STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

CITY OF STEVENS POINT, Complainant, vs. STEVENS POINT FIREFIGHTERS ASSOCIATION, LOCAL 484, IAFF, AFL-CIO, Respondent.	Case XI No. 17833 MP-349 Decision No. 12639-A
STEVENS POINT FIREFIGHTERS ASSOCIATION, LOCAL 484, IAFF, AFL-CIO, Complainant, vs. CITY OF STEVENS POINT, Respondent.	Case XII No. 17854 MP-350 Decision No. 12652-B

Appearances:
Mulcahy & Wherry, S.C., Attorneys at Law, by Mr. John F. Maloney, appearing on behalf of the City.
Crooks, Low & Earl, Attorneys at Law, by Mr. James E. Low, appearing on behalf of the Union.

FINDINGS OF FACT CONCLUSIONS OF LAW AND ORDER

City of Stevens Point, Wisconsin, having filed a complaint of prohibited practices with the Wisconsin Employment Relations Commission on April 11, 1974, alleging that Stevens Point Firefighters Association Local No. 484, IAFF, AFL-CIO, had committed certain prohibited practices within the meaning of Section 111.70 of the Municipal Employment Relations Act; and the Commission having appointed George R. Fleischli, a member of its staff, to act as Examiner and issue Findings of Fact, Conclusions of Law and Orders as provided in Section 111.07(5) of the Wisconsin Statutes; and subsequently thereto Stevens Point Firefighters Association Local No. 484, IAFF, AFL-CIO having filed with the Examiner an Answer and "counterclaim" or complaint of prohibited practices wherein it alleged that the City of Stevens Point, Wisconsin, had committed certain prohibited practices within the meaning of Section 111.70 of the Municipal Employment Relations Act; and the Commission having appointed George R. Fleischli Examiner to make and issue Findings of Fact, Conclusions of Law and Orders as provided in Section 111.07(5) of the Wisconsin Statutes on said "counterclaim" or complaint, and having consolidated both complaints for hearing before said Examiner; and hearing having been held at Stevens Point, Wisconsin on May 9, 1974, before the Examiner; and the Examiner having considered the evidence 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 the City of Stevens Point, Wisconsin, hereinafter referred to as the City, is a municipal employer within the meaning of Section 111.70(1)(a) of the Municipal Employment Relations Act, having offices at City Hall in Stevens Point, Wisconsin.

2. That Stevens Point Firefighters Association Local No. 484, IAFF, AFL-CIO, hereinafter referred to as the Union, is a labor organization within the meaning of Section 111.70(1)(j) of the Municipal Employment Relations Act having offices at Stevens Point, Wisconsin, and is the voluntarily recognized bargaining representative of all firefighting personnel employed by the City of Stevens Point in its Fire Department including Captains, Lieutenants, mechanics, motor pump operators, and firefighters for purposes of collective bargaining on questions of wages, hours, and conditions of employment.

3. That prior to January 1, 1974, the City and Union were parties to a collective bargaining agreement establishing wages, hours and conditions of employment for said firefighting personnel which agreement expired by its own terms on December 31, 1973; that sometime during the summer of 1973, the Union submitted proposals to the City for changes in said collective bargaining agreement to become effective January 1, 1974; that sometime prior to the first meeting with the representatives of the Union for the purpose of negotiations, the City submitted proposals to the Union for the changes in said collective bargaining agreement which dealt primarily with a number of the "noneconomic" or "language" aspects of the agreement.

