STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

RACINE COUNTY DEPUTY SHERIFFS' ASSOCIATION, Complainant, vs. RACINE COUNTY, Respondent.	Case XII No. 15347 MP-123 Decision No. 10917-A

Appearances:
Mr. Jay Schwartz, Attorney at Law, appearing on behalf of the Complainant.
Mr. Dennis J. Flynn, Corporation Counsel, appearing on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Racine County Deputy Sheriffs' Association having on February 21, 1972 filed a complaint with the Wisconsin Employment Relations Commission wherein it alleged that Racine County had committed prohibited practices within the meaning of the Wisconsin Municipal Employment Relations Act; and the Commission having appointed Marvin L. Schurke, a member of the Commission's staff, to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and Order as provided in Section 111.07(5) of the Wisconsin Employment Peace Act; and the parties having waived hearing in the matter and having stipulated to submit the matter for decision on the basis of the pleadings and briefs; and the Examiner having considered the stipulations and arguments and being fully advised in the premises makes and files the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. That Racine County Deputy Sheriffs' Association, hereinafter referred to as the Complainant, is a labor organization having its principal offices at 3142 92nd Street, Sturtevant, Wisconsin.

2. That Racine County, hereinafter referred to as the Respondent, is a municipal employer having its principal offices at the Racine County Courthouse, Racine, Wisconsin.

3. That the Respondent presently has in effect the Racine County Code of Ordinances which states, inter alia:

"4.21 RETROACTIVE SALARY INCREASE PROHIBITED

The Racine County Board of Supervisors shall not grant or approve any retroactive salary and/or

compensation increases to any public officer, agent, employee, or group of employees, after the services shall have been rendered."

4. That at all times pertinent hereto the Respondent has recognized the Complainant as the exclusive collective bargaining representative of uniformed and plain clothes deputies employed in the Racine County Sheriffs' Department; that the Complainant and Respondent were parties to a collective bargaining agreement which contained an expiration date of December 31, 1971; that prior to December 31, 1971 the Complainant and Respondent entered into negotiations for a new collective bargaining agreement to succeed the aforesaid collective bargaining agreement; and that no new agreement was reached between the Complainant and Respondent prior to December 31, 1971.

5. That subsequent to December 31, 1971, the Complainant and Respondent continued to negotiate for a new collective bargaining agreement; that in such negotiations the Complainant asserted a demand that any wage increase agreed upon by the parties for 1972 be made effective retroactive to December 31, 1971; and that the Respondent, by and through its Personnel Committee, took the position that it would bargain about wages, hours and conditions of employment, but that it would not negotiate respecting retroactive payment of wages from the period after the termination of the 1971 labor contract on December 31, 1971 and until the new contract would hopefully become effective.

Upon the basis of the above and foregoing Findings of Fact, the Examiner makes the following

CONCLUSIONS OF LAW

1. That the Racine County Deputy Sheriffs' Association is the representative of a majority of the employes in an appropriate collective bargaining unit. 1/

2. That the question of retroactive payment of negotiated wage increases directly affects the wages of municipal employes and is a subject for bargaining within the meaning of Section 111.70(1)(d), Wisconsin Statutes.

3. That Racine County, by its refusal to negotiate with the Racine County Deputy Sheriffs' Association concerning the payment of wage increases for 1972 retroactive to the termination date of the 1971 collective bargaining agreement, has refused to bargain collectively with the representative of a majority of its employes in an appropriate collective bargaining unit and has committed and is committing prohibited practices within the meaning of Sections 111.70(3)(a)1 and 4, Wisconsin Statutes.

Upon the basis of the above and foregoing Findings of Fact and Conclusions of Law, the Examiner makes the following

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1/ No issue was raised in this proceeding concerning the status of the Complainant as the majority representative or concerning the appropriateness of the unit; and those issues were previously determined in Racine County (8810) 12/68.

ORDER

IT IS ORDERED that the Respondent, Racine County, its officers and agents, shall immediately:

1. Cease and desist from refusing to bargain collectively with the Racine County Deputy Sheriffs' Association concerning the payment of wage increases retroactively to the termination date of the 1971 collective bargaining agreement between Racine County and the Racine County Deputy Sheriffs' Association.

