STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

WISCONSIN PROFESSIONAL POLICE ASSOCIATION/LAW ENFORCEMENT EMPLOYEE RELATIONS DIVISION Complainant, vs. CITY OF MONROE, Respondent.	Case 15 No. 40902 MP-2126 Decision No. 25691-A

Appearances:

Cullen, Weston, Pines & Bach Attorneys at Law, 20 North Carroll Street, Madison, Wisconsin 53703, by Mr. Gordon E. McQuillen, on behalf of Complainant.

Ms. Lili Best Crane, Assistant City Attorney, City of Monroe, Monroe, Wisconsin 53566-0056, on behalf of Respondent.

EXAMINER'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On July 20, 1988 the above-named Complainant filed a complaint with the Wisconsin Employment Relations Commission alleging that the above-named Respondent had committed prohibited practices within the meaning of Secs. 111.70(3)(a)1 and 4, Stats. The Commission appointed the undersigned, Marshall L. Gratz, a member of its staff, to act as Examiner in the matter and to make and issue Findings of Fact, Conclusions of Law and Order, as provided in Sec. 111.07(5), Stats. Pursuant to notice, the Examiner conducted a hearing in the matter on October 15, 1988 in Monroe, Wisconsin. Briefing was completed on December 5, 1988.

On the basis of the record, the Examiner hereby issues the following Findings of Fact, Conclusions of Law and Order in the matter.

FINDINGS OF FACT

1. Complainant Wisconsin Professional Police Association/Law Enforcement Employee Relations Division, herein Complainant or Union, is a labor organization with its offices at 9730 West Bluemound Road, Wauwatosa, Wisconsin 53226. At all times material herein, Complainant has been the certified exclusive bargaining representative of all regular full-time and regular part-time dispatchers of the City of Monroe Police Department, excluding supervisory, managerial and confidential employes.

2. Respondent City of Monroe, herein Respondent or City, is a municipal employer with its offices located in Monroe, Wisconsin, and has a mailing address of P.O. Box 200, Monroe, Wisconsin 53566-0200. At all times material herein the City has maintained and operated the Monroe Police Department which employs the employes in the collective bargaining unit set forth above in Finding of Fact 1.

3. Robert Pechanach has been one of Complainant's business agents for approximately two and one-half years, handling all aspects of collective bargaining for the units to which he is assigned. During that time, Pechanach has served as bargaining agent for a bargaining unit of the Respondent's power of arrest police officers. In addition, Pechanach is assigned as Complainant's business agent for the abovenoted bargaining unit of dispatchers in the City's Police Department. Pechanach served in that capacity in the parties' negotiations concerning a first agreement with Respondent which have given rise to the instant complaint proceeding.

4. At all times material herein, the Respondent was represented by its

Salary and Personnel Committee in bargaining with Complainant for a first bargaining agreement covering the dispatchers' bargaining unit, and David Radzanowski was the chairman of said committee and its chief spokesman during those negotiations. James Myers is the City Clerk for the Respondent and at all times material herein acted as secretary to the Salary and Personnel Committee. Thomas Simonson, at all times material herein, has been a member of Respondent's Salary and Personnel Committee and became its chairman after February of 1988.

5. Sometime in August of 1987 the Respondent, by its Salary and Personnel Committee and Myers, met with Complainant, represented by Pechanach, to exchange initial proposals on a first agreement covering the dispatcher unit. At that meeting Pechanach presented the following initial proposal:

PROPOSALS FROM THE
WISCONSIN PROFESSIONAL POLICE ASSOCIATION
LAW ENFORCEMENT EMPLOYEE RELATIONS DIVISION
ON BEHALF OF POLICE DISPATCHERS
TO THE
CITY OF MONROE

> The Association proposes that the City adopt and adhere to all Articles of the Collective Bargaining Agreement between the City of Monroe and its Police Officers in creating a new Collective Bargaining Agreement for the Monroe Police Department Dispatchers except for the below listed proposed changes;
>
> 1. Term of agreement: 3 years, 1987/88/89.
>
> . . .

