

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of

WEST MILWAUKEE PROFESSIONAL FIRE
FIGHTERS ASSOCIATION, LOCAL 1417, I.A.F.F.

For Final and Binding Arbitration
Involving Firefighter Personnel in
the Employ of

VILLAGE OF WEST MILWAUKEE (FIRE
DEPARTMENT)

Case XXI
No. 25824 MIA-487
Decision No. 17927-A

Appearances:

Leroy Waite, International Representative, I.A.F.F., 1600 East
Ridge Road, Beloit, Wisconsin 53511, appearing on behalf of
the Association.

Roger Walsh, Attorney at Law, Lindner, Honzik, Marsack, Hayman
and Walsh, 700 North Water Street, Milwaukee, Wisconsin 53211,
appearing on behalf of the Village.

FINDINGS OF FACT, CONCLUSIONS OF LAW
AND ORDER TO PRODUCE FINAL OFFERS

West Milwaukee Professional Fire Fighters Association, Local 1417, I.A.F.F., having on February 28, 1980, filed a petition pursuant to Section 111.77 of the Municipal Employment Relations Act (MERA), with the Wisconsin Employment Relations Commission, alleging that the Association and the Village of West Milwaukee were at an impasse in their collective bargaining with respect to wages, hours and working conditions to be contained in a new collective bargaining agreement covering non-supervisory fire fighter personnel in the employ of the Village; and an informal investigation having been conducted in the matter on April 25, May 30, and June 26, 1980; and the Commission having on July 8, 1980 directed that a formal hearing be conducted in the matter pursuant to the request of the Village for the purpose of determining whether the parties were at an impasse within the meaning of Section 111.77 of MERA and, if so, to determine and obtain the final offers of the parties which were to be submitted to arbitration; 1/ and a formal hearing having been conducted at Milwaukee, Wisconsin on July 25, 1980 by Stuart S. Mukamal, a mediator on the Commission's staff, at which time the parties presented evidence and arguments as to whether an impasse existed between the parties and, when the investigator advised the parties of his belief that an impasse existed, to present their final offers before said hearing was closed; and the Commission, having reviewed the record and the briefs of the parties with respect to the matter, issues the following Findings of Fact, Conclusions of Law and Order to Produce Final Offers.

FINDINGS OF FACT

1. That the West Milwaukee Professional Fire Fighters Association, Local 1417, I.A.F.F., hereinafter referred to as the Association, is a labor organization maintaining its offices, care of its President, John R. Paulson, at 1702 South 52nd Street, Milwaukee, Wisconsin 53219.

1/ Our order also specifically directed that the parties be prepared, prior to the close of the hearing, to present their final offers for submission to an arbitrator should the facts and circumstances so warrant.

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2. That the Village of West Milwaukee, hereinafter referred to as the Village, is a municipal employer, and among its various governmental functions operates a fire department with offices located at 4515 West Burnham, West Milwaukee, Wisconsin 53214.

3. That the Association is the certified collective bargaining representative of all regular non-supervisory fire fighters in the employ of the Village; and that the Association and the Village were parties to a collective bargaining agreement covering wages, hours and conditions of employment of said employes, effective from January 1, 1978 to, and including, December 31, 1979, which, by agreement of the parties, has been extended until a new agreement is reached or imposed by an arbitrator.

4. That on October 26, 1979 and December 18, 1979 the Association and Village exchanged proposals to be included in a new agreement to succeed the 1978-1979 agreement; that thereafter the parties met on four occasions in efforts to reach an accord on a new collective bargaining agreement; that on February 28, 1980 the Association filed a petition with the Wisconsin Employment Relations Commission, alleging that the parties had reached an impasse in their collective bargaining, and requesting the Commission to conduct an investigation and certify the results thereof, and determine whether final and binding arbitration, and the form thereof, should be initiated; that an informal investigation was conducted in the matter on April 25, 1980 by Stanley H. Michelstetter II, and on May 30, 1980 and June 26, 1980 by Stuart S. Mukamal, both members of the Commission's staff; and, that pursuant to the request of the Village, a formal hearing was conducted by Stuart S. Mukamal on July 25, 1980 at Milwaukee, Wisconsin, to determine whether the parties were at impasse, and if so, to obtain their final offers.

