STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MADISON MUNICIPAL EMPLOYEES LOCAL 60, AFSCME, AFL-CIO, Complainant, vs. CITY OF SUN PRAIRIE and DONALD N. FOULKE, Respondents.	Case X No. 32156 MP-1506 Decision No. 21067-A

Appearances:

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

DeWitt, Sundby, Huggett & Schumacher, S.C., by Mr. Robert D. Sundby, 121 South Pinckney Street, P.O. Box 2509, Madison, Wisconsin 53701, appearing on behalf of Respondents.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Madison Municipal Employees Local 60, AFSCME, AFL-CIO, filed a complaint on September 9, 1983 with the Wisconsin Employment Relations Commission alleging that the City of Sun Prairie and Donald N. Foulke had committed prohibited practices within the meaning of Sec. 111.70(2)(3)(a)(4), Wis. Stats.; the Commission appointed Christopher Honeyman, a member of its staff to act as Examiner in this matter and to make and issue Findings of Fact, Conclusions of Law and Order, as provided in Sec. 111.70(5), Wis. Stats. A hearing was held in Sun Prairie, Wisconsin on December 9, 1983. Briefs were filed by both parties and the record was closed on February 20, 1984. The Examiner, having considered the evidence and arguments and being fully advised in the premises, makes and files the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. Madison Municipal Employees Local 60, AFSCME, AFL-CIO is a labor organization within the meaning of Sec. 111.70(1)(j), Wis. Stats., and maintains its office at 5 Odana Court, Madison, Wisconsin 53719.

2. City of Sun Prairie is a municipal employer having its principal offices at 124 Columbus Street, Sun Prairie, Wisconsin 53590. Donald N. Foulke is the Mayor of the City of Sun Prairie and its agent.

3. On March 30, 1983 Complainant Union filed a petition for election with the WERC, and on August 23, 1983 the Commission conducted a representation election among City of Sun Prairie employes in the following bargaining unit:

> All regular full-time and regular part-time employes of the City of Sun Prairie, excluding supervisory, confidential, professional, craft employes, law enforcement employes with the power of arrest and employes of the Water and Light Department.

4. The employes in the bargaining unit described in Finding of Fact 3 above voted 27-10 in favor of Complainant Union, and on August 31, 1983 the Commission certified Complainant Union as the exclusive representative of said employes.

5. On August 24, 1983, Respondent Foulke notified all of the employes in the bargaining unit described above that their working hours would be reduced from

forty hours per week to thirty-two hours per week, effective August 29, 1983, for an indefinite period of time. The reduction was made for economic reasons, and the record does not show that retaliation for the employes' vote was intended.

6. On August 26, 1983, Complainant Union's Staff Representative Darold Lowe notified Respondent Foulke in writing that Complainant was requesting to bargain with the City relative to the decision and the impact of the reduction in work hours. By letter dated August 31, 1983, Respondent Foulke replied to Lowe as follows:

> Thank you for your letter of August 26th. In your letter you are requesting to bargain with the City as it relates to decision and impact in reduction of working hours, I am sorry, but until we receive notification from the State that you are the certified bargaining representative for the bargaining unit of the City of Sun Prairie employees, we are unable to meet with you.
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> As soon as we receive notificaiton from the State as to your certification, we will request that bargaining for a contract commence as soon as possible.

7. In or about late August or early September, 1983, Complainant Union filed a request in Dane County Circuit Court for a temporary restraining order to restrain Respondent City from implementing the cut in hours. This motion was scheduled for hearing on September 14, 1983 before Judge Richard W. Bardwell. On or about September 13, Complainant Union's attorney, Bruce Ehlke, discussed with Respondent's attorney, Robert Sundby, the possible settlement of that matter. The record shows that the attorneys arrived at an agreement by which the City was to restore the hours to their former level, in exchange for the Union holding in abeyance its request for a temporary restraining order and abandoning any claim for back pay. On the same day, Ehlke wrote to Judge Bardwell as follows:

> This letter will serve to confirm that I have been advised by Attorney Robert Sundby, who represents the City, that the City will restore the employees' work hours per week to their original level, effective as of September 14, 1983, and at least until the parties have been able to sit down to discuss this matter further. Accordingly, there is no need to proceed with the Motion for Temporary Injunction scheduled to be heard by you on September 14, 1983, at 3:00 P.M., and that hearing has been taken off your calendar. We would appreciate it if the Court would defer further proceedings in this matter until further notice from the parties.