The parties were working from a draft of an agreement submitted by Complainant based on the existing agreement between the Respondent and Complainant covering the bargaining unit of the Respondent's sworn police officers. The Complainant's initial proposal did not set forth a provision for pension contributions, but instead covered that subject in the working draft. The working draft submitted by the Complainant proposed the same language for the pension provision that existed in the agreement covering the police officers and read as follows:

> ARTICLE XXIV -PENSION
>
> The City will make the full contribution to the Wisconsin Retirement Fund, subject to annual adjustments of each participant's earnings.

6. At all material times, the full employe contribution to Wisconsin Retirement Fund (WRF) consisted of six percent of the participant's earnings for general employes such as those in the instant dispatchers unit and of seven percent of the participant's earnings for protective service personnel such as the employes in the Respondent's power of arrest law enforcement unit. At all material times, the City has been paying the full seven percent toward its police officers' WRF employe contribution. At all material times, the City has been paying two percent of the other employes' earnings toward WRF with the remaining four percent being deducted from the employes' after tax earnings and paid over to the WRF.

7. Respondent and Complainant met on September 21, 1987 for bargaining. At that meeting the Respondent submitted its counterproposal which read as follows with regard to the pension contribution:

> 10. Article XXIV - Pension - Amend to read as follows: The City will contribute 2% of the employees contribution to the Wisconsin Retirement Fund.

At said meeting the parties reached tentative agreement on a number of items, including the Respondent's counterproposal regarding pension

contribution set forth above. There was some discussion between Pechanach and Radzanowski regarding the pension amount and Pechanach noted on his copy of the counter-proposal next to the pension proposal "T/A if factual," and under the title to the pension provision on his initial proposed draft of an agreement he noted "OK w/2% if factual." Simonson noted on his copy of Complainant's initial draft "OK 2% if true for rest of City." At the parties' next bargaining session, in October of 1987, Myers presented a summary of items that had been agreed to and items still on the table, a copy of which was given to Pechanach. Among the items listed as "ITEMS AGREED TO" was the following:

> 10. Article XXIV - Pension - Amend to read as follows: The City will contribute 2% of the employees contribution to the Wisconsin Retirement Fund.

Pechanach made no further or subsequent inquiry as to the 2% contribution. The contingency noted by Pechanach and Simonson regarding the 2% contribution was as to whether that was the amount Respondent was paying toward the WRF employe contribution for its other employes who were not represented by Complainant, i. e., for those of its employes who were unrepresented. As noted in Finding of Fact 6, above, at all times material herein Respondent has paid, and continues to pay, 2% toward the employe contribution for WRF for its unrepresented employes and for the dispatchers.

8. The pension language was not discussed again in negotiations, and the parties continued to bargain on other issues. The parties resolved all issues except for wages and vacation, reaching what they felt was an impasse on those two issues in December of 1987. On December 28, 1987 Complainant filed a petition for interest arbitration along with a cover letter indicating the parties had reached agreement on everything except wages and vacation and a preliminary final offer with respect to those issues.

9. An informal investigation was conducted on February 22, 1988 by an investigator from the Commission's staff. During the course of that meeting, the parties reached tentative agreement on a complete collective bargaining agreement which included the Respondent's counterproposal on pension. The tentative agreement was considered for ratification by the dispatcher unit membership that same evening, with two of the three employes in the bargaining unit being present. The tentative agreement was ratified by the employes at that time.

10. Shortly after learning that the Union membership had ratified the tentative agreement, the Respondent unilaterally implemented the agreed-upon changes in wages and vacation. Complainant did not object to that implementation at that time.

11. Pechanach subsequently prepared a draft of the new agreement and sent it to Myers for Respondent to sign. The draft contained the following pension provision which was identical to Complainant's own initial proposal on pension:

> ARTICLE XXIII -PENSION
>
> The City will make the full contribution to the Wisconsin Retirement Fund, subject to annual adjustments of each participant's earnings.

Before receiving the City's response, Pechanach notified the Commission in writing by letter dated March 22, 1988 that the parties had settled and that Complainant was withdrawing its petition for interest arbitration. On March 25, 1988 the Commission issued an Order of Dismissal of Complainant's petition.