5. That at said hearing the Village was permitted to present evidence and argument with regard to the question of whether the parties were at impasse; that at the conclusion of said presentation the staff investigator conducting the hearing advised the parties of his belief that an impasse existed and requested that they submit final offers; that, pursuant to said request, the Association submitted an offer, which consisted of a clear statement of its proposal on each issue still in dispute; that the Village objected to the investigator's request, based on its contention that the investigator lacked the authority to declare an impasse and to demand the production of final offers but agreed to submit a final offer "under protest"; that the offer submitted by the Village did not constitute a clear statement of its final offer on each issue still in dispute, since it contained wage proposals which made reference to wage rates that were not then ascertainable, and might not be ascertainable prior to the decision of an interest arbitrator; that the investigator then advised the Village that its offer, submitted at the hearing under protest, was defective in that it contained wage proposals that were not then ascertainable and asked the Village if it was willing to change its offer to correct said defect; that the Village objected to the investigator's authority to determine whether said offer was defective, and refused to change its offer to correct said defect; that the investigator then advised the parties of his intent to close the hearing, and that he would advise the Commission that the Village's final offer should be deemed to consist of: (1) those proposals contained in its offer filed at the hearing under protest, except those wage proposals that related to wage rates which were not then ascertainable, and (2) certain wage proposals contained in a prior offer, made on June 13, 1980, and identified as the Village's "2d tentative final offer" in lieu of those wage proposals contained in the offer filed under protest that were not then ascertainable.

6. That the portion of the Village's offer filed at the hearing and found to be defective by the investigator read, in relevant part, as follows:

<u>Firefighter and Fire/Sanitary Inspector</u>	<u>Effective 1/1/80</u>
Fifth Year	\$33 below 5th year Patrolman Rate for 1980
<u>Fire Lieutenants</u>	
First Year	\$73 below 1st year Sergeant Rate for 1980
Second Year	\$33 below 1st year Sergeant Rate for 1980
Third Year	\$33 below 2nd year Sergeant Rate for 1980

Note: All patrolmen sergeant rates refer to those in West Milwaukee listed on a monthly basis.

7. That the reference to the patrolmen and sergeant rates contained in the Village's offer filed at the hearing under protest referred to law enforcement personnel, employed by the Village; that at the time of the hearing the wage rates for such personnel had not been established because the issue of what wage rates said personnel should receive was then pending before arbitrator Frank Zeidler in a final offer arbitration proceeding involving the Village and the West Milwaukee Professional Policemen's Association; 2/ that the relevant portions of the final offers which were then pending before arbitrator Zeidler were as follows:

	<u>Village's Final Offer</u>	<u>West Milwaukee Professional Policemen's Association Final Offer</u> <u>3/</u>	
	<u>01/01/80</u>	<u>01/01/80</u>	<u>07/01/80</u>
Patrolmen			
Fifth Year	\$1,601.81	\$1,587.11	\$1,634.72
Sergeant of Police . . .			
First Year	\$1,675.18	\$1,659.81	\$1,709.60
Second Year	\$1,735.28	\$1,719.36	\$1,770.94

8. That an impasse existed in the negotiations between the Village and the Association at the time of the hearing herein; that the offer of the Village, filed at the hearing under protest, was indefinite in that it contained wage proposals which made reference to wage rates that were not then ascertainable; 4/ that none of the wage proposals contained in the Village's offer of June 13, 1980 are properly considered to be part of its final offer herein; and that to date the Village has not filed a proper final offer in the matter.

2/ Case XX, No. 25605, MIA-475, Decision No. 17745.

3/ The offer of the West Milwaukee Professional Policemen's Association was actually expressed as percentage increases (8% and 3%). For clarity, we have set out their final offer in monthly salary figures.

4/ As discussed in our memorandum, said wage rates became ascertainable thereafter when arbitrator Zeidler issued his award on July 28, 1980.

9. That the parties have not established mutually agreed upon procedures for the final resolution of disputes arising in collective bargaining, and further, that the parties have not mutually agreed that the arbitration should not be limited to the last and final offers of each of the parties.

