STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

SHEBOYGAN COUNTY LAW ENFORCEMENT EMPLOYEES, LOCAL NO. 2481, WISCONSIN COUNCIL OF COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO, Complainant, vs. SHEBOYGAN COUNTY, Respondent.	Case XXX No. 21406 MP-728 Decision No. 15380-B

ORDER AFFIRMING EXAMINER'S
FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

Examiner Amedeo Greco having, on November 21, 1977, issued his Findings of Fact, Conclusion of Law and Order in the above-entitled matter, wherein he found that the above-named Respondent had violated sec. 111.70(3)(a)4 of the Municipal Employment Relations Act by refusing to sign a collective bargaining agreement, and wherein he ordered the Respondent to cease and desist from refusing to sign said agreement and to take certain affirmative action; and the Respondent having, on December 1, 1977, timely filed a petition for review of said decision pursuant to the provisions of sec. 111.07(5), Stats.; and the Commission having reviewed the record including the petition for review and the arguments of the parties, and being satisfied that said Findings of Fact, Conclusion of Law and Order be affirmed;

NOW, THEREFORE, it is

ORDERED

That the Findings of Fact, Conclusion of Law and Order of the Examiner be, and the same hereby are, affirmed and the Respondent is hereby directed to advise the Commission in writing, within ten (10) days of the date of this Order, as to what steps it has taken to comply with said Order.

Given under our hands and seal at the City of Madison, Wisconsin this 13th day of April, 1978.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Morris Slavney
Morris Slavney, Chairman

Herman Torosian, Commissioner

Marshall L. Gratz
Marshall L. Gratz, Commissioner

SHEBOYGAN COUNTY (SHERIFF'S DEPARTMENT), XXX, Decision No. 15380-B

MEMORANDUM ACCOMPANYING ORDER AFFIRMING EXAMINER'S FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

The Examiner's Decision

There are no material issues of fact. Most of the factual allegations contained in the complaint were admitted and other relevant questions of fact were resolved by stipulations. Based on the record of this case, and the record in an earlier proceeding under sec. 111.77, Stats. 1/ the Examiner found, inter alia:

(1) After the certification of the Complainant as the representative of law enforcement personnel employed in the Respondent's Sheriff's Department, the Complainant and Respondent's bargaining representatives reached agreement on a number of items to be included in an initial collective bargaining agreement for 1976 and 1977;

(2) The Complainant and Respondent were unable to reach agreement on certain additional issues and the Complainant filed a petition for final and binding arbitration pursuant to sec. 111.77, Stats.;

(3) After an investigation, wherein the Commission found that an impasse existed in the negotiations, the Commission ordered the parties to submit the issues in dispute to binding arbitration. In so doing, the Commission found, contrary to the Respondent's contention, that the items previously agreed to need not be submitted to the arbitrator as part of the parties' final offers; 2/

(4) On November 24, 1976 the arbitrator issued an award which directed that "the union's last offer be incorporated into the 1976-1977 contract" between the Complainant and Respondent;

(5) Although the Respondent has implemented the Complainant's final offer on the issues in dispute before the arbitrator, and all of the items which had been agreed upon by the parties' bargaining representatives before the issuance of that award, the Respondent's board has never acted to formally adopt either, and the Respondent has refused to sign and execute a draft collective bargaining agreement which accurately states all of the items agreed to by the representatives of the Complainant and Respondent for inclusion in the 1976-1977 collective bargaining agreement as well as the final offer of the Complainant, which the arbitrator had directed the parties to include in the 1976-1977 collective bargaining agreement.

Based on these findings the Examiner concluded that the Respondent had violated sec. 111.70(3)(a)4 of the MERA by refusing to sign and execute the draft agreement in question and ordered the Respondent to cease and desist from refusing to sign the draft agreement; to sign and execute the draft agreement; and to notify its employes and the Commission of its intent to do so.

1/ Sheboygan County, Case XXVI, No. 20511, MIA-249.

2/ Decision No. 14859 8/76.

The Petition for Review

In its petition for review, the Respondent takes exception to the conclusion of law entered by the Examiner contending that said conclusion raises a substantial question of law and policy. The Conclusion of Law reads as follows:

> "Respondent has violated Section 111.70(3)(a)4 of MERA by refusing to sign and execute the collective bargaining agreement (Exhibit 1) which contains the items agreed to by the parties in their negotiations, as well as the disputed items which were submitted to arbitration."

The Respondent did not file a brief in support of its petition for review and relies instead on the arguments contained in its brief to the Examiner. The Complainant likewise relies on its arguments before the Examiner. Since the Respondent has limited its petition to consideration of the legal and policy questions raised by the Examiner's Conclusion of Law, and because the Commission is satisfied that the Respondent's other arguments were adequately dealt with by the Examiner's memorandum, we limit our discussion here to the legal and policy questions raised.

Discussion

It is the Respondent's basic contention that where the parties fail to reach agreement on all of the terms 3/ to be included in a collective bargaining agreement and an arbitrator is called upon to issue a final and binding award under sec. 111.77, Stats., there is no "agreement reached" within the meaning of sec. 111.70(1)(d), Stats. 4/ Therefore, the Respondent reasons, its refusal to sign the draft collective bargaining agreement in question cannot constitute a violation of sec. 111.70(3)(a)4, Stats. 5/ We disagree.