On September 14, the City restored the hours of all employes to forty per week.

8. On September 1, City Clerk-Treasurer Michael Puksich wrote to Lowe to advise him that the City was willing to bargain a contract for the 1984 fiscal year. The first bargaining meeting between the parties took place on September 29; at that meeting there was no discussion of the Union's demand to bargain concerning the decision to cut hours, the impact of the decision or back pay. On October 13, 1983, James Sargent, Chairman of the City's negotiating committee, wrote to Lowe in pertinent part as follows:

> I may have been remiss in not responding prior to this date in reference to the City's intentions and willingness to bargain the impact of the reduced hours experienced by your membership. You raised the question regarding the City's willingness to bargain the impact of reduced hours on September 27, 1983. At this time, I infatically (sic) want to assure you that the City's negotiating team, from its insession (sic), has been willing to bargain this matter.
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> It was also my understanding that Attorney Sundby, in discussions with your legal counsel, may have found some definitive resolution to this matter or may have been in the process of the same. I am hopeful that this situation can be resolved in the best interest of both parties.

A second bargaining meeting was held on October 25. At that meeting the City team proposed to the Union that the employes be allowed to work back the hours lost at the overtime rate of time and a half. This proposal was not accepted by the Union, but was formally adopted as the City's position concerning bargaining of this issue at a City Council meeting on November 1, 1983.

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

CONCLUSIONS OF LAW

1. The decision to reduce the hours of employes for economic reasons was a mandatory subject of bargaining as of the time Complainant Union received a majority of votes in the election held on August 23, 1983. By unilaterally reducing those hours and refusing to bargain concerning same until the formal certification was issued by the WERC, Respondents therefore violated Sec. 111.70(3)(a)1 and 4, Wis. Stats.

2. In the September 13, 1983 agreement between the parties' attorneys by which Respondent restored working hours to their former level, Complainant Union agreed to forego any claim for back pay. That agreement was a collective bargaining agreement within the meaning of Sec. 111.70(3)(b)4, Wis. Stats., and therefore it does not effectuate the purposes and policies of the Municipal Employment Relations Act to require the payment of back pay as part of the remedy herein.

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

ORDER 1/

It is ordered that City of Sun Prairie, its officers and agents, shall immediately

1. Cease and desist from reducing working hours without first bargaining concerning same with Madison Municipal Employees Local 60, AFSCME, AFL-CIO.

2. Take the following affirmative action, which the Examiner finds will effectuate the purposes and policies of the Municipal Employment Relations Act:

> a. Notify the employes by posting in conspicuous places on its premises, where notices to its employes are usually posted, a copy of the notice attached hereto and marked "Appendix A." Such copy shall be signed by a responsible official of the City and shall be posted immediately upon receipt of a copy of this order, and shall remain posted for a period of thirty days thereafter. Reasonable steps shall be taken to insure that said notice is not altered, defaced or covered by other material.
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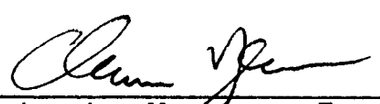
> b. Notify the Wisconsin Employment Relations Commission in writing within twenty days of the date of service of this order as to what steps have been taken to comply herewith.

Dated at Madison, Wisconsin this 10th day of April, 1984.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By 
Christopher Honeyman, 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.
(Footnote One continued on Page Four)

1/ (Continued)

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.

