STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

OAKHILL CORRECTIONAL INSTITUTION LOCAL 3021, DISTRICT COUNCIL 24, AFL-CIO, and WISCONSIN STATE EMPLOYEES UNION,	
Complainants,	Case 263 No. 41528 PP(S)-151 Decision No. 25978-C
vs.	
STATE OF WISCONSIN, and OAKHILL CORRECTIONAL INSTITUTION,	
Respondents.	

Appearances:

Mr. Richard V. Graylow, Lawton & Cates, S.C., Attorneys at Law, 214 West Mifflin Street, Madison, Wisconsin 53703-2594, appearing on behalf of Oakhill Correctional Institution Local 3021, District Council 24, AFL-CIO, and Wisconsin State Employees Union.

Ms. Teel D. Haas, Legal Counsel, Department of Employment Relations, 137 East Wilson Street, P.O. Box 7855, Madison, Wisconsin 53707-7855, appearing on behalf of the State of Wisconsin, and Oakhill Correctional Institution.

FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

On December 6, 1989, I issued Decision No. 25978-A, which included the following "ORDER":

> The complaint filed on January 6, 1989, and its subsequent amendments, are dismissed.

On July 10, 1990, the Wisconsin Employment Relations Commission (Commission) issued Decision No. 25798-B, which included the following "ORDER":

A. That Examiner's Findings of Fact 1-6 are affirmed.

B. That Examiner's Finding of Fact 7 is set aside.

C. That Examiner's Conclusions of Law 1 and 2 are affirmed.

D. That Examiner's Conclusion of Law 3 is set aside and the following Conclusions of Law 3 and 4 are issued:

> 3. Within the context of the arguments presented by the Union herein, under no interpretation of the facts alleged by the January 6, 1989, complaint and its subsequent amendments, can the terms of the Local Agreement be considered enforceable under Sec. 111.84(1)(d) Stats., beyond July 30, 1988. Thus, the issuance of the July 11, 1988, memo and the termination of the Local Agreement by Oakhill management do not raise any factual or legal issue

remediable under Sec. 111.84(1)(d), Stats.

> 4. Under certain interpretations of the facts alleged by the January 6, 1989, complaint and its subsequent amendments, the terms of the Local Agreement can be considered enforceable under Sec. 111.84(1)(e), Stats., beyond July 30, 1988. Thus, the issuance of the July 11, 1988, memo and the termination of the Local Agreement by Oakhill management do raise factual and legal issue potentially remediable under Sec. 111.84(1)(e), Stats.

E. That the Examiner's Order dismissing the complaint is affirmed as to the alleged violation of Sec. 111.84(1)(d), Stats., and reversed as to the alleged violation of Sec. 111.84(1)(e), Stats.

F. That the portion of the complaint alleging a violation of Sec. 111.84(1)(e), Stats., is remanded to the Examiner for further proceedings.

. . .

After resolution of a dispute between the parties regarding the issues for remand, and with the consent of the parties, hearing on the remand was conducted in Madison, Wisconsin, on May 29, 1991. A transcript of that hearing was provided to the Commission on June 18, 1991. The parties filed briefs and reply briefs by September 13, 1991.

FINDINGS OF FACT

1. Findings of Fact 1 through 6 from State of Wisconsin, and Oakhill Correctional Institution, Dec. No. 25978-A (McLaughlin, 12/89), aff'd Dec. No. 25978-B (WERC, 7/90), are, by this finding, incorporated into this decision.
Oakhill Correctional Institution is referred to below as Oakhill or as OCI.

2. In pages 8 and 9 of the Memorandum of Dec. No. 25978-B (WERC, 7/90), the Commission stated:

> We disagree with the Examiner's analysis. We conclude that when the Legislature approves master bargaining agreements which by their terms authorize the existence of local agreements, the Legislature also implicitly approves of the continued existence and viability of any local agreements of unspecified

duration which the parties have reached under the auspices of previous master agