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-B

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.

ORDER AFFIRMING IN PART AND REVERSING IN PART EXAMINER'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Examiner Edmond J. Bielarczyk, Jr. issued his Findings, Conclusions and Order in the above matter on June 10, 1988, wherein he concluded that Complainant and Respondent have a binding collective bargaining agreement in effect until at least May 1, 1990; that Respondent had violated its Sec. 111.70(3)(a)4 and 1, Stats., duty to bargain by failing upon request to reduce that agreement to a signed written document; but that Respondent's refusal to negotiate about wages, hours and conditions of employment to take effect before May 1, 1990 did not violate Secs. 111.70(3)(a)4 and 1, Stats. The Examiner ordered cease and desist and notice posting relief and further ordered Respondent to reduce to writing and sign the above-noted agreement.

Both parties filed timely petitions for review. Briefing to the Commission was completed on October 5, 1988.

The Commission has considered the Examiner's decision, the record, and the written arguments, and, being fully advised in the premises, is satisfied that the Examiner's Findings of Fact, Conclusions of Law and Order should be affirmed in part and reversed in part.

NOW, THEREFORE, it is hereby

ORDERED 1/

A. The Examiner's Findings of Fact 1-10 and 12-16 are affirmed.

B. The Examiner's Findings of Fact 11 and 17-18 are modified to read as follows:

> 11. That Jeffery and Rohr had conferred prior to Reott's issuance of the 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 Jeffery caused Reott to include the automatic renewal provision in that attachment in order to be consistent with Rohr's wishes as previously communicated to Jeffery by Rohr; that Rohr's response on May 2, 1978 specifically states, "The skilled trades agree with what the General Ordinances provide. . . " with the only exception being the number of vacation days; and that the parties during negotiations in 1978 thereby agreed to a three (3) year automatic renewal provision.
>
> 17. That there is a collective bargaining agreement in effect between the parties until May 1, 1990.
>
> 18. That the collective bargaining agreement in effect between the parties has not been reduced to a written and signed document; that Complainant's requests for bargaining noted above were all requests to bargain anew about wages, hours and conditions of employment and were never limited to a request that Respondent reduce the existing wages, hours and conditions of employment to a written and signed document; and that Respondent has not been shown to have refused, upon request, to reduce the existing wages, hours and conditions of employment to a written and signed document.

C. The Examiner's Conclusion of Law 1 is affirmed.

D. The Examiner's Conclusion of Law 2 is modified to read as follows:

> 2. That as there is a collective bargaining agreement in effect between the Complainants and Respondent until May 1, 1990, Respondent's refusal to bargain wages, hours and conditions of employment pursuant to Complainants' request did not violate Secs. 111.70(3)(a) 4 or 1, Stats.

E. The Examiner's Conclusion of Law 3 shall be reversed to read as follows:

> 3. That although the collective bargaining agreement in effect between Complainants and Respondent has not been reduced to a written and signed document, Complainants have not specifically requested that Respondent reduce that existing agreement to a written, signed document, and therefore Respondent has not been shown to have refused to reduce an agreement previously reached to a signed and written document within the meaning of Sec. 111.70(3)(a)4 and 1, Stats.

(Footnote 1/ appears on the next page.)

F. The Examiner's Order, Paragraph 1, shall be reversed and Paragraph 2 of said order is therefore modified to read as follows:

> The complaint filed in the above matter shall be and hereby is dismissed in its entirety.

Given under our hands and seal at the City of Madison, Wisconsin this 24th day of February, 1989.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
S. H. Schoenfeld, Chairman

_____
Herman Torosian, Commissioner

_____
A. Henry Hempe, Commissioner

1/ Pursuant to Sec. 227.48(2), Stats., the Commission hereby notifies the parties that a petition for rehearing may be filed with the Commission by following the procedures set forth in Sec. 227.49 and that a petition for judicial review naming the Commission as Respondent, may be filed by following the procedures set forth in Sec. 227.53, Stats.

