications than merely changing a previously handwritten manner of recording time worked. Use of a time clock alters the standard of accountability for employes and imposes a future basis for potential discipline. Therefore, Local 150 contends that the Examiner properly concluded that the change was a mandatory subject of bargaining.

Local 150 concurs with the Examiner's use of the decision in Village of Sturtevant, Dec. No. 19543-A (Schiavoni, 2/83), aff'd by operation of law Dec. No. 19543-B (WERC, 3/83). Local 150 also cites the case of Holly Manor Nursing Home, 235 NLRB 426 (1978) as being supportive of the Examiner's decision.

Given all the foregoing, the Local 150 asks the Commission to affirm the Examiner's decision.

DISCUSSION

When bargaining a first contract (as well as during any subsequent contract hiatuses), the employer's duty to bargain requires that it maintain the status quo as to all matters which are primarily related to wages, hours and conditions of employment (i.e., mandatory subjects of bargaining). School District of Wisconsin Rapids, Dec. No. 19804-C (WERC, 3/85). The employer's status quo obligations do not extend to matters which are primarily related to the formulation or management of public policy or to the management and direction of the employer's operation (i.e., permissive subjects of bargaining). West Bend Education Association v. WERC, 121 Wis.2d 1(1984)

While the parties were bargaining their first contract, the Village unilaterally installed a time clock and required employes represented by Local 150 to punch in and out, respectively, at the start and end of their scheduled work shift. Both parties agree that if the installation and use of the time clock is primarily related to wages, hours and conditions of employment and thus is a mandatory subject of bargaining, then the Village's unilateral conduct violated its duty to bargain with Local 150. The parties disagree on whether the installation and required use of the time clock is a mandatory subject of bargaining and we turn to a consideration of that question.

The record establishes that prior to the use of time clock, employes were required to report the number of hours worked each day but not the time they started or ended their work day. From this evidence, the Examiner apparently inferred that employes had some "flexibility" in terms of when they started or ended their work day. We do not find the record as a whole supports the Examiner's finding of employe "flexibility." We reach this conclusion because prior to the use of the time clock, the record establishes that employes had scheduled times when their shifts started and ended and that it was the Village's expectation that employes would adhere to the work schedule. The addition of a time clock in part reflects a Village concern that employes were not honoring the Village's expectation as to when they started and ended scheduled shifts. While the Village had not previously monitored employe compliance with the scheduled work day, we do not find the absence of such monitoring created an employer/employe understanding that the work day was flexible as to when it began and ended.

Thus, we are satisfied the use of the time clock does not represent a change in employe "hours" but rather an attempt to enforce existing employe hours.

Given the foregoing, this case is factually distinguishable from the Village of Sturtevant case relied on by the Examiner and cited by the Complainant. 2/ In Village of Sturtevant, a time clock represented a departure of an employer/employe understanding that employe work schedules were flexible and informal. Thus, while the Examiner in Sturtevant acknowledged the legitimacy of the employer interest in:

> . . . possessing more accurate records as to who is actually working at any given time in order to avoid and/or determine potential legal liability for actions involving employes and to insure accurate compensation for actual hours worked by employes . . .

she concluded the change in employe hours and potentially employe compensation predominated over the impact on these legitimate employer interests. Therefore, in Village of Sturtevant, the decision to impose a time clock on employes was found to be a mandatory subject of bargaining.

Here, as previously discussed, we have concluded there was no change in "hours" generated by the time clock. However, Local 150 argues the required use of the time clock is also a mandatory subject of bargaining because it increases employe accountability for hours worked and thus impacts on "conditions of employment." It can well be argued that the disciplinary concern raised by Local 150 is more appropriately addressed in any bargaining the

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2/ The Complainant Local 150 also cites Holly Manor Nursing Home but that case primarily involved discrimination allegations and thus is not of any particular assistance in a duty to bargain analysis.

parties may engage in over the impact of the implementation decision. However, assuming arguendo that this impact on "conditions of employment" is appropriately part of a duty to bargain mandatory/permissive analysis, we find this impact is outweighed by the Village's management interests in knowing when employes are actually working to avoid and/or determine potential legal consequences/liability for actions of employes (as was present in Sturtevant) and knowing whether employes are starting and ending work as scheduled. Thus, the use of the time clock is a permissive subject of bargaining. Therefore, the Village was not obligated to bargain over the implementation of the time clock, and we have dismissed the complaint. 3/

Dated at Madison, Wisconsin this 15th day of November, 1994.

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

3/ The complaint does not allege a refusal to bargain as to the impact of the Village's decision to require use of the time clock. Thus, no issues as to bargaining over the impact of the Village's permissive decision are before us.