STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

WISCONSIN COUNCIL OF COUNTY AND MUNICIPAL EMPLOYEE (WCCME), LOCAL 1752D, Complainant, vs. SCHOOL DISTRICT OF WAUSAUKEE Respondent.	Case VIII No. 24260 MP-957 Decision No. 16914-A

Appearances:

Lawton & Cates, Attorneys at Law, 110 East Main Street, Madison, Wisconsin 53703, by Mr. Richard V. Graylow, appearing on behalf of the Complainant.

Condon, Hanaway & Wickert, Ltd., 312 Cherry Street, Green Bay, Wisconsin 54305 by Mr. Donald J. Hanaway, Esq., appearing on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

JAMES D. LYNCH, Examiner: This matter was originally filed as Count No. 2 of a petition for declaratory relief filed by the Wisconsin Council of County and Municipal Employees (WCCME), Local 1752D pursuant to Section 227.06(1) Stats. involving a dispute between it and the School District of Wausaukee. This action was thereafter severed and refiled as a separate complaint of prohibited practices on March 9, 1979. On March 19, 1979, the Commission appointed James D. Lynch as Examiner to make and issue Findings of Fact, Conclusions of Law and Order. The matter was held in abeyance by agreement of the parties and was thereafter set for hearing upon written motion of the complainant dated April 28, 1980. The matter was scheduled for hearing on August 22, 1980 at the Marinette City Hall, Marinette, Wisconsin. At hearing, Counsel for both parties stipulated to submit as the record herein the entire record developed in In the Matter of the Request of the Wisconsin Council of County and Municipal Employees (WCCME), Local 1752D for a Declaratory Ruling involving Mediation-Arbitration with the School District of Wausaukee Case VII, No. 24112, DR(M)-114, Decision No. 17576 (1/80). Thereafter, both parties filed briefs and reply briefs, the last of which was received by the Examiner on August 12, 1981. And, being fully advised in the premises, having considered the evidence and arguments of the parties, the Examiner hereby makes and issues the following

FINDINGS OF FACT

1. Wisconsin Council of County and Municipal Employees (WCCME) Local 1752D, herein the Union, is a labor organization which represents a bargaining unit consisting of "all regular full-time and all regular part-time custodial and maintenance employes, including clerical employes, bus drivers, bus supervisor, cooks and nurse" employed by the School District of Wausaukee.

2. The School District of Wausaukee, herein the District, is a municipal employer which operates a school system in Wausaukee, Wisconsin.

3. During the early parts of 1978, the parties engaged in collective bargaining negotiations for an initial contract. Throughout those negotiations, the parties reached tentative agreements on a number of contract items, including provisions relating to health insurance and holidays.

4. On May 2, 1978, the parties jointly filed a petition for mediation-arbitration pursuant to Section 111.70(4)(cm), Stats. Thereafter, the parties on May 8, 1978, met with an investigator from the Commission's staff, for the purpose of determining whether an impasse had arisen in the collective bargaining negotiations between the parties. At that time, the parties executed a joint stipulation of which included tentative agreements on both health insurance and holidays.

5. After an unsuccessful attempt at mediation, the parties on May 8, 1978, exchanged final offers. In submitting its final offer, the District for the first time withdrew its tentative agreements on health insurance and holidays and submitted different proposals on those issues.

6. On May 22, 1978, the Commission certified that the parties were at impasse in their negotiations and ordered the initiation of mediation-arbitration. Thereafter, the parties jointly selected Milo G. Flaten as the mediator-arbitrator.

7. On August 23, 1978, Arbitrator Flaten conducted a mediation session between the parties, after which time he conducted an arbitration hearing on the outstanding issues.

8. On October 9, 1978, Arbitrator Flaten issued his Award wherein he ruled that the District's final offer should be incorporated into the contract. Arbitrator Flaten's award incorporated the District's final offers on health insurance and holidays. As noted above, said offers were different from the ones tentatively agreed to by the parties in their negotiations.