4. That during the period beginning on October 5, 1973, and ending on December 18, 1973, Michael E. Van de Kerckhove, the City's labor negotiator, and the other two members of the City's negotiating team, Vic Soik, Fire Chief, and Ray Bartkowiak, Assistant Fire Chief, met on seven occasions with the Union's attorney, James E. Low, and the other three members of the Union's negotiating team, Arthur Ceplina, Chairman, Ernest Schultz, and Dale Tuszke, for the purpose of discussing the changes in the collective bargaining agreement which had been proposed by the Union and the City; that during these negotiation meetings Van de Kerckhove and Low acted as spokesmen for their respective bargaining teams but other members of the bargaining teams could and did participate in the discussion; that at the beginning of the first negotiation meeting on October 5, 1973, the parties discussed the "ground rules" for negotiations including a procedure for entering into "tentative agreements" and the two negotiating teams agreed that if they reached a mutually acceptable version of a particular proposal in neogiations, they would "tentatively agree" to the resolution of the proposal and move on to another proposal; that it was expressly stated and understood by both parties that all such agreements were "tentative" in the sense that they were contingent on agreement being subsequently reached on all the issues in the negotiations and subject to the further understanding that the overall agreement on all the issues in the negotiations would be "tentative" in that it had to be ratified by the Union's membership and adopted by the City's Common Council; that on more than one occasion during this discussion and during a number of subsequent discussions of the procedure for entering into "tentative agreements" which occurred in the negotiations herein and in the negotiatio for a collective bargaining agreement covering the City's Police Department [illegible] Low made

that at the October 18, 1973 meeting, the parties reached "tentative agreement" on a new preamble (Exhibit F) to replace the existing preamble contained in the 1973 collective bargaining agreement and Van de Kerckhove and Low initialed said "tentative agreement" at 8:00 p.m., that on or before November 27, 1973, the parties reached "tentative agreement" on a new Article IX - FUNERAL LEAVE (Exhibit A) to replace Article IX - FUNERAL LEAVE contained in the 1973 collective bargaining agreement, a new Article III - PROBATION (Exhibit B) to replace Article III - PROBATIONARY PERIOD contained in the 1973 collective bargaining agreement, a new Article ( ) - SAVINGS CLAUSE (Exhibit C), a new Article ( ) - GRIEVANCE PROCEDURE (Exhibit D) and the introductory sentence of a new Article ( ) - MANAGEMENT RIGHTS (Exhibit E) and Van de Kerckhove and Low initialed said "tentative agreements" at 8:40 p.m. on that date.

6. That subsequent to November 27, 1973, probably at the next negotiation meeting which occurred on December 6, 1973, Low advised Van de Kerckhove that he would no longer be willing to initial any further "tentative agreements" reached but that all "tentative agreements" reached would be included in any collective bargaining agreement if agreement was reached on all issues in the negotiations; that sometime during the negotiation meetings which occurred on December 6, 11 and 18, 1973, the parties reached "tentative agreements" on the balance of a new Article ( ) - MANAGEMENT RIGHTS (Exhibit G), a new Article XVIII - ENTIRE MEMORANDUM OF AGREEMENT (Exhibit H) to replace Article XVIII - CONFIRMATION OF AGREEMENT contained in the 1973 collective bargaining agreement, a new Article ( ) - UNION ACTIVITY (Exhibit I), a new Article XIII - SICK LEAVE (Exhibit J) to replace Article XIII - SICK LEAVE contained in the 1973 collective bargaining agreement, a new Article XV - CALL-IN AND OVERTIME PAY (Exhibit K) to replace Article XV - OVERTIME contained in the 1973 collective bargaining agreement, a new Article VIII - VACATIONS (Exhibit L) to replace Article VIII - VACATIONS contained in the 1973 collective bargaining agreement, and a new Article VII - HOLIDAYS (Exhibit M) to replace Article VII - HOLIDAY PAY contained in the 1973 collective bargaining agreement; that at the negotiation meeting on December 18, 1973, Van de Kerckhove gave the Union's bargaining team draft copies of all of the "tentative agreements" reached since the November 27, 1973 negotiation meeting (except Article VII - VACATIONS (Exhibit L)) and asked if they properly reflected the "tentative agreements" reached; that the Union's negotiating committee indicated that the draft copies supplied by Van de Kerckhove were not entirely acceptable and a few additional modifications were made to the draft copies provided but they were not initialed.