227.49 Petitions for rehearing in contested cases. (1) A petition for rehearing shall not be prerequisite for appeal or review. Any person aggrieved by a final order may, within 20 days after service of the order, file a written petition for rehearing which shall specify in detail the grounds for the relief sought and supporting authorities. An agency may order a rehearing on its own motion within 20 days after service of a final order. This subsection does not apply to s. 17.025(3)(e). No agency is required to conduct more than one rehearing based on a petition for rehearing filed under this subsection in any contested case.

227.53 Parties and proceedings for review. (1) Except as otherwise specifically provided by law, any person aggrieved by a decision specified in s. 227.52 shall be entitled to judicial review thereof as provided in this chapter.

(a) Proceedings for review shall be instituted by serving a petition therefore personally or by certified mail upon the agency or one of its officials, and filing the petition in the office of the clerk of the circuit court for the county where the judicial review proceedings are to be held. Unless a rehearing is requested under s. 227.49, petitions for review under this paragraph shall be served and filed within 30 days after the service of the decision of the agency upon all parties under s. 227.48. If a rehearing is requested under s. 227.49, any party desiring judicial review shall serve and file a petition for review within 30 days after service of the order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. The 30-day period for serving and filing a petition under this paragraph commences on the day after personal service or mailing of the decision by the agency. If the petitioner is a resident, the proceedings shall be held in the circuit court for the county where the petitioner resides, except that if the petitioner is an agency, the proceedings shall be in the circuit court for the county where the respondent resides and except as provided in ss. 77.59(6)(b), 182.70(6) and 182.71(5)(g). The proceedings shall be in the circuit court for Dane county if the petitioner is a nonresident. If all parties stipulate and the court to which the parties

(Footnote 1/ is continued on page 4.)

(Footnote 1/ continued from page 3.)

desire to transfer the proceedings agrees, the proceedings may be held in the county designated by the parties. If 2 or more petitions for review of the same decision are filed in different counties, the circuit judge for the county in which a petition for review of the decision was first filed shall determine the venue for judicial review of the decision, and shall order transfer or consolidation where appropriate.

(b) The petition shall state the nature of the petitioner's interest, the facts showing that petitioner is a person aggrieved by the decision, and the grounds specified in s. 227.57 upon which petitioner contends that the decision should be reversed or modified.

. . .

(c) Copies of the petition shall be served, personally or by certified mail, or, when service is timely admitted in writing, by first class mail, not later than 30 days after the institution of the proceeding, upon all parties who appeared before the agency in the proceeding in which the order sought to be reviewed was made.

Note: For purposes of the above-noted statutory time-limits, the date of Commission service of this decision is the date it is placed in the mail (in this case the date appearing immediately above the signatures); the date of filing of a rehearing petition is the date of actual receipt by the Commission; and the service date of a judicial review petition is the date of actual receipt by the Court and placement in the mail to the Commission.

CITY OF MADISON

MEMORANDUM ACCOMPANYING ORDER AFFIRMING IN PART AND REVERSING IN PART EXAMINER'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

BACKGROUND

The Complaint initiating this proceeding alleged, inter alia, as follows:

> 3. There is presently no agreement in existence between the Union and the City which sets forth the wages, hours and conditions of employment presently accordable to those City Employees who comprise the bargaining units represented by the Union.
>
> 4. The Union has since June 10, 1987, on numerous occasions, requested representatives of the City to meet and confer with its representatives, at reasonable times, in good faith, in an effort to arrive at a written collective bargaining agreement setting forth the wages, hours and conditions of employment accordable to the involved bargaining unit employees.
>
> 5. The City, despite such written requests, has failed and refused, and continues to fail and refuse to meet with the Union in an effort to arrive at such a written collective bargaining agreement.
>
> 6. By such conduct the City has, and presently is, interfering with, restraining and coercing Municipal Employees in the exercise of rights guaranteed by Section 111.70(2), Wis. Stats., all in violation of Section 111.70(3)(a)(1), Wis. Stats.
>
> 7. By such conduct the City has, and presently is refusing to bargain collectively with the Union as the recognized representative of its carpenter and painter employees in violation of Section 111.70(3)(a)(4), Wis. Stats.

