

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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 NORMAN VISGER and :  
 HAROLD W. SMITH, :  
 :  
 Complainants, : Case 1  
 : No. 33661 MP-1617  
 and : Decision No. 22158-B  
 :  
 TOWN BOARD OF MINONG, :  
 :  
 Respondent. :  
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Appearances:

Robert Zum Brunnen Law Offices, Attorneys at Law, P. O. Box 96, Spooner, Wisconsin, 54801, by Ms. Kathryn Zum Brunnen, appearing on behalf of the Complainants.  
 Lawton and Kissack, Attorneys at Law, 109 Walnut Street, P. O. Box 119, Spooner, Wisconsin, 54801, appearing on behalf of the Repondent, and Melli, Walker, Pease and Ruhly, S.C., Attorneys at Law, Suite 600, Insurance Building, 119 Monona Avenue, Madison, Wisconsin, 53701-1664, by Mr. Jack D. Walker, appearing on the brief on behalf of the Respondent.

FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND ORDER

COLEEN A. BURNS, Hearing Examiner: Norman Visger and Harold W. Smith, herein the Complainants, filed a complaint with the Wisconsin Employment Relations Commission on August 8, 1984, wherein the Complainants alleged that the Town Board of Minong, herein the Respondent, had committed prohibited practices within the meaning of the Municipal Employment Relations Act, by unilaterally changing terms and conditions of their employment and, otherwise bargaining in bad faith. Scheduling of hearing in the matter was held in abeyance pending settlement discussions. On November 29, 1984, the Commission appointed Daniel J. Nielsen, an examiner on the Commission's staff, to conduct the hearing on the complaint and to make and issue Findings of Fact, Conclusions of Law and Order. A hearing was scheduled for December 18, 1984, and thereafter, rescheduled for April 4, 1985. The parties met on April 4, 1985, as scheduled and, at that time, entered into an agreement in resolution of the Complaint. The Commission was subsequently contacted by Respondent, who requested that the matter be rescheduled for hearing. Respondent further requested that, in view of Examiner Nielsen's participation on April 4, 1985, the Commission substitute another Examiner to hear and decide the case. Examiner Nielsen agreed to withdraw from the case and, on April 25, 1985, the Commission issued an order substituting Coleen A. Burns, a member of the Commission's staff, as Examiner to make and issue Findings of Fact, Conclusions of Law and Order. A hearing on the complaint was held on May 22, 1985, in Rice Lake, Wisconsin. The parties, thereafter, filed briefs which were received by August 2, 1985.

Having considered the arguments and the record, the Examiner makes and issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. Complainants, Norman Visger and Harold W. Smith, are municipal employes within the meaning of Section 111.70(1)(i), Stats.; and that each Complainant resides at Route 2, Minong, Wisconsin, 54859.
2. Respondent, Town Board of Minong, at all times material herein, has acted as agent of, and on behalf of the Town of Minong, which is a municipal employer within the meaning of Section 111.70(1)(j), with offices located at the Minong Town Hall, Minong, Wisconsin, 54859.

3. That on August 8, 1984, Complainants filed the instant Complaint alleging that Respondent had committed prohibited practices within the meaning of Chapter 111, Wis. Stats.; that on November 29, 1984, the Commission appointed Daniel J. Nielsen, a member of its staff, as Examiner to conduct the hearing on the Complaint and issue Findings of Fact, Conclusions of Law and Order as provided in Secs. 111.70(4)(a) and 111.07, Wis. Stats.; that on April 4, 1985, Examiner Nielsen met with Attorney Thomas Kissack, Respondent's Counsel, and Attorney Kathryn Zum Brunnen, Complainants' Counsel, in Spooner, Wisconsin for the purpose of conducting a hearing on the Complaint; that also present were Complainant Visger and Respondent Town Board which consisted of three members, i.e., Mr. Vig, Mr. Sannwald and Mr. Coons, and that prior to the start of the hearing, Complainants and Respondent entered into an agreement in resolution of the allegations of prohibited practices contained in the Complaint.

4. That on April 4, 1985, Examiner Nielsen went on the record and stated, inter alia, as follows:

In discussions had prior to going on the record, the parties were able to arrive at a voluntary settlement of this matter, and the terms of the settlement, as I understand them, are as follows: The previously existing contract between Mr. Visger and the Town of Minong will be reinstated with the following modifications: First, the Town of Minong will pay \$200.00 per month as a health insurance statement but will not actually contract for health insurance; the sick day provisions of the written agreement will provide for 12 days of sick leave per year with no carryover, no accumulation; the holidays provision, there will be the eight listed paid holidays; where the employee works on a holiday, he will receive, in addition to his salary straight time, comp time to be taken at a later date; vacation, the previous vacation entitlement will be reinstated with the provision that 30 days prior to approval be given by the Town Board or its agents on the use of vacation; on retirement, the Town will contribute \$25.00 per month, the employee will contribute \$25.00 per month; the worker's compensation provision, the payment of the Town to the employee will be in the amount of the differential between any worker's comp received and the net pay ordinarily received by the employee; the hourly rate will be \$8.75.

