

In the Matter of the Petition of
MILWAUKEE DISTRICT COUNCIL 48, Local
587, AFSCME, AFL-CIO

To Initiate Mediation-Arbitration
Between said Petitioner and

MILWAUKEE BOARD OF VOCATIONAL,
TECHNICAL & ADULT EDUCATION DISTRICT
NO. 9

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On May 21, 1979, Local 587, AFSCME, AFL-CIO, affiliated with District Council 48 (Local 587) filed a petition for mediation-arbitration with the Wisconsin Employment Relations Commission (Commission) for the purpose of resolving an alleged impasse in its negotiations with Milwaukee Area Technical College (MATC). The Commission assigned the matter to Byron Yaffe, a member of the Commission's staff for the purpose of conducting an informal investigation in accordance with Sections ERB 31.08 and ERB 31.09, Wis. Adm. Code. During the course of the investigation and prior to the close of the investigation, a dispute arose concerning the proper application of Section ERB 31.09(2) Wis. Adm. Code, to-wit: Whether the parties should be allowed to modify their final offers which had been exchanged on June 13, 1979. Local 587 contends that said final offers are not subject to further amendment based on certain "ground rules" or "understandings" established by the investigator during the course of the investigation, and MATC contends that said final offers are subject to further amendment based on its claim that the Commission's rule set out in Section ERB 31.09(2) Wis. Adm. Code, if valid, 1/ permits the parties to amend their final offers prior to the close of investigation, notwithstanding any "ground rules" or "understanding" established by the Commission's Investigator. 2/ By letter dated August 15, 1979 the Investigator advised the parties that he intended to allow both parties to make further amendments in their final offers and gave his reasons therefore. Thereafter, pursuant to a timetable established by the Investigator, MATC filed an amended final offer on August 22, 1979. On August 30, 1979 Local 587 filed its petition herein wherein it asks the Commission to review and reverse and/or modify the decision of the Investigator. 3/

- No. 17402

On September 4, 1979, the Commission, by letter from its General Counsel, advised the parties of its intent to review the decision of the Examiner and to do so, if possible, on the basis of written arguments without conducting an evidentiary hearing. The parties filed their written arguments by September 19, 1979. The Commission has reviewed the arguments of the parties in the file in this case, including the decision of its Investigator contained in his letter dated August 15, 1979, and based on that record concludes that the motion should be denied.

NOW, THEREFORE, it is

ORDERED

That the motion of Local 587 to reverse and/or modify the decision of Investigator be, and the same hereby is, denied.

Given under our hands and seal at the
City of Madison, Wisconsin this 2nd
day of November, 1979.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Morris Slavney
Morris Slavney, Chairman

Gary L. Covelli
Gary L. Covelli, Commissioner

MILWAUKEE AREA BOARD OF VOCATIONAL, TECHNICAL & ADULT EDUCATION
DISTRICT NO. 9, LXXIX, Decision No. 17402

MEMORANDUM ACCOMPANYING ORDER DENYING
MOTION TO REVERSE AND/OR MODIFY DECISION OF INVESTIGATOR

Based on the briefs of the parties, it would appear that there are a number of factual assertions contained in Local 587's petition and brief which may be disputed by MATC. However, it would appear that there is no dispute over the following background facts.

During the course of the investigation, the Commission's Investigator advised the parties of certain "ground rules" he intended to follow in the course of obtaining their final offers and the parties engaged in an exchange of final offers, during which the Union was allowed to amend its final offer on at least one occasion. During the course of the investigation and during mediation conducted by the Investigator, a tentative agreement was reached between the representatives of the parties which was later rejected by Local 587's membership, and thereafter the Investigator, as part of his investigation, conducted two additional mediation meetings which did not result in a settlement of the dispute. MATC advised the Investigator that it desired to amend its final offer, and Local 587 objected, contending that further amendments should not be allowed because of the "ground rules" or "understandings" established by the Investigator, notwithstanding the fact that the Investigator to date has not yet closed the investigation.

On August 15, 1979, the Investigator wrote the parties advising them of his decision to allow them to amend their final offers, and giving his reasons therefore. That letter reads in relevant part as follows:

I am writing to advise you that I have decided to allow MATC to modify its final offer in the above case.

I concede that the ground rules for the exchange of final offers which I set forth at the beginning of the investigation did not allow either party to modify its final offer unless there was a surprise in the other party's final offer which it had no previous opportunity to respond to. Further, I concede that those circumstances are not present in the instant dispute, since MATC was advised of District Council 48's second final offer and chose in response thereto not to modify its initial final offer.

However, additional circumstances justify, in the Investigator's opinion, modification of the ground rules which were established at the commencement of the investigation.