The Complaint requests that Respondent be ordered to cease and desist from interference and refusal to bargain conduct with respect to Complainant. It further requests Respondent be ordered to

> . . . immediately commence, through its officers and agents, to meet and confer with representatives of the Union at reasonable times, in good faith, with respect to the wages, hours and conditions of employment of its carpenter and painter employees with the intention of reaching an agreement as concerns such matters.

It further requests that Respondent

> (a). . . immediately commence, through its officers and agents, to meet and confer with representatives of the Union at reasonable times, in good faith, with respect to the wages, hours and conditions of employment of its carpenter and painter employees with the intention of reaching an agreement as concerns such matters.

(b) Post appropriate notices in conspicuous places informing its carpenter and painter employees that it will collectively bargain with the Union as concerns such employees' wages, hours and conditions of employment and to provide such further relief.

In addition, the Complaint requests "such further relief as the commission may deem appropriate and just."

At the hearing, the Complaint was amended to apply to the City's craft electrician employes, as well.

The City, in its Answer, asserted that the City:

> 3. . . .denies the allegations contained in Complaint paragraph 3 and alleges that there is a bona fide agreement in existence between the Union and the City and that said agreement exists in writing and constitutes a mutual understanding concerning the wages, hours and conditions of employment accordable to those City employees comprising the bargaining units represented by the Union upon which writings the City acted and relied.
>
> 4. . . .admits that the Union has requested a meeting with representatives of the City as alleged but denies the characterization that such requests were "numerous."
>
> 5. . . .denies the allegations contained in Complaint paragraph 5 and further alleges that its representative has offered to meet with the Union at an appropriate time in advance of the expiration of the existing agreement to discuss a successor agreement.
>
> 6. . . .denies that it has in any fashion violated any provision of Sec. 111.70(2) or Sec. 111.70(3)(a)1, Wis. Stats., and further alleges the existence of a continuing history of willingness to consider and implement changes, where appropriate, to that agreement concerning the wages, hours and conditions of employment of the represented groups.
>
> 7. . . .denies the allegations contained in Complaint paragraph 7 and further alleges that it has expressed its willingness to collectively bargain with the Union at an appropriate time for the creation of a successor agreement.

The City's answer concludes with a request that the Commission issue an order dismissing the Complaint in its entirety.

DECISION OF THE EXAMINER

The Examiner found that there currently exists a collective bargaining agreement which constitutes a valid defense for the City's refusal to bargain about wages, hours and conditions of employment terms to take effect prior to May 1, 1990. He so concluded on the basis of correspondence and other interactions between the parties from and after 1973. In particular, he noted that the concept of a three-year automatic renewal was set forth in the City's April 27, 1978 letter to BTC representative John Rohr. Although that letter was never initialled or otherwise affirmatively agreed to, and although Rohr's May 2, 1978 written reply expressed agreement "with what the General Ordinances provide,"

and although the General Ordinances did not and do not contain a reference to an automatic three year renewal arrangement, the Examiner inferred that Rohr had agreed to all of the contents of the City's April 27 letter and attachment except vacations and wages as to which his May 2, 1978 reply letter proposed changes and on which subjects agreement was reached and confirmed through subsequent correspondence.

The Examiner also concluded that the City's refusal of BTC's request that the City meet and bargain with it to arrive at a written agreement constituted a City failure and refusal to reduce its existing agreement to written form. He concluded that the City had thereby committed a refusal to bargain violative of Sec. 111.70(3)(a)4, and derivatively an interference violative of Sec. 111.70(3)(a)1. By way of remedy, he ordered the City to cease and desist from such violations in the future, to reduce its existing agreement with the Complainant to writing and to post a notice stating,

> 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.

Both parties filed timely petitions for review.

POSITION OF COMPLAINANTS

Since the City claims the right to refuse to bargain immediately about a new agreement based on the existence of an agreement in effect through April 30 of 1990, the City must prove the existence of that agreement by the "clear and unmistakable evidence" standard applicable to any other alleged waiver of MERA rights. Under that standard of proof or any other, the Examiner's findings and conclusions to the effect that the City and BTC ever entered into a collective bargaining agreement with a three-year automatic renewal arrangement are contradicted by the credible evidence and should be reversed by the Commission.