12. Thereafter, Myers telephoned Pechanach regarding what Respondent felt were three errors in Complainant's draft of the agreement, including the pension provision. Pechanach and Myers discussed the claimed discrepancies and were able to resolve the two besides the pension provision. As to the pension language, Pechanach acknowledged that the parties had agreed that the Respondent City would pay 2% with regard to the employe contribution, but asserted that they had so agreed on condition that 2% was the equivalent of the full employe contribution. Pechanach explained

that he had therefore used the "full" language in his draft. Myers replied that Respondent had agreed to contribute 2% toward the employe's share of the pension contribution and that Pechanach's "full" language was not the language the parties had agreed upon. At that time and since, Respondent has been unwilling to sign an agreement containing the "full" employe contribution pension language presented by Pechanach. Respondent's City Council has not, to date, formally ratified any terms of agreement with Complainant covering the dispatcher unit.

13. On April 21, 1988 Pechanach sent the Commission a letter, along with a petition for interest arbitration. In that letter, Pechanach: stated that although the parties had reached tentative agreement on February 22, 1988, an issue had since arisen as to how much the Respondent was to pay toward the employe contribution for pension; stated the parties' positions on that issue; asserted that the parties have been unable to resolve their dispute on that matter; and stated that the Complainant wished to submit the issue to arbitration.

14. Myers then wrote the Commission on May 5, 1988, asserting that "all matters were agreed to during the various collective bargaining sessions and through the mediation process" and that the City was unwilling to consent to the further interest arbitration proceedings being requested by the Complainant. When Respondent remained unwilling to enter into reopened interest arbitration proceedings, Complainant filed the instant complaint.

15. The parties' above-noted tentative agreement, as it related to pension, was that the agreement would read as set forth on the Respondent's counterproposal on that issue, i.e., a City contribution of "2% of the employees contribution to the Wisconsin retirement Fund." The parties' tentative agreement to that effect was not subject to the condition that "2%" must be equivalent to the full WRF employe contribution.

16. Respondent's representatives have not been shown to have caused the Complainant or the dispatcher bargaining unit employes to mistakenly believe that "2%" is equivalent to the full WRF employe contribution for dispatcher employes or to mistakenly believe that agreeing to the City's pension language would result in the City paying the full WRF employe contribution so as to relieve the dispatcher unit employes of WRF deductions from their paychecks. Therefore, if the Union's agreement to the tentative agreement and/or the Union membership's ratification of the tentative agreement was (were) premised on a belief that the pension language in the tentative agreement would result in the City paying the full WRF employe contribution, that belief was a unilateral Union mistake that was not caused or shared by the City.

CONCLUSIONS OF LAW

1. The statements and actions of the representatives of Respondent City in its negotiations with Complainant concerning pension contributions for the dispatcher unit have not been shown to have been misleading or misrepresentative or to have constituted a prohibited practice within the meaning of Sec. 111.70(3)(a)4 or 1, Stats.

2. Respondent City, its officers and agents, did not commit a prohibited practice within the meaning of Secs. 111.70(3)(a)4 or 1 when its officers and agents refused to approve and sign the agreement draft submitted to them by Complainant and/or when its officers and agents refused to agree to reopen the interest arbitration process for further collective bargaining between the parties.

ORDER 1/

The instant complaint is dismissed in its entirety.

Dated at Madison, Wisconsin this 10th day of February, 1989.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Marshall L. Gratz
Marshall L. Gratz, Examiner

1/ Any party may file a petition for review with the Commission by following the procedures set forth in Sec. 111.07(5), Stats.

Section 111.07(5), Stats.

(5) The commission may authorize a commissioner or examiner to make findings and orders. Any party in interest who is dissatisfied with the findings or order of a commissioner or examiner may file a written petition with the commission as a body to review the findings or order. If no petition is filed within 20 days from the date that a copy of the findings or order of the commissioner or examiner was mailed to the last known address of the parties in interest, such findings or order shall be considered the findings or order of the commission as a body unless set aside, reversed or modified by such commissioner or examiner within such time. If the findings or order are set aside by the commissioner or examiner the status shall be the same as prior to the findings or order set aside. If the findings or order are reversed or modified by the commissioner or examiner the time for filing petition with the commission shall run from the time that notice of such reversal or modification is mailed to the last known address of the parties in interest. Within 45 days after the filing of such petition with the commission, the commission shall either affirm, reverse, set aside or modify such findings or order, in whole or in part, or direct the taking of additional testimony. Such action shall be based on a review of the evidence submitted. If the commission is satisfied that a party in interest has been prejudiced because of exceptional delay in the receipt of a copy of any findings or order it may extend the time another 20 days for filing a petition with the commission.