"APPENDIX A"

NOTICE TO ALL EMPLOYES:

Pursuant to an order of the Wisconsin Employment Relations Commission, and in order to effectuate the policies of the Municipal Employment Relations Act, we hereby notify our employes that:

> We will immediately cease and desist from reducing employes' working hours without bargaining with Madison Municipal Employees Local 60, AFSCME, AFL-CIO.

Dated at Sun Prairie, Wisconsin this _____ day of _____, 1984.

By _____
on behalf of City of Sun Prairie

THIS NOTICE MUST REMAIN POSTED FOR THIRTY DAYS FROM THE DATE HEREOF AND MUST NOT BE ALTERED, DEFACED OR COVERED BY ANY OTHER MATERIAL.

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The complaint alleges that the City and its Mayor, Donald N. Foulke, violated Sec. 111.70(2) and (3)(a)4 by unilaterally reducing the hours of all bargaining unit employes and subsequently refusing to bargain with the Union concerning that act. The complaint does not allege that the reduction in hours was made for retaliatory reasons because of the employes' decision to be represented. 2/

The Respondents' answer admitted taking the action complained of but denied that the decision to reduce hours was a mandatory subject of bargaining. The answer further alleged that the complaint is moot because the parties had agreed that no claim for back pay would be made in the course of reaching an agreement by which the hours were restored, and because the City has subsequently agreed to bargain concerning the impact of the decision and has made proposals to that effect to the Union.

Sec. 111.70(3)(a)5, Wis. Stats., states in part that "An employer shall not be deemed to have refused to bargain until an election has been held and the results thereof certified to the employer by the Commission." Respondents argue that this sentence shows that the City was within its rights in determining to cut hours without bargaining with the Union, since there is no evidence of a retaliatory motive and the certification of representative naming the Union as exclusive bargaining agent for the employes was not issued until seven days after the reduction in hours had been announced. Respondents' reading of this sentence, however, is excessively literal and taken out of context. Immediately prior to the sentence cited is the statement "Where the employer has a good faith doubt as to whether a labor organization claiming the support of a majority of its employes is an appropriate bargaining unit does in fact have that support, it may file with the Commission a petition requesting an election to that claim." This sentence and the language of the section as a whole show that the intent of the statute is not to provide either a literal "hoop" through which a union must jump, or a loophole through which an employer may escape bargaining with a union which has properly prevailed in an election, but is to support the election process as the means by which a union gains recognition from a disputing employer. The fact that a delay occurs after the election, under the Commission's procedure, before the certification is issued, is not license for an employer to take unilateral action in the meantime, since the delay is merely an administrative device to allow for the filing of objections to the election. 3/ No objections were filed to the election in this matter, the City had a representative in attendance at the election who knew the election results immediately afterwards, and the City was therefore in no doubt as to the fact that its employes were represented by Complainant Union when it took the unilateral action complained of. Working hours of employes are by definition primarily related to wages, hours or conditions of employment, and are therefore a mandatory subject of bargaining. Under MERA the City was therefore obligated to bargain with Complainant Union concerning any proposed change in the existing hours of employes regardless of whether or not the City had sound economic reasons, or even an urgent necessity, for such changes. 4/

The normal remedy for a violation of this type involves restoration of the status quo, including back pay for any losses suffered by employes as a result of the Employer's unilateral act. 5/ But in this proceeding there is a complicating factor, which is the evidence that an agreement was reached limiting the remedy

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2/ See also Tr. p. 19.

3/ Village of Clinton, 14141-B, C (6/76); see also, F. W. Woolworth, 188 NLRB 941, 948, and cases cited therein.

4/ Village of Clinton, supra; City of Wisconsin Dells, 11646 (3/73).

