STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

O.P.E.I.U LOCAL NO. 9, AFL-CIO, CLC, Complainant, vs. CITY OF WAUKESHA, Respondent.	Case 67 No. 37470 MP-1881 Decision No. 23969-A

Appearances:

Mr. Joseph Robison, Business Manager, O.P.E.I.U. Local No. 9, AFL-CIO, CLC, 6333 West Bluemound Road, Milwaukee, WI 53213, appearing on behalf of Complainant.

Mulcahy & Wherry, S.C., Attorneys at Law, by Mr. Robert Mulcahy, 815 East Mason Street, Suite 1600, Milwaukee, WI 53202, appearing on behalf of Respondent.

FINDINGS OF FACT, CONCLUSION OF LAW, AND ORDER

O.P.E.I.U. Local No. 9, AFL-CIO, CLC, filed a Complaint on August 21, 1986 with the Wisconsin Employment Relations Commission alleging that the City of Waukesha had committed prohibited practices within the meaning of Sec. 111.70, Wis. Stats., by refusing to sign a negotiated collective bargaining agreement. 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, Conclusion of Law and Order, as provided in Sec. 111.70(5) Wis. Stats. A hearing was held in Waukesha, Wisconsin on October 24, 1986, at which time the parties were given full opportunity to present their evidence and arguments. The parties filed briefs, and the record was closed on January 5, 1987. The Examiner, having considered the evidence and arguments and being fully advised in the premises, makes and files the following Findings of Fact, Conclusion of Law and Order.

FINDINGS OF FACT

1. Office and Professional Employees International Union Local No. 9, AFL-CIO, CLC, herein referred to as Complainant or the Union, is a labor organization within the meaning of Sec. 111.70(1)(h), Stats., and has its principal offices at 6333 West Bluemound Road, Milwaukee, Wisconsin, 53213.

2. City of Waukesha, herein referred to as the City or Respondent, is a municipal employer within the meaning of Sec. 111.70(1)(j), Stats., and has its principal offices at City Hall, 201 Delafield Avenue, Waukesha, Wisconsin, 53186.

3. At all material times Complainant has been the certified exclusive bargaining representative for all full-time and regular part-time year-round clerical, custodial and parking agent employes employed by the City at its 201 Delafield Avenue address, excluding all managerial, professional, technical, administrative, confidential and supervisory employes, employes employed in other collective bargaining units, elected officials, seasonal, casual, temporary, and all other employes. Before Complainant was certified as exclusive representative by the WERC on May 23, 1984, said employes were unrepresented. In 1983 and 1984, as part of their compensation package enacted by the City, said employes were eligible for merit pay steps in their pay schedule.

4. On or about November 28, 1984, Complainant and Respondent commenced negotiations for an initial collective bargaining agreement covering the employes identified in Finding of Fact 3 above. After numerous meetings during the course of approximately one and a half years, a tentative agreement was reached at a meeting on April 2, 1986. This tentative agreement was rejected by the Union at a ratification vote.

5. Subsequent to the rejection of the first tentative agreement, Complainant sent to Respondent a proposal for a modified agreement, which was accepted in principle by Respondent. On June 11, 1986, the Union ratified this agreement, and on June 17, 1986, the Employer's City Council also ratified the agreement. The record shows that the motion to ratify the agreement in the City Council stated in relevant part: "Alderman LaPorte moved for ratification with back pay being given when the contract language is agreed upon and signed." On June 18, 1986, the Employer instituted new hours consistent with the terms of the agreement; on June 23, 1986 the Employer instituted pay rates consistent with the agreement and proceeded to pay back pay to the employes.

6. Subsequent to the ratification of the agreement by both parties, each party raised concerns relating to the wording of the agreement in certain areas. On July 17, 1986 the parties met, and discussed several points. Among these points was the effective date for merit increases pursuant to the schedule adopted as part of the collective bargaining agreement. Respondent maintained that the date of January 1, 1987 has been intended as the effective date at all times, and proposed that this be spelled out in the agreement. The record demonstrates that the Union opposed the inclusion of the January 1, 1987 date in the body of the collective bargaining agreement and that the City then proposed a side letter to the agreement to contain that term of employment. The record shows that the Union agreed to submit the side letter for a ratification vote.

7. At a meeting held on July 23, 1986, the Union bargaining committee presented the side letter of agreement without recommending that it be adopted. In a vote, the side letter was rejected by the Union's membership. On July 24, 1986, the Union's Business Manager Robison sent to the City's Personnel Director Tom Wisniewski four signed copies of the collective bargaining agreement, without the side letter attached; Robison requested in an accompanying letter that the City execute the agreement, and advised the City that the membership had rejected the side letter. Robison's letter stated "Should the City desire a meeting to attempt to resolve this issue, please contact the undersigned." The City refused and continues to refuse to sign the collective bargaining agreement without the side letter.

8. The record shows that the City's negotiators consistently and repeatedly warned the Union's negotiators that agreements reached between them were contingent on approval of the final drafted language. The record shows that the ratification vote by the City was contingent upon a similar expectation; and the record fails to show that the Union had ever objected to this condition prior to the ratification votes.

9. The record shows that the City's agreement not to include the date of implementation of the merit pay steps was in response to the Union's insistence that this not be in the body of the contract language. The record shows, therefore, that the side letter constituted a material part of the agreement as a whole.

10. The record shows that while the City had maintained a merit pay system in the past, merit payments were not part of the status quo at the time the parties reached their tentative agreement. The record shows that the Employer had not paid merit pay in either 1985 or 1986, and that Complainant had not filed any complaint concerning said failures to pay.

11. The record shows that the Union was aware that the Employer had made signing the agreement contingent on a final agreement on contract language, and further shows that the City's refusal to sign the agreement was based on the absence of a meeting of the minds as to a material element of the agreement. The record therefore shows that the totality of the City's conduct does not establish that the City bargained in bad faith with the Union.

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

CONCLUSION OF LAW

Respondent did not, by refusing to sign an agreement which was not fully agreed upon in all material respects, fail or refuse to bargain in good faith in violation of Sec. 111.70(3)(a)1 and 4, Stats.

Upon the basis of the foregoing findings of Fact of Fact and Conclusion of Law, the Examiner makes the renders the following

ORDER 1/

It is ordered that the complaint be, and the same hereby is, dismissed.

Dated at Madison, Wisconsin this 4th day of March, 1987.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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.

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(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.

CITY OF WAUKESHA

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

The Complaint alleges that the City violated Sec. 111.70, Stats., by refusing to sign an agreed and ratified initial collective bargaining agreement. The answer contends that no agreement was reached, and alleges that Complainant engaged in bad faith bargaining by failing to ratify a side letter which was allegedly part of the agreement.

BACKGROUND

On May 23, 1984, the Union was certified by the WERC as exclusive representative of a hitherto unrepresented group of employes essentially comprising clerical and related classifications in the City Hall. The parties engaged in lengthy bargaining over an initial contract, which culminated in 1986 with two tentative agreements.

The first tentative agreement, which was reached on April 2, 1986, was denied ratification by the Union, apparently primarily because of a provision requiring employes to pick up the cost of a pension increase. The parties resumed negotiations following a new Union proposal, and about the end of May, 1986, a second tentative agreement was reached. This was ratified by the Union on June 11, 1986, and subsequently by the City Council on June 17, 1986. On June 18 the City instituted new hours of work which were part of the agreement, and on June 23 the City proceeded to adjust employes' pay rates and pay them back pay consistent with the salary schedule in the new agreement. Subsequently, however, each party raised concerns to the other concerning interpretations of and possible gaps in the contract language. A meeting was held on July 17 to address these mutual concerns.

Only one of the items addressed at the July 17 meeting is relevant to this matter - the question of the implementation date for the merit increases already agreed upon as part of the salary schedule. Prior to and at this meeting, the City maintained that an implementation date for these steps had always been intended to be set at January 1, 1987. The Union argued that January 1, 1985 was contemplated as the starting date for merit increases by the facial language of the salary schedule, and offered to settle for July, 1986. The City refused and insisted upon the January 1, 1987 date. It is undisputed that the Union objected to inclusion of that date in the text of the collective bargaining agreement; the import of the rest of the meeting is disputed between the parties: Three City witnesses testified that during the discussions which followed, the City and Union agreed on a side letter, to be applied for purposes of interpreting the agreement, which would specify that January 1, 1987, was the starting date for merit increases. The City witnesses contend that the Union negotiators accepted the side letter and agreed to recommend it to the Union's membership.

One Union witness testified concerning this meeting, and contended that the Union's negotiators had not agreed to recommend the side letter to the membership, but merely to bring it back for a vote. That witness, Kathy Mehling, also testified, however, that no one on the Union's side said at the July 17 meeting that the side letter was not acceptable.

On July 23, the Union held a meeting at which the side letter was discussed. Union Business Manager Robison, according to Mehling's uncontradicted testimony, explained the side letter and stated that this was what the City wanted, but did not argue either in its favor or against it. A vote taken at that meeting rejected the side letter.

On the following day Robison sent to the City's Attorney Mulcahy four signed copies of the collective bargaining agreement without the side letter attached, and requested the City to sign the agreements, while noting that the side letter had been rejected by the membership. In his reply Mulcahy, contending that the side letter was a integral part of the agreement, refused to sign the contract.

The City presented evidence showing that on several occasions prior to the first tentative agreement, it had expressly reserved rights to check and approve the final form of the contract, including all language, before it was finalized. The record contains no evidence that the Union ever objected to this condition.

THE PARTIES' POSITIONS

Complainant argues that the parties had a firm and complete collective bargaining agreement as of the City's ratification on June 17, 1986. The Union contends that the City never proposed any date for implementation of merit raises other than that implied by simple examination of the pay schedule, which was effective on its face January 1, 1985. The Union argues that the City raised the January 1, 1987 date as a last-minute grab motivated by the City's discovery that it had failed to budget for the merit steps of the pay schedule. Complainant argues that its good-faith attempt to ameliorate the Employer's problem, by considering a side letter which would have imposed a later date, should not be held against it, and that the agreement is final as of its ratification. In this respect Complainant points to the fact that the parties had engaged in the exchange of final offers under the statutory mediation-arbitration provisions and the Employer's final offers never contained any mention of a January 1, 1987 implementation date for merit pay. Complainant also notes that despite language in the City's motion to ratify the collective bargaining agreement stating that the back pay would be paid only when the final language was reviewed, the City proceeded to pay back pay within a few days thereafter. Complainant views the City's subsequent discipline of two clerical employes involved in the transmission of the pay increase data as belated and intended to shore up the City's position for litigation.

Complainant also alleges that the past practice of the City was for payment of annual merit increases, and that by refusing to continue that practice effective January 1, 1985, the City violated its duty to bargain by unilaterally altering the status quo.

Respondent contends that the record amply demonstrates that the Union was aware that all contract language was subject to review by Respondent's attorney, and that the Union never objected to this condition. Respondent argues that its negotiators' notes of the bargaining meetings show that the date of January 1, 1987 was discussed for merit increases and that the Union never proposed an alternate date. Respondent argues that after this gap in the written agreement came to light, along with other such gaps, the City met in good faith with the Union to attempt to arrive at agreements on all of these matters, and that it conceded points on other issues while the Union conceded the point on the implementation date of merit increases. Respondent points to the testimony of its three witnesses and alleges that this establishes that the Union acted in bad faith by failing to make a recommendation in favor of adoption of the side letter at its July 23 meeting.

Respondent argues with respect to the outcome of that meeting that the implementation date for merit increases was clearly part of the underlying agreement, that it agreed to put this in a side letter at the Union's insistence, and that the Union's failure to ratify the side letter left the parties without a meeting of the minds. Respondent argues that it has a legal right to make the review which disclosed this gap part of the conditions of agreement, and that the fact that the City had paid the regular wages increases shortly after ratification was an error resulting from an improper assumption of authority by clerical employes. The City contends that the sole reason for the delay in discipline of those employes was that the Personnel Director did not discover that the increases had been paid until long after the fact.

DISCUSSION

It is clear that the City could not be obligated to sign a collective bargaining agreement unless the requisite "meeting of the minds" had occurred. 2/

2/ Adams County, Dec. No. 11307-A, B, WERC, 4/73.

The question presented by this case is whether, in fact, a meeting of the minds ever occurred, and if so, on what basis.

In Hartford Union High School District, 3/ the Commission addressed a case in which a party's counsel had been asked for advice after a tentative agreement was reached, and subsequently raised new issues. The Commission there stated:

> If such advice and counsel is sought after the parties have reached a tentative agreement on substantive proposals submitted by both parties during the course of negotiations, as was done in this case, the Commission must find that the party seeking such advice and counsel, at such time, had not bargained in good faith where new issues are created by such advice and counsel and said party thereafter insists upon the implementation of the advice. Various concessions made by either party, prior to reaching tentative agreement, may not have been made had the party making such a concession been aware that new substantive issues would be introduced into the negotiations following the tentative agreement between the bargaining teams involved. To interject new issues following the tentative agreement would open a Pandora's box in the collective bargaining process.
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> If either party intends to have a tentative agreement reviewed for both language changes and substantive proposals, it has the duty to so advise the other party prior to reaching a tentative agreement on all issues. Good faith bargaining does not contemplate advice and counsel in absentia after the parties have reached a tentative agreement on all proposals presented at the bargaining table.

Here it is apparent that the Union was on notice that the City would hold any agreement to be tentative until the final form of the language was passed on by its attorney. There is no evidence to counter Respondent's several exhibits making this point at various stages of the negotiations. 4/ That, however, would not defend the City, under Hartford, if the evidence shows that the City, in fact, raised an entirely new issue at this stage of the proceeding; I read Hartford to imply that language and other concerns consistent with the parties' intent may be raised or proposed for change at such a late date, not that an element of the agreement may be vitiated.

The facts are confused, particularly in view of the City's June 17 adoption of a motion urging ratification with pay increases to be put into effect after the contract language was finalized, and its June 23 implementation of those increases prior to any concerns being raised over the language. Respondent's contention that its Personnel Director did not know that the increases had been paid is somewhat unusual, and is relied on by Respondent as explanation for the fact that the employes involved were disciplined by a letter of reprimand issued some three months after the raises were implemented, after this litigation had commenced. Respondent's explanation is, however, plausible in view of the uncontradicted testimony to the effect that the Personnel Director was on vacation on the day his secretary called to ask whether raises were supposed to be implemented. It is possible to interpret his reply either as an ambiguous statement which set in motion this curious chain of events, or as an instruction which was not followed by his secretary. At all events, the City was certainly on notice as to the payment by two months later, when the complaint was filed.

But the fact of payment of the increases is not, in my view, dispositive of the issue here. It is clear that the increase was paid contrary to the City Council's stipulation, because that requirement was that the language be finalized first. Complainant does not contend that the contract language was final as of the ratification date; in this complex initial round of bargaining, the Union, like the City, had unresolved questions of wording and gap-filling to address

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3/ Dec. No. 11002-B, WERC, 9/74.

4/ Respondent's Exhibits 7, 11, 20 and (immediately after the City Council's vote) 21.

after that date. The July 17 meeting demonstrates not only that there were ambiguities which both sides wished to raise prior to considering the agreement final, but particularly that the implementation date for merit increases was, in fact, not previously agreed. I reach this conclusion for the following reasons:

While the Union contends that it was never told until after the parties had ratified an agreement that the City desired to delay the implementation of merit increases until January 1, 1987, the record clearly shows that the Union had never proposed a date for implementation prior to the July 17 meeting. The City introduced evidence that its negotiators' notes from earlier bargaining sessions showed a date of January 1, 1987 for merit increases, which the Union dismisses as self-serving. But while Union witness Mehling denied hearing that date mentioned at any time during the Employer's presentation of its proposals, she admitted that early in the negotiations the City noted that it had not been conducting evaluations of employes with a view to merit increases and that it would have to evaluate employes before merit could be paid. 5/ I find nothing in the record to counter the inference created by this testimony that the Union was on notice that the City intended something other than a fully retroactive date for merit increases.

The discussion at the July 17, 1986 meeting, disputed as it is, also supports the Employer's case. While Mehling disputed the City witnesses' contentions that the Union "tentatively agreed" to the 1987 date, she admitted 6/ that the Union negotiators did not state it was unacceptable to them. Moreover, the 1987 implementation date for merit increases, had this been an unexpected proposal, would have the effect of delaying by two full years step increases for a substantial part of the bargaining unit. This was not a trivial matter, plainly; the fact that the Union did not make a strenuous objection to the City's proposal therefore carries certain implications. Chief among these is the inference that the Union expected such a proposal, or at least that it was not interested in staking a claim to payment as of January 1, 1985 based on the facial construction of the salary schedule.

There is also no dispute that the Union was the party which insisted on the January 1, 1987 date being included not in the text of the contract, but in a side letter. This indicates that the implementation date cannot be considered here as an extraneous, separate agreement, but must be recognized as an integral part of the collective bargaining agreement. It matters little, therefore, whether the Union promised to recommend ratification of the side letter or merely agreed to refer the question to the membership: In either case, the circumstances of the July 17 meeting indicate that the Union was not about to argue that the contract as already ratified required a January 1, 1985 date.

Similarly, whether or not the Union agreed to recommend acceptance of the side letter, its rejection by the membership left the parties without an agreement on a material element of the collective bargaining agreement as a whole. To find otherwise would allow a party to include a deliberate ambiguity in an agreement, by diverting the interpretation of that ambiguity into a separate agreement and then derailing the second agreement. Where the item concerned is material to the collective bargaining agreement, the party insisting that agreement be reached in its entirety can hardly be found to have acted in bad faith by refusing to sign the partial agreement. In this instance, the merit pay steps of the schedule apply to a significant number of employes and involve a significant amount of money. The City was within its rights in conditioning its approval of the agreement on a final review by its attorney. That review disclosed a gap or ambiguity, at best, and the evidence presented by the Union does not establish that the City was raising a new issue. Therefore, the City acted within its rights in maintaining that the implementation date for merit pay had to be agreed on before the parties would have an entire agreement. The fact that the City paid the other salary increases therefore emerges as mere error, rather than as evidence that the City understood that it had a complete and final agreement. For these reasons I conclude that the City properly determined, upon notice that the

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5/ Tr. pp. 41-42.

6/ Tr. p. 53.

Union had not ratified the side letter, that a complete agreement had not been reached, and that it did not fail or refuse to bargain in good faith by refusing to sign the incomplete collective bargaining agreement.

Dated at Madison, Wisconsin this 4th day of March, 1987.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Christopher Honeyman, Examiner