STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

JANESVILLE CITY EMPLOYEES LOCAL 523, AFSCME, AFL-CIO,	:	
Complainant,	:	Case 48 No. 35649 MP-1764
vs.	:	Decision No. 22981-A
CITY OF JANESVILLE,	:	
Respondent.	:	

Appearances:

Ms. Berta S. Hoesly, City Attorney, 18 North Jackson Street, Janesville, Wisconsin, 53545, appearing on behalf of Respondent.

Mr. Thomas Larsen and Mr. David Ahrens, Staff Representatives, Wisconsin Council 40, AFSCME, AFL-CIO, 1722 St. Lawrence, Beloit, Wisconsin, 53511, appearing on behalf of Complainant.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The above named Complainant filed a complaint with the Wisconsin Employment Relations Commission on September 18, 1985, alleging that the City of Janesville had violated Secs. 111.70(3)(a) 1, 3, and 4, Wis. Stats., by refusing to bargain an initial labor agreement on a timely basis and by refusing to allow a general shift selection on the basis of seniority among employes. 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 Janesville, Wisconsin on November 22, 1985, at which time the parties were given full opportunity to present their evidence and arguments. Both parties filed briefs, and the record was closed on January 10, 1986. 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. Janesville City Employees Local 523, AFSCME, AFL-CIO is a labor organization within the meaning of Sec. 111.70(1)(h), Wis. Stats., and has its principal offices c/o Wisconsin Council 40, AFSCME, AFL-CIO, 5 Odana Court, Madison, Wisconsin 53719.

2. City of Janesville is a municipal employer and has its principal offices at City Hall, 18 North Jackson Street, Janesville, Wisconsin 53545.

3. In accordance with the results of an election held on June 6, 1985, the Commission on June 19, 1985 certified Complainant as exclusive bargaining representative of all regular full-time and regular part-time employes without the power of arrest employed by the City of Janesville Police Department, excluding confidential, supervisory and managerial employes and employes with the power of arrest.

4. Julie Barrette is Personnel Director of the City of Janesville, and its agent. On June 11, 1985 Complainant's Staff Representative Ahrens wrote to Barrette requesting dates for a meeting for the purpose of negotiating an initial labor agreement. On June 28, 1985 Ahrens, having received no reply, repeated his request, again by letter. On the same day, Barrette called Ahrens to discuss possible dates. Ahrens declined to discuss the matter at the time, but Barrette by letter dated July 2, 1985 offered dates of July 18 or 19 for "the initial exchange of proposals" and July 30 or 31 for the "first negotiation session". A meeting was held between the parties on July 18, at which Complainant presented initial proposals for a collective bargaining agreement but Respondent proposed

nothing. Complainant's proposals were not complete, particularly in the lack of a proposal concerning union activity and a wage proposal; Complainant added a proposal concerning union activity on July 31, and subsequently made a wage proposal. At the July 31 meeting between the parties, Respondent proposed two clauses of a contract, and stated that further proposals would be made as and when they were ready. The record shows that Barrette refused to give a date certain by which the City's initial proposals would be complete, and refused a request by Ahrens to mail said proposals to the Union as and when they were prepared. Subsequently, the Union on two occasions cancelled bargaining meetings, but the record shows that at meetings which were held the Union commented on proposals of the City, while the City refused to comment on proposals of the Union. The record shows that by the date of the hearing herein major portions of the City's opening proposal to the Union had still not been forwarded to the Union, and that the City had still not discussed with the Union any of the Union's proposals despite repeated requests to do so. The record fails to show any substantive reason for the City's delay.

5. Prior to 1980, all dispatching functions were performed separately by sworn police officers for the Police Department and by Fire Department employes for that department. In 1980, the City hired three employes to serve as dispatchers in the Police Department without having sworn police officer status. The record shows that the three employes then hired all had the same seniority, but were given their preference of shifts. In September, 1983 a centralized dispatch unit covering both police and fire services was formed, with some of the former dispatchers and some new employes filling this function. The record shows that seniority was not the sole test of which employe received what shift, but that employes were consulted as to their preferences. On February 25, 1985, Police Chief Ray Voelker held separate meetings with the three shifts of communication technicians to discuss the formation of that new job classification, which combined two former functions. During the course of at least one such meeting he stated that employes would be allowed to take part in a general shift bidding procedure after the return of an employe who was then away for several months on a military leave. The record fails to show that Voelker promised that the bidding for shifts would be solely on the basis of seniority. The record shows that the absent communication technician returned to work on August 20, 1985 but that no general shift selection had been allowed up to the date of the hearing.

6. The record shows by a clear and satisfactory preponderance of the evidence that Respondent has engaged in a pattern of delay in putting forth initial proposals for a collective bargaining agreement and in conducting a general bid for shifts among communication technicians.

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

CONCLUSIONS OF LAW

1. By refusing to make timely initial proposals for collective bargaining to Complainant, Respondent bargained in bad faith and violated Sec. 111.70(3)(a) 1 and 4, Stats.

2. By refusing after the representation election to conduct the general bid for shifts promised on February 25, 1985, Respondent unilaterally altered the status quo prevailing at the time of the representation election and violated Sec. 111.70(3)(a)(4), Stats. The same action tended to interfere with, restrain and coerce employes in the exercise of their statutory rights, and therefore violates Sec. 111.70(3)(a)(1), Stats. The record does not establish that Respondent's refusal was intended as retaliation for employes' union activity, and it therefore does not violate Sec. 111.70(3)(a)(3), Stats.

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 Janesville, its officers and agents shall immediately:

1. Cease and desist from delaying negotiations and refusing to continue, pending agreement on any new shift selection procedure, standards and practices relating to shift selection which prevailed prior to the representation election.

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

a. Bargain in good faith with Complainant, specifically including the prompt preparation and submission to Complainant of a complete set of initial proposals for a collective bargaining agreement.

b. Promptly conduct a general shift bidding procedure among employes and implement the results of same, weighing in good faith seniority in relation to other factors in the selection of employes for shifts.

c. Notify 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 copies shall be signed by a responsible official of the district and shall be posted immediately upon receipt of a copy of this Order, and shall remain posted for a period of 30 days thereafter. Reasonable steps shall be taken to insure that said notice is not altered, defaced, or covered by other material.

d. Notify the Wisconsin Employment Relations Commisson in writing within 20 days of the date of service of this order as to what steps have been taken to comply herewith.

Dated at Madison, Wisconsin, this 28th day of March, 1986.

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.

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 EMPLOYEES

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

WE WILL bargain in good faith with Janesville City Employees Local 523, AFSCME, AFL-CIO, and will promptly prepare and submit our initial proposals to that labor organization.

WE WILL promptly conduct a general "shift pick" among employees in the Communication Technician classification.

Dated _____

By _____

On Behalf of the City of Janesville

THIS NOTICE MUST REMAIN POSTED FOR 30 DAYS FROM THE DATE HEREON AND MUST NOT BE ALTERED, DEFACED OR COVERED BY ANY OTHER MATERIAL.

CITY OF JANESVILLE

MEMORANDUM ACCOMPANYING
FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

The Complaint alleges that the City violated Sec. 111.70(3)(a) 1, 3 and 4, Stats., by refusing to make proposals on a timely basis and by refusing to allow employes to pick shifts by seniority, contrary to alleged past practice.

The City's Bargaining Proposals

The essential facts with respect to this allegation are undisputed, are outlined in the Findings, and need not be repeated here. It is undisputed that virtually all of the Union's initial proposals were in the hands of the City by their second meeting, on July 31, 1985, and that the bulk of the City's initial proposals had yet to be submitted to the Union as of the hearing on November 22. At the hearing the City offered to supply a batch of proposals to the Union, but conceded that these had not been forwarded previously and that at the following bargaining meeting the City's opening proposals still would not be complete. The City does not dispute that it has refused steadfastly to comment on almost all of the Union's proposals pending completion of its own initial offer. It is also undisputed that virtually all of the economic proposals made by the City to date represent a diminution of existing benefits. There is no dispute that with one exception 2/ the City has yet to explain any of its proposals to the Union, and has consistently refused to engage in a dialogue concerning their merits.

Complainant contends that the City engaged in "surface bargaining" by meeting on a number of occasions with the Union and presenting three or four proposed contract language items at each meeting, with no further action. Complainant contends that the City engaged in dilatory bargaining by proposing to reduce benefits without justification. Complainant argues that the City's actions tend to prolong the bargaining process indefinitely and that there has been no actual bargaining to date. Complainant contends that the good or bad faith of bargaining behavior is shown by the totality of a party's actions, and that the totality of the City's actions shows a refusal to come to grips with the substance of the negotiations. The Complainant contends that this shows that the City has bargained in bad faith.

Respondent contends that Complainant confuses a failure to agree with a failure to bargain, and that a give and take process is occurring. Respondent contends that the Union's initial proposal contains errors of copying from other contracts with the City and that this shows the flaws which can occur when a party is in too much haste. Respondent contends that the requests for delays in meeting dates have come from both parties, and that it is not using dilatory tactics merely by encountering the occasional conflict with other business. Respondent further argues that the Union has shown a greater interest in "game playing" and making accusations than in bargaining, and that the Union has filed a petition for mediation-arbitration which is inconsistent with its claim in this proceeding that no bargaining has taken place.

The general test of good faith at the bargaining table is the totality of conduct of the party involved. 3/ Dilatory tactics can violate the statutory requirement to "meet and confer at reasonable times", but must be assessed as part of the overall conduct of both parties. 4/ Where both parties have been equally dilatory, bad faith on the employer's part has not been found. 5/ The complaint

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2/ With respect to a City proposal to introduce a new requirement relating to ambulatory surgery, the City's representatives explained to the Union that this proposal was to be City-wide.

3/ See City of Green Bay, Dec. No. 18731-B (WERC, 6/83) and cases cited therein at fn. 14.

4/ See e.g. Crane Co., 244 NLRB 103, 102 LRRM 1351, Rhodes St. Clair Buick, Inc., 242 NLRB 1320, 101 LRRM 1448.

5/ Dunn Packing Co., 143 NLRB 1149 (1963). But Cf. McLean v. NLRB, 333 F2d 84 (CA6, 1964), 56 LRRM 2475, where prior delay by the union did not excuse subsequent delay by the employer.

here does not specifically allege that the City engaged in bad faith by proposing reductions in benefits. It has often been noted that collective bargaining does not automatically imply bargaining for increases; furthermore, a certain amount of bombast must be allowed for, particularly in the early stages of negotiations. And the fact that negotiation meetings have been cancelled is neither unilateral nor significant on this record, as each such instance is explained logically enough in testimony.

But the City's overall conduct does imply an unwillingness to apply itself to the business of negotiating a labor agreement. In Board of School Directors of Milwaukee 6/ the employer was found to have engaged in bad-faith bargaining by failing to furnish the union with requested information for a period of some two and a half months; this was described as "inordinate delay". As in Milwaukee, there is in this record no credible explanation for the slowness of preparation of the City's bargaining proposals. While the City contends that the "give and take" of bargaining is proceeding, it does not explain how "give and take" can take place before each party has some idea of the initial proposals of the other. The City's unbroken refusal to comment on Union proposals or to explain its own, combined with the extreme slowness of its preparation of said proposals, threatens to delay actual bargaining indefinitely; and the City's intent is confirmed by its admitted refusal, upon the Union's request, to furnish the proposals to the Union by mail or even to supply an estimated date by which its proposals would be complete. At the same time, such proposals as the City has produced provide for reductions in benefits, which the City, as noted, continues to refuse to explain. The overall impression created is one of an employer which insists on producing its initial proposals at a pace which can only be described as glacial, together with a total lack of explanation of its reasons either for the substance or the manner of its presentation. While the Union's pending petition for mediation-arbitration can ultimately supply a satisfactory and legislatively sanctioned test of the reasonableness of the City's proposals of reductions in benefits, I must conclude that the totality of the City's conduct demonstrates the "inordinate delay" discussed in Milwaukee, and that it constitutes bad-faith bargaining. 7/

Shift Selection

Complainant originally alleged that seniority was the sole basis used for shift selection until the City's refusal to allow a shift bidding procedure after employes voted to be represented. In its brief Complainant contends that seniority was shown by testimony to be "the major factor" but does not allege that it is the sole factor in shift selection. Complainant argues that the record shows that the City promised that a general shift selection would be allowed after the return of Communication Technician Betsie Wissbaum, but that in the event the City refused to allow the bid.

Respondent contends that the City has never allowed seniority to be more than one of several factors governing shift selection, but concedes that Police Chief Voelker did tell employes on February 25 that a shift bid would be held. Respondent argues that several conditions were specified by Voelker as having to be met prior to the general shift selection, and that these included a balance of experienced and inexperienced dispatchers on each shift, a condition which it allegedly still cannot meet. But Respondent also contends that once Complainant was certified as exclusive representative of the employes the City could "no longer proceed with any type of alteration of its shift assignment practices." Respondent also alludes to various problems experienced by the combined dispatching unit since its inception, including extended delays and errors in dispatching, in arguing that the assignment of employes to shifts must be done with sensitivity to the public need.

I note that the Union's witnesses gave testimony which did not persuasively establish that the City had ever assigned shifts solely on the basis of seniority. The Union's principal witness, Communication Technician Toni Grace,

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6/ Dec. No. 15825-B, C (1979), at page 21.

7/ Cf. School District No. 4, Village of Shorewood, Dec. No. 11410-C (1974), in which an initial slowness of meeting and proposal was compensated for by substantial activity prior to the hearing.

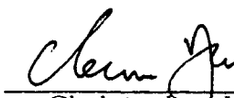
gave testimony tending to confuse seniority with alphabetical selection. But Complainant essentially abandoned the claim to seniority as sole standard for shift selection in its brief, and the testimony of Police Chief Voelker was consistent with that of the Union witnesses with respect to the fact that a promise to conduct a general bid for shifts had been made on February 25, 1985. Both Voelker's testimony and that of the Union witnesses stand for the proposition that employes have been consulted at intervals previously concerning their preferred shifts, even if their preferences were not always accommodated in order of seniority.

The general rule is that upon the selection of a bargaining representative, an employer is obligated to continue its previous wages and benefits, pending bargaining of new arrangements. 8/ But the status quo is applied by the Commission in a dynamic sense which includes pre-existing patterns of change, rather than freezing conditions of employment completely. 9/ Here, the status quo applicable is plainly different from Complainant's original theory, as the evidence clearly supports an inference that seniority was weighed against levels of experience as well as the origin of employes' experience, so that a mixture of former police and fire dispatchers could be assured on every shift instead of having only employes familiar with fire dispatching work present. But the fact remains that the City had in effect conducted periodic rounds of shift bidding, and it is undisputed that prior to the election Voelker promised to hold another after the return of Technician Wissbaum. Voelker testified that his conditions were that Wissbaum return from military service, that she work "long enough to get her skill level up sufficiently," and that "we did not have too many inexperienced people on a shift." 10/ But Voelker's claim that three months after Wissbaum's return she was still not up to par in every function of the combined job seems strained, and Respondent does not rely on this in its brief. His claim that there are still too many inexperienced employes is unpersuasive, particularly because the evidence shows that the City has in the past considered employes' lengths of experience as one of the factors in a general shift selection.

At the same time, Grace's testimony that the Department's immediate supervisor, Lieutenant Lembrich, had told her that there would be no "shift pick" because the parties were "engaging in negotiations" supplies a different motive for the City's action. This was not denied at the hearing, and indeed Respondent explicitly adopts this rationale as an argument in its brief. In view of the past practice of the City of holding periodic rounds of shift bidding and the explicit promise to hold another, the holding of such bids must be held to be part of the status quo in existence at the time the employes voted to be represented for collective bargaining purposes. The fact that shift bidding is not governed solely by seniority supplies the answer to Voelker's concerns about the distribution of employes; but it does not change the fact that the right to an occasional round of shift bidding is a form of working condition previously enjoyed by employes, nor does it change the fact that the City had committed itself to holding another such bid within a reasonable period of time following Wissbaum's return. The fact that it had not done so by the date of the hearing, therefore, appears to be related to the general pattern of dilatory conduct referred to above, as well as to the erroneous impression of the City's status quo legal duty identified in its brief. I therefore conclude that the City is obligated to hold such a shift bid promptly, even though it need not be based solely on employes' choices in order of seniority.

Dated at Madison, Wisconsin, this 28th day of March, 1986.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By 
Christopher Honeyman, Examiner

8/ School District of Wisconsin Rapids, Dec. No. 19084-C (WERC, 3/85). See also NLRB v. Katz, 396 U.S. 736 (1962), NLRB v. Dothan Eagle, Inc., 434 F. 2d 92 (CA 5, 1970).

9/ Wisconsin Rapids, supra.

10/ Tr. page 91.