Based on the above and foregoing Findings of Fact, the Commission makes the following:

CONCLUSIONS OF LAW

1. That an impasse, within the meaning of Sec. 111.77(3) of MERA, exists between the Association and Village with respect to negotiations leading toward a collective bargaining agreement for the year 1980 covering the wages, hours and conditions of employment for fire fighting personnel employed by the Village.

2. That, pursuant to Sec. 111.77(3) of MERA and ERB 30.07 Wis. Admin. Code, the Commission's investigator had the authority, on behalf of the Commission, to advise the parties that an impasse existed at the conclusion of the hearing herein and to request that the parties submit their final offers on the issues in dispute.

3. That the offer submitted by the Village under protest on the issues remaining in dispute at the conclusion of the hearing herein did not constitute a "final offer" on the issues in dispute as contemplated in Sec. 111.77(4)(b) of MERA, because it contained wage proposals which made reference to wage rates which were not then ascertainable; and that since none of the wage proposals made by the Village in its offer of June 13, 1980 and referred to in Finding of Fact No. 5 above were intended by the Village to be part of its offer made under protest at the conclusion of the hearing, the Village to date has not made a final offer pursuant to the requirements of Sec. 111.77 (4)(b) of MERA.

Based on the above and foregoing Findings of Fact and Conclusions of Law, the Commission makes the following:

ORDER

1. That the investigator's action closing the hearing herein is set aside and the investigation is hereby reopened.


2. That the Village shall make a written final offer, which offer shall contain a single, clear, unambiguous and presently ascertainable proposal on all issues in dispute between the Village and the Association, and serve a copy of same on the Commission and upon the Association on or before October 10, 1980.

3. That following the receipt of a copy of the Village's final offer properly submitted in compliance with paragraph 2 above, the Association shall notify the investigator on or before October 20, 1980 of its desire to either change or not to change the Association's final offer. Should the Association not desire to change its final offer the investigator shall advise the Commission and the parties that the impasse still exists and shall thereupon close the investigation and submit the final offers to the Commission. Should the Association timely indicate that it desires to change its previous final offer, it

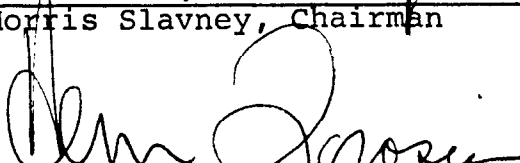
shall so advise the investigator, who shall then proceed with his investigation and continue same until such time as he is satisfied that the parties do not desire to change their last final offers, and at that time he shall notify the parties that the investigation is closed and at the same time advise the Commission thereof, and shall thereupon submit the final offers, and any stipulation agreed upon by the parties, to the Commission and thereupon the Commission shall issue an order certifying the dispute to final and binding arbitration.

Given under our hands and seal at the
City of Madison, Wisconsin, this 30th
day of September, 1980.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

BY 

Morris Slavney, Chairman



Herman Torosian, Commissioner



Gary L. Covelli, Commissioner

MEMORANDUM ACCOMPANYING FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER
TO PRODUCE FINAL OFFERS

The instant petition was filed on February 28, 1980. Commission investigators 5/ held investigation meetings on April 25, May 30, and June 26, 1980, wherein they attempted to mediate the dispute. At the conclusion of the meeting on June 26, 1980 the investigator sought to obtain the "final offers" of the parties. Although the Village and Association had previously provided the investigator with tentative final offers pursuant to the exchange procedure being utilized by the investigator, the Village took the position that it should not be required to provide the investigator with a final offer based on its claim that it would be inappropriate to declare an impasse at that time.

Thereafter on July 1, 1980 the Village notified the Commission, in writing, of its position, wherein it claimed inter alia 6/ that there was no impasse and requested that a formal hearing be conducted to adduce evidence as to whether the parties were in fact at an impasse. On July 8, 1980 the Commission issued an order setting a hearing in the matter for July 25, 1980.