The term of this written agreement will be effective on this date, April 4th, 1985, through December 31st, 1986. Is that the understanding of the parties? Don't all talk at once here.

5. That in response to Examiner Nielsen's statement, the following exchange occurred:

MS. ZUM BRUNNEN: I believe it is, yes.

MR. VISGER: That's my understanding.

EXAMINER NIELSEN: Okay. Mr. Kissack?

MR. KISSACK: Two additional things just for clarification of the record, that this settlement is made with the understanding that there is -- that this is a settlement of all claims and causes of action, that is, the same relates to Mr. Visger and Mr. Smith as against the Town of Minong.

EXAMINER NIELSEN: On this contract?

MR. KISSACK: On this --

MS. ZUM BRUNNEN: On the complaint of the 1983 contract.

EXAMINER NIELSEN: I was going to cover that in a moment.

MR. KISSACK: Also there was some discussion, there was nothing in the contract that can be construed as far as any guaranteed hours of the work week also.

EXAMINER NIELSEN; I think that's --

MS. ZUM BRUNNEN: That's correct.

EXAMINER NIELSEN: The complaint to prohibit practices (sic) will be dismissed 14 days from today unless I'm notified in writing by the parties prior to that time that the settlement has not been consummated. Now, Mr. Kissack, I will assume that you will provide a draft of this agreement for Mr. Visger's review and Ms. Zum Brunnen's?

MR. KISSACK: I will take care of redrafting the contract and we'll send it to Attorney Zum Brunnen. Would you also like a copy sent to you or just the final draft after it's --

EXAMINER NIELSEN: I don't need a final draft of anything. I will dismiss this complaint with prejudice in 14 days unless I'm informed otherwise, okay?

MR. KISSACK: Okay

EXAMINER NIELSEN: Is there anything further to come before the Examiner?

MS. ZUM BRUNNEN: I have nothing else.

EXAMINER NIELSEN: Very well. Let me ask you, are you going to be ordering a copy of the transcript?

MS. ZUM BRUNNEN: I don't see that it's necessary to order one, I guess.

MR. KISSACK: I don't need one, no.

MS. ZUM BRUNNEN: I think everything is pretty well spelled out as far as the agreement.

EXAMINER NIELSEN: There will be nothing further to come before the Examiner. The hearing is adjourned.

6. That, thereafter, the Town of Minong held its annual meeting; that Town Chairman Vig, for informational purposes and to dispel rumors circulating through the Town, described the terms of the April 4, 1985 agreement to the electors; that the electors, on their own motion, voted to reject the agreement; and that, thereafter, Respondent requested the Commission to reschedule a hearing on the Complaint.

7. That on April 25, 1985, the Commission issued an order substituting Coleen A. Burns, a member of its staff, as Examiner to make and issue Findings of Fact, Conclusions of Law and Order in the matter; that on May 22, 1985, Examiner Burns met with the parties in Rice Lake, Wisconsin for the purpose of conducting a hearing on the Complaint; that in opening statements, Complainants' Attorney, Kathryn Zum Brunnen objected to proceeding to hearing on the Complaint on the basis that the parties, on April 4, 1985, had entered into a valid and binding agreement in resolution of the issues raised in the Complaint; and that Examiner Burns, reserved ruling on Complainants' objection, and proceeded to conduct a hearing on the Complaint.

8. That on April 4, 1985, Respondent and Complainants entered into an agreement in resolution of all allegations of prohibited practices contained in the Complaint, which agreement was set forth in the record before Examiner Nielsen; and that this agreement was not contingent upon any further action, including reduction to writing and ratification, by either party or the electors of the Town of Minong.

#### CONCLUSIONS OF LAW

1. That on April 4, 1985, Respondent Town Board of Minong and Complainants Visger and Smith entered into a valid agreement in resolution of all allegations of prohibited practices contained in the Complaint, which agreement is binding upon Respondent, Complainants and the Town of Minong.

2. That the vote of the electors at the annual meeting of the Town of Minong did not invalidate the agreement set forth in Conclusion of Law 1.

3. That as a result of the agreement set forth in Conclusion of Law 1, there is no longer any controversy concerning the allegations of prohibited practices contained in the Complaint.

ORDER 1/

IT IS HEREBY ORDERED that the Complaint be, and the same hereby is, dismissed in its entirety.

Dated at Madison, Wisconsin this 24th day of October, 1985.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By *Coleen A. Burns*  
Coleen A. Burns, Examiner

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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.

TOWN OF MINONG

MEMORANDUM ACCOMPANYING  
FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND ORDER

Timeliness of Briefs

As Respondent argues in its reply brief, Complainants' brief was received by the undersigned one day after it was due. While untimeliness is not to be encouraged, the Examiner is not persuaded that a one day delay is so prejudicial to Respondent that the Examiner should deny Complainants the right to have their arguments considered herein. Consequently, the Examiner has accepted Complainants' brief for consideration herein. Moreover, the argument with respect to Complainants' objection to proceeding to a determination on the merits of the Complaint was made at hearing and, therefore, is before the undersigned regardless of whether or not Complainants' post-hearing brief is accepted.

BACKGROUND 2/

On April 4, 1985, the Town Board of the Town of Minong, together with the Town Board's Attorney, Thomas Kissack, were present at the Bank of Spooner for the purpose of proceeding with a hearing on the allegations contained in the instant Complaint. Complainant Visger and Complainants' attorney, Kathryn Zum Brunnen, were also present. 3/ Prior to Commencement of the hearing, which was to be conducted by Examiner Nielsen, the parties reached a voluntary agreement in resolution of the matters contained in the Complaint. The terms of settlement were read into the record by Examiner Nielsen and, upon further clarification by Attorneys Kissack and Zum Brunnen, were agreed to by both parties.

Subsequently, at the annual meeting of the electors of Town of Minong, the electors voted to reject the agreement which was reached on April 4, 1985. Respondent, thereupon, requested the Wisconsin Employment Relations Commission to proceed to hearing on the Complaint. Thereafter, Examiner Nielsen withdrew from the case and the undersigned was substituted as Examiner.

At hearing, Complainants objected to proceeding to hearing on the basis that the parties, on April 4, 1985, had entered into a valid and binding agreement in resolution of the issues raised in the Complaint. The undersigned reserved ruling on Complainants' objection and proceeded with hearing on the Complaint.

Positions of the Parties

Complainants

The parties, on April 4, 1985, entered into an agreement in resolution of the prohibited practice claims set forth in the Complaint. The settlement agreement is valid and binding upon the parties and precludes the Examiner from issuing a decision on the merits of the allegations contained in the Complaint.

Respondent

Complainants failed to amend the Complaint to include allegations concerning the agreement of April 4, 1985. Consequently, Commission rules and due process considerations preclude the Examiner from addressing arguments concerning this agreement.

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2/ Inasmuch as the Complaint is being dismissed without a determination of the merits, the Examiner does not deem it necessary to set forth either the facts or the arguments of the parties with respect to the merits of the allegations contained in the Complaint.

3/ It is unclear whether Complainant Smith was also present.

Alternatively, Complainants' reliance on the agreement is misplaced. The agreement of April 4, 1985, was contingent upon the terms of the agreement being reduced to writing and ratified by the Town, which contingency did not occur. 4/ The terms of settlement, therefore, are not binding upon Respondent, and do not serve to bar further proceedings on the Complaint.

#### DISCUSSION

According to Respondent, the undersigned may not consider Complainants' arguments with respect to the April 4, 1985 agreement because Complainants failed to amend the Complaint to include any allegations concerning the April 4, 1985 agreement. Complainants, however, are not alleging that Respondent's conduct with respect to the April 4, 1985 agreement gives rise to additional prohibited practice claims and, thus, are not seeking to amend the Complaint. 5/ Rather, Complainants are arguing that the April 4, 1985 agreement serves as a bar to proceeding to a determination of the merits of the Complaint, as originally filed with the Commission.

Complainants objection is not unlike an affirmative defense which, as set forth in Wisconsin Administrative Code ERB 12.03, a Respondent may raise at hearing. Since Complainants' objection was made in opening statements at hearing before the undersigned, Respondent was afforded the opportunity to present evidence and argument in response to the objection. Further, Respondent had the opportunity to ask for a continuance if additional time was needed to respond to Complainants' objection. As a result, the undersigned is not persuaded by Respondent's arguments that Complainants' objection is untimely, or that consideration of Complainants' objection is otherwise prejudicial to Respondent's right of due process. 6/

As discussed more fully above, the undersigned deems it appropriate to consider Complainants' objection herein. If, as Complainants argue, the parties, on April 4, 1985, entered into a valid and binding agreement in resolution of the issues raised by the Complaint, then there would no longer be any controversy concerning the unfair labor practices alleged in the Complaint. Therefore, it would be appropriate to dismiss the Complaint without a determination of the merits of the allegations contained in the Complaint.

According to Respondent, the agreement of April 4, 1985 was contingent upon further action by the parties, i.e., that the agreement be reduced to writing and ratified. Respondent asserts that the agreement was not reduced to writing and ratified and, consequently, is without effect.

The terms of the April 4, 1985 settlement are set forth in the record before Examiner Nielsen. A review of this record establishes that the agreement was in resolution of all controversies concerning the unfair labor practices alleged in the Complaint. A further review of the record fails to disclose any statement which expressly provides that the agreement was contingent upon any further action by either party, including the contingency asserted by Respondent, i.e., that the agreement be reduced to writing and ratified. Moreover, as discussed more fully below, no contingency can be implied.

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4/ Although not addressed in post-hearing brief, the argument was raised at hearing before the undersigned and will be considered herein.

5/ Consequently, the Administrative Rules governing the amendments of Complaints do not serve as a basis for refusing to consider Complainants' arguments with respect to the April 4, 1985 agreement.

6/ Respondent cites City of Prairie du Chien, No. 21619-A, (7/84) and White Lake Joint School District No. 2, No. 12623-A, (9/75) in support of the proposition that the WERC will not allow a party to present arguments on an issue if the issue was not pleaded in the Complaint or litigated at hearing. In these cases, however, the claims which the Examiner refused to consider were advanced, for the first time, after completion of hearing. Thus, unlike the instant case, the opposing party was deprived of the opportunity to present evidence to rebut the claim.

At the time of the April 4, 1985 settlement, the Town Board of the Town of Minong consisted of three members, all of whom were present at the hearing before Examiner Nielsen. Since all three Town Board members were present when the agreement was reached on April 4, 1985, and the Town Board has statutory authority to enter into such an agreement, 7/ it is not reasonable to conclude, absent express language to the contrary, that the agreement was contingent upon some further ratification by the Town Board.

To be sure, the parties could have made the agreement of April 4, 1985, contingent upon ratification by the electors at the annual Town Meeting. However, no such contingency is expressed in the record before Examiner Nielsen. Further, as Town Chairman Vig testified at hearing before the undersigned, it was not the intent of the Town Board to submit the agreement of April 4, 1985 to the annual meeting for ratification and, in fact, the Town Board did not submit the agreement to the electors for ratification. Rather, the subject of the agreement was discussed by the Town Chairman for the purpose of informing the electors of the terms of the agreement. The undersigned is satisfied, therefore, that the agreement of April 4, 1985 was not contingent upon ratification by the electors at the annual Town Meeting. While it is true that the electors, on their own motion, voted to reject the agreement of April 4, 1985, such rejection does not render the agreement invalid. The authority to enter into the agreement of April 4, 1985 resides with the Town Board, and not the Town electors at the annual Town Meeting. 8/

While it is true that Examiner Nielsen, in concluding remarks, stated that he would dismiss the Complaint within 14 days unless notified that the "settlement has not been consummated" or "unless informed otherwise", the undersigned does not construe such remarks to mean that the agreement was contingent upon the parties reducing the agreement to writing and ratifying the same. Examiner Nielsen was not setting forth a term of the agreement, but rather was informing the parties of the procedure he would follow in formally dismissing the Complaint. Where, as here, the terms of the agreement are to be embodied in a written document it is not unusual for an Examiner to delay formal dismissal of the Complaint pending execution of the written document. To say, however, that such a delay implies that the agreement is contingent upon the reduction of the document to writing is, in point of fact, placing the cart before the horse. Specifically, a distinction must be made between an action upon which the agreement is contingent, and an action which, by the terms of the agreement, is required to be performed. Failure of the first vitiates the agreement, while failure of the second violates the agreement. In the present case, the failure to reduce the agreement to writing would fall within the latter, rather than the former, category.

In conclusion, the undersigned is persuaded that on April 4, 1985, the Town Board had lawful authority to enter into an agreement in resolution of the issues raised in the Complaint and, in fact, did enter into such an agreement with Complainants. Further, contrary to the argument of the Respondent, the agreement was not contingent upon future ratification by either the Town Board or the electors of the Town of Minong.

Given the existence of the April 4, 1985 agreement, there are no longer any issues to be resolved with respect to the prohibited practices alleged in the Complaint. Therefore, the Complaint is hereby dismissed.

Dated at Madison, Wisconsin this 24th day of October, 1985.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By *Coleen A. Burns*  
Coleen A. Burns, Examiner

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7/ See generally, Chapter 60, Wis. Stats. and specifically Sec. 60.22(2).

8/ See generally, Chapter 60, Subchapter III, of the Wisconsin Statutes.