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-C
CITY OF MADISON, Complainant, vs. MADISON MUNICIPAL EMPLOYEES, LOCAL 60, Respondent.	:	Case CI No. 31449 MP-1463 Decision No. 20657-C

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. John Cerro, 4922 Goldfinch Drive, Madison, Wisconsin 53714, appearing on his own behalf in the Commission review proceeding.

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.

ORDER MODIFYING EXAMINER'S FINDINGS OF FACT AND CONCLUSIONS OF LAW AND AFFIRMING EXAMINER'S ORDER

Examiner Daniel L. Bernstone, on April 24, 1984, issued consolidated Findings of Fact, Conclusions of Law and Order with Accompanying Memorandum in the two matters noted above wherein Examiner Bernstone concluded that the above-noted Union had entered into an oral agreement with the City to refrain from proceeding to arbitration regarding the John Cerro grievance; that the City therefore did not commit prohibited practices within the meaning of Sec. 111.70(3)(a)5 of MERA by its refusal to proceed to arbitration of said grievance; but that the Union, by attempting to proceed to arbitration, violated the agreement of the parties not to further process the Cerro grievance and therefore committed a prohibited practice within the meaning of Sec. 111.70(3)(b)4 of MERA. Timely petitions for Commission review of that decision were filed by Cerro on May 9, 1984, and by the Union, on May 11, 1984. Cerro filed a supporting written argument on June 7, 1984. The Union and the City elected not to file additional written argument. The Commission 1/ having reviewed the record and the petition for review and having

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1/ Chairman Torosian did not participate in this decision.

concluded that the Examiner's Findings of Fact and Conclusions of Law should be modified and that the Examiner's Order should be affirmed;

NOW, THEREFORE, it is

ORDERED 2/

A. That the Examiner's Findings of Fact 1-6 are affirmed and adopted.

2/ Pursuant to Sec. 227.11(2), Stats., the Commission hereby notifies the parties that a petition for rehearing may be filed with the Commission by following the procedures set forth in Sec. 227.12(1) and that a petition for judicial review naming the Commission as Respondent, may be filed by following the procedures set forth in Sec. 227.16(1)(a), Stats.

227.12 Petitions for rehearing in contested cases. (1) A petition for rehearing shall not be prerequisite for appeal or review. Any person aggrieved by a final order may, within 20 days after service of the order, file a written petition for rehearing which shall specify in detail the grounds for the relief sought and supporting authorities. An agency may order a rehearing on its own motion within 20 days after service of a final order. This subsection does not apply to s. 17.025 (3)(e). No agency is required to conduct more than one rehearing based on a petition for rehearing filed under this subsection in any contested case.

227.16 Parties and proceedings for review. (1) Except as otherwise specifically provided by law, any person aggrieved by a decision specified in s. 227.15 shall be entitled to judicial review thereof as provided in this chapter.

(a) Proceedings for review shall be instituted by serving a petition therefor personally or by certified mail upon the agency or one of its officials, and filing the petition in the office of the clerk of the circuit court for the county where the judicial review proceedings are to be held. Unless a rehearing is requested under s. 227.12, petitions for review under this paragraph shall be served and filed within 30 days after the service of the decision of the agency upon all parties under s. 227.11. If a rehearing is requested under s. 227.12, any party desiring judicial review shall serve and file a petition for review within 30 days after service of the order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. The 30-day period for serving and filing a petition under this paragraph commences on the day after personal service or mailing of the decision by the agency. If the petitioner is a resident, the proceedings shall be held in the circuit court for the county where the petitioner resides, except that if the petitioner is an agency, the proceedings shall be in the circuit court for the county where the respondent resides and except as provided in ss. 182.70(6) and 182.71(5)(g). The proceedings shall be in the circuit court for Dane county if the petitioner is a nonresident. If all parties stipulate and the court to which the parties desire to transfer the proceedings agrees, the proceedings may be held in the county designated by the parties. If 2 or more petitions for review of the same decision are filed in different counties, the circuit judge for the county in which a petition for review of the decision was first filed shall determine the venue for judicial review of the decision, and shall order transfer or consolidation where appropriate.

(b) The petition shall state the nature of the petitioner's interest, the facts showing that petitioner is a person aggrieved by the decision, and the grounds specified in s. 227.20 upon which petitioner contends that the decision should be reversed or modified.

. . .