7. That prior to the December 18, 1973 negotiation meeting, the City had taken the position that it would not make any proposals on the "economic" issues in the negotiations (other than to offer to continue to pay the wage rates and fringe benefits provided in the 1973 collective bargaining agreement) contending that the "non-economic" or "language" issues should be settled first; that after the discussion of Van de Kerckhove's draft copies of the "tentative agreements" reached since the November 27, 1973 meeting, the City made its first proposal on the remaining issues in the negotiations which had been identified as "economic"; that thereafter, the parties made a number of proposals and counterproposals on the remaining issues in the negotiations before they reached a point where they both were unwilling to make any further concessions; that sometime before the meeting ended at 8:30 p.m., Van de Kerckhove outlined 21 issues which, according to the City, were dropped by the proponent, tentatively agreed to or remained unresolved.

8. That shortly after the negotiation meeting on December 18, 1973, the Union made a request that the Wisconsin Employment Relations Commission appoint a mediator to attempt to resolve the impasse in negotiations and the City concurred in said request; that Donald B. Lee was designated Mediator by the Wisconsin Employment Relations Commission

and a mediation meeting was scheduled for January 14, 1974; that shortly before the mediation meeting, Van de Kerckhove sent Lee a letter, with a a copy to the Union, outlining the issues causing the impasse in the negotiations from the City's point of view; that at the mediation meeting on January 14, 1974 Ceplina indicated that the list of issues set out in Van de Kerckhove's letter was incomplete and provided Lee with a list of 13 issues that the Union felt were causing the impasse; that during the course of the mediation meeting on January 14, 1974, the City indicated no disagreement with the Union's list of issues causing the impasse and either at that time or at a later date indicated that there was an additional issue relating to its demand that Article XVI - EXISTING RIGHTS contained in the 1973 collective bargaining agreement be deleted from the 1974 collective bargaining agreement; that although several of the 14 issues were "non-economic" in nature, none of the issues tentatively agreed to were included among the 14 issues; that the parties were unable to resolve the impasse in negotiation during the course of the mediation meeting and, on January 16, 1974, Low prepared a petition for the initiation of compulsory final and binding, "final offer" arbitration pursuant to Section 111.77(4)(b) of the Wisconsin Statutes; that in answer to item four of said petition, which asks for a statement of the "issues at impasse" between the parties, Low set out the City's position and the Union's position as of January 14, 1974 on the 13 issues contained in Ceplina's list which was given to Lee at the January 14, 1974 negotiation meeting.

9. That on January 21, 1974, the Wisconsin Employment Relations Commission received the Union's petition for compulsory, final and binding, "final offer" arbitration and being satisfied that the conditions precedent set out in Section 111.77 of the Wisconsin Statutes had been met, issued an order, 1/ initiating compulsory, final and binding, "final offer" arbitration and directing the parties to submit, in written form, their "final offer" as of January 14, 1974 to the Wisconsin Employment Relations Commission on or before February 11, 1974 and to serve a copy of same on the other party and to select an arbitrator from a panel of five arbitrators submitted in the accompanying letter of transmittal; that on February 6, 1974, the parties selected David B. Johnson Arbitrator and notified the Wisconsin Employment Relations Commission of his selection; that on February 8, 1974 the Wisconsin Employment Relations Commission issued an Order 2/ appointing David B. Johnson, Arbitrator to issue a final and binding award in the matter pursuant to Section 111.77 (4)(b) of the Wisconsin Statutes.

10. That neither the City nor the Union submitted its "final offer" as of January 14, 1974 on or before February 11, 1974, as directed by the Commission's order; 3/ that on or about February 27, 1974 the City prepared a "final offer" which was different than its "final offer" as of January 14, 1974 and submitted a copy of same to the Arbitrator and the Union; that the City's "final offer" dated February 27, 1974 only addressed itself to the 14 issues that were at impasse as of January 14, 1974; that on March 14, 1974 the parties had a pre-arbitration conference with Johnson for the purpose of discussing the procedure to be followed in the arbitration proceeding and it was agreed, inter alia, that the hearing would be held on April 9, 1974 and that either party could amend its "final offer" under section 111.77(4)(b) by mailing a copy of same to the Arbitrator on or before April 4, 1974; that during the pre-

(14) to be the subject of arbitration and Johnson urged the parties to attempt to reduce the number of issues, but no reference was made to the status of the "tentative agreements" which had been reached during the course of the negotiations; that both the City and the Union filed amended "final offers" by placing them in the mail on April 4, 1973; that the City's "final offer", which was different than its "final offer" as of January 14, 1974 and its "final offer" as of February 27, 1974, addressed itself to the 14 issues at impasse on January 14, 1974 and made no reference to the provisions of the 1973 collective bargaining agreement or to the "tentative agreements" which had been reached in negotiations; that the Union's "final offer", was essentially a copy of the 1973 collective bargaining agreement with appropriate modifications in language to reflect that it was an "award" for 1974 rather than an "agreement" for 1973 and certain requested changes in the economic benefits and language, all of which were included among the 14 issues at impasse on January 14, 1974.