CITY OF MONROE

MEMORANDUM ACCOMPANYING EXAMINER'S
FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

BACKGROUND

Complainant Association, on July 20, 1988, filed the instant complaint wherein it alleged that the Respondent City committed prohibited practices within the meaning of Sec. 111.70(3)(a)4, and derivatively (3)(a)1, Stats., by the following conduct: (1) during the course of the bargaining on an initial agreement covering the dispatchers' bargaining unit, misrepresenting the amount it contributed to the Wisconsin Retirement Fund (WRF) on behalf of the dispatcher employes causing the Complainant to believe the Respondent was contributing the full amount on behalf of the employes, as a result of which the parties tentatively agreed to language requiring the Respondent to pay the full employe contribution to the WRF; (2) subsequently refusing to ratify and sign the parties' total tentative agreement because of a dispute as to how much the Respondent was to pay toward the employes' contribution to WRF; and (3) refusing to negotiate with Complainant regarding the pension payment and opposing Complainant's attempt to submit the dispute to final and binding arbitration under Sec. 111.70(4)(cm), Stats.

The Complaintant requested as relief that the Respondent be ordered: to cease and desist from committing the alleged prohibited practices, to ratify the collective bargaining agreement with the clause requiring Respondent to pay the full employe contribution to WRF, to make the employes whole, and to pay Complainant's costs and attorneys fees.

In its answer, Respondent City, among other things, denied the allegations in the complaint and requested that the instant complaint be dismissed and that the Complainant be ordered to execute the agreement reached on February 22, 1988, including the provision for a 2% contribution to WRF and to pay Respondent's costs and attorney's fees. At the hearing, Respondent withdrew its requests for affirmative relief other than costs and attorneys fees.

POSITION OF COMPLAINANT

The Complainant notes that Sec. 111.70(3)(a)4, Stats., provides that it is a prohibited practice for a municipal employer to refuse to execute a collective bargaining agreement previously agreed upon. Here, Complainant has ratified, signed and tendered to the City a draft agreement which incorporates its understanding of the parties' tentative agreements. The Respondent has not ratified any version of the collective bargaining agreement and has not rescinded its unilateral implementation of its understanding of the agreement. The Respondent has thus implemented disputed items that are mandatory subjects of bargaining, in particular, the retirement contribution in dispute.

Complainant cites the testimony of Pechanach and Myers as indicating that neither party informed the other that the tentative agreements were subject to ratification of the entire agreement, but "tacitly" reserved the right to ratify the agreement. Complainant asserts that, "absent ratification of the same written document, the parties could not have an enforceable agreement." It was clear once the tentative agreement was reduced to writing that the parties had not reached agreement on the pension provision. Complainant asserts that once it was clear that the parties were not in agreement, it was a per se refusal to bargain for the Respondent to refuse to continue to negotiate and to unilaterally implement a mandatory subject of bargaining when the parties have mediation-arbitration available. Citing, City of Brookfield, Dec. No. 19822-C (WERC, 11/84).

Complainant states it is at a loss to understand what the Respondent thinks its relationship is with the Complainant given the dispute over pension. Three possibilities are offered: (1) the parties do not have a collective bargaining agreement; (2) the parties have the agreement the Respondent unilaterally implemented; or (3) the parties have the agreement drafted by Complainant.

Complainant contends that its draft of the agreement should be implemented because the evidence shows that the Complainant agreed to Respondent's proposed language if 2% were in fact equal to the full employe contribution required by WRF. Respondent never advised the Complainant or its negotiator that the required employe contribution exceeded 2%. That it may have been naive for Pechanach to rely on Respondent's representations cannot form a basis for upsetting the overall bargain. It was also not inconsistent for Pechanach to use language in the draft of the agreement that states the Respondent will pay the "full employe contribution," since he believed that 2% was the full contribution. Such language also makes good sense because it would foreclose the need to renegotiate the matter if the State increased the amount of the employe contribution. Since the Complainant's draft is consistent with the parties' oral agreement, it is appropriate that the Commission order that the draft agreement be implemented.

