STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MADISON BUILDING AND CONSTRUCTION TRADES COUNCIL INC., and LOCAL UNION #314 OF THE UNITED BROTHERHOOD OF CARPENTERS, and LOCAL UNION #802 OF THE INTERNATIONAL BROTHERHOOD OF PAINTERS, and LOCAL #159 OF THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS AND ALLIED TRADES, AND ITS AFFILIATED LOCAL UNIONS, Complainants, vs. CITY OF MADISON, Respondent.	Case 131 No. 39329 MP-2018 Decision No. 24904-A

Appearances:

Kelly & Haus, Attorneys at Law, by Ms. Carol L. Rubin, 121 East Wilson Street, Madison, Wisconsin, 53703-3422, appearing on behalf of the Complainants.

Mr. Larry O'Brien, Assistant City Attorney, City of Madison, 210 Martin Luther King Jr. Blvd., Madison, Wisconsin, 53710, appearing on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Madison Building and Construction Trades Council, Inc., and Local Union #314 of the United Brotherhood of Carpenters, Local Union #802 of the International Brotherhood of Painters, and Allied Trades, and Local Union #159 of the International Brotherood of Electrical Workers, and its affiliated local unions, having, on September 9, 1987 filed a complaint with the Wisconsin Employment Relations Commission alleging that the City of Madison had committed prohibited practices within the meaning of Sec. 111.70(3)(a)1 and 4, Stats., by failing and refusing to meet with the Complainant to arrive at a written collective bargaining agreement; and the Commission having, on October 20, 1987, appointed Edmond J. Bielarczyk, Jr., a member of its staff, to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and Order as provided in Secs. 111.70(4)(a) and 111.07, Stats.; and hearing on said complaint having been scheduled for November 17, 1987, rescheduled to December 15, 1987 and rescheduled and held on January 29, 1988 in Madison, Wisconsin; and a stenographic transcript having been prepared and received by the Examiner on February 25, 1988; and post hearing arguments and reply briefs having been received by the Examiner by May 3, 1988; and the Examiner having considered the evidence and being fully advised in the premises, makes and issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. That Madison Building and Construction Trades Inc., is the exclusive certified bargaining representative of the following bargaining units: (1) all electricians and electrical apprentices employed by the City of Madison, excluding all other employes, (2) all painters and painter apprentices employed by the City of Madison, excluding all other employes; and (3) all carpenters and carpenter

apprentices employed by the City of Madison, excluding all other employes; 1/ that said Council and Local Union #314 of the United Brotherhood of Carpenters, Local Union #802 of the International Brotherhood of Painters and Local Union #159 of the International Brotherhood of Electrical Workers 2/, hereinafter referred to as the Complainants are a labor organization maintaining its offices at 1602 South Park Street, Madison, Wisconsin; that William Carden, Business Manager, Painters Local 802, is a member of the Complainants and authorized to negotiate on behalf of the Complainants; and, that Knute Larson, Executive Treasurer of Carpenters Local 314, is a member of the Complainants and authorized to negotiate on behalf of the Complainants.

2. That the City of Madison, hereinafter referred to as the Respondent, is a municipal employer maintaining its offices at 210 Martin Luther King Jr. Blvd., Madison, Wisconsin; that at all material times herein Charles Reott has been an authorized bargaining agent for the Respondent; and that at all material times herein Timothy Jeffery has been an authorized bargaining agent for the Respondent.

3. That on June 10, 1987 Complainants' Representative, Robert C. Kelly, sent the following letter to Jeffery:

> Dear Mr. Jeffery:
>
> We represent the negotiating committee of the Madison Building and Construction Trades Council, Inc. and its appropriate affiliated locals, the exclusive bargaining representative for those employed as carpenters or painters by the City of Madison. Our client is most desirous of entering into a written agreement with the City establishing the wages, hours and conditions of employment of the involved bargaining unit employees. In the case of most matters this will involve, as our client sees it, merely the reduction of the present situation to writing.
>
> In any event, we on behalf of our client request that you and/or other appropriate representatives of the City meet with representatives of the Council for the purpose of arriving at such an agreement. We ask that you inform us at your earliest convenience of several dates upon which the involved City representatives could meet for that purpose. We await your advice, hopefully on a timely basis.
>
> Very truly yours,
>
> Robert C. Kelly /s/
>
> RCK:dm
>
> cc: Bill Carden
> Knute Larson

That on June 24, 1987 Jeffery sent the following letter to Kelly:

> Dear Mr. Kelly:
>
> I am in receipt of your June 10, 1987 letter concerning an interest in discussions regarding a written agreement. I will be on vacation July 1 through July 29. Upon my return I will contact you.

1/ City of Madison, Dec. No. 9908 (WERC 10/70).

2/ At the commencement of the hearing Complainants amended the complaint to include Local #159.