11. That upon receiving a copy of the Union's "final offer" on April 8, 1974, the City's attorney, John F. Maloney, contacted Johnson and the Chairman of the Wisconsin Employment Relations Commission by telephone to advise them that the City intended to file its complaint herein and that the City would seek a stay or adjournment of the arbitration proceeding until the allegations contained and its complaint had been resolved; that on April 9, 1974, Maloney asked Johnson to adjourn the arbitration hearing until the allegations contained in its complaint herein had been resolved and Johnson recessed the hearing indefinitely; that on the same day, Maloney drafted the City's complaint herein which was received by the Commission on April 11, 1974; that on April 22, 1974 the Union filed its answer to the City's complaint along with its "counterclaim" or complaint against the City which was consolidated for hearing with the City's complaint before the undersigned Examiner. 4/

Based on the above and foregoing Findings of Fact, the Examiner makes and enters the following

CONCLUSIONS OF LAW

1. That by changing its "final offer" before Arbitrator Johnson so as to exclude the "tentative agreements" reached during the course of the negotiations, the Union has not failed or refused to bargain collectively in good faith as required by Section 111.70(1)(d) and Section 111.77 of the Municipal Employment Relations Act and therefore has not committed and is not committing a prohibited practice within the meaning of Sections 111.70(3)(b)3 of the Municipal Employment Relations Act.

2. That by submitting a "final offer" which failed to specifically incorporate the provisions of the 1973 collective bargaining agreement, or the "tentative agreements" which had been reached during the course of bargaining which were intended to be a part of its "final offer", the City of Stevens Point has not committed, and is not committing a prohibited practice within the meaning of Section 111.70(3)(a)4 of the Municipal Employment Relations Act.

3. That by filing the complaint herein and seeking to postpone the arbitration proceeding before Arbitrator Johnson because of the pendency of the complaint herein, the City of Stevens Point, has not and is not committing a prohibited practice within the meaning of Section 111.70(3)(a)4 of the Municipal Employment Relations Act.

4/ City of Stevens Point (12652) 4/25/74.

Based upon the above and foregoing Findings of Fact and Conclusions of Law, the Examiner makes and enters the following

ORDER

1. That the complaint filed herein by the City of Stevens Point alleging that Stevens Point Firefighters Association, Local 484, IAFF, AFL-CIO, has committed prohibited practices within the meaning of the Municipal Employment Relations Act, be and the same hereby is, dismissed.

2. That the "counterclaim" or complaint filed herein by the Stevens Point Firefighters Association, Local 484, IAFF, AFL-CIO, alleging that the City of Stevens Point has committed prohibited practices within the meaning of the Municipal Employment Relations Act, be and the same hereby is dismissed.

Dated at Madison, Wisconsin this 25th day of September, 1974.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By George R. Fleischli
George R. Fleischli, Examiner

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

In its complaint, the City alleges that during the course of bargaining with the Union for a 1974 collective bargaining agreement to replace the 1973 collective bargaining agreement which expired on December 31, 1973, "tentative agreement" was reached on a number of new provisions and changes in old provisions of the 1973 collective bargaining agreement, and that the "final offer" submitted to the Arbitrator by the Union on April 4, 1974, withdrew those "tentative agreements" on said provisions. The City contends, that by withdrawing said "tentative agreements" in its "final offer" submitted to the arbitrator pursuant to the provisions of Section 111.77(4)(b) of the Municipal Employment Relations Act, the Union has violated its duty to bargain in good faith as required by the provisions of the Municipal Employment Relations Act. In its answer, the Union denies that it reached any enforceable agreement with the City and affirmatively alleges that the "tentative agreements" which were reached on the provisions referred to in the complaint were specifically conditioned upon agreement being reached on all of the issues in negotiations, which condition was never met. In addition, the Union alleges that it had made the statement several times during the negotiations that the "tentative agreements" "could not be used in support of the City's position or in opposition to the Union's position in any later hearing" if the parties failed to reach final agreement. The Union contends that since collective bargaining reached an impasse and the Union petitioned for arbitration, the "tentative agreements" were not binding on it in any way and that its failure to include the "tentative agreements" in its final offer was consistent with its duty to bargain in good faith.