(c) Copies of the petition shall be served, personally or by certified mail, or, when service is timely admitted in writing, by first class mail,
(Continued on Page 3)

B. That the Examiner's Findings of Fact 7-10 are modified and expanded as follows; and as modified below, Findings of Fact 7-13 are adopted as the balance of the Commission's Findings of Fact in this matter:

> 7. That included among the terms of the mediated agreement were agreements by the Union and the City both that Forestry Inspector would remain in Compensation Group 16, Range 14 and that the grievance of employe John Cerro seeking a reallocation of his position from Forestry Inspector (in Range 14) to Project Coordinator (in Range 15) would not be taken to arbitration; 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.
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> 8. That on January 6, 1983, the City of Madison employes represented by Local 60 ratified the tentative agreement of December 30, 1982, and the Union notified the City of said ratification by a letter dated January 14, 1983.
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> 9. That on January 18, 1983, prior to City Council action on the tentative agreement, the following events took place: Timothy Jeffery, City Director of Labor Relations, received a telephone call from Union Chief Negotiator Darold Lowe wherein Lowe stated that the Union's Executive Board had overruled the bargaining committee concerning the Cerro grievance and had directed that the grievance proceed to arbitration; later that evening Union Bargaining Committee Chairperson Marcella McCallum informed Jeffery that she among others was upset with the action of the Executive Board and that they would make an effort that evening to overcome the ruling of the Executive Board by going directly to the Union membership, and that she, and other members of the bargaining committee would attempt to persuade the Union membership to

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2/ (Continued)

not later than 30 days after the institution of the proceeding, upon all parties who appeared before the agency in the proceeding in which the order sought to be reviewed was made.

Note: For purposes of the above-noted statutory time-limits, the date of Commission service of this decision is the date it is placed in the mail (in this case the date appearing immediately above the signatures); the date of filing of a rehearing petition is the date of actual receipt by the Commission; and the service date of a judicial review petition is the date of actual receipt by the Court and placement in the mail to the Commission.

abide by the terms of the tentative agreement; ultimately, Jeffery received a telephone call from Darold Lowe who informed him that the aforesaid efforts of McCallum and others were unsuccessful; that Jeffery thereupon told Lowe that the City would proceed that evening with the ratification of the tentative agreement and would attempt to hold the Union to all of the terms of the tentative agreement including the agreement regarding the Forestry Inspector and the agreement that the Cerro grievance would not proceed to arbitration.

10. That immediately thereafter Jeffery and City Alderman Warren Onken amended the Common Council resolution to include the second paragraph noted below and presented the matter for ratification to the Common Council; that Jeffery thereupon informed the Common Council that the Union staff representative and bargaining committee had been overruled by their Executive Board but recommended that the Common Council should proceed to ratify and that Jeffery intended to hold the Union to all of the terms of the tentative agreement including the Union's agreement not to proceed to arbitration regarding the Forestry Inspector matter; and that the Council thereupon adopted the following resolution:

> BE IT RESOLVED that the Mayor and the City Clerk be and they are hereby authorized to execute a Labor Agreement between the City of Madison and City Employees Local 60, AFSCME, AFL-CIO, for the period January 1, 1983 through December 31, 1983, on behalf of the City of Madison.
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> BE IT FURTHER RESOLVED that the authorization is pursuant to the specific terms and conditions of the settlement as mediated by Mr. Herman Torosian.

11. That on January 20, 1983, Jeffery sent a letter to Lowe notifying the Union that the City Council had voted to ratify the agreement, noting the underlined resolution paragraph above, and stating the following:

> It is the intention of the City to hold Local 60 to all terms of the agreement reached on December 30, 1982, including the agreement that the position of Forestry Inspector was properly classified at salary range 14 and that the union would not proceed to arbitration on the pending grievance involving said position.
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> Enclosed is the original labor agreement. Please execute and return to my office. I in turn will provide you with a copy of the fully executed contract.

12. That on February 17, 1983, authorized representatives of both parties executed their 1983 agreement.

13. 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; and that on March 9, 1983, the City notified the Union in writing that it was unwilling to proceed to arbitration of the Cerro grievance.

C. That the Examiner's Conclusions of Law are modified as follows and, as modified, are adopted as the Commission's Conclusions of Law in this matter.

1. That the Union is bound by its oral agreement tentatively reached by its bargaining representatives on December 30, 1982, ratified on January 6, 1983, by the City of Madison employes it represents, and thereafter reaffirmed by its representatives' February 17, 1983, execution of the 1983 labor agreement in response to the City's letter of January 20, 1983.