As both parties are well aware, after final offers were exchanged and both parties advised the Investigator that they did not wish to modify the last offer each submitted, further mediation efforts resulted in a tentative agreement between the two negotiating committees which was subsequently rejected by the Union's membership. Thereafter, two additional mediation sessions were held wherein alternative solutions were considered. In the undersigned's opinion, although these mediation sessions did not result in an agreement, much information was exchanged which would indicate that the actual differences between the parties are much less substantial than would appear from an examination of the final offers which were exchanged prior to the aforementioned mediation sessions.

Accordingly, I believe it is my responsibility as an Investigator in this matter to provide the parties with an opportunity, based upon the new information each acquired during the mediation sessions which followed the exchange of final offers, to modify their offers to reflect the actual differences which exist between the parties at this time.

Since MATC has already advised the undersigned that it wishes to modify its final offer at this time, I will allow it to do so. I am therefore herein requesting that MATC's modified final offer be submitted to me in writing by August 22, 1979. I will thereafter transmit MATC's modified offer to District Council 48, which will then have an opportunity to modify its offer in response thereto, assuming that MATC makes substantive changes in its original final offer.

I encourage both parties to take advantage of this opportunity to reduce the harm that could flow from an arbitration award resulting from a forced choice between offers which do not reflect the real differences between the parties and which more importantly, contain proposals which may be far less effective in dealing with the parties' problems than those which have been constructively considered and discussed during the mediation process.

POSITION OF LOCAL 587

It is the position of Local 587 that the decision of the Investigator to allow MATC to change its final offer is in violation of Section 111.70(4)(cm)6.a. Stats. which states that the parties shall submit a "single final offer" and Sections ERB 31.09, 31.10, 31.11, 31.12 and 31.13 Wis. Adm. Code and was otherwise without authority either in the statute or the rules.

In addition, Local 587 alleges that the Investigator's decision violates the "ground rules" established by the Investigator during the course of the investigation, which provided that neither party would be permitted to modify its final offer, except under certain circumstances which are not present in this case.

In its brief, Local 587 alleges that one of the ground rules established was that "neither party can amend or modify its final offer without the consent of the other party" unless there was a surprise in the other party's final offer which it had no previous opportunity to respond to. According to Local 587, this circumstance is not present because MATC was advised of Local 587's second final offer, and chose not to modify its initial final offer in response. Further, according to Local 587, both parties then advised the Investigator that they did not wish to modify the last offer each had submitted.

After further mediation by the Investigator, a tentative agreement was reached by the two negotiating committees which was subsequently rejected by Local 587's membership. Local 587 alleges that before the matter was submitted to its membership, the Investigator advised the parties in response to a question posed by its staff representative, Robert Klaus, that in the event of rejection of the tentative agreement by the membership, "it's back to final offers" and thereby implied that no further changes or modifications would be permitted without the consent of both parties.

After the rejection by the membership, the parties continued to meet and discuss the issues, but failed to reach agreement. At that time MATC indicated its desire to amend its final offer, and Local 587 refused to agree to any amendments.

With regard to its claim that the Investigator's decision violates the statute, Local 587 points out that prior to the close of the investigation, each party is required to submit its "single final offer containing its final proposals on all issues in dispute," and it argues that such was done here. After the parties indicated they had no further changes, the offers were final according to Local 587.

With regard to its claim that the Investigator's decision violates the Commission's rules, Local 587 points out that under Section ERB 31.09, the Investigator allows the parties to amend their final offers until both parties, with knowledge of the content of the final offer of the other, indicate their offers are final. When this occurred, each side according to Local 587, was entitled to plan its strategy accordingly, and neither side should be permitted to change its offer thereafter.

With regard to its claim that the Investigator violated his own "ground rules," Local 587 indicates that each side was entitled to rely on those rules and plan their strategy accordingly, and that the events which transpired after the exchange of final offers did not constitute such a change of circumstance as to justify the decision of the Investigator.

POSITION OF MATC

MATC first contends that there is no procedure that allows the Commission to entertain the petition herein, and argues that Local 587's objection is premature and should not be considered at this time.

With regard to the merits of the petition, MATC contends that it should be summarily dismissed based on the rules of the Commission. According to MATC, Section ERB 31.09(2) deals with the precise issue raised here, and the Commission cannot overrule the decision of its Investigator without offending said rule. Since the investigation has not been closed and the Investigator was advised that MATC, having knowledge of the content of Local 587's offer, desired to amend the proposal in its final offer, the Investigator had no choice but to allow MATC to amend its final offer.