At the hearing the Village introduced testimony and an exhibit in support of its position that an historic ("parity") relationship exists between the wage rates paid to law enforcement personnel and fire fighting personnel in its employ. Specifically the Village attempted to prove that, at least since 1970, the monthly salary received by fire fighters in the top step of the pay range has remained approximately \$33 below the rate for patrolmen in the top step of their pay range. Based on this alleged relationship and the fact that the wage rates for patrolmen had not been established at the time of the hearing, the Village took the position that no impasse should be found until such time as the wage rates for law enforcement personnel were established.

At the time of the hearing herein, July 25, 1980, the wage rates for the law enforcement personnel were not certain since the matter was pending before Arbitrator Zeidler. The Village estimated that, based on statements made by Arbitrator Zeidler, an award in that case, selecting the final offers of one of the parties and establishing the wage rates for law enforcement personnel, would be issued within a few weeks. In fact Zeidler's award was issued on July 28, 1980.

In his award Arbitrator Zeidler selected the final offer of the West Milwaukee Professional Policemen's Association, the relevant portions of which are set out in Finding of Fact No. 7. Prior to the receipt of a copy of said award, the Village wrote a letter to the Commission outlining its position that: (1) only the Commission may determine the existence of an impasse under Section 111.77, and that herein the Commission should make a determination of that issue after receipt of the transcript and briefs; and (2) the investigator erred when he determined that the Village's offer, filed under protest at the hearing, was "defective". After the Village and Association received copies of Arbitrator Zeidler's award, further efforts were

5/ Stanley H. Michelstetter II of the Commission's staff was initially assigned to investigate the petition but became unavailable due to his resignation from the staff of the Commission on or about June 13, 1980 and Stuart S. Mukamal was therefore assigned to take his place.

6/ The Village also objected that the investigation had been closed before it had filed its final offer. As noted in our order for hearing herein (Decision No. 17927) the notice closing the investigation was inadvertently issued by the investigator in his written advice to the Commission.

made by the investigator to resolve the matter by further mediation or a mutual agreement, allowing for further modification of offers by the parties; but such efforts were unsuccessful. The transcript of the July 25 hearing was received on August 18, 1980 and written arguments were received by September 15, 1980.

Position of the Village

The Village's position is threefold. First, the Village contends that, under the provisions of Section 111.77 and the Commission's rules and precedents, only the Commission, and not the Commission's investigator, has the power to determine the existence of an impasse. Therefore, according to the Village, the finding of an impasse made by the Commission's investigator at the hearing is not binding on the Commission and the Commission should proceed to find whether an impasse existed at that time.

Secondly, the Village contends that no impasse existed in the negotiations at the time of the hearing. At the hearing the Village pointed out that the Commission has previously recognized the relationship that exists between police and fire negotiations in Wisconsin when it held that a contract provision, designed to maintain police and fire "parity" was not unlawful.^{7/}

In its brief the Village contends that its position in this regard is not inconsistent with the Commission's decision in the City of Milwaukee case ^{8/}, relied upon by the Commission's investigator. While acknowledging that the question of whether an impasse exists "must be determined as of a point in time" as stated by the investigator, the Village notes that said decision recognized the City's legitimate interest in maintaining uniformity and avoiding "leap frogging" when dealing with several bargaining units.

The Village argues that:

- (1) The question of the existence of an impasse at a particular point in time depends upon a number of factors including:

". . . The bargaining history, the good faith of the parties in negotiations, the length of the negotiations, the importance of the issues to which there is a disagreement, the contemporaneous understanding of the parties as to the state of negotiations . . ."

- (2) The existence of an impasse "is a question of fact under all circumstances" ^{9/}
- (3) A "working definition of impasse" has been held by one Federal Court of Appeals to be where "there was not realistic prospect that continuation of discussion at that time would have been fruitful." ^{10/}

According to the Village, the evidence discloses that there was a realistic prospect that further negotiations would be fruitful after a short adjournment. That evidence established that Arbitrator Zeidler's

^{7/} City of West Allis (12706) 5/74.

^{8/} Decision No. 11792, April 26, 1973.

^{9/} Citing Midwest Casting Corp. 79 LRRM 1098 (1971)

^{10/} Citing NLRB v. Association of Steel Fabricators 98 LRRM 3150 (CA2 1978).

award would be received within 2 to 3 weeks and the Village would reconsider its position after the issuance of his award. According to the Village, the Association's claim that it would not reconsider its position regardless of the outcome of the Zeidler arbitration was not credible.