Sincerely,

Timothy C. Jeffery
Director of Labor Relations

TCJ:pak

that on June 26, 1987 Kelly sent the following letter to Jeffery:

Dear Mr. Jeffery:

We acknowledge receipt of your letter of June 24, 1987 in response to our request to commence negotiations for a written labor agreement covering the wages, hours and conditions of employment of the City's carpenter and painter employees. We look forward to hearing from you on a timely basis upon your return from vacation.

Very truly yours,

Robert C. Kelly /s/

RCK:bes

cc: Knute Larson, Business Agent
Southwest Wis. District Council of Carps.
Bill Carden, Business Agent
Painters Local 802

that on August 6, 1987 Kelly sent the following letter to Jeffery:

Dear Mr. Jeffery:

We, on behalf of the Madison Building and Construction Trades Council, Inc. renew its request, originally made almost sixty days ago, to commence on a timely basis, negotiations for a written labor agreement as concerns the wages, hours and conditions of employment of the City's Painter and Carpenter employees. We look forward to hearing from you on a timely basis.

Very truly yours,

Robert C. Kelly /s/

RCK:bes

cc: Knute Larson
Bill Cardin (sic)

that on August 12, 1987 Jeffery sent the following letter to Kelly:

Dear Mr. Kelly:

In response to your letter of June 10, 1987 regarding the interest of the Madison Bulding and Construction Trades Council, Inc., to enter into a written agreement with the City, I would offer the following information.

The City and representatives of the Madison Building Trades Council first entered into an agreement for the period 1973-75. The parties subsequently entered into a three year agreement for the period May 1, 1975 through April 30, 1978. The agreement between the parties was again renewed for the three year period May 1, 1978 through April 30, 1981.

The 1978-81 agreement contained the following provision:

> "The determination of cost of employee benefits set forth herein shall be automatically renewed for successive three (3) year periods beginning May 1, 1981, unless either party shall notify the other in writing on or before April 1st of any year in which this agreement would otherwise be renewed that it desires to modify this agreement."

Pursuant to the above provision, the agreement between the City and the Madison Building and Construction Trades Council, Inc., was automatically renewed for the three year period of May 1, 1981 through April 30, 1984, May 1, 1984 through April 30, 1987, and most recently for the three year period May 1, 1987 through April 30, 1990.

The City is not receptive to opening negotiations during the term of the current agreement. We would be agreeable to such discussions in conjunction with a successor agreement.

that on August 13, 1987 Kelly sent the following letter of Jeffery:

Re: Madison Building and Construction Trades Council, Inc.

Dear Mr. Jeffery:

May we have a copy of the written collective bargaining agreement which you claim sets forth the wages, hours and conditions of employment presently contractually accordable to the City's carpenter and painter employees.

that on August 25, 1987 Jeffery sent the following letter and attachment to Kelly:

Dear Mr. Kelly:

Pursuant to your August 13, 1987 letter, I have enclosed the following documents:

1. Memorandum of Understanding covering contract period 1973-1975.

2. Letter to Mr. Rohr dated July 31, 1978 re: Determination of Cost of Employee Benefits with attachment.

3. Letter to Mr. Rohr dated April 27, 1978 re: Prevailing Rate Schedule - Skilled Trades with attachment.

Attachment 1

MEMORANDUM OF UNDERSTANDING

TO: Mr. Harold Rohr, Representative of Madison Building Trades Council

This is to confirm the agreement reached by the City of Madison and representatives of the Madison Building Trades Council, in respect to the compensation to be paid journeyman trades employees for the two-year contract period 1973-1975 as follows:

1. The prevailing rate in the Madison area shall be paid, less a 22% figure representing the costs of employee benefits (78% of gross prevailing rate) for each of the years of the contract period.

2. The vacation schedules shall consist of a 10-day vacation period in addition to 6 paid holidays and 3 1/2 paid days off. Employees who have accrued greater than 10 days vacation may take such time off without pay if they so desire. Sick leave shall continue to be accrued to the employees.

3. Employees may elect to retain their current vacation allowances and 2 "floating" holidays. In the event of such election, the benefit allowance shall be calculated at 25% (75% of gross prevailing rate), and:

   (a) In the event the adjusted rate (75% of the gross prevailing rate) is less than the rate in effect at the time of the rate change, no employee will receive a decrease in wages as a result of the 25% election; and

   (b) The election shall reamin in effect during the two-year contract period.

   (c) Vacation credit shall be pro-rated for the year(s) represented by the contract period; (2) floating holidays shall be granted for 1973 in addition to the pro-rata provision to employees hired prior to the 1973-75 contract period.