3/ It was the Respondent's contention throughout the arbitration proceeding that the arbitrator's award should include all of the terms of the proposed collective agreement even if they were embodied in a prior agreement or were agreed to during negotiations and were not conditioned on settlement of other issues, as was the case in Stevens Point (12639-A) 9/74.

4/ "(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. . . ."

5/ "(3) PROHIBITED PRACTICES AND THEIR PREVENTION. (a) It is a prohibited practice for a municipal employer individually or in concert with others:

. . .

4. To refuse to bargain collectively with a representative of a majority of its employes in an appropriate collective bargaining unit. . . . The violation shall include, though not be limited thereby, to the refusal to execute a collective bargaining agreement previously agreed upon."

Sec. 111.77, Stats., further defines the duty to bargain in good faith in disputes involving county law enforcement personnel to include a requirement that the parties comply with the procedures contained therein. Those procedures culminate in final and binding arbitration over the "issues in dispute" if the parties reach an impasse in their bargaining. The Commission believes that the intent of the legislation is that the award of the arbitrator on the issues in dispute be incorporated 6/ into a collective bargaining agreement consisting of the terms of the old agreement, if any, which neither party has proposed to change, and any changes or new provisions which the parties have agreed upon during their negotiations for inclusion in the collective bargaining agreement.

The Respondent's position, on the other hand, would substitute the arbitration award for the entire agreement. We find no intent on the part of the legislature to substitute an arbitrator's award for the collective bargaining agreement which the parties are expected to negotiate in good faith. On the contrary, an analysis of the procedure provided, especially the statutory presumption in favor of the final offer selection process, convinces us that the legislative intent was to limit the arbitrator's award to the issues in dispute after an impasse is reached on said issues.

We wish to emphasize that in our view nothing herein or in our earlier decision initiating arbitration of the instant parties' contract dispute precludes a party from insisting on the inclusion in the final offers of positions on issues about which the parties have no substantive dispute but to which position(s) one of the parties has attached a condition precedent such as settlement of some or all other issues. 7/ In our view, such conditional agreements would technically remain "issues in dispute" within the meaning of sec. 111.77(4)(a), Stats., and the second sentence of sec. 111.77(4)(b), Stats. until the condition so attached has been either met or waived. In this case, however, no such condition precedent was shown to have been expressed with regard to the agreements reached.

Concluding as we do, that the intent of the procedure contained in sec. 111.77, Stats., is to require the inclusion of any award on the issues in dispute in a collective bargaining agreement along with the other terms of the agreement reached, harmonization of that section with sec. 111.70(1)(d), Stats., and sec. 111.70(3)(a)4, Stats., requires that we find that the failure to sign and execute an "agreement reached," which includes provisions which are based on an award issued under sec. 111.77, Stats., is a per se refusal to bargain in good faith. However, even if we were to conclude that the third sentence of sec. 111.70(1)(d), Stats. and the fifth sentence of sec. 111.70(3)(a)4, Stats., were inapplicable to the facts in this case because of the failure to agree to the issues covered by the award, the refusal to execute an agreement which embodies items agreed upon and items awarded by an arbitrator under sec. 111.77, Stats., is evidence supporting a finding of bad faith bargaining. It should be noted in this regard that the United States Supreme Court's decision in the Heinz case referred to in the Examiner's opinion, predated the inclusion of an express statutory requirement in the NLRA that a party sign any agreement reached. As

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6/ In reaching this conclusion we rely on the totality of sec. 111.77 rather than the last sentence of sec. 111.77(4)(b), Stats. as we may have implied in our earlier decision referred to in footnote 2 above. That sentence could readily be interpreted to mean that the final offer of the prevailing party is to be "incorporated" into the arbitrator's award. However, such interpretation does not resolve the dispute here.

7/ cf. City of Stevens Point, supra, footnote 3.

the court noted in that case, such conduct "tends to frustrate the end sought by the requirement for collective bargaining" and "discredits the organization, impairs the bargaining process and tends to frustrate the aim of the statute to secure industrial peace through collective bargaining." 8/ The employes on whose behalf such an agreement was negotiated would understandably be disturbed by such conduct which gives rise to doubts not only concerning the employer's good faith, but the employer's willingness to abide by the "award" issued and the enforceability of the agreement of which it is intended to be a part.

We note that, although the Respondent refers to sec. 59.15, Stats. in its argument, it has not attempted to justify its conduct herein based upon the failure of its board to adopt any aspect of the agreement reached. Proper harmonization of the provisions of sec. 111.77, Stats. and sec. 59.15(2)(c) and (d) may or may not excuse such failure. However, even assuming that the Respondent was required to submit some portion or all of the agreement reached to its board for ratification, it may not here use its own failure to do so to justify its refusal to execute the tendered draft of the agreement reached.

Dated at Madison, Wisconsin this 13th day of April, 1978.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Morris Slavney
Morris Slavney, Chairman

Herman Torosian, Commissioner

Marshall L. Gratz
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8/ H. J. Heinz Company v. NLRB 311 U.S. 514 2d LRRM 291, 297 (1941).