2. That the Union, by attempting on February 22, 1983, to proceed to arbitration of the Cerro grievance violated the terms of a collective bargaining agreement and thereby committed a prohibited practice in violation of Sec. 111.70(3)(b)4, Stats.

D. That the Examiner's Order is affirmed and adopted as the Commission's Order in this matter.

Given under our hands and seal at the City of Madison, Wisconsin this 17th day of September, 1984.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Marshall L. Gratz
Marshall L. Gratz, Commissioner

Danae Davis Gordon
Danae Davis Gordon, Commissioner

MEMORANDUM ACCOMPANYING ORDER MODIFYING EXAMINER'S FINDINGS OF FACT AND CONCLUSIONS OF LAW AND AFFIRMING EXAMINER'S ORDER

BACKGROUND

The Union's complaint alleged that the City violated Sec. 111.70(3)(a)5, Stats., by its admitted refusal to proceed to arbitration on a grievance. The City cross-complained that the Union violated Sec. 111.70(3)(b)4 by continuing to seek arbitration of that grievance contrary to the terms of an alleged negotiated agreement not to do so. The cases were consolidated by Commission order dated May 11, 1983. 3/

THE EXAMINER'S DECISION

The Examiner found that on June 30, 1982, employe John Cerro filed a grievance requesting an upward reallocation of his position and that this grievance was denied by City management and appealed to arbitration by the Union on October 6, 1982. While the grievance was being processed, the Union and the City commenced negotiations about a 1983 agreement and Cerro's grievance and the question of the proper compensation level for Forestry Inspector were discussed during these negotiations. On December 30, 1982, the parties were assisted in reaching a tentative agreement for 1983 by Commission Mediator Herman Torosian.

The Examiner found that included among the terms of the mediated agreement was an oral agreement by the Union and City that (1) the Forestry Inspector position was properly included in Compensation Group 16, Range 14 and (2) Cerro's grievance would not be arbitrated. While the sole Union witness, Marcella McCallum, a member of the Union's bargaining committee, denied that the parties agreed not to arbitrate the Cerro grievance, she did not testify with respect to any conversation between Mediator Torosian and the parties at the December 30, 1982, mediation session. In contrast to McCallum's uncorroborated denial of such an oral agreement, the Examiner found there was a preponderance of evidence that an oral agreement was reached during the mediation session that the Cerro grievance would not be arbitrated based upon the following: City Negotiator Ken Wright testified that the City was informed by Mediator Torosian at 7:30 p.m. that the parties had reached a tentative agreement for 1983 and that the arbitration of the Cerro grievance was "settled." Thereafter, a joint face-to-face session was held at which time Torosian reiterated the details of the settlement, one of which was that the Cerro grievance would not proceed to arbitration. Wright then testified that no objection was raised by the Union concerning Torosian's statement in that regard. City Negotiator Jeffery corroborated Wright's testimony. On April 19, 1983, the parties met with Mediator Torosian who reviewed his notes from the December 30 mediation session and reported that the parties had reached a tentative agreement which included an agreement that the Cerro grievance would not go to arbitration.

The Examiner further found that on January 6, 1983, the "Union membership" 4/ ratified the tentative agreement that was reached December 30, 1982, and that the Union notified the City of the ratification by letter dated January 14, 1983. On January 18, 1983, Union Representative Lowe informed Jeffery that the Union's Executive Board had overruled the Union's bargaining committee and desired that the Cerro grievance proceed to arbitration. Later that same day, the Madison City Council ratified the tentative agreement reached on December 30, 1982. On March 9, 1983, the City notified the Union that it would not proceed to arbitration on the Cerro grievance.

3/ Dec. No. 20656-A, 20657-A.

4/ See Footnote 5, infra.

The Examiner concluded that the parties agreed on December 30, 1982, as part of their tentative agreement for a 1983 contract, not to arbitrate Cerro's grievance. He further reasoned (at page 6 of his decision) that the action taken by the Union's Executive Board did not affect the negotiated settlement in any way because ratification by the Union membership had theretofore been achieved and because there was no "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."

PETITION FOR REVIEW

The Union's Petition for Review was captioned only with respect to Case CI (the City's complaint against the Union). In that Petition, the Union requested that the Commission review and modify: (1) the Examiner's Conclusions of Law, and (2) that portion of his Finding of Fact 7 stating that "the grievance of 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."