Carpenters Local 314
Electricians Local 159
Painters Local 802

C. B. Ott
Director, Labor Relations
and Collective Bargaining

Attachment 1

July 31, 1975

Mr. Harold Rohr, President
Madison Building and Construction
Trades Council, Inc.
1602 South Park Street
Madison, Wisconsin 53715

Re: Determination of Cost of Employee Benefits

Dear Mr. Rohr:

Forwarded for your concurrence on behalf of Carpenters Local #314, Electricians Local #159 and Painters Local #802, is the Determination of Cost of Employee Benefits annually required by the Personnel Division in accordance with the provisions of Sec. 3.38(1)(e)1 of the Madison General Ordinances.

Please confirm your concurrence in said Determination. Please advise if you have any questions relative to the matter.

Very truly yours,

William A. Jansen
Deputy City Attorney

WAJ:sc
Enclosure
cc: C. F. Reott, Jr.
Personnel Director

Attachment 2

PERSONNEL DIVISION
DETERMINATION OF COST OF EMPLOYEE BENEFITS
Pursuant to Sec. 3.38(1)(e)1 of the
Madison General Ordinances

The Madison Building and Construction Trades Council, Inc., has negotiated labor agreements establishing outside wage rates to be paid to journeyman craftspersons and apprentices for a contract term of three (3) years commencing May 1, 1975, and ending April 30, 1978.

Sec. 3.38(1)(e)1 of the Madison General Ordinances provides that the cost of employee benefits as annually determined by the Personnel Division shall be deducted from the prevailing rate paid to such craftspersons and apprentices employed by the City of Madison.

Now, therefore, the Personnel Division of the City of Madison, in accordance with the provisions of Sec. 3.38(1)(e)1 of the Madison General Ordinances, does hereby determine the cost of employee benefits paid to employees of the City of Madison represented by the Madison Building and Construction Trades Council, Inc. to be twenty-two (22%) percent of the prevailing rate for the first year of the aforesaid three-year contract and for the remaining two years of said three-year contract unless otherwise annually determined in accordance with the provisions of the aforesaid Ordinance; and that from and after May 1, 1975, the rate to be paid to such employees is seventy-eight (78%) percent of their individual gross prevailing rate applicable to such employees as set forth in their respective 1975-78 Labor Agreements.

Said determination for such employees is based upon their voluntary use of a vacation schedule which shall, for such employees, consist of their use of ten (10) vacation days in addition to six (6) paid holidays and three one-half (3 1/2) paid days off, provided, however, that employees who have accrued greater than ten (10) days vacation pursuant to the provisions of the Madison General Ordinances, may take such time off without pay if they so desire without affecting the rate determined herein, and with sick leave continuing to accrue to such employees during such vacation.

Said determination is further based upon the assumption that employees may elect to retain the vacation allowances and two (2) "floating" holidays established by Ordinance, but in the event of such election, the cost of employee benefits shall be determined to be twenty-five (25%) percent of their gross prevailing rate; provided, however:

(a) If after such election the adjusted rate (75% of the gross prevailing rate) is less than the employees' pay rate in effect prior to the rates established by the 1975-78 contract, such employee will not

receive a decrease in wages paid under the previous contract as a result of such 25% election; and

(b) Once made, such election shall remain in effect during the remainder of the aforesaid three-year contract period; and

(c) Vacation credit shall be prorated for the years represented by the contract period and two (2) floating holidays shall be granted in addition to the prorata provision to employees hired prior to the 1973-75 contract.

C. F. REOTT, Jr. /s/
Personnel Director

Attachment 3

April 27, 1978

Mr. Harold Rohr
Painters Local 802
1602 South Park Street
Madison, Wisconsin 53715

RE: Prevailing Rate Schedule - Skilled Trades

Dear Mr. Rohr:

Section 3.38(5)(a) of the Madison General Ordinances provides as follows:

(5) Prevailing Rate for Skilled Trades
(a) Position which requires completion of a formal apprenticeship, or the equal, in a trade or craft recognized by employees shall be subject to adjustment on the first of the month following settlement of any change in the prevailing rate. In computing the prevailing rate the cost of employment benefits as annually determined by the Personnel Division shall be deducted from such prevailing rate for payroll purposes.

Since 1973, the Personnel Division has determined the cost of employee benefits for such employees to be twenty-two (22) percent of the prevailing rate. This percentage has been derived from the cost of the benefits received by such employees which include all the benefits received by non-represented permanent employees except for the following differences:

1. Ten (10) vacation days
2. No floating holidays
3. No longevity pay

(The exception to the above is Mr. Henry Fuller, Maintenance Electrician at the Water Utility, who receives only 75% of the prevailing rate but in exchange receives twenty (20) vacation days plus two (2) floating holidays.)

Attached is an amended "Determination of Cost of Employee Benefits." As you will note, it continues to provide that the

cost of employee benefits is twenty-two (22) percent of the prevailing rate. Please note that the attached memorandum provides for the automatic renewal of the cost determination unless either party desires to modify it.

Unless we hear otherwise, on or before May 1, 1978, we will assume that the matters discussed herein meet with your approval.