Finally, at the hearing the Village argued that its offer, filed under protest, was a proper final offer and that the investigator exceeded his authority and erred when he determined that it was not a proper offer, and combined it with portions of an earlier offer which included different wage rates. At the hearing, the Village, in support of its position that its offer was proper, cited the Racine County case 11/, wherein the Commission found that an offer which made reference to something outside the offer itself was a proper final offer. The Village argued that its offer, which made reference to the wage rates for certain patrolmen and sergeants, which were then pending in the form of final offers before Arbitrator Zeidler, properly included such rates by reference. Alternatively the Village argued that even if its offer was improper the investigator exceeded his authority and erred by so ruling and combining its offers.

In its brief the Village does not repeat its claim that its offer was proper, but does claim that the investigator exceeded his authority by attempting to construct or "make up" a final offer. According to the Village, its final offer submitted under protest should no longer be considered part of the record, since it was rejected by the investigator.

Position of the Association

The Association does not dispute the authority of the Commission's investigator to find that an impasse existed. According to the Association the investigator properly found, on the evidence presented, that an impasse existed and asked the parties for their final offers. To rule otherwise, according to the Association, would be to allow another bargaining unit (the law enforcement unit) to bargain for the instant unit of fire fighters. The Association does not take a position on the question of whether the investigator had the authority to determine that the offer submitted by the Village at the hearing was not a proper final offer, or whether he was correct in so ruling. Instead the Association concedes that it is an undesirable practice "to submit a final offer which does not contain exact dollar amounts" but argues that as a matter of policy the Commission should certify an impasse based on the offers made at the conclusion of the hearing and allow the arbitrator to determine whether the Village's offer is defective. If the Village's offer is defective, the arbitrator would then be compelled to find for the Association. This procedure would, according to the Association, insure that neither party could obtain delays, unfair advantage, and frustrate the statutory procedure by the practice of filing defective offers.

Discussion

Our order for hearing not only directed our investigator to take evidence concerning whether the parties were at an impasse, but also directed him to determine and obtain the final offers of the parties if he found an impasse. Thus, to the extent that the Village's claim that the investigator lacked the authority to call for final offers may be based on the intent of our order, there can be no doubt that we intended to grant him such authority

11/ Decision No. 17196-B, February 8, 1980.

According to the Village, the wording of Section 111.77(4)(b) and Sections ERB 30.07, ERB 10.17, ERB 10.18, ERB 10.19 and ERB 30.11, Wis. Adm. Code, support its contention that, in cases where the matter is in dispute, only the Commission has the authority to make a determination that the parties are, in fact, at impasse, and that the purpose of a hearing is to take evidence necessary to make that determination. The proper procedure, according to the Village, would be for the Commission to determine on the basis of the evidence whether an impasse exists, and if so, order the party who has failed to make a final offer to show cause why it should not do so. 12/

We do not dispute the Village's contention that the ultimate responsibility for determining the existence of an impasse under Section 111.77 and Chapter ERB 30, Wis. Admin. Code lies with the Commission. However, in the process of administering Section 111.77 the Commission necessarily relies on the professional judgment of its investigators for initially making such determinations. This is true whether such judgments are made in the context of written advice based on an informal investigation or transcribed rulings made in a formal hearing. If our investigators were not so empowered, a non-cooperative party could make a mockery of the investigative process by insisting on a hearing and prior determination of impasse before submitting its final offer. Then, after a determination of impasse has been made by the Commission, the non-cooperating party, if it has not already obtained the desired quantum of delay, could allege changed circumstances in its response to the order to show cause.

As the Village correctly points out in its brief, the existence of an impasse is a question that must be answered in the context of the facts in a given case and as of a given point in time. We believe that the investigator properly found that an impasse existed in this proceeding at the end of the hearing. The issues remaining at the time of the hearing were relatively few and uncomplicated. Previously there had been a number of meetings and preliminary exchanges of final offers. The Association believed that an impasse had been reached sometime before the hearing and continued to exist at that point in time. In fact, the Village's sole basis for claiming that no such impasse existed related to its desire to reconsider its position based on the outcome of the negotiations, or more particularly, the arbitration proceeding involving the bargaining unit of law enforcement personnel employed by the Village.

