STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MADISON MUNICIPAL EMPLOYEES, LOCAL 60, AFSCME, AFL-CIO, and JOHN CERRO, Complainants, vs. CITY OF MADISON and JOEL SKORNICA, MAYOR, Respondents.	Case C No. 31319 MP-1458 Decision No. 20656-B
CITY OF MADISON, Complainant, vs. MADISON MUNICIPAL EMPLOYEES, LOCAL 60, Respondent.	Case CI No. 31449 MP-1463 Decision No. 20657-B

Appearances:

Mr. Darold Lowe, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 5 Odana Court, Madison, Wisconsin 53719, appearing on behalf of the Union.

Mr. Timothy C. Jeffery, Director of Labor Relations, Room 401, City-County Building, 210 Monona Avenue, Madison, Wisconsin 53709, appearing on behalf of the City.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On March 24, 1983, Madison Municipal Employees, Local 60, AFSCME, AFL-CIO and John Cerro filed a complaint with the Wisconsin Employment Relations Commission, hereinafter the Commission, wherein it alleged that the City of Madison had violated Sec. 111.70(3)(a)5, of the Municipal Employment Relations Act (MERA) by refusing to proceed to arbitration on the grievance of John Cerro. On April 14, 1983, the City of Madison filed a complaint with the Commission wherein it alleged that the Union had violated Sec. 111.70(3)(b)4 by refusing to give effect to a negotiated settlement of the grievance. On May 11, 1983, the Commission entered an order consolidating the cases for hearing and appointed Daniel L. Bernstone, a member of the Commission's staff to act as Examiner, to conduct a hearing on said complaints and to make and issue Findings of Fact, Conclusions of Law and Order as set forth in Sec. 111.07(5) Wis. Stats. Said hearing in the matter was held on June 23, 1983 in Madison, Wisconsin; and the parties having filed post-hearing briefs which were exchanged by the Examiner on September 8, 1983; and the Examiner having considered the evidence and arguments of the parties, and being fully advised in the premises, makes and issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. That Madison Municipal Employees, Local 60, AFSCME, AFL-CIO, hereinafter referred to as the Union, is a labor organization which, for the last several years has represented for purposes of collective bargaining, certain employes of the City of Madison, and which maintains offices at 5 Odana Court, Madison, Wisconsin 53719.

2. That the City of Madison, hereinafter referred to as the City, is a municipal employer with offices located at the City-County Building, Madison, Wisconsin 53709.

3. That the Union and the City were parties to two collective bargaining agreements, effective by their terms from January 1, 1982 to December 31, 1982 and from January 1, 1983 to December 31, 1983, respectively, covering wages, hours and other terms and conditions of employment.

4. That the 1982 and 1983 collective bargaining agreements between the City and the Union contain in pertinent part, the following provisions on final and binding arbitration:

> 6.02 FINAL AND BINDING ARBITRATION
>
> A. Arbitration may be resorted to only when issues arise between the parties hereto with reference to interpretation, application or enforcement of the provisions of this Agreement.
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> B. Any dispute which shall be determined by the arbitrator to be non-grievable, shall be appealable under the provisions of Chapter Three of the Madison General Ordinances.
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> C. It is contemplated by the provisions of this Agreement that any arbitration award shall be issued by the arbitrator at the earliest date after completion of the hearing.
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> D. No item or issue may be the subject of arbitration, unless such arbitration is formally requested within thirty (30) days following the filing of a Written Response required by Step Two or the due date therefor. This provisions is one of limitation, and no award of any arbitrator may be retroactive for a period greater than thirty (30) days prior to the presentation of the grievance in Step One as herein provided or the date of occurence, whichever is greater.
>
> E. Final and binding arbitration may be initiated by either party serving upon the other party a notice in writing of the intent to proceed to arbitration. Said notice shall identify the Agreement provision, the grievance or grievances, the department and the employees involved. Unless the parties can, within five (5) working days following the receipt of such written notice, agree upon the selection of an arbitrator, either party may in writing request the Wisconsin Employment Relations Commission to submit a list of five (5) arbitrators to both parties.
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> F. The parties shall within five (5) working days upon receipt of said list meet for the purpose of selecting the arbitrator by alternatively striking names from said list until one name remains. Such person shall then become arbitrator.