2. Take the following affirmative action which will effectuate the policies of the Municipal Employment Relations Act:

   a. Upon request, bargain collectively with the Racine County Deputy Sheriffs' Association as the exclusive representative of all employes in the aforesaid appropriate unit, with respect to the payment of wage increases for 1972 retroactive to the termination date of the 1971 collective bargaining agreement between Racine County and the Racine County Deputy Sheriffs' Association.

   b. Notify the Wisconsin Employment Relations Commission in writing within twenty (20) days from the date of this Order as to what steps have been taken to comply herewith.

Dated at Madison, Wisconsin, this 22nd day of June, 1972.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Marvin L. Schurke
Marvin L. Schurke, Examiner

RACINE COUNTY
Case XII Decision No. 10917-A

MEMORANDUM ACCOMPANYING
FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

In its complaint filed on February 21, 1972, the Complainant alleged that the Respondent had adopted a resolution against the payment of wage increases retroactively and alleged bargaining table conduct during which representatives of the Respondent took the position that they would not recommend retroactivity because of such resolution. On April 5, 1972 the Respondent advised the Examiner that it admitted the existence of the ordinance in question and admitted that it had refused to negotiate on the subject of retroactivity, but claimed that it had no duty to bargain concerning retroactivity. Both parties stipulated at that time to waive hearing in the matter and to submit arguments by written briefs. The Examiner established April 19, 1972 as the deadline for filing briefs, and the Respondent filed a brief in accordance with such deadline. The Complainant did not file a brief and did not reply to the brief filed by the Respondent.

PERTINENT STATUTES:

"111.70 MUNICIPAL EMPLOYMENT

(1) Definitions. As used in this subchapter:

. . .

(d) 'Collective bargaining' means the performance of the mutual obligation of a municipal employer, through its officers and agents, and the representatives of its employes, to meet and confer at reasonable times, in good faith, with respect to wages, hours and conditions of employment with the intention of reaching an agreement, or to resolve questions arising under such an agreement. The duty to bargain, however, does not compel either party to agree to a proposal or require the making of a concession. Collective bargaining includes the reduction of any agreement reached to a written and signed document. The employer shall not be required to bargain on subjects reserved to management and direction of the governmental unit except insofar as the manner of exercise of such functions affects the wages, hours and conditions of employment of the employes. In creating this subchapter the legislature recognizes that the public employer must exercise its powers and responsibilities to act for the government and good order of the municipality, its commercial benefit and the health, safety and welfare of the public to assure orderly operations and functions within its jurisdiction, subject to those rights secured to public employes by the constitutions of this state and of the United States and by this subchapter.

. . .

(3) PROHIBITED PRACTICES AND THEIR PREVENTION.

(a) It is a prohibited practice for a municipal employer individually or in concert with others:

1. To interfere with, restrain or coerce municipal employes in the exercise of their rights guaranteed in sub. (2).

. . .

4. To refuse to bargain collectively with a representative of a majority of its employes in an appropriate collective bargaining unit. Such refusal shall include action by the employer to issue or seek to obtain contracts, including those provided for by statute, with individuals in the collective bargaining unit while collective bargaining, mediation or fact-finding concerning the terms and conditions of a new collective bargaining agreement is in progress, unless such individual contracts contain express language providing that the contract is subject to amendment by a subsequent collective bargaining agreement. Where the employer has a good faith doubt as to whether a labor organization claiming the support of a majority of its employes in an appropriate bargaining unit does in fact have that support, it may file with the commission a petition requesting an election to that claim. 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. The violation shall include, though not be limited thereby, to the refusal to execute a collective bargaining agreement previously agreed upon. The term of any collective bargaining agreement shall not exceed 3 years.

. . .

(4) POWERS OF THE COMMISSION

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(L) Strikes Prohibited. Nothing contained in this subchapter shall constitute a grant of the right to strike by any county or municipal employe and such strikes are hereby expressly prohibited.

. . .

111.70 (7) PENALTY FOR STRIKER. Whoever violates sub. (4) (L) after an injunction against such a strike has been issued shall be fined $10. After the injunction has been issued, any employe who is absent from work because of purported illness shall be presumed to be on strike unless the illness is verified by a written report from a physician to the employer. Each day of continued violation constitutes

a separate offense. The court shall order that any fine imposed under this subsection be paid by means of a salary deduction at a rate to be determined by the court.