Complainant alternatively requests from the Commission a declaration that the parties never reached closure on the retirement contribution issue and an order that the parties return to the table on the matter. It is contended by the Complainant that since Respondent acknowledges that it pays the full employe contribution of seven percent (7%) for its police, it is clear that Respondent's representation that 2% was the full WRF employe contribution being paid by it on behalf of any of the City's employes is incorrect. Pechanach was aware that the police officers had their full contribution of 7% paid by Respondent and he was entitled to believe the Respondent was correct in representing that 2% equalled the full dispatcher employe contribution, since the testimony of Pechanach and Simonson demonstrates the Respondent must have understood that Pechanach believed 2% was the full amount.

The evidence indicates that either there was a misunderstanding or the Respondent misled Pechanach. In the latter case the Complainant's draft should be ordered implemented. In the former case it should be found that no agreement was reached and the parties ordered to bargain, culminating in arbitration, if needed.

The Complainant argues that the Respondent's language on pension should not be ordered implemented because there is no evidence to indicate the parties ever reached agreement to less than City payment of the full WRF employe contribution. To order implementation of Respondent's language would encourage a party to deliberately propose ambiguous language and fail to resolve the ambiguity by withholding the facts it possesses. On the contrary, the Commission's role should be to encourage an equitable bargaining atmosphere.

Complainant concludes that if the complaint is dismissed, the parties will be left without an agreement and Complainant will have exhausted all of its administrative remedies, leaving the parties "in an irresolvable limbo."

In response to the Respondent's brief, Complainant asserts that since there is no contract, there is no "contract clause at issue." If Pechanach agreed to the 2% contribution, there would be no dispute; however, Pechanach conditioned the agreement on 2% being equal to the full employe contribution. Complainant also takes issue with Respondent's assertion that the mediation on February 22nd resulted in a "final agreement," on the grounds that it ignores the fact that tentative agreements are not final until they are mutually ratified by the parties.

As to Respondent's assertion that Complainant was fully informed that the Respondent would only contribute 2% on behalf of the employes to WRF and that Respondent never represented that as being "full," both Pechanach and Simonson's notes contained qualifications on the two percent. Both notes were in error and there is no evidence that Simonson's notation indicated approval if the Respondent contributed 2% to its other nonunionized employes. There was a mixed practice depending on the unit to which the employes belonged and such a misunderstanding cannot form the basis for an agreement.

With regard to Respondent's assertion that Pechanach should have known that 2% did not equal the full employe contribution to WRF, Complainant notes that this was the first time Pechanach had negotiated for dispatchers and asserts he was entitled to rely on the Respondent's representations in

tentative agreement. As to any assertion that Pechanach misled the dispatchers, there is no evidence presented to suggest he did so.

The Complainant reasserts that mutual mistake cannot result in a contract.

POSITION OF THE RESPONDENT

The Respondent takes the position that it has not committed any prohibited practices. Respondent asserts it bargained in good faith with Complainant and entered into a final agreement with Complainant as a result of the mediation that took place on February 22, 1988. That agreement was verbally approved by both parties. Relying on that verbal agreement, the Respondent implemented the wage increase that was part of that agreement. That agreement also provided for the Respondent to continue to contribute 2% toward the employe contribution to WRF. Complainant is now asking that Respondent be ordered to execute an agreement containing a retirement provision that the Respondent did not agree to and which had not been part of the final agreement. For the Commission to do so would be unfair and inequitable.

Respondent asserts that there was no mutual mistake regarding how much it would contribute toward retirement for the dispatchers. Respondent contends that at no time did it agree to pay the "full amount" and made it clear from the start of the negotiations that it would pay 2% to WRF as evidenced by its written counterproposal, the minutes of Salary and Personnel Committee, and the Issues Summary. Complainant was fully informed that Respondent would contribute 2% to WRF, and the City never represented that contribution as being equivalent to the "full" employe contribution. Retirement was agreed to in September of 1987 and was not an issue at the mediation/investigation in February of 1988.

It is also contended by Respondent that Pechanach "knew or should have known" that 2% was not the full employe contribution to WRF. Pechanach's claim that he assumed 2% equalled the full employe WRF contribution based on Respondent's representations is undercut by his letter to the Commission in April of 1988 wherein he stated, "The City contends that they agreed to pay only 2% of the 6% contribution." Further, despite Pechanach's notation that 2% was okay "if factual," he made no inquiries to determine whether his assumption was correct.