Cerro, on his own behalf, entered an appearance for purposes of this Commission Review by his submission of a Petition for Review and supporting written arguments separate from the Petition filed by the Union herein. Technically, no formal appearance was entered on Cerro's behalf at the hearing before the Examiner. The only appearances entered were on behalf of the Union and the City. From Cerro's Petition and written arguments, however, it appears that he was present at that hearing.

In his Petition for Review, Cerro asserts the following:

> I feel that Mr. Bernstone was in error because according to the testimony given at the hearing, Local 60's bargaining committee came to a tentative agreement which depended upon its Executive Boards (sic) decision. On January 6, 1983 the Executive Board voted in my favor by a 19 to 1 margin to pursue my grievance to Arbitration. As did the Union membership on January 18, 1983.
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> I further contend that the union Bargaining Committee had no authority to make any sort of trade off with my grievance. I had informed Mr. Darold Lowe approximately 3 months before the bargaining process began that my original request was for reallocation and not reclassification.
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> I would also like to state that Mr. Darold Lowe told me on the day of the unfair labor practice hearing that I would not be allowed to speak on my own behalf. I feel that this was unfair because it was because of my case that we were having the hearing.
>
> I also feel that if my case was allowed to go to Arbitration, I would then be able to present facts pertaining to my grievance.

In his written argument in support of his Petition, Cerro argued as follows:

> It is my belief that neither the City of Madison nor Local 60 can legally trade away an employee's grievance. The reason being (sic) is that there could never be a conclusion to the grievance and the employee would have no recourse. Therefore step three mentioned in the contract between the City and Union Local 60 would be absolutely worthless. Step three states that if a grievance is not satisfactorily settled in step two, then the employer or Union may proceed to step three. On October 6, 1982 Mr. Lowe (Council 40 Representative) notified Mr. Timothy Jeffery Labor Relations Director that we were appealing my grievance to arbitration (Step III.)
>
> In my opinion Mr. Jeffery purposely delayed any action on my grievance until the bargaining sessions began in the hope of making a trade off at that time.

> In conclusion I must say that I feel my right as a Union member to proceed through the three step grievance procedure has been denied me and is illegal.

As noted, neither the City nor the Union filed written arguments concerning the Petitions for Review.

DISCUSSION

In our opinion, the Examiner properly found in his Finding of Fact 7 that the mediated settlement included an oral agreement that the Cerro grievance would not be arbitrated. We have modified the initial clause in that Finding only to more clearly state the nature of the Cerro grievance and to eliminate the Examiner's unnecessary attribution of why the parties agreed upon the non-arbitration of the Cerro grievance. In support of the existence of an oral agreement not to arbitrate the Cerro grievance, the detailed and uncontradicted testimony of City Negotiators Wright and Jeffery regarding the specifics of the oral agreement at the mediation session stands in marked contrast to the testimony of the Union's only witness (McCallum), who simply denied there was such an agreement. Nothing in the record corroborates her testimony in that regard.

The oral agreement not to proceed to arbitration on the Cerro grievance was part of a tentative agreement and hence was subject to the same implicit or explicit conditions (i.e., ratification) as the balance of the tentative agreement reached on December 30. The Union's written January 14, 1983, notification to the City that the tentative agreement had been ratified by the Union's Madison City membership 5/ was unqualified and unconditional. As such it constituted a basis upon which the City could reasonably rely that (1) the Union's Madison City membership had ratified the tentative agreement in its entirety including the Union's agreement not to proceed to arbitration with the Cerro agreement, and (2) the ratification of the tentative agreement in its entirety by the Union membership was sufficient, without any other conditions being met, to bind the Union to the terms of the tentative agreement upon ratification thereof by the City.

As the Examiner found, Lowe informed Jeffery on January 18, 1983, that the settlement term dealing with the Cerro grievance was rejected by the Union's Executive Board. 6/ As the Examiner correctly noted, that was, so far as the record shows, the first reference by the Union to the need for Executive Board approval or nonrejection of that or any other aspect the settlement. While Lowe thereby put Jeffery and the City on notice that the Local 60 Executive Board had rejected the portion of the settlement terms relating to dropping the Cerro grievance, Lowe did not thereby communicate that the Union's Madison City membership had voted to rescind its earlier ratification of the tentative agreement.