While we do not doubt the sincerity of the Village's motivation for seeking to postpone the further processing of the instant petition for this purpose, we do not believe, as a matter of policy, that such a reason should be accepted as a basis for a finding of a lack of impasse. Contrary to the Village's claim, because of the unsettled status of the law enforcement negotiations, there was no realistic prospect at that time that continuation of the discussion would have been fruitful. While it is true that the Village might later reconsider its position depending on the outcome of the other proceeding (i.e., settlement or selection of one of the two final offers) such a potential was speculative and depended on factors outside the Village's control. This is unlike a situation where the negotiators for one party expresses a bona fide need to consult with their principals in order to reconsider their position based on known or determinable facts. A temporary cessation of the discussion to accommodate such a need might be

12/ The Village cites our issuance of such an order in the Milwaukee Area Technical College case, Decision No. 17131, July 12, 1979. However, that case involved an objection to a final offer which contained alternative wage proposals and not a hearing on impasse.

appropriate -- since at the time of such request there might well exist a realistic prospect that continuation of discussion would be fruitful.

For the above reasons we find that an impasse existed at the time of the hearing and that the investigator properly directed the Village to produce its final offer. We also agree that the offer that was filed by the Village was indefinite. We do not accept the investigator's advice with respect to constructing the Village's final offer as described in paragraph 3 of our Finding of Fact.

The Village's offer was indefinite in that it did not set out proposed wage rates which were then ascertainable, making it impossible for the Association to make an intelligent decision as to whether to amend or maintain its final offer.^{13/} Further, although it was very likely that Zeidler's award would be issued shortly, there was no way to guarantee that the arbitrator appointed in this proceeding would know the content of the Village's wage proposal if, there were a delay in the issuance of the Zeidler award, or if his award was legally challenged. Finally, the Racine County case relied upon by the Village, is inapposite. There it was possible to determine the exact content of the disputed offer since it incorporated, by reference, language which was then ascertainable. A more appropriate analogy could be drawn to the Commission's decision in the Milwaukee Area Technical College case ^{14/}, where the Commission found that a final offer, which contained alternative wage proposals, was subject to the objection that it was not a single final offer as contemplated by the mediation-arbitration statute.

We cannot accept the Association's position that the appropriate policy for dealing with potentially defective offers is to certify the existence of an impasse and allow the arbitrator to resolve the issue. Arbitrators, appointed under Section 111.77, are not expected or empowered to resolve procedural issues which are appropriately raised prior to the certification of impasse. More importantly, their decisions are to be based on the statutory criteria, not alleged defects in the procedures before the Commission or the offers of the parties.

Because the Village's offer was indefinite, and in view of its refusal at the hearing to correct same, the investigator has proposed that we combine portions of the Village's previous offer with its defective offer. In our view this is not the appropriate remedy for

^{13/} Our concern here is not based on a finding that the testimony of the Association, that it desired to make no further modifications regardless of the outcome of the Zeidler award, is not credible. Rather we view this as an issue of the appropriate policy to further the underlying purposes of the statutory procedure, regardless of the Association's actual desires.

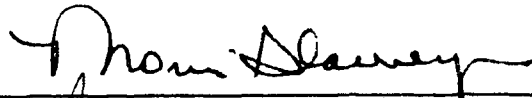
^{14/} Decision No. 17131-A, August 21, 1979.

the Village's non-cooperation, which was based, at that point in time, on a legally debatable position. We have, therefore, ordered the Village to make a proper final offer within a time certain. Because the Zeidler award has now been issued and because we have rejected the Association's position as to the current finality of the Village's offer we have: (1) not limited the Village in formulating the content of its offer; and (2) held open the possibility of further exchanges by providing the Association with the option to make further modifications in its offer.

Dated at Madison, Wisconsin, this 30th day of September, 1980.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By



Morris Slavney, Chairman



Herman Torosian, Commissioner



Gary L. Covelli, Commissioner