In its "counterclaim" or complaint, the Union alleges that the City has violated its duty to bargain in good faith under the provisions of the Municipal Employment Relations Act, 5/ by (1) failing to submit a "final offer" upon which the Arbitrator could issue an award without modification; (2) submitting a "final offer" that was totally meaningless knowingly, deceitfully, fraudulently and in an effort to completely misrepresent its position and frustrate and avoid the provisions of Section 111.77 of the Municipal Employment Relations Act; and (3) engaging in unilateral communications with the Arbitrator and the Wisconsin Employment Relations Commission which allegedly prejudiced the Union's position before the Arbitrator and the Wisconsin Employment Relations Commission. In its answer to the Union's complaint, the City denied the allegations set forth in the "counterclaim".

THE CITY'S COMPLAINT

At the hearing, it became clear that there is no substantial dispute over the facts alleged in the City's complaint. The parties

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5/ The counterclaim cites a number of provisions of the Municipal Employment Relations Act, some of which are clearly inapplicable, but the Examiner concluded that the gravamen of the complaint is that the City has not bargained in good faith in violation of Section 111.70(3)(a)4 (City of Stevens Point, 12652-A, 5/74) and neither party has raised further argument with regard to that construction of the pleadings. It should be noted that the City's complaint incorrectly alleged that the Union has failed to bargain in good faith in violation of Section 111.70(3)(a)4 instead of Section 111.70(3)(b)3.

did meet on the dates indicated and did reach certain "tentative agreements" as alleged. There was a subsequent impasse, or breakdown in bargaining, which occurred on December 18, 1973, and the parties participated in mediation thereafter on January 14, 1974, wherein they discussed the 13 or 14 issues upon which the parties had been unable to reach "tentative agreement". The mediation effort failed to produce an agreement on any of those issues and the Union filed a petition for compulsory, final and binding "final offer" arbitration pursuant to Section 111.77(4)(b) of the Municipal Employment Relations Act. In answer to the question posed by Item four of the petition, which asks for an itemization of the "issue or issues at impasse," the Union set out in "Exhibit A" the 13 issues which it had given the Mediator on January 14, 1974.

With the possible exception of the 14th issue, which was referred to in the City's "final offers" of February 27, 1974, and April 4, 1974, "Exhibit A" which was attached to the Union's petition for arbitration, accurately reflected the positions of both parties as of the date of the petition, January 21, 1974, on the issues that the parties had been unable to reach "tentative agreement". Although neither party subsequently complied with the Commission's order 6/ to submit their "final offers" as of January 14, 1974, the Union's "final offer" as of January 21, 1974, the date of the petition, apparently was that it would agree to the proposed modifications and additions to the 1973 collective bargaining agreement which had been tentatively agreed to if the City would accept its position on the 13 issues set out in Exhibit A. If the City had accepted the Union's position on each of the remaining issues, the condition that made the agreements on the other issues "tentative" would have been met. However, the Union argues that because the City did not agree to accept its position on the remaining issues it was free to change any aspect of its "final offer" under the provisions of Section 111.77(4)(b) and the agreement on procedure reached in the presence of the arbitrator. The City argues that any change in the Union's "final offer" which did not include the "tentative agreements" would be violative of the Union's duty to bargain in good faith.

Section 111.77(4)(b) of the Municipal Employment Relations Act reads as follows:

> "(b) Form 2. Parties shall submit their final offer in effect at the time that the petition for final and binding arbitration was filed. Either party may amend its final offer within 5 days of the date of the hearing. The arbitrator shall select the final offer of one of the parties and shall issue an award incorporating that offer without modification."