5/ See City of Green Bay, 18731-B (6/83) and cases cited therein.

available here. Attorney Sundby gave unrebutted testimony 6/ that in the course of a telephone discussion with Complainant Union's attorney Ehlke, the latter agreed that no claim would be pursued for lost wages if the City agreed to restore the hours to their former level. Sundby testified that based on this agreement, the City did restore the hours to the previous forty per week despite its continuing dispute with Complainant over whether this was a mandatory subject of bargaining. The record shows that Complainant was on notice 7/ that this was a major element in Respondent's defense, but Complainant presented no evidence to contradict Sundby's testimony. I therefore accept Sundby's account of the telephone conversation as accurate.

The City contends that the agreement reached between Sundby and Ehlke disposed of all outstanding issues in this matter and that the entire case is therefore moot. Sundby, however, did not testify that the Union's attorney had agreed to dismissal of either the complaint proceeding or the motion for temporary restraining order, and Ehlke's letter to Judge Bardwell of September 13 speaks in terms of an indefinite postponement of any further action on the motion pending "further discussions" between the Union and City. It appears that at the time of the September 13 agreement the attorneys expressed a continuing disagreement over whether the decision to reduce hours was a mandatory subject of bargaining, and the agreement was therefore limited in scope. Also, a full month later the chairman of the City's bargaining committee, James Sargent, strongly indicated that the City was willing to bargain the impact of reduced hours, in his letter to Lowe. This letter and the position taken therein would make no sense if the City had been able to secure from the Union an abandonment of all claims in return for the agreement to restore working hours to their former level. But at the same time, the fact that the Union was slow to renew its demand for back pay lends support to Sundby's testimony that giving up the lost wages over the two weeks that hours were reduced was the price which the City exacted from the Union in return for its agreement to restore those hours. 8/ It is apparent that the City has subsequently bargained concerning the impact of the reduced hours. Indeed, the record shows that the City's Personnel and Finance Committee went so far as to recommend to the City Council that employes be reimbursed outright for losses suffered. 9/ The City Council did not agree to this proposal, but did ratify and reaffirm a proposal earlier made by its bargaining committee that the employes be allowed to work back the lost hours at the overtime rate of pay. While it is apparent that this proposal was not acceptable to the Union, it is also apparent that at least since Sargent's October 13 letter, the City has acted in good faith in bargaining this issue with Complainant Union.

Because the City has bargained in good faith with the Complainant after its initial unilateral action, I do not find that a bargaining order is a necessary remedy here. 10/ At the same time, the Union cannot now claim back pay in this proceeding without violating its agreement by which the hours were restored to their former level. An agreement reached disposing of litigation over collective bargaining issues between an employer and union is a specialized form of collective bargaining agreement, but it is a collective bargaining agreement nonetheless, and it does not serve the purposes and policies of MERA to allow such an agreement to be ignored in a subsequent proceeding. Indeed, the City might

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6/ At the hearing I reserved ruling on the admissibility of this evidence. I conclude that it must be admitted, as it does not involve an offer of settlement which could prejudice the merits of the case, but rather a completed settlement, which affects the remedy obtainable.

7/ An affidavit by Sundby containing essentially the same evidence was filed three days before the hearing, with a copy to Complainant.

8/ There is no evidence that Ehlke's authority as attorney for Complainant was in any way limited or was exceeded by his agreement with Sundby.

9/ See Tr. p. 41.

10/ The fact that the decision to reduce hours is found to be a mandatory subject of bargaining does not necessitate a bargaining order, in view of the fact that the City reversed that decision as a result of the September 13 settlement.

have had grounds to allege a violation of Sec. 111.70(3)(b)4 by virtue of Complainants' renewed demand for back pay. I cannot, accordingly, find that the City must pay back pay in this matter, even though, had no agreement been reached, that would be a normal element of the remedy. The only elements of the standard remedy for this type of violation remaining in this proceeding are a general cease-and-desist order and the requirement to post a notice. These are therefore ordered.

Dated at Madison, Wisconsin this 10th day of April, 1984.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Christopher Honeyman, Examiner