Had the City Council's ratification vote been predicated on those facts alone, we would have had no doubt as to the reasonableness of the City's reliance on the Union's unconditional and unqualified January 14 written notice of ratification of the tentative agreement by the Union's City of Madison membership. However, there were additional developments on January 18 worthy of consideration herein. We have entered expanded and modified Findings of Fact and modified Conclusions of Law to address that evidence in greater detail and to incorporate our analysis of its legal significance.

Specifically, Jeffery's conversation with McCallum and his second conversation with Lowe described in modified Finding of Fact 9 undercut the reasonableness of the City's reliance on the January 14 letter confirming ratification.

5/ The Union's January 14 letter (Jt. Exhibit 8) specifies that the ratification was by the "City of Madison employes represented by Local 60." The Examiner had generally described that group as the "Union membership."

6/ The Local 60 Executive Board is composed, for the most part, of members from outside the City of Madison bargaining unit involved in this case.

However, in our view, any doubts as to the binding nature of the oral agreement not to arbitrate the Cerro grievance are resolved to our satisfaction by the Union representatives' February 17, 1983, execution of the 1983 agreement after the Union's receipt of Jeffery's letter of January 20. 7/ By executing the agreement in the context of the City's understanding expressed in the January 20 letter forwarding the document for signature, the Union representatives reaffirmed the Union's willingness to be bound by the terms of the December 30, 1982, agreement including non-arbitration of the Cerro grievance.

We have therefore concluded that at least after February 17, 1983, the oral agreement not to arbitrate the Cerro agreement became an unconditional collective bargaining agreement binding on the Union. The Union's February 22, 1983, efforts to proceed to arbitration in that matter constituted a violation of that agreement.

We turn now to the remaining arguments advanced by Cerro as bases for reversing the Examiner's decision and order.

Contrary to Cerro's contention, under provisions for grievance processing and arbitration such as those in the 1982 collective bargaining agreement between the City and the Union, the fact that the Union initially advanced an unresolved grievance to arbitration does not preclude the possibility of a mutual agreement between the Union and the City to resolve the grievance without a decision by an arbitrator.

Cerro further contends that the City and Union traded non-arbitration of his grievance for other considerations in the contract bargain. Such a contention, without more, would not make the non-arbitration agreement the product of unlawful conduct by the City and/or the Union. The trading of grievances is not unlawful per se, but rather only where it is shown to have been arbitrary, discriminatory or in bad faith. 8/ Cerro did not assert, let alone prove, any such basis for finding the trade-off of his grievance unlawful. Therefore, we conclude, on the basis of this record, that the Union's agreement not to arbitrate the Cerro grievance was neither illegal nor otherwise unenforceable.

Cerro also contends that it was unfair that Union Representative Lowe did not allow him to speak on his own behalf at the hearing. While Cerro was listed as a complainant in the caption of the complaint, in Case C only the Union is referred to in the body of that complaint as a "complainant" and that complaint was signed only by Lowe as "Staff Representative" with his signature preceded by "Filed on behalf of Local 60, AFSCME, AFL-CIO". In such circumstances, it may well have been the impression of some or all concerned that the Union was the only party complainant in Case C. Nevertheless, we consider Cerro to be a named party complainant in this matter by reason of his inclusion in the complaint caption. As such, he had every right to enter a formal appearance in person or through counsel, to call witnesses (including himself), to cross examine other parties' witnesses, and to present other evidence and arguments to the Examiner. That he did not do so was his decision, as was his decision to rely on the Union representative's understanding and advice concerning Cerro's role at the hearing. Since the Examiner did not deny Cerro any of the foregoing rights and privileges of a party named complainant, Cerro is in no position herein to complain that he has been denied a fair hearing in the matter.

7/ The 1983 agreement was executed on behalf of the Union by representatives identified therein as the President and the Secretary of the Local as well as the Chairperson and the Secretary of the Bargaining Committee and Lowe, as WCCME District Representative.

8/ E.g., Achey v. Steelworkers, 96 LRRM 2221 (1977) and Miller v. Greyhound Lines, 95 LRRM 2871 (1977). See generally, Mahnke v. WERC, 66 Wis.2d 524 (1975).

For the foregoing reasons, we 9/ have affirmed the Examiner's Order based on the Modified Findings of Fact and Modified Conclusions of Law set forth above.

Dated at Madison, Wisconsin this 17th day of September, 1984.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Marshall L. Gratz
Marshall L. Gratz, Commissioner

Danae Davis Gordon
Danae Davis Gordon, Commissioner

9/ Chairman Torosian did not participate in this decision.