MATC disagrees with the Investigator's characterization of the ground rules as set out in his letter above, but agrees that even if said rules were established by the Investigator, they could not vary the rules established by the Commission in Section ERB 31.09. According to MATC, it relied on the Commission's published rules and interpreted any statements made by the Investigator in that light. According to MATC, it was of the opinion that it could amend its final offer at any time prior to the close of the investigation, and it answered all inquiries as to whether it desired to amend its final offer in light of that understanding.

While MATC preserves its right to question whether Section ERB 31.09(2) is in conformity with the Statute, 4/ it points out that Local 587 has already amended its final offer once under that rule, and argues that it is too late for the Union to challenge the right of MATC to make amendments in its final offer. According to MATC, if final offers may not be amended, then Local 587's original final offer should be the one submitted to arbitration.

MATC concedes that the actions of the Investigator of soliciting final offers while mediation was still taking place may have been misleading to the Union. However, in light of the Commission's rules, the offers solicited must be deemed "tentative" in view of the clear right to amend so long as the investigation remained open.

4/ MATC correctly points out that the Statute expressly denies the right of the parties to unilaterally change their final offers in the mediation-arbitration stage of the procedure, thereby possibly implying that the Commission has the authority to allow such amendments during the course of the investigation stage.

Furthermore, MATC argues there are good reasons in this case to allow the parties to amend their final offers. Specifically, MATC points out:

(1) The final offers which Local 587 insists should now be submitted to arbitration were originally exchanged in June;

(2) Subsequent mediation resulted in a tentative agreement; and

(3) After the tentative agreement was rejected by the Union's membership, additional mediation resulted in further movement toward settlement of all the issues.

According to MATC, to require the parties to arbitrate on the basis of the final offers submitted in June, would be to make a mockery of the statutory purpose of promoting settlements by discarding all the movement that the parties may have made toward settlement, and requiring them to go back to their extreme positions.

DISCUSSION

With regard to MATC's claim that there is no procedure that allows the Commission to entertain the motion herein, we note that Section ERB 10.01 and Section ERB 10.11, Wis. Adm. Code provide that parties may file motions in writing with the Commission with regard to any proceeding under subchapter IV of Chapter 111, Stats. Furthermore, even in the absence of such rules, the Commission believes that it has the authority and responsibility to entertain such a motion for the purpose of supervising the administration of the provisions of Section 111.70(4)(cm)6. Stats. by its staff. 5/

We agree with MATC that there is a serious question of the propriety of allowing parties to seek Commission review of matters pending before Commission investigators prior to the completion of their investigation. However, based on the special circumstances present in this case, we believe that such review is warranted.

First of all, the Commission's Investigator has clearly indicated his intent to allow MATC to amend its final offer, and MATC has already done so. Secondly, there has been an apparent breakdown in the investigation procedure in this case, which is directly attributable to that decision. While we could refuse to review the matter at this time, and in effect force Local 587 to a choice as to whether to further amend its final offer and attempt to preserve its objection, or stand on what it believes to be its legal rights, that approach could result in unnecessary delay and might be counterproductive in terms of the overriding purpose of the procedure contained in Section 111.70(4)(cm)6. Stats. -- the encouragement of the voluntary resolution of labor disputes. Further, we believe that the issue raised herein is of sufficient importance to the proper administration of the investigation procedure to require clarification by the Commission at this time.

There would appear to be considerable merit to MATC's argument that based on the strict wording of the Commission's rule, it still has a legal right to amend its offer. The rule in question reads in relevant part as follows:

ERB 31.09 Informal investigation or formal hearing.

(1) PURPOSE. It shall be the duty of the commission or its agent conducting the informal investigation or formal hearing, to adduce facts pertinent to a determination as to whether the parties are deadlocked in their negotiations, and if so, to obtain the single

5/ See Milwaukee Area Technical College, Dec. No. 17131, dated August 21, 1979.

final offers of the parties containing their final proposals on issues in dispute, and to further obtain a stipulation executed by the parties on all matters agreed upon to be included in the new or amended collective bargaining agreement. During the informal investigation or formal hearing the commission or its agent may engage in an effort to mediate the dispute.