Arguments of the Parties:

The City argues that the "last offer" arbitration provision of Section 111.77 was intended to require both parties to limit any "last offer" to those issues on which they are unable to reach "tentative agreement". According to the City, a contrary interpretation would be in conflict with the established policy of promoting the peaceful resolution of labor disputes through collective bargaining and to treat "final offer" arbitration as a substitute for good faith bargaining rather than a stimulus as it was intended to be

The Union contends that, unless the parties stipulate otherwise, a "final offer" submitted to the arbitrator under Section 111.77(4)(b) must include every provision which would otherwise be incorporated into a collective bargaining agreement in order for the award to be meaningful and valid, and that its offer, unlike the City's offer, is in compliance with the Statute. According to the Union, the "final offer" arbitration process does become a substitute for the collective bargaining process when that process breaks down in the form of an impasse. With regard to the City's claim that the Union has acted in bad faith by dropping all of the "tentative agreements" reached during collective bargaining, the Union points out that the meaning of the word "tentative" was discussed on several occasions during bargaining and that it clearly reserved the right to withdraw the "tentative agreements", if no agreement was reached.

The City contends that the Union's argument is premised on a misreading of the expression "without modification" which was intended to distinguish "last offer" arbitration from conventional interest arbitration and not to require the parties to submit "last offers" which include provisions not really in dispute. Finally, the City contends that the Union's interpretation of the Statute is contrary to the prevelant practice under the Statute and inconsistent with other provisions of the Municipal Employment Relations Act.

Discussion:

The Examiner is satisfied that a rigid interpretation of the requirements of Section 111.77(4)(b) along the lines suggested by the City or the Union is unwarranted and that the determination of the Union's alleged bad faith therefore will turn on the question of whether the withdrawal of the "tentative agreements" under the circumstances present in this case constitutes bad faith bargaining.

A reading of the awards which have been issued to date under Section 111.77(4)(b) indicates that it is common practice for the parties to make "last offers" which specifically refer only to those issues which are in dispute before the arbitrator. 7/ However, there is implicit or explicit recognition in all of these cases that the issue or issues discussed in the award are frequently only a part of the provisions which will ultimately be incorporated into the collective bargaining agreement after the award is issued and consideration is frequently given to what other concessions the parties have made in choosing between the "last offers".

However, the fact that the practice under the Statute is as the City describes it does not mean that Section 111.77(4)(b) was intended

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7/ Of the 38 published "last offer" arbitration awards issued by arbitrators pursuant to Section 111.77(4)(b) that the Examiner is aware of, all 38 indicate or imply that the prevailing party's "last offer" on the issues in dispute before the arbitrator will be incorporated into a collective bargaining agreement. In only five awards did the opinion indicate that the parties specifically agreed to limit the issues in dispute before the arbitrator. Three of the awards reflect that one or both of the "last offers" submitted specifically stated that the undisputed provisions of the old agreement or other issues which are not in dispute before the arbitrator are specifically made a part of the "last offer" submitted. None of the awards indicate that either of the parties took the trouble to put their "last offer" in the form of a completed document as the Union did in this case.

to require the parties to submit "final offers" which are limited to those issues on which the parties cannot even conditionally agree. Such a restrictive interpretation is clearly not warranted. Section 111.77(4)(b) refers to the "final offer" in effect at the time the petition is filed and specifically states that either party may change its "final offer" within five days of the hearing. In this case, the Union's "final offer" as of the date of the petition consisted of last year's contract, with the modifications and additions tentatively agreed to provided the City agreed to accept its position on the other 13 issues. Clearly, the Union was free to change its "final offer" under Section 111.77(4)(b) in any way it saw fit, provided such a change did not violate its duty to bargain in good faith.

The duty to bargain in good faith is spelled out generally in Section 111.70(1)(d). In cases involving law enforcement and fire-fighting personnel, certain additional requirements are placed on the parties by Section 111.77. Neither of these provisions specifically forbids the conduct of the Union herein described, making it a per se violation. If the conduct in question constitutes bad faith bargaining, it must be because it constitutes conduct that is so incompatible with the duty to bargain in good faith that, standing alone, it constitutes evidence of bad faith. On the facts presented herein, the Examiner is satisfied that it does not.