5. That on June 30, 1982, employee John Cerro filed a grievance concerning the reclassification of the position of Forestry Inspector and said grievance was appealed to arbitration on October 6, 1982.

6. That in September or October of 1982, the parties commenced negotiations for the 1983 agreement; that the grievance of John Cerro was discussed during the negotiations; that on December 30, 1982, the parties were assisted in reaching a tentative agreement by Commission Mediator Herman Torosian.

7. That included among the terms of the mediated agreement was the agreement by the Union and the City that the Forestry Inspector position was properly classified in Compensation Group 16, Range 14 and that the grievance of employe

John Cerro would not be taken to arbitration in light of the agreement by the parties to retain the Forestry Inspector position at Range 14 in the contract; that the parties' agreement not to proceed to arbitration respecting employe Cerro's grievance was communicated to the City in its caucus by Mediator Torosian at 7:00 p.m. on December 30, 1982; that at approximately 7:30 p.m. on the same date, Mediator Torosian brought the parties together in a face to face joint session; that during that session, Mediator Torosian summarized the details of the parties' tentative agreement and again indicated it was his understanding that the parties had agreed that the grievance of employe Cerro would be dropped; that no objection was raised during the joint session by the Union concerning Mediator Torosian's statement that the dropping of the Cerro grievance by the Union was part of the mediated contract settlement; that thereafter, on April 19, 1983, the parties had occasion to meet again with Mediator Torosian, at which time he reviewed his notes from the December 30, 1982 mediation session and reported to the parties that his notes indicated the tentative agreement reached on December 30, 1982 included an agreement that the Forestry Inspector position was properly classified and that the Cerro grievance would not be submitted to arbitration.

8. That on January 6, 1983, the Union membership ratified the tentative agreement of December 30, 1982 and the Union notified the City of said ratification by a letter dated January 14, 1983.

9. That on January 18, 1983, Timothy Jeffery, Director of Labor Relations for the City, received a telephone call from Darold Lowe, the Union's chief negotiatior, in which Lowe informed Jeffery that the Union's Executive Board had overruled the bargaining committee concerning the Cerro grievance and desired that the grievance proceed to arbitration; that Marcella McCallum, and other members of the bargaining committee attempted to overcome the ruling of the Executive Board by going directly to the Union membership; that later that evening, Jeffery received a telephone call from Darold Lowe, at which time Lowe informed Jeffery that those efforts were unsuccessful.

10. That, despite the action of the Union's Executive Board, the Madison City Council, on January 18, 1983, ratified the parties' tentative agreement of December 30, 1982; that on January 20, 1983, the City, by letter, notified the Union of its ratification and its intention to abide by the earlier agreement concerning the Cerro grievance; that on February 22, 1983, the Union notified Ms. June Weisberger that she had been selected as arbitrator with respect to the John Cerro grievance; that on March 9, 1983, the City, by letter, notified the Union of its decision not to proceed to arbitration of the Cerro grievance.

Upon the basis of the above and foregoing Findings of Fact, the Examiner makes and issues the following

CONCLUSIONS OF LAW

1. That the Union entered into an oral agreement with the City, on December 30, 1982, to refrain from proceeding to arbitration regarding the John Cerro grievance and therefore the City did not commit prohibited practices within the meaning of Section 111.70(3)(a)5 of MERA by refusing to proceed to arbitration of said grievance.

2. That the Union, by attempting to proceed to arbitration, violated the agreement of the parties entered into on December 30, 1982 not to further process the Cerro grievance and therefore committed a prohibited practice within the meaning of Section 111.70(3)(b)4 of MERA.