Pechanach testified in reference to his notes of the February 22nd mediation/investigation that he thought 5% was the full contribution. Respondent also points to a bargaining note of Simonson's which the City characterizes as indicating that 2% was agreed to if it was true that Respondent paid 2% for its nonunionized employes. Hence, the tentative agreement was on the 2%, if that is what other of Respondent's employes received, and not if it equalled the "full" WRF employe contribution.

It is further contended by Respondent that, having been a business agent for Complainant for two years, Pechanach had resources available to him to determine what constituted the full employe contribution to WRF for dispatcher employes. Respondent relied on Pechanach to accurately convey its offer to the dispatchers and on his statement that the dispatchers had approved the tentative agreement.

Respondent contends that Complainant has not shown by a clear and satisfactory preponderance of the evidence that Respondent has committed a prohibited practice. There is no evidence in this case that Respondent interfered with Complainant or was motivated by animus toward Complainant. It also has not been shown that Respondent refused to execute an agreement previously agreed upon, since the agreement was for a 2% contribution to WRF and Respondent has been and is willing to execute an agreement document to that effect.

In its reply brief, Respondent renews its arguments that it would be unfair to order Respondent to execute the Complainant's draft of the agreement. Contrary to Complainant's assertion that the subject of the retirement contribution was confusing, Respondent argues that it made its position clear that it would only pay 2%. Given Pechanach's involvement with the police officers' agreement and the fact that a 2% contribution was

the status quo for the dispatchers and the nonunionized employes, Pechanach knew or should have known that 2% did not constitute "full." Also, there could not have been confusion about what group of employes was the subject of the inquiry because Pechanach knew the only other unionized group was the police officers and he knew "full" for them was 7%.

Regarding the allegation Respondent has per se refused to bargain by unilaterally implementing the wages and vacation that was agreed to, Respondent asserts that it bargained in good faith on the retirement issue and the parties came to agreement on that issue and all others. The Respondent implemented the new wages and vacation in reliance on the verbal agreement reached on February 22, 1988 and on its expectation that Pechanach would accurately draft the agreement. The 2% contribution to WRF was the status quo, so the Respondent did not implement a new retirement contribution by continuing to contribute 2%. The only changes implemented were wages and vacation and there is no dispute over these subjects.

Respondent asserts that the Complainant's draft of the retirement provision is inconsistent with the parties' oral agreement and contains retirement language that Respondent rejected in September of 1987. To order the implementation of that language would encourage drafters of agreements to independently include unapproved language, leaving the other side with either having to accept the language or returning to expensive, time-consuming negotiations.

Lastly, as to its refusal to proceed to final and binding arbitration, Respondent argues that the Commission informed the Respondent it could choose whether to voluntarily re-enter that process or not. The Respondent therefore contends that it was entirely within its rights in choosing not to do so.

DISCUSSION

Complainant has alleged that Respondent violated Sec. 111.70(3)(a)4, Stats., and derivatively Sec. 111.70(3)(a)1, Stats.: by misrepresenting in bargaining how much it contributed toward the WRF employe share, causing Complainant to believe Respondent was paying the full share; by refusing to ratify the total tentative agreement which included a provision requiring the Respondent to pay the full employe share to WRF; and by refusing to negotiate with Complainant regarding the pension contribution after it became clear that there was a dispute over that matter.

The Examiner finds no merit in any of Complainant's claims.

Complainant has not sustained its burden of proof as regards its claim that Respondent misled Complainant or made misrepresentations in negotiations leading to the tentative agreement on the City's pension counterproposals. It is undisputed that the issue was discussed and tentatively agreed on September 21, 1987. There is, however, conflicting testimony regarding what was said. In his testimony, Pechanach claimed: that Respondent's representatives told him that 2% was full; that this was his first dispatcher unit negotiation; and that he relied on the City's representation without taking other steps to ascertain its validity. In their testimony, City witnesses Radzanowski, Myers and Simonson denied that the City's representatives made any such representation. Pechanach's bargaining notes confirm his testimony to the extent that the parties' agreement to the City's "2%" language was conditioned on whether something was "factual." For, Pechanach's bargaining notes label the City's pension language as "T/A if factual" and elsewhere characterize the pension issue as "OK w/ 2% if factual." Those notations provide little guidance as to what it was that had to be factual, however. They do not, for example, say "OK if full" or anything else similarly specific. In contrast, City representative Simonson's bargaining notes state "OK 2% if true for rest of City." Thus, Simonson's note (on Exhibit 23) provides a more specific indication that 2% was agreed if 2% was "true for rest of City." It is factual that 2% was the existing level of City payment toward the WRF employe contribution for the rest of the City's employes besides those represented by Complainant--i.e., for the City's nrepresented employes. Pechanach could not have understood "the rest of the City" to include the police officer unit represented by Complainant since Pechanach acknowledged in his testimony that he was aware at all material times that the full WRF