The only documentary reference to a three-year automatic renewal---the Reott letter of April 27, 1978---was a City proposal that was never initialled or otherwise agreed to by Rohr or anyone else from BTC. Rather, Rohr's May 2 constituted a counterproposal which later led to an unequivocal agreement that contained no reference to a three-year automatic renewal arrangement. The City never thereafter mentioned such an automatic renewal arrangement in writings or orally. Rather, the parties' conduct is entirely consistent with the BTC's contention that they have been informally living under a loosely understood status quo, making adjustments in it over the years when they have been able to mutually agree to do so. Jeffery's testimony about a pre-April 27, 1978 discussion with Rohr is undercut by the tone and contents of the correspondence exchanged in April and May of 1978. Furthermore, if the City wanted to prove such an unusual provision was orally agreed upon 10 years ago, it should have called Rohr to testify to that effect and did not do so. Furthermore, even if Rohr had agreed to the City's April 27, 1978 letter, that letter by its terms would establish an automatic renewal arrangement applicable only to the cost determination elements of the parties' relationship, not to any other terms and conditions of employment.

If the Commission agrees that the City has failed to meet its burden of proving that there is an existing agreement in effect between the parties at present, the Commission should modify the Examiner's findings and conclusions accordingly and can set aside the portions of the Examiner's decision dealing with the City's refusal to reduce that agreement to writing. The Commission's order should require the City to bargain with the BTC immediately about the terms and conditions of employment to be set forth in a new agreement between the parties.

If, however, the Commission affirms the Examiner on the existence of an agreement including a three-year automatic renewal arrangement, then the Commission should affirm the Examiner's findings, conclusion and order as regards

the City's failure and refusal to reduce that agreement to writing. That issue was joined by the complaint and answer, and the evidence affirmatively establishes that the BTC requested that the City meet without delay with its representatives for the purpose of arriving at a written agreement and that the City failed and refused to do so. The City's improper post-hearing submission of what amounts to the City's third version of the parties' current agreement reduced to written form does not alter the fact that the City committed the violation found by the Examiner. The Examiner's notice posting order is proper since a refusal to reduce an existing agreement to written and signed form is a refusal to bargain collective in good faith violative of Sec. 111.70(3)(a)4, Stats., and not a merely technical violation of the duty to bargain.

POSITION OF THE CITY

The Examiner's findings and conclusions to the effect that the City and the BTC had a series of binding three year agreements beginning May 1 of 1978, 1981, 1984 and 1987 are fully supported by the evidence and should be affirmed. Because the City's defense is based on existence of an agreement containing an auto-renewal provision, this is not a case involving a waiver of bargaining provision, making the special standard of proof in waiver cases inapplicable herein. In the context of the informal mode of doing business that the parties had over the years, Rohr's noncomplaint about the City's April 27, 1978 assertion that Rohr's failure to respond by May 1, 1978 constituted Rohr's and BTC's approval of the terms of that letter, including approval of an automatic 3 year renewal arrangement applicable to the parties' entire agreement. City witness Tim Jeffery testified that the automatic three year renewal arrangement was consistent with BTC representative John Rohr's wishes as expressed to Jeffery in a conversation preceding the issuance of the April 27 letter. The BTC could have but did not produce or call Rohr to dispute that testimony and it stands entirely unrebutted. The parties' conversations and actions thereafter reflect bilateral understanding and reliance on the existence of binding agreements consistent with the 3-year renewal arrangement.

The Examiner's findings and conclusions to the effect that the City has refused and failed to reduce to writing its 1987-1990 agreement with BTC should be set aside and not ruled upon by the Commission because that was not an issue pleaded, proven or argued in the instant proceeding. In any event, the notice posting requirement of the Examiner's order was unduly broad, improperly suggesting that the City had failed to bargain in good faith at some time when it was under a statutory obligation to do so, rather than merely communicating that the City had technically violated the duty to bargain by its failure to reduce to writing an agreement previously reached by the parties. The City stands ready to enter into a written and signed agreement setting forth the terms of the currently existing agreement between the parties, and the City has attached to its brief to the Commission a formal agreement document for that purpose.

DISCUSSION

The basic issues presented by these review petitions are:

1. Whether the parties agreed in 1978 that their collective bargaining agreements thereafter would automatically renew for three year terms unless one of the parties gave notice of intent to modify by April 1 of the renewal year. The Examiner found that they had so agreed.