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

ORDER 1/

1. That the Complaint against the City of Madison be dismissed in its entirety.

(See Footnote 1 on Page 4)

2. That Respondent Madison Municipal Employees, Local 60, shall immediately:

a) Cease and desist from seeking to arbitrate the grievance of John Cerro.

b) Take the following affirmative action which the Examiner finds will effectuate the policies of the Municipal Employment Relations Act:

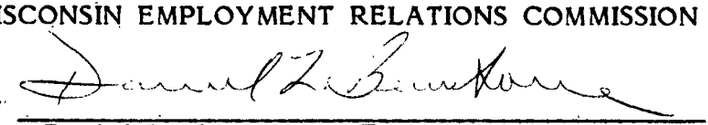
1. Comply with the oral agreement reached between the parties on December 30, 1982 regarding the grievance of John Cerro.

2. Notify all employes by posting in conspicuous places where bargaining unit employes are employed and where notices to all employes are usually posted, copies of the notice attached hereto and marked "Appendix A". "Appendix A" shall be and remain posted for sixty (60) days thereafter. Reasonable steps shall be taken by the Respondent Union to insure that notices are not altered, defaced or covered by other material.

3. Notify the Wisconsin Employment Relations Commission in writing, within twenty (20) days following the date of this Order, as to what steps have been taken to comply herewith.

Dated at Madison, Wisconsin this 24th day of April, 1984.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By 
Daniel L. Bernstone, Examiner

1/ Any party may file a petition for review with the Commission by following the procedures set forth in Sec. 111.07(5), Stats.

Section 111.07(5), Stats.

(5) The commission may authorize a commissioner or examiner to make findings and orders. Any party in interest who is dissatisfied with the findings or order of a commissioner or examiner may file a written petition with the commission as a body to review the findings or order. If no petition is filed within 20 days from the date that a copy of the findings or order of the commissioner or examiner was mailed to the last known address of the parties in interest, such findings or order shall be considered the findings or order of the commission as a body unless set aside, reversed or modified by such commissioner or examiner within such time. If the findings or order are set aside by the commissioner or examiner the status shall be the same as prior to the findings or order set aside. If the findings or order are reversed or modified by the commissioner or examiner the time for filing petition with the commission shall run from the time that notice of such reversal or modification is mailed to the last known address of the parties in interest. Within 45 days after the filing of such petition with the commission, the commission shall either affirm, reverse, set aside or modify such findings or order, in whole or in part, or direct the taking of additional testimony. Such action shall be based on a review of the evidence submitted. If the commission is satisfied that a party in interest has been prejudiced because of exceptional delay in the receipt of a copy of any findings or order it may extend the time another 20 days for filing a petition with the commission.

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Position of the Union

The Union contends the 1982 and 1983 collective bargaining agreements contain final and binding arbitration clauses and that the John Cerro grievance was properly appealed to arbitration in October, 1982. Thus, the Union argues, the City is under an obligation to proceed to arbitration. Furthermore, the Union denies that it entered into an agreement with the City, as part of the tentative agreement on a 1983 contract reached during mediation on December 30, 1982, that the John Cerro grievance would not be arbitrated.

Position of the City

While admitting the existence of the final and binding arbitration clauses in both the 1982 and 1983 collective bargaining agreements, the City maintains it is under no obligation to proceed to arbitration of the Cerro grievance because the Union, as part of the mediated settlement which resulted in the 1983 contract, agreed to drop the grievance. The City argues that the 1983 agreement was ratified by both parties with that understanding in mind. Finally, the City contends the Union's Executive Board possessed no authority to disavow any part of the agreement.