Sincerely,

C. F. Reott, Jr., AEP
Personnel Director

CFR:mjb

cc: Mr. Tim Jeffery, Director of Labor Relations
Mr. Gale Dushack, City Accounting

Attachment 3

PERSONNEL DIVISION
DETERMINATION OF COST OF EMPLOYEE BENEFITS
Pursuant to Section 3.38(5) (a) of the
Madison General Ordinances

The Madison Building and Construction Trades Council, Inc., does negotiate labor agreements establishing outside wage rates to be paid to journeyman craftspersons and apprentices.

Section 3.38(5)(a) of the Madison General Ordinances provides that the cost of employee benefits as annually determined by the Personnel Division shall be deducted from the prevailing rate paid to such craftspersons and apprentices employed by the City of Madison.

Now, therefore, the Personnel Division of the City of Madison, in accordance with the provisions of Section 3.38 (5)(a) of the Madison General Ordinances, does hereby determine the cost of employee benefits paid to employees of the City of Madison represented by the Madison Building and Construction Trades Council, Inc., and hired after May 1, 1973 to be twenty-two (22) percent of the prevailing rate for the period May 1, 1978, through April 30, 1981.

Said determination for such employees is based upon their voluntary use of a vacation schedule which shall, for such employees, consist of their use of ten (10) vacation days in addition to six (6) paid holidays and three one-half (1 1/2) paid days off, provided, however, that employees who have accrued greater than ten (10) days vacation pursuant to the provisions of the Madison General Ordinances, may take such time off without pay if they so desire without affecting the rate determined herein, and with sick leave continuing to accrue to such employees during such vacation.

(The exception to the above is Mr. Henry Fuller, Maintenance Electrician at the Water Utility, who receives only 75% of the prevailing rate but in exchange receives twenty (20) vacation days plus two (2) floating holidays.)

The determination of cost of employee benefits set forth herein shall be automatically renewed for successive three (3) year periods beginning May 1, 1981, unless either party shall notify the other in writing on or before April 1st of any year

in which this agreement would otherwise be renewed that it desires to modify this agreement.

C. F. Reott, Jr., AEP
Personnel Director

DATE: _____

mjb

that on August 28, 1987 Kelly sent the following letter to Jeffery:

Re: Madison Building and Construction Trades Council, Inc.

Dear Mr. Jeffery:

We, upon reviewing your letter of August 25, 1987 and its attachments, renew our request first made by letter dated June 10, 1987 that appropriate representatives of the City meet with appropriate members of the Madison Building and Construction Trades Council, Inc. for the purpose of negotiating the terms of a written collective bargaining agreement covering the wages, hours and conditions of employment of the City's carpenter and painter employees.

We await your advice on a very timely basis.

Very truly yours,

Robert C. Kelly

RCK:bes

cc: Knute Larson
Bill Carden

that on September 8, 1987 Jeffery sent the following letter to Kelly:

Dear Mr. Kelly:

In response to your August 28, 1987 correspondence, please be advised that I would be more than happy to meet with representatives of the Madison Building & Construction Trades Council in conjunction with a successor agreement. The current agreement expires April 30, 1990.

and, that on September 9, 1987 Complainants filed the instant complaint with the Commission alleging Respondent's conduct interfered with, restrained and coerced municipal employes in the exercise of their guaranteed rights in violation of Sec. 111.70(3)(a)1, Stats., and that Respondent had and is presently refusing to bargain with the Complainants in violation of Sec. 111.70(3)(a)3.

4. That in 1978 Harold Rohr was Complainants' bargaining representative; that on May 2, 1978 Rohr sent the following letter to Reott:

Dear Chuck:

I'm sorry I haven't contacted you sooner, however, I've been unavailable for the last couple of weeks.

I would appreciate your reviewing the vacation of ten (10) days as per agreement. The skilled trades agree with what the General Ordinances provide, however, it is their feeling that they would like to know what the cost to them would be if they were to receive an additional five (5) days vacation.

I would like to have you explore the possibility of the additional cost to be deducted from their hourly rate rather than changing the percentage figure that is now being used. I'm thinking along the lines that this would be a one shot deal for those involved.

Thanking you for your cooperation in this matter, I remain

Respectfully yours,

Harold Rohr, /s/
Business Representative of
Painters Local Union #802
1602 South Park Street
Madison, Wisconsin 53715

that thereafter the parties agreed upon a pay formula and vacation schedule; that on May 18, 1978 Rohr sent the following letter to Reott:

RE: Prevailing Rate Schedule -
Skilled Trades

Dear Chuck:

This is to inform you that the Skilled Trades personnel working for the City of Madison under the prevailing rate, unanimously agree to the 75% formula which would entitle them to twenty (20) vacation days per year.

They would appreciate it if you could implement this as soon as possible.

Thanking you for your co-operation I remain.

Respectfully yours,

Harold E. Rohr, President /s/
Madison Building & Construction
Trades
and
Business Representative of
Painters Local Union #802
1602 South Park Street
Madison, Wisconsin - 53715

5. That in 1979 the Respondent received information from the Complainant concerning increases in the prevailing wage rates for craft employes and the Respondent increased the wage rates of the affected employes.

6. That on December 17, 1981, William Carden and Marshall Kuhnly sent the following letter to Jeffery:

Dear Mr. Jeffery:

As per request by Mr. Herrick, due to the current budget problems incurred by the CDA/Housing Operations, we have made a thorough review of the wages and benefits provided to the CDA/Housing Operations craft employees.

As discussed by Mr. Herrick and the parties involved, we felt it would be in the best interest of the City and the craft employees concerned, to make the following adjustments relative to wages and benefits. These adjustments are being proposed to avoid the lay-off of craft employees in the CDA/Housing Operations.

WAGES
Area Prevailing Wage Rate less 29.5%.

CITY BENEFIT PACKAGE
Health Insurance
Wisconsin Retirement Fund
Holidays (6 days)
Paid Leave (1.5 days)
Vacation (20 days)
Sick Leave (13 days)
Life Insurance

Thanking you for your consideration in this matter, we remain

Respectfully yours,

William Carden, Bus. Manager
Painters Local #802

Marshall Kuhnly, Bus. Manager
Carpenters Local #802

that on December 23, 1981 Jeffery responded by letter to Kuhnly that wages be the prevailing wage rate less thirty (30) percent; that on January 11, 1982 Jeffery, by letter, requested Kuhnly to respond to Jeffery's December 23, 1981 letter; that on January 12, 1982 Carden and Kuhnly sent the following letter to Jeffery:

Dear Mr. Jeffery:

In your letter of December 23rd, you are proposing that the benefit package offered craft employees employed by the CDA/Housing Operations be adjusted to the rate of 30 per cent less than the prevailing wage rate. With the understanding that this proposal includes the City Benefit Package as outlined in our letter of December 17, 1981, we will accept your proposed percentage adjustment.

Respectfully yours,

William Carden, Bus. Manager /s/
Painters Local #802

Marshall Kuhnly, Bus. Manager /s/
Carpenters Local #314

7. That on December 12, 1983 Rohr sent a letter to Jeffery requesting to meet and discuss with Jeffery a benefit option plan for Building Trades personnel; that on January 8, 1984 Rohr sent a letter to Jeffery concerning an employe's request not to participate in the City's Health Insurance Program decreasing the employe's percentage of prevailing wages to twenty-five and one-half (25 1/2) percent; and, that on February 20, 1985 Jeffery sent a letter to Rohr stating that elimination of various portions of the benefit package on an individual basis in exchange for a higher wage rate would be contrary to the parties practice.

8. That Complainants contend the Respondent has refused since June 1, 1987 and up to the present to bargain, has acted in bad faith by providing misleading and incomplete information in response to Complainants' request for information,

and Respondent has interfered with, restrained and coerced its craft employes in said employes attempt to exercise their rights; that Complainants contend the Respondent has acknowledged it refused to bargain until 1990; that the Complainants contend the Respondent has no credible good faith basis to rely on a provision of automatic three (3) year renewal since 1978; that Complainants contend they never agreed to such a provision and had no knowledge of the Respondent's purported belief until the Respondent asserted this response after being asked to negotiate with Complainants; that Complainants argue an automatic three (3) year renewal provision is very unusual but that automatic renewal cannot be assumed from silence on the issue; that Complainants assert the last round of bargaining occurred in 1981-82 and at no time in said bargaining was any reference made to an automatic renewal; that Complainants argue the April 27, 1978 letter from Reott to Rohr is the only document submitted by the Respondent which makes any reference to a three (3) year renewal period, that said document was an initial proposal maintaining the status quo; is not initiated as agreed to the parties, and does not establish an automatic three (3) year renewal for an entire agreement; that the Complainants argue that none of the letters exchanged by the parties after the April 27, 1978 letter makes any reference to a three (3) year automatic renewal; that Complainants assert that there is no signed agreement to a three (3) year automatic renewal; and, that Complainants contend the agreement reached between the parties in 1982 contains no three (3) year automatic renewal provision.

9. The Respondent contends there is a written agreement between the parties, that one has existed continuously for many years, that the parties have a history of cooperative negotiations and willingness to consider amendments to said written agreements, and that the Respondent is willing to bargain at an appropriate time in advance of the expiration of the current agreement on April 30, 1990; that Carden's and Kuhnly's lack of knowledge concerning all the activities and correspondence between Respondent and Complainants representative Rohr is irrelevant; that Rohr, as authorized representative of the Complainant, agreed in 1978 to the automatic three (3) year renewal period; that the Complainant is bound by the 1978 agreement; that a contract exists and is based upon the various writings between the parties, the conduct of the people who administered the agreement and the reliance by the Respondent on the existence of such agreements; that Sec. 111.70(1)(a), Stats., does not prescribe the form of the document and that the parties agreement has fulfilled the purpose of a written agreement and to find a technical violation of said section would serve no positive end; that Complainants' arguments of bad faith on the part of the Respondent in supplying information to the Complainants should be stricken from Complainants' brief as Complainants did not amend their complaint and the Respondent had no notice of such a claim; that the Complainants did not call Rohr or Building and Trades Council, Inc. Representative Jim Ward to rebut the testimony of Respondent's witnesses; that Complainants did not dispute Rohr and Ward had the authority to speak on behalf of the Complainants; that Rohr and Ward were the recognized bargaining representatives and Carden's and Larson's lack of agreement to a three (3) year renewal provision is irrelevant.

10. That since 1981 the Complainants have annually submitted to the Respondent prevailing wage rates of carpenters, electricians, and painters; that on June 2, 1987 Carden submitted to the Respondent the prevailing wage rate for Painters; that on August 17, 1987 Damon Bryant, Business Manager, Local Union #159 of the International Brotherhood of Electrical Workers, submitted to Respondent the prevailing wage rate for Electricians; and, that in June of 1986 Larson submitted to Respondent the prevailing wage rates for carpenters; and, that after receipt of new prevailing wage rates Respondent has always implemented the new wage rates in accordance with the parties agreement.

11. That Reott testified that Rohr proposed the three (3) year automatic renewal provision prior to his sending Rohr said April 27, 1978 letter with attached "Personnel Division, Determination of Cost of Employee Benefits, pursuant to Section 3.38(5)(a) of the Madison General Ordinances"; that Rohr's response on May 2, 1978 specifically states Complainants . . ." . . . agree with what the General Ordinances provide, . . ." with the only exception being the number of vacation days; that Jeffery testified Rohr verbally agreed with said automatic renewal provision; and, that the parties during negotiations in 1978 agreed to a three (3) year automatic renewal provision.

12. That prior to April 1, 1981 the Complainants requested to reopen the collective bargaining agreement; and, that during the 1981 negotiations neither party proposed a change in the three (3) year automatic renewal provision.

13. That during December, 1981 through February 4, 1982 the parties negotiated a change in the benefit rate in the Respondents CDA/Housing Operations Department in an effort to avoid the lay-off of craft employes in said Department; and, that said agreement entailed correspondence between Jeffery, on behalf of the Respondent, and Carden and Marshall Kuhnly on behalf of the Complainants.

14. That on April 14, 1983 Carden informed Jeffery in writing that the Brotherhood of Painters and Allied Trades Local Union #802 represented a majority of the employes of their craft employed in the Respondent's Housing Authority and requested to negotiate wages, hours and working conditions; that Jeffery ignored said request; that on April 22, 1983 Kuhnly informed Jeffery in writing that the Central Wisconsin District Council of Carpenters represented a majority of the employes of their craft employed in the Respondent's Housing Authority and requested to negotiate wages, hours and working conditions; that Jeffery ignored said request; and, that Complainants took no action when Jeffery ignored said requests.

15. That prior to April 1, 1984 neither party requested to reopen said collective bargaining agreement; and, that said agreement was therefore renewed until May 1, 1987.

16. That prior to April 1, 1987 neither party requested to reopen said agreement; and, that said agreement was therefore renewed until May 1, 1990.

17. That there is a collective bargaining agreement in effect between the parties; that Respondent's refusal to bargain pursuant to Complainants' request to bargain wages, hours and working conditions did not interfere with, restrain or coerce municipal employes in the exercise of their guaranteed rights and did not constitute a refusal to bargain.

18. That the collective bargaining agreement in effect between the parties has not been reduced to a written and signed agreement; that the Respondent has refused and continues to refuse to reduce said agreement to a written and signed document; and, that Respondent's action in refusing and continuing to refuse to reduce said agreement to a written and signed document constitutes a refusal to bargain and Respondent has interfered with, restrained, or coerced municipal employes in the exercise of their guaranteed rights.

Upon the basis of the above Findings of Fact, the Examiner makes and issues the following

CONCLUSIONS OF LAW

1. That Madison Building and Construction Trades Council is the certified bargaining representative of the bargaining units described in Finding of Fact No. 1; and, that William Carden and Knute Larson are authorized representatives of said Council.

2. That there is a collective bargaining agreement in effect between the Complainants and Respondent until May 1, 1990; and that Respondent's actions in refusing to bargain wages, hours and working conditions pursuant to Complainants' requests did not commit a prohibited practice within the meaning of Sec. 111.70(3)(a)1 or 4, Stats.

3. That the collective bargaining agreement in effect between the Complainants and Respondent has not been reduced to a written and signed document; that Respondent by refusing and continuing to refuse to reduce said agreement to a written and signed agreement has committed a prohibitive practice within the meaning of Sec. 111.70(3)(a)1 and 4, Stats.

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

ORDER 3/

1. It is ordered that to remedy Respondent's violation of Sec. 111.70(3)(a)1 and 4, Stats., Respondent, its officers and agents, shall immediately take the following affirmative steps:

a. Cease and desist from failing or refusing to bargain in good faith by failing or refusing to reduce the party's collective bargaining agreement to a written and signed document.

b. Notify all employes by posting in conspicuous places in Respondent's office where employes represented by the Complainants work copies of the notice attached hereto and marked "Appendix A" which should be signed by the Director of Labor Relations, and shall be posted immediately upon receipt of a copy of this Order and shall remain posted for sixty (60) days thereafter, Respondent shall take reasonable steps to insure that said notices are not altered, defaced, or covered by other materials.

c. Notify the Wisconsin Employment Relations Commission in writing, within twenty (20) days following the date of this Order as to what steps have been taken to comply herewith.

2. It is ordered that the Complaint be dismissed as to all violations of the Municipal Employment Relations Act alleged, but not found herein.

Dated at Madison, Wisconsin this 10th day of June, 1988.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Edmond J. Bielarczyk, Jr., Examiner

3/ 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 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:

1. We will bargain in good faith and will reduce the collective bargaining agreement in effect between the City of Madison and the Madison Building and Construction Trades Council to a written and signed document.

By _____
Director of Labor Relations

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The instant matter arose when, on June 10, 1987 the Complainants sent a request to the Respondent to initiate collective bargaining and to enter into a written agreement. Ultimately the Respondent asserted there was an agreement in effect until 1990 and refused to bargain with the Complainants. Thereafter, on September 9, 1987 the instant complaint was filed.

The dispute herein centers on the question of whether an automatic three (3) year renewal provision 4/ was agreed to by the parties in 1978, and, whether this provision has continued in effect up to the present.

Complainants' Position

Complainants contend that the Respondent has refused to bargain with the Complainants since June 1, 1987. The Complainants also argue that the Respondent acted in bad faith by providing misleading and incomplete information to the Complainants. The Complainants assert the Respondent has no credible good faith basis to rely on and that the Respondent has acknowledged it refuses to bargain until 1990.

The Complainants argue they never agreed to an automatic three (3) year renewal provision, had no knowledge of this provision until the Respondent refused to bargain, and that given the unusualness of such a provision, automatic renewal cannot be assumed from silence on the issue. The Complainants argue that the last round of bargaining occurred in 1981-1982. That at that time no reference was made to an automatic renewal provision. Since then, the Complainants assert, the parties have simply maintained the status quo. The Complainants argue that the April 27, 1978 letter, from Reott to Rohr, is the only document which makes reference to an automatic renewal provision. The Complainants assert that document was merely a proposal maintaining the status quo, was never signed off as agreed to, and, as such, does not establish an automatic renewal for an entire agreement.

The Complainants point out that none of the letters exchanged between the parties since April 27, 1978 make a reference to an automatic renewal provision. The Complainants argue that there is no signed agreement between the parties agreeing to an automatic three year renewal and that when the parties reached agreement in 1982, there was no automatic renewal provision contained in the 1982 agreement. The Complainants also assert the April 14, 1983 letter from Carden to Jeffery and the April 22, 1983 letter from Kuhnly to Jeffery have no bearing on the instant matter.

Respondent's Position

The Respondent contends there is a written agreement in effect between the parties. The Respondent argues that an agreement between the parties has existed continuously for many years and that the parties have a history of cooperative negotiations. The Respondent acknowledges that it has refused to bargain, but asserts it is willing to bargain at the appropriate time, the expiration of the current agreement on April 30, 1990.

The Respondent also asserts that the fact Complainants' representatives, Carden and Kuhnly, lack knowledge concerning all of the correspondence and activity between the Complainants' representative Rohr and the Respondent is irrelevant. The Respondent asserts Rohr was Complainants' authorized representative in 1978 and that he agreed to the automatic renewal provision. The Respondent argues that the Complainant is bound by that agreement.

4/ See Finding of Fact No. 3

The Respondent also asserts that a collective bargaining agreement between the parties exist. This agreement, the Respondent argues, is based upon the various writings between the parties, the conduct of the people authorized to administer the agreement, and Respondent's reliance on such agreements. Here the Respondent points out that Sec. 111.70(1)(a), Stats., does not prescribe the form the written document is to be in. The Respondent contends the parties' agreement has fulfilled the purpose of a written agreement and to find a technical violation of said section would serve no positive end.

The Respondent also asserts that Complainants' arguments of bad faith on the part of the Respondent in supplying information to the Complainants should be stricken from the record. The Complainant did not amend the instant complaint and Respondent had no notice of such a claim.