(2) INFORMAL INVESTIGATION PROCEDURE. The Commission or its agent shall set a date, time and place for the conduct of informal investigation and shall notify the parties thereof in writing. The informal investigation may be adjourned or continued as the commission or its agent deems necessary. During said investigation the commission or its agent may meet jointly or separately with the parties for the purposes described in subsection (1) above. Prior to the close of the investigation the investigator shall obtain in writing the final offers of the parties on the issues in dispute, as well as a stipulation in writing on all matters agreed upon to be included in the new or amended collective bargaining agreement. At the same time the parties shall exchange copies of their final offers, and shall retain copies of such stipulation, and if at said time, or during any additional time permitted by the investigator, no objection is raised that either final offer contains a proposal or proposals relating to nonmandatory subjects of bargaining, the commission agent shall serve a notice in writing upon the parties indicating the investigation is closed. The commission or its agent shall not close the investigation until the commission or its agent is satisfied that neither party having knowledge of the content of the final offer of the other party, would amend any proposal contained in its final offer. Following the close of the investigation the commission agent shall report the findings to the commission, either orally or in writing, as the commission may direct, and at the same time transmit to the commission the final offers and the stipulation received from the parties. (Emphasis added)

As MATC correctly points out, the Investigator has not closed the investigation, and has been advised of MATC's desire to amend its final offer. However, the Commission also recognizes that the facts alleged by Local 587 and the statement contained in the second paragraph of the Investigator's letter (both of which are disputed by MATC) if true, raise a serious question about the proper application of this rule to the facts in this case.

The Commission has been concerned for some time about the administration of its rule regarding the finalization of offers by investigators on its staff. Based on reports received from Commission investigators, and representatives of the parties involved in mediation-arbitration proceedings, we are aware that there is some diversity of practice with regard to the administration of this rule. 6/ On the one hand the Commission has been concerned that it not unduly restrict its investigators in the manner by which they effectuate the intent of this rule. Based on its own familiarity with the mediation process, the Commission believes that it is a mistake to impose uniform and inflexible ground rules or procedures on a process which by its very nature is dynamic and unpredictable. On the other hand, as Local 587 correctly points out, the parties are entitled to know what procedures will apply when they are called upon to make important judgments concerning possible changes in their bargaining position.

6/ See for example, Interim Report to Legislative Council's Special Committee, dated October 12, 1979, by the Wisconsin Center for Public Policy, at p. 34 and p. 37.

If the Investigator in this case did in fact establish and effectively communicate the "ground rule" referred to in the second paragraph of his letter, and if pursuant to that ground rule he thereafter allowed the parties to change their offers in accordance with such ground rule, and had the Investigator, believing that neither party desired to change its offer further, closed the investigation therewith, we believe such conduct would be consistent with the policy reflected in Section ERB 31.09(2), Wis. Adm. Code. However, the undisputed facts in this case reflect that this is not what transpired.

Assuming arguendo that the Investigator established a ground rule as alleged by Local 587, and that the content of such ground rule was effectively communicated to the representatives of MATC, we do not believe the Commission or its Investigator can at this juncture refuse to allow either party the opportunity to amend their offers because the Investigator did not thereafter close the investigation. Instead, he proceeded to mediate the dispute further, ultimately obtaining sufficient concessions from the parties to reach a tentative agreement. Both parties could reasonably conclude that his failure to close the investigation under such circumstances amounted to a "modification of the ground rules." If it was the Investigator's intent to hold MATC to its final offer as first communicated in June, it was entitled to actual notice that the investigation was being closed long before the instant dispute arose. 7/ Further, even if it is assumed that the Investigator said, in response to the question from the Union's representative concerning the procedure to be followed if a tentative agreement was not ratified, that "it's back to final offers" and that such communication was overheard by MATC's representatives, as alleged by Local 587, such a statement is ambiguous and is no substitute for a clear communication of an intention to close the investigation. Had MATC been notified that the Investigator was about to close the investigation based on its "final offer" then on the table, it might well have asked for more time to consider other possible changes in its final offer and might well have amended its final offer to conform to some or all of the concessions it was willing to make in mediation in order to achieve the tentative agreement.


The dispute in this case is regrettable in that the procedure followed may well have misled both parties. To the extent that this is true, it would be unfair to imply that the fault in this case was solely that of the Commission's Investigator, or that it was the fault of the representatives of the parties. It is our belief that our decision herein will hereafter provide sufficient guidance for the future so that our Investigators as well as the parties are aware of the latitude enjoyed by our Investigators in establishing ground rules for the implementation of Section ERB 31.09(2) Wis. Adm. Code in given fact situations, and the controlling importance of the notice closing investigation in relation to any such ground rule.] ↗


7/ We do not mean to imply that the Investigator could not have thereafter continued to mediate after closing the investigation had the parties been willing to participate in further mediation.

Based on the above and foregoing, we conclude that the motion of Local 587 to reverse and/or modify the decision of the Investigator should be denied, and we have so ordered. As a result, it was permissible for MATC to amend its final offer. Local 587 may, therefore, further amend its final offer. The Investigator is hereby instructed not to close the investigation until neither party, having knowledge of the content of the final offer of the other party, would amend any proposal in its final offer.

Dated at Madison, Wisconsin this 2nd day of November, 1979.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By 
Morris Slavney, Chairman


Gary L. Covelli, Commissioner