2. If so, whether the issue of a failure/refusal by the City to reduce to a written and signed document the parties 1987-90 agreement was pleaded and proven. The Examiner evidently concluded that it was since he found such a refusal and concluded that it constituted a violation of Sec. 111.70(3)(a)(4), Stats.

3. If both of the above are so, whether the Examiner's notice posting order was overly broad.

Propriety of Examiner's Findings and Conclusions that the Parties have an Agreement in Effect through April 30, 1990

Upon review of the evidence presented at the hearing and the arguments advanced in the parties' briefs and reply briefs to the Examiner and to the Commission, we agree with the Examiner that the parties have an enforceable collective bargaining agreement in effect through April 30, 1990.

The bases upon which we reach that conclusion are as follows:

First, it is undisputed and clearly established that the parties had an initialled memorandum of understanding for 1973-75. (part of J. Ex. 3). This shows that agreements for a stated term are not entirely foreign to the parties relationship. On the other hand, it reflects a degree of formality not thereafter repeated by the parties as regards the document containing a reference to an automatic renewal arrangement.

Second, on April 25, 1977, Jeffery rejected Rohr's December 9, 1976 request for adjustment of vacation and wage formula on the grounds that the parties had a three-year contract from May 1, 1975 through April 30, 1978, and that the City was reluctant to reopen and amend the three year contract during its term. (R. Exhs. 9, 10) So far as the record indicates, the BTC did not complain to WERC or otherwise assert that the City was wrong about the existence of the three-year contract referred to by Jeffery. There was no bilaterally signed or initialled written document in existence setting forth the terms of that agreement. However, the record does show that the City sent BTC representative Rohr a July 31, 1975 letter asking that he confirm his concurrence in the attached Personnel Division Determination of Cost of Employee Benefits (part of J. Ex. 3). There is no evidence that Rohr replied in writing or otherwise to that letter. Nevertheless, Rohr's silence in response to Jeffery's April 25, 1977 assertion that a three-year agreement---which was consistent at least as regards its duration with the City's July 31, 1975 letter and attachment---confirmed by acquiescenc! the existence of the three-year agreement that Jeffery had asserted. This, despite the absence of a bilaterally signed or initialled written agreement, and given only a letter from the City to Rohr and the absence of a subsequent objection to it from Rohr. That history makes it more likely that in 1978, in the absence of an initialled agreement and given only a City letter to Rohr and evidence that Rohr had not responded negatively to it, the parties could have also considered themselves bound to a successor agreement incorporating the unobjected to letter's terms. Indeed, Reott's testimony (tr. 116) suggests that the City's relationship with Rohr was such that if Rohr approved concepts in advance of a City letter confirming them and did not object following issuance of such a letter, the matter could safely be assumed to be settled on the basis of the terms set forth in the letter. Similarly, Jeffery asserted that he and Rohr had an understanding that they had an agreement in effect even though references to its existence seldom appeared in their correspondence. (tr. 133).

Third, the City's April 27, 1978 letter (part of J. Ex. 3) proposed a three-year automatic renewal arrangement. The language in that regard read as follows:

> 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.

Although the cover letter notes only "that the attached memorandum provides for the automatic renewal of the cost determination unless either party desires to modify it", the renewal language itself refers not only to the cost determination process but also to renewal of the parties agreement as a whole. It is for that reason at least plausible that that language was understood by the parties to apply both to the cost determination process as well as to any other terms and conditions constituting the parties agreement. Especially so when it is noted that the wage and fringe benefit elements comprising the cost determination had been the only items referred to in the 1973-75 and 1975-78 documents noted above.

Fourth, Jeffery testified (tr. 129) that the City's inclusion of the three-year auto-renewal concept in its April 27, 1978 was consistent with Rohr's wishes as previously discussed with Jeffery (tr. 129). Jeffrey's testimony to that effect stands unrebutted. The Complainants' failure to produce and call Rohr warrants an inference that Rohr's testimony on the point would have been adverse to Complainants' position.