employe share for police officers is seven percent. For those reasons, and because the City rejected the Union's proposal of the police officer unit "full" language in favor of its 2% counter proposal, the Examiner concludes that Complainants have not proven by a clear and satisfactory preponderance of the evidence that City representatives misled the Union or made misrepresentations during the parties discussion and tentative agreement on the pension issue. (Even if the claimed misrepresentations had been found to have been made, there would remain the question of whether the Union's reliance on same without independent efforts to check validity was reasonable.)

The Examiner finds no merit in Complainant's alternate theory that, at a minimum, there has been a mutual mistake/misunderstanding as to the meaning of the pension language in the parties' tentative agreement. The City rejected the Union's "full" language and counterproposed unequivocal 2% language. The parties reached agreement on the City's language and did not reach agreement on the Union's language. For those reasons, and based on the record as a whole, the Examiner is satisfied that if the Union agreed to the tentative agreement or the unit members ratified the tentative agreement on an understanding that it would cover the full employee share and relieve the employes of paycheck deductions for WRF, they were mistaken. Any such mistake was the Union's alone and was neither caused nor shared by the City's representatives. In those circumstances there is no justification for relieving the Union of the consequences of its own mistake or misunderstanding as to the implications of the unequivocal 2% language to which it tentatively agreed and which was part of the tentative agreement ratified by its membership.

Given the foregoing, there is no merit in the Union's claim that the City has unlawfully failed to reduce an agreement previously reached to a written and signed document. The document tendered by the Union contained "full" pension language that was materially different from the "2%" language agreed upon by the parties. The Union's draft materially deviated from the tentative agreement even if 2% were equivalent to "full," since it would grant the employes legislative increases in the employe share automatically whereas the agreed-upon language would not. The fact that 2% is less than "full" further demonstrates that the Union was asking the City to approve and sign something other than the agreement previously reached between the parties. Hence, the City was entirely justified in refusing to approve and sign the Union's draft. See, Racine Unified School District, Dec. Nos. 15890-D, 15914-D (Hoornstra with final authority, 2/78).

The Examiner also concludes that the City was jusitified in its refusal to reopen bargaining and interest arbitration. The parties reached a tentative agreement on all matters in dispute, including pensions. The tentative agreement specifically provided for City payment of 2% toward the employe WRF contribution. The Union membership ratified the tentative agreement on February 22, 1988. The City implemented the changes called for in the agreement (including wage and vacation improvements) in reasonable and detrimental reliance on the Union's ratification thereof. The City has further demonstrated its understanding that it is bound to the terms of that agreement by defending itself in this proceeding in part on the grounds that the parties have reached a binding agreement. In all of the circumstances of this case, then, the Examiner is satisfied that the City has unconditionally bound itself to the agreement, even though its City Council has not yet formally ratified/adopted the agreement. That binding agreement constitutes a valid defense and justification for the City's refusal to reopen negotiations and interest arbitration proceedings.

For the foregoing reasons, the Examiner has dismissed the complaint in its entirety.

Contrary to Complainant's contention, that result does not leave the parties' relationship in limbo. Rather, as noted above, the parties have entered a comprehensive tentative agreement which the Union membership ratified on September 22, 1988 and which the City bound itself to by its implementation of same shortly thereafter. Both parties therefore have an obligation, upon request by the other, to reduce that agreement--including the 2% pension provision--to a written and signed document. That obligation is enforceable through prohibited practice procedures under Secs. 111.70(3)(a)4 or (3)(b)3, Stats.

The Examiner finds no basis for ordering costs or attorneys fees in this matter and therefore has rejected both parties' requests for same.

Dated at Madison, Wisconsin this 10th day of February, 1989.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Marshall L. Gratz
Marshall L. Gratz, Examiner