The practice of withdrawing agreements reached on specific issues in collective bargaining is a suspicious one, since it can be evidence of intent to avoid an agreement. 8/ However, where an agreement is tentatively made on conditional terms that are proper but never met, the subsequent withdrawal of that agreement would seem to be justifiable and compatible with the duty to bargain in good faith. This is particularly true if the withdrawal is made after an impasse occurs and one of the parties resorts to the use of a legal weapon for resolving the impasse such as a strike. 9/ Compulsory arbitration, which is intended to serve as a strike substitute would appear to be analogous to a lawful strike for purposes of evaluating such conduct.

Here, the City took the position at the outset of negotiations, that it would not discuss "economic" issues until the "non-economic" or "language" issues were settled. 10/ The Union acquiesced to the City's position and, after considerable give and take, reached "tentative agreement" on a number of the issues that the City identified as "non-economic." However, the "tentative agreements" reached were all expressly conditioned on the parties' ability to reach agreement on all the issues. When they could not, the Union petitioned for

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8/ See e.g., Hartford Fire Insurance Company 191 NLRB 78, 77 LRRM 1581 (1971) enf. 79 LRRM 3007 (8th Cr. 1972). But see Food Service Co. 202, NLRB 107, 82 LRRM 1746 (1973) where the employer was found to have had "good cause" to withdraw withdraw agreements where he subsequently retained counsel and he had never unequivocally committed himself to some of the agreements.

9/ Great Falls Employers' Council 123 NLRB No. 109, 44 LRRM 1021 (1959), rev'd. on other grounds 277 F. 2d 772, 46 LRRM 2434 (9th Cir. 1960); Collins and Aikman Corp. v. NLRB 68 LRRM 2320 (4th Cir. 1968); Caroline Farms Div. v. NLRB 69 LRRM 2257 (4th Cir. 1968).

10/ The question of whether it is bad faith bargaining for one party to condition further negotiations on such a "ground rule" was not raised herein, but see Federal Mogul Corporation 1974 CCH NLRB, Paragraph 26, 864 (1974).

arbitration and eventually withdrew all of the "tentative agreements" when it submitted its "final offer" on April 4, 1974. There is no evidence that the Union was "leading the City on" or was otherwise insincere in its effort to reach agreement on all of the issues in negotiations. Both parties entered into the "tentative agreements" in a good faith effort to reach agreement on all of the issues in negotiations.

Given the fact that the City understood that the Union entered into the "tentative agreements" on the express condition that the parties subsequently reach agreement on all of the issues in negotiations, and was forewarned that, as far as the Union was concerned, the "tentative agreements" "could not be used . . . at any later hearing" it was not bad faith bargaining for the Union to drop all of the tenative agreements" reached in formulating the "final offer" it considered to be the most appropriate under the criteria set out in Section 111.77(6). Section 111.70(4)(b) clearly gives the Union the right to change its "final offer" and its decision to drop the "tentative agreements" from its "final offer" was not, under the circumstances of this case, in violation of its duty to bargain in good faith.

UNION'S COMPLAINT

Validity of City's Final Offer:

The Union's claim that the City bargained in bad faith by submitting a "final offer" which could not serve as a basis for an award is premised on an interpretation of 111.77(4)(b) which is rejected as unduly restrictive and contrary to the prevailing practice under the Statute. It is clear on the record presented, the City's "final offer" of April 4, 1974, like its "final offer" of February 27, 1974, implicitly included the provisions of the 1973 collective bargaining agreement as modified by the "tentative agreements" which were dropped in the Union's "final offer", and that such an offer provides a perfectly valid basis on which an award under Section 111.77(4)(b) could be made "without modification." Therefore, the City did not, by submitting its offer in such a form violate its duty to bargain in good faith.

Claim of Deceit, Fraud and Misrepresentation:

There was no evidence introduced at the hearing that would support a finding that the City was guilty of deceit, fraud or misrepresentation and the Union's claim in that regard would appear to be totally unfounded.

Unilateral Communications:

The City stipulated that its counsel made telephone calls to the Arbitrator and the Chairman of the Wisconsin Employment Relations Commission on April 8, 1974, the day before the scheduled hearing before the Arbitrator, for the purpose of advising them that the City intended to file its complaint herein and object to the Arbitrator's proceeding on the basis of the Union's final offer dated April 4, 1974. At the hearing, the Union indicated that it no longer objected to the City's communication with the Wisconsin Employment Relations Commission in view of the fact that either party has a right under the law to unilaterally invoke the processes of the Wisconsin Employment Relations Commission by filing a complaint or notifying the Commission of its intent to file a complaint. However, the Union indicated that it does object to the City's unilateral communication with the Arbitrator concerning a motion it intended to make in a case already pending before the Arbitrator, and argues that such action may have prejudiced its position before the Arbitrator.

While unilateral communications in judicial proceedings or quasi-judicial proceedings ought to be discouraged because of the obvious potential for abuse, the phone calls which the City initiated on April 8, 1974, were for the purpose of communicating information which might have the effect of making the Arbitrator's 100-mile trip on the folloiwng day unnecessary, and not for the purpose of affecting his judgment on the merits of the case pending before him. The fact that there might have been a better way to handle the communication, such as a telegram or a conference call, does not change the nature of the information communicated. On the evidence presented, such a communication did not constitute a prohibited practice within the meaning of any of the provisions of Section 111.70(4)(a) of the Municipal Employment Relations Act.

PROCEDURE IN MIA CASES

As part of its argument that the City has refused to bargain in good faith by filing the complaint herein, the Union raises an important procedural question as to what effect, if any, a prohibited practice complaint involving alleged bad faith bargaining ought to have on an arbitration proceeding under Section 111.77 of the Wisconsin Statutes. The Union argues that such a complaint ought not serve as a bar to the arbitration proceeding under Section 111.77 since the arbitrator, as a Commission agent, can dispose of any allegations concerning bad faith bargaining as part of the arbitration proceeding.

It is clear that an arbitrator appointed by the Commission to issue an award pursuant to Section 111.77 of the Wisconsin Statutes, has no authority to hear or decide allegations of the commission of any prohibited practices unless he is also serving as an Examiner appointed by the Commission pursuant to the provisions of Section 111.07(5) of the Wisconsin Statutes. However, it is also clear that the underlying purpose of Section 111.77 could be frustrated if one party can delay arbitration proceedings for a protracted period of time by the simple device of filing an appropriate prohibited practice complaint. If the Commission were satisfied that one party to an arbitration proceeding had filed a complaint which, unlike the complaint in this case, was based on a desire to frustrate the arbitration proceeding rather than a legitimate (but not necessarily meritorious) claim of a breach of the duty to bargain, such conduct would clearly amount to bad faith bargaining and the Commission could attempt to formulate an appropriate remedial order to eliminate the incentive for such conduct.

Here, the complaint filed by the City, while not meritorious in the Examiner's opinion, is based on a legitimate dispute as to the intent of Section 111.77(4)(b) which has not been the subject of a prior Commission decision. The complaint, if meritorious, would have made any award issued on the basis of the "last offers" before the Arbitrator of dubious validity and encourage further litigation. While the Commission has held in one prior case 11/ that a prohibited practice charge ought not serve as a bar for an arbitration proceeding where it could not have any practical effect on the Arbitrator's award even if the complaint had merit, the Examiner is unaware of any case where it has explicitly ruled that a complaint which has that potential ought to serve as a bar to an arbitration proceeding. The City has never asked for an order staying the

arbitration proceeding and the indefinite recess granted by the Arbitrator has made such an order unnecessary. However, in view of the dismissal of the City's complaint, there would appear to be no reason why the Arbitrator could not proceed if the City does not seek an order from the Commission staying that proceeding within the 20 days allowed for filing exceptions to the Examiner's decision.

Dated at Madison, Wisconsin this 25th day of September, 1974.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By George R. Fleischli
George R. Fleischli, Examiner