. . ."

DISCUSSION:

The Complainant has chosen to stand on the allegations of its complaint, and it is apparent that the Complainant contends that the Respondent's reliance on the anti-retroactivity ordinance and its consistent refusal to negotiate with the Union concerning retroactive payment of wages, constituted a refusal to bargain within the meaning of Section 111.70(3)(a)4.

The Respondent offers two lines of argument in defense of its position. The Respondent first argues that after the termination of a labor contract, the relationship between the employer and employes is terminable at will and that services performed by an employe following the termination of a labor contract are, by law, in accord with the previous labor contract. The cases cited in this regard represent a body of law dealing with individual employment contracts rather than collective bargaining agreements. Such contracts ordinarily assure the employe continued employment for a specified period of time at a specificed salary or wage rate. The rule established in those cases is, as cited by the Respondent, that if the employe chooses to work beyond the expiration date contained in the contract, and no new contract is negotiated, an extension of the previous contract is implied, so that payment by the Employer of the salary rate and other compensation specified in the old contract constitutes full performance of his obligations during an interim period prior to the effective date of a new contract. The present dispute concerns a collective bargaining agreement and must be distinguished from the situations involved in the cases cited. While collective bargaining agreements may bind the labor organization and the Employer to a specified set of wage rates and conditions of employment during the term of such agreement, the employment of any individual in the collective bargaining unit covered by such an agreement generally continues to be terminable at the will of the individual. Seniority provisions and other employment security provisions of a collective bargaining agreement may place limits on the ability of the Employer to terminate any individual employe "at will", but such agreements generally anticipate some labor turnover and do not attempt to guarantee the continued employment of each individual in the bargaining unit. No-strike and no-lockout provisions in a collective bargaining agreement do not compare fully to the term of employment or term of contract provisions of an individual employment contract. Such collective bargaining agreement provisions are directed at work stoppages resulting from the concerted activities of a group of employes or employer action against a group of employes during the term of a collective bargaining agreement.

Contrary to the general rule cited regarding individual employment contracts, an extension of a collective bargaining agreement is not necessarily implied in the absence of affirmative action by the parties. In a recent case in the private sector, 2/ the

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2/ Pierce Manufacturing, Inc. (9549-A) 2/71 [H.E. Dec.] aff'd W.E.R.C. (9549-C) 8/71.

Commission affirmed the finding of its Examiner that a collective bargaining agreement expired according to its terms and that no extension agreement had been negotiated by the parties or could be implied from their conduct at or away from the bargaining table. There is nothing in the present record which shows that the Complainant and Respondent entered into an extension agreement. The Pierce case and the cases cited therein establish the principle that collective bargaining agreements do expire and that hiatus periods do occur during which no contract is implied.

Adoption of the rule proposed by the Respondent would produce a result which is clearly counter-productive to the purposes of the Municipal Employment Relations Act. Section 111.70(4)(L), Wisconsin Statutes, prohibits strikes by municipal employes and Section 111.70(7) assesses penalties against municipal employes who engage in strikes. If extension of the "old" agreement were to be implied in every case where municipal employes continued to work after the expiration of the "old" contract while attempting to bargain collectively for a "new" contract, municipal employes would be placed in a position where, should they fail to reach agreement through their collective bargaining prior to the expiration of their old agreement, they would be forced to choose between an illegal strike or continued employment at a sacrifice of any possibility of obtaining increased wages or benefits for the period of the continued employment. Certainly, the statutory policy favoring the peaceful settlement of labor disputes in municipal employment would be better served by leaving the question of retroactivity to the parties for settlement at the bargaining table. The fact that retroactivity is bargainable would not deprive either party of pressure or a hard bargaining stance involving retroactivity, but would promote the use of such leverage at the bargaining table rather than on the picket line.

The second line of argument advanced by the Respondent starts from the premise that that an implied contract existed when the employes continued to work beyond December 31, 1971. The Respondent acknowledges in its brief that retroactive payment of wage increases has often been negotiated by parties to labor disputes, but urges that an employer has no obligation under law to discuss the subject of retroactive wages with employes, and suggests that comity, rather than law, would move employers to negotiate concerning retroactivity.