Fifth, Rohr's May 2 letter does not take issue with the three-year renewal contained in the City's April 27 letter. While it affirms that the skilled trades agree with what the General Ordinances provide (the Ordinances did/do not refer to auto-renewing three-year terms), Rohr's May 2 letter responds only on a different element, to wit, vacations and wages, as to which the parties negotiated further and reached agreement. There is no other evidence suggesting that Rohr was not in agreement with the balance of the City's April 27 letter. Reott affirmatively testified (tr. 109-111) that Rohr did not complain about it to him or to his knowledge to any other City representative; however, Reott's recollection of the events of that time period was shown to be incomplete in other respects. (tr. 119-121). Finally, the Complainants' failure to produce and call Rohr to support its position that Rohr's May 2 letter was intended as a rejection of the balance of the City's April 27 letter warrants an inference that his testimony on that point would have been adverse to the Complainants' position.

Sixth, Jeffery testified that sometime shortly after April 22, 1983, James Ward, whom Jeffery understood to be a representative of BTC, "expressed an interest in sitting down with the City, and negotiating a more elaborate labor agreement between the parties. My response was that I would be happy to do so in conjunction with the successor agreement and that concluded our conversation." (tr. 151). That evidence warrants the inference that Ward shared Jeffery's implicitly-asserted view that the parties then had in effect a collective agreement and that there was some time certain for negotiations of a successor agreement to occur. Especially so given the Complainants' failure to produce and call Ward to testify otherwise.

Seventh, Rohr sent Jeffery a December 12, 1983 written request (R. Ex. 24) that the City and BTC enter into discussions of a benefits option plan and "some of our ideas for a Building Trades Contract." Jeffery testified that he responded orally to Rohr that the City would not enter into such discussions until the time arrived for negotiations of a successor agreement. (tr. 155). According to Jeffery, Rohr did not pursue that matter any further in that time frame. That evidence warrants the inference that Rohr shared Jeffery's implicitly asserted view that the parties then had in effect a collective agreement and that there was some time certain for negotiations of a successor agreement to occur. Especially so given the Complainants' failure to produce and call Rohr to testify otherwise.

Given the absence of evidence that the parties had agreed on some other duration for some or all of their agreement, it appears reasonable to conclude from the foregoing that the duration of the agreement Rohr and Ward implicitly acknowledged to be in existence in 1983 must have been three years with the automatic renewal arrangement referenced in the City's April 27, 1978 letter and in Jeffery's earlier conversation with Rohr.

Eighth, we agree with Complainants that many of the parties' actions relied upon by the City and the Examiner (such as the periodic union modifications of changes in prevailing rate and subsequent City adjustments of wages accordingly)

were as consistent with Complainants' theory that the parties were operating under the stauts quo as they were with the City's theory that the parties were operating under a series of agreements automatically renewing themselves for three year terms of agreement.

Propriety of Examiner's Findings and Conclusions that City Failed and Refused to Reduce An Existing Collective Bargaining Agreement to Writing

In our opinion, while the pleadings fairly join the issue of whether the parties have a written collective bargaining agreement in existence between them, they do not join the issue of whether the Complainants demanded and the City refused to reduce the parties' existing agreement to a signed and written document.

Complaint paragraph 3 asserts, "There is presently no written collective bargaining agreement in existence between the Union and the City which sets forth the wages, hours and conditions of employment presently accordable to those City employees who comprise the bargaining units represented by the Union." That paragraph, when read in the context of the complaint as a whole, reflected not only an assertion that there was no written agreement, but also that there was no agreement of any kind in existence between the parties. The City's answer in paragraph 3 specifically asserted both "that there is a bona fide agreement in existence between the Union and the City and that said agreement exists in writing. . ." (emphasis added). The City thereby expressly joined issue both as to the existence of an agreement in any form and as to whether any such agreement was in writing. The City's initial brief to the Examiner (at p. 1) reiterated its position "that in fact a written contract does exist between the parties" and "that one has existed continuously for many years. . . ."