Discussion

The issue in this case is not whether the subject matter of the John Cerro grievance, reclassification of the Forestry Inspector position, is covered by the parties' collective bargaining agreement. Clearly, it is covered by the arbitration clause in the agreement. Rather, the sole issue is whether the parties agreed, as part of the tentative agreement they reached during mediation on December 30, 1982, that they would not proceed to arbitration of the grievance of John Cerro. The Union denies the parties entered into such an agreement on that date. The Union presented only one witness, Marcella McCallum, a member of the Union's bargaining committee. She was present during the mediation which took place on December 30, 1982. She testified that the Cerro grievance was discussed during the mediation session on that date, but that there was no agreement that the Union would drop or not proceed to arbitrate that grievance. McCallum did not testify, however, with respect to any conversation between the Wisconsin Employment Relations Commission Mediator Herman Torosian and the parties on December 30, 1982, nor is there anything in the record to support her denial that the parties agreed on that date not to proceed to arbitrate the Cerro grievance. Furthermore, in contrast to her mere denial that such an agreement was reached on December 30, 1982, there is a preponderance of evidence that an agreement was indeed reached between the City and Union during the December 30 mediation session that the Cerro grievance would not be arbitrated. The testimony of Ken Wright, Labor Relations Specialist for the City, who was present at the December 30 mediation, was specific and detailed concerning that agreement. Wright testified that the City was informed by Mediator Torosian at 7:00 p.m. on December 30 that the parties had reached a tentative agreement for 1983 and that the matter of the arbitration of the Cerro grievance was "settled." Wright also testified that at approximately 7:30 p.m. on that date, Mediator Torosian brought the parties together in a joint face to face session at which time he reiterated all of the details of the settlement. One of the details announced by Mediator Torosian was that the Cerro grievance would not proceed to arbitration. Wright then testified that no objection was raised by the Union concerning that announcement by Mr. Torosian. Wright further testified that he, Jeffery, Lowe and McCallum met with Mr. Torosian at the Commission's offices on April 19, 1983, and that at that meeting Mediator Torosian reviewed his notes from the December 30 mediation and concluded upon the review that he had reported to the parties on December 30 that they had reached a tentative agreement which included an agreement that the Forestry Inspector position was properly classified and that the Cerro grievance would not go to arbitration. Jeffery, the City's Director of Labor Relations, who was present at the December 30 mediation, testified in narrative form, and corroborated the testimony of Wright concerning the parties' agreement on that date that the John Cerro grievance would not be arbitrated.

In light of the foregoing evidence, it is concluded that the parties agreed on December 30, 1982, as part of their tentative agreement for a 1983 contract, not to proceed to arbitrate John Cerro's grievance. The action taken by the Union's Executive Board, in overruling the Union's bargaining committee, and ordering that the grievance be arbitrated, is not binding on the City in view of the prior ratification of the agreement by the Union membership and in the absence of any evidence indicating that the tentative agreement reached in mediation and subsequently ratified by the Union membership was subject to approval by the Union's Executive Board.

Dated at Madison, Wisconsin this 24th day of April, 1984.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By 
Daniel L. Bernstone, Examiner

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No. 20656-B
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"APPENDIX A"

NOTICE TO ALL EMPLOYES
REPRESENTED BY MADISON MUNICIPAL EMPLOYEES,
LOCAL 60, AFSCME, AFL-CIO

Pursuant to an Order of the Wisconsin Employment Relations Commission, all employes of the City of Madison represented by Madison Municipal Employees, Local 60, AFSCME, AFL-CIO are hereby notified by Local 60, its officers and agents that:

1. We will cease and desist from seeking to arbitrate the grievance of John Cerro which was appealed to arbitration on October 6, 1982.

2. We will comply with the oral agreement reached between Local 60 and the City of Madison on December 30, 1982 regarding the grievance of John Cerro.

Dated this _____ day of _____ , 1984.

Madison Municipal Employees, Local 60,
AFSCME, AFL-CIO

By _____

THIS NOTICE MUST REMAIN POSTED FOR SIXTY (60) DAYS
FROM THE DATE HEREOF AND MUST NOT BE ALTERED,
DEFACED OR COVERED BY ANY MATERIAL.