Looking first to the underlying premise for the Respondent's argument, the Examiner continues to be persuaded that the parties did not agree to extend all of the terms and conditions of the old contract. On the contrary, it is clear that the Complainant asserted a demand for retroactivity and continues to assert that demand. The law applied to collective bargaining agreements is not identical to the law applied to individual employment contracts. 3/ If the parties had specifically agreed to extend all of the terms and conditions of the 1971 contract, including the wage rates specified

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3/ In its order affirming its Examiner in Pierce, supra, the Commission stated that reliance on the Restatement of Contracts is particularly hazardous in dealing with labor relations. The same hazards would seem to attach to reliance on Corpus Juris Secundum or on the conventional contract cases from which CJS and the Restatement are derived.

therein, into 1972, the Respondent would have a contract claim of its own to enforce against the Complainant's demands. The Respondent has not shown such a comprehensive extension to exist, and therefore has no effective contractual defense to further bargaining on the subject of retroactivity.

The Respondent claims that its anti-retroactivity ordinance was intended to put its employes on notice that the Respondent would not pay retroactive wage increases, and that it must be assumed that the employes had knowledge of the ordinance, so that when they decided to work beyond the termination of their 1971 labor contract an implied extension of the old contract came into existence. This derivation of an implied contract particularly ignores the "collective" aspect of collective bargaining and asks the Examiner to imply a contract for the labor organization based on knowledge and actions of individuals. The ordinance might be interpreted merely as a statement predicting the initial bargaining table position of the Respondent, but the enactment of such an ordinance by a municipal governing body cannot relieve the municipal employer of the duty to bargain imposed by state statute. Continued reliance on the ordinance as a basis for refusal to meet and confer at reasonable times in a good faith effort to reach agreement on the retroactivity issue opens the Municipal Employer to liability for violation of the statute.

The Respondent cites Article IV, Section 26 of the Wisconsin Constitution, and comparison of that constitutional provision with Section 4.21 of the Racine County Code of Ordinances indicates that the former may have served as a pattern for the latter. The Respondent recognizes that the Constitutional provision is not directly applicable to it, and any attempt to interpret the Constitution in this proceeding would clearly be dicta. The Corpus Juris Secundum discussion and the cases cited on this point indicate at least some reliance on the fact that contracts were in existence covering the period for which retroactivity was sought, and do not appear to contemplate collective bargaining situations. Lacking a sound premise, the Respondent's argument in this regard is not persuasive.

The Respondent's brief indicates that the parties have negotiated for a wage increase in terms of a specified amount of money per month. The period over which a negotiated increase in hourly, weekly or monthly wages is to be paid directly affects the total amount of wage increase to be received by the employes during the term of the collective bargaining agreement. As such, bargaining for retroactivity, i.e. the negotiation of the period for which the wage increase will be paid, has a direct and intimate effect on the wages of the employes in the collective bargaining unit represented by the Complainant. The Commission has established a broad definition of the scope of collective bargaining in municipal employment:

> "It is impossible to completely isolate matter affecting salary, hours and working conditions from the duties and responsibilities of the School Board in administering an educational program. We conclude that where any phase or portion of the legislative responsibilities of the School Board have a direct and intimate effect upon salaires, hours and working conditions of its

employes, then those matters are subject to collective bargaining within the meaning of Section 111.70 . . ." 4/

In the Madison case the labor organization claimed that the school calendar came within the scope of bargaining on wages, hours and conditions of employment because the selection of days worked affected the working conditions of the employes, and the Commission sustained that argument. The instant case is much more clear, as the refusal to bargain here directly affects the wages of the employes and the amount of wage increase to be received by employes in the collective bargaining unit during the term of their 1972 collective bargaining agreement.

Dated at Madison, Wisconsin, this 22nd day of June, 1972.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Marvin L. Schurke
Marvin L. Schurke, Examiner

4/ Jt. School Dist. #8, City of Madison, et al (7768) 10/66, Aff'd 37 Wis. 2d 483 (1967); City of Wauwatosa (10670-A) 12/71.