9. Following the issuance of Arbitrator Flaten's award, the District typed a complete contract which incorporated the terms of said award and tendered it to the Union on November 17, 1978, for its signature. As of the time of the instant hearing, the Union has refused to sign said proferred contract.

10. The Union on February 2, 1979, filed a petition with the Wisconsin Employment Relations Commission, herein the Commission, wherein it requested the issuance of a declaratory ruling pursuant to Section 227.06(1) Stats., to determine whether Flaten's interest arbitration award issued under Section 111.70(4)(cm) Stats. was valid. On February 26, 1979, the School District of Wausaukee filed a response to said petition wherein it requested that the petition be dismissed. On June 18, 1979, hearing was held on said matter at Marinette, Wisconsin, before Examiner Amedeo Greco, a member of the Commission's staff. Thereafter, in the course of its decision, the Commission issued the following:

CONCLUSIONS OF LAW

1. The interest Arbitration Award herein is reviewable by the Commission under Section 227.06(1) Stats.

2. As there are insufficient grounds to overturn said award under the standards set forth in ERB 31.18, said award was lawfully made under the provisions of Section 111.70(3)(b)6 and Section 111.70(4)(cm) Stats.

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

DECLARATORY RULING

Having exercised its discretionary jurisdiction to review said interest Award under Section 227.06(1), the Commission finds that the Flaten Award was not violative of ERB 31.18 and that it was lawfully made pursuant to the provisions of Section 111.70(3)(b)6 and Section 111.70(4)(cm), Stats.

In the matter of the Peition of the Wisconsin Council of County and Municipal Employees (WCCME), Local 1752D Requesting a Declaratory Ruling Pursuant to Section 227.06(1) Stats., Involving a Dispute Between Said Petitioner and the School District of Wausaukee, Decision No. 17576 (1/80).

11. The Union on March 9, 1979 filed the instant complaint alleging that the District's action in refusing to implement the tentative agreements regarding health insurance and holidays referred to in Findings of Fact numbers 4, 5 and 8, supra, is in violation of Sections 111.70(3)(a)4 and 111.70(3)(a)1.

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

CONCLUSION OF LAW

That the District, by its action in submitting a final offer pursuant to Section 111.70(4)(cm) of the Municipal Employment Relations Act which differed from the tentative agreements on health insurance and holidays it had reached during the course of bargaining with the Union and which it implemented thereafter following issuance of the mediator-arbitrator's award incorporating the provisions of the District's final offer as a part of the parties collective bargaining agreement, did not violate Sections 111.70(3)(a)4 and 111.70(3)(a)1, Stats.

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

ORDER

That the complaint filed herein shall be, and hereby is, dismissed.

Dated at Madison, Wisconsin this 30th day of September, 1981.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
James D. Lynch, Examiner

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

The relevant facts are fully recited in the Findings of Fact and will not be repeated here.

The question presented for decision is whether a party who has tentatively agreed to certain proposals during the course of negotiations but who thereafter submits as a part of its final offer tendered pursuant to Section 111.70(4)(cm) of the Municipal Employment Relations Act and who thereafter implements such proposals as part of the collective bargaining agreement when its final offer is selected by the mediator-arbitrator commits an unlawful refusal to bargain and thereby interferes with the free exercise of employe rights guaranteed by the law.

As noted in Findings of Fact No. 10, the Commission has issued a declaratory ruling involving the self-same parties to this instant dispute. In its memorandum accompanying that decision, the Commission discussed these same contentions urged herein in the following fashion:

> "Turning to the merits of those challenges, the Union argues that said award should be vacated because it contains several illegal provisions. One challenge centers on the fact that the award provides for issues which were tentatively agreed to by the parties in their negotiations. Thus, the Union argues that the parties tentatively agreed to proposals on holidays and health insurance, that the District thereafter withdrew its agreement on those two items and submitted different proposals in its final offer, and that Arbitrator Flaten subsequently incorporated the District's offers in his Award. In support of its position, the Union relies on Milwaukee Deputy Sheriff's Association v. Milwaukee County, 64 Wis 2d 651 (1974), and Sheboygan County, (15380-B), affirmed Circuit Court of Dane County, Case No. 163-032 (12/79).
>
> Contrary to the Union's claim, the instant case is not controlled by Milwaukee Deputy Sheriff's Association, as in that case a party attempted to raise a new issue before an arbitrator after negotiations had closed. Here, the parties did bargain over the questions of health insurance and holidays in their negotiations and the District's ultimate health insurance and holiday proposals were presented to the Union in the District's final offer, before the matter was closed and submitted to Arbitrator Flaten. As a result it appears that the Union had knowledge of the District's positions on these issues and that it had an opportunity to respond thereto when it filed its final offer.
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> The Union's reliance on Sheboygan County is likewise misplaced. There, the parties tentatively agreed to certain proposals in their negotiations and thereafter submitted unresolved disputed items to final and binding arbitration. After the Arbitrator found for the union, the employer refused to include the previously agreed to tentative items in a contract on the ground that they were not included in the arbitrator's award. The Commission found that the employer's refusal was unlawful because such tentative items were not in dispute and therefore need not have been included in the award. In so finding, however, we cited our earlier holding in Stevens Point (12369-B) and (12652-C) 10/74 and made it clear that parties in certain circumstances could retract their prior tentative agreements and submit those issues to arbitration. In the Stevens Point case we stated that the withdrawal of a tentative agreement, as such, was not a per se violation of a party's duty to bargain in good faith, but instead, each case must be considered on its own facts to determine if such action consitutes a refusal to bargain.

In the instant case, neither party told the other during negotiations that its acceptance of tentative agreements was conditioned upon reaching total agreement on a new contract. Furthermore, neither party told the other that such tentative agreements "could not be used at any later hearing." To that extent, then, the facts herein are somewhat different from those in Stevens Point, supra.

Here, on the other hand, there was no clear understanding between the parties as to the nature of the "tentative" agreements. Thus, Miller was asked at the hearing whether there was any agreement by the parties to the effect that such tentative agreement could not be reconsidered later in negotiations and thereafter submitted to arbitration. Miller acknowledged that there was no such agreement. As a result, the record fails to establish that the parties ever agreed that any final offers in mediation-arbitration would be limited to those items over which there had been no prior tentative agreements. Accordingly, under the facts herein, acceptance of the Union's proposal would, as the Commission noted in affirming the Examiner in Stevens Point, supra:

> . . . have the result of converting a tentative agreement on certain proposals to an agreement on such proposals by the filing of a petition for arbitration. In our opinion, such a result would discourage the parties, in their negotiations, from reaching tentative agreements on various, if not all, issues involved.

Since the parties here never agreed that tentative agreements would become finalized upon filing of a petition for mediation-arbitration, it would be likewise improper for the Commission to unilaterally impose such a significant bargaining requirement on the District. Accordingly, we find that the District was entitled to retract its prior tentative agreements on health insurance and holidays and to submit final offers which included those revisions. 3/

We therefore find that the District could submit a health insurance and holiday proposal in its final offer which was different from the one which it had tentatively agreed to with the Union, and that the subsequent inclusion of those proposals in Arbitrator Flaten's Award was not illegal.

. . .

3/ Our holding in this case is predicated upon the fact that the District's conduct did not constitute a per se refusal to bargain when it withdrew its tentative agreements in the mediation-arbitration process. We therefore do not pass judgement as to whether the withdrawal of tentative agreements under different circumstances would constitute an unlawful refusal to bargain."

In view of the Commission's determination, there is no reason to conclude that the District has acted unlawfully herein. Accordingly, the instant complaint shall be, and hereby is, dismissed.

Dated at Madison, Wisconsin this 30th day of September, 1981.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By James D. Lynch, Examiner