The Respondent also points out that the Complainants did not call as witnesses Complainants' representatives Ward or Rohr to dispute Respondent's witnesses' testimony. Nor did the Complainants dispute that Ward and Rohr had the authority to speak on behalf of the Complainants. The Respondent also asserts that Larson's and Carden's lack of agreement to a three (3) year automatic renewal provision is irrelevant.

DISCUSSION

The record demonstrates that on April 27, 1978 Reott, as Respondent's representative, sent a letter to Rohr, as Complainants' representative. This letter specifically references an attachment entitled as follows:

Personnel Division
Determination of Cost of Employee Benefits
Pursuant to Section 3.38(5)(a) of the
Madison General Ordinances

This letter also makes specific reference to the automatic renewal of the cost determination. The automatic renewal provision contained in said attachment specifically states that the costs for employe benefits will be automatically renewed for successive three (3) year periods beginning May 1, 1981 unless either party notifies the other in writing on or before April 1 of any year in which the agreement would otherwise be renewed that the party desires to modify the agreement. Thereafter, on May 2, 1978, Rohr sent a letter to Reott specifically agreeing to what the General Ordinances provide except that he wanted to know the cost of increasing the number of vacation days. The Examiner finds that Rohr therefore specifically agreed to the three (3) year automatic renewal provision. The Examiner also finds that Complainants' current representatives lack of knowledge concerning the 1978 agreement is irrelevant. Clearly, the letter sent to Rohr by Reott specifically addressed the automatic renewal provision as the only exception to Reott's letter raised by Rohr was the number of vacation days, which the parties later agreed to.

The record further demonstrates that during the 1981-1982 negotiations, neither party raised the issue of the automatic renewal provision. The Complainants have acknowledged that no bargaining has taken place since that round of negotiations. Yet, the record demonstrates that since that round of negotiations the Complainants' representatives have submitted to the Respondent prevailing wage rates for the craft employes it represents on an annual basis. As recently as June 2, 1987, Carden submitted the prevailing wage rates for painters to Jeffery. Given the Complainants' annual submission of prevailing wage rates to the Respondent, the undersigned finds that both parties have acted on the basis that there is an agreement in existence between the parties. The Complainants' assertion that the parties have only maintained the status quo since 1982 ignores the fact that Rohr agreed to the automatic renewal provision in 1978, that neither party proposed any changes in this provision during 1981-1982 negotiations, and that there have been no negotiations for a successor agreement since the 1981-1982 negotiations.

The Commission has held that it will not infer a waiver of the right to bargain unless such a waiver is clear and unmistakable. 5/ The record, as noted above, demonstrates neither party has requested to change the automatic renewal provision since 1978. Further, that since 1978 the Respondent has increased wages pursuant to the correspondence it has received annually from the Complainant concerning the crafts prevailing wage rates. Based upon these facts, the Examiner concludes there is an automatic renewal provision in existence between the parties. The fact that Larson and Carden claim they were unaware of its existence is irrelevant. Particularly since both have submitted prevailing wage rates for their respective crafts to the Respondent. Having found the parties to have mutually agreed upon the automatic renewal provision, and, the record demonstrating Complainants' request to bargain was submitted after the renewal date specified in the provision, the Examiner concludes the Respondent's refusal to bargain wages, hours and working conditions did not violate Sec. 111.70(3)(a) 1 or 4. The Examiner has dismissed this portion of the complaint.

However, the record also demonstrates the Respondent has refused to reduce the collective bargaining agreement to a written and signed document. Sec. 111.70(1)(a) clearly defines collective bargaining as including

> . . . the reduction of any agreement reached to a written and signed document . . .

The Examiner disagrees with Respondents contention that finding a technical violation would serve no positive end. Numerous documents and correspondence have been exchanged between the parties. However, the agreement has never been reduced to a written and signed document. Had the parties done so, the instant matter may not have arose because both parties, without an exhaustive research of their files, would have been able to determine the agreement between the parties. Therefore, the Examiner has concluded the Respondent has violated Sec. 111.70(3)(a) 4 Stats., that Respondent's conduct also constitutes a derivative violation of Sec. 111.70(3)(a)1 Stats., and directed the Respondent to cease and desist from bargaining in good faith by refusing to reduce the agreement to a written and signed document.

Dated at Madison, Wisconsin this 10th day of June, 1988.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Edmond J. Bielarczyk, Jr., Examiner

5/ City of Brookfield, Dec. No. 11406-A (Bellman, 7/73), aff'd Dec. No. 11406-B (WERC, 9/73), aff'd Waukesha Circuit Court (9/74); Fennimore Joint School District, Dec. No. 11865-A (Fleischli, 6/74); Eau Claire County, Dec. No. 14080-A (Malamud, 1/76).