On the subject of a refusal to reduce the existing agreement to a written and signed document, Complaint paragraphs 4 and 5, respectively, assert that the Union requested that the City meet and confer with its representatives at reasonable times in good faith "in an effort to arrive at a written collective bargaining agreement setting forth the wages, hours and conditions of employment accordable to the involved bargaining unit employees" and that the City "has failed and refused, and continues to fail and refuse to meet with the Union in an effort to arrive at such a written collective bargaining agreement." The Complaint also reflects that the relief sought by Complainant was limited to an order from the Commission requiring that the City bargain "with the intention of reaching an agreement."

Those allegations when read in the context of the complaint as a whole, reflect an assertion only that the Union requested (and that the City failed and refused to enter into) bargaining in an effort to arrive at an agreement, and a related assertion that the Union requested (and the City failed and refused to enter into) bargaining in an effort to arrive at a written agreement. The City's Answer admitted "that the Union has requested a meeting with representatives of the City as alleged. . . " and denied the allegations contained in Complaint paragraph 5 that the City had failed and refused to meet as so requested, further alleging that the City's representative offered to meet with the Union at an appropriate time in advance of the expiration of the existing agreement to discuss a successor agreement.

In our opinion, neither the Complaint nor the Answer nor the parties' hearing presentations nor their post-hearing briefs to the Examiner can fairly be said to have joined issue on the question of whether the Complainants requested and the City refused to reduce the existing terms and conditions of employment to a written and signed document. Rather, the pleadings, hearing presentations and arguments reflect that Complainants were asserting a right to bargain anew with the City as to what the wages, hours and conditions of employment would be, and not any failure by the City to memorialize the existing agreement to a written and signed agreement upon Respondent's request.

We therefore conclude that the issue of whether the City refused to reduce the existing terms of agreement in effect between the parties to a written and signed document was not fairly at issue between the parties in this proceeding. We therefore agree with the City's contention that the Examiner exceeded his authority and the bounds of fair play and due process by reaching and deciding that issue.

Furthermore, even if that issue had been fairly joined, the evidence does not support the Examiner's findings and conclusions that the Complainants ever requested the City to meet for the purpose of reducing the existing wages, hours and conditions of employment to a written and signed document. Rather, the evidence shows that the Complainants demanded that the City bargain anew as to what the wages, hours and conditions of employment would be, not merely to memorialize the existing agreement to a written and signed agreement. Complainants have cited language in certain of its demands to bargain wherein its counsel suggested that much of what the Complainants were seeking to bargain about was merely reducing existing arrangements to writing. However, those statements themselves confirm that the Complainants' demands were not limited exclusively to that, but rather also included bargaining anew on some subjects. Thus, while we agree with the Examiner that the parties had no written and signed document setting forth the existing agreement between them and that the City refused to enter into the broader scope of bargaining requested by the Complainants, we are satisfied that the proofs do not establish that the City was ever asked to reduce to a written and signed agreement only those terms presently in effect between the parties. Therefore, we have reversed the Examiner's conclusion that the City refused such a request in violation of Sec. 111.70(3)(a)4 and 1.

Nevertheless, since the parties have an agreement in effect between them and since that agreement has not to date been reduced to a written and signed document, the MERA duty to bargain would require both of the parties to reduce that existing agreement to a written and signed document upon the unequivocal request of the other that it do so.

Conclusion

We have modified the Examiner's Findings, Conclusions and Order to conform with our analysis. 2/ Because we have dismissed the complaint in its entirety, we have no occasion to consider the propriety of the wording of the notice that had been included in the Examiner's remedial order.

Dated at Madison, Wisconsin this 24th day of February, 1989.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
S. H. Schoenfeld, Chairman

_____
Herman Torosian, Commissioner

_____
A. Henry Hempe, Commissioner

2/ It should be noted that the Examiner did not address the Complainants' arguments in its briefs to him that the City had violated Sec. 111.70(3)(a)(4), Stats., by providing incomplete and misleading

(Footnote 2/ continues on page 13.)

(Footnote 2/ continued from page 12.)

information to Complainants in response to Complainants' request that the City provide Complainants with a copy of the written agreement the City claimed existed between the parties. We agree with the City's response in its reply brief to the Examiner that the complaint did not assert a claim of failure to provide information and that said claim was not fairly at issue between the parties in the matter and hence not a matter on which the Examiner could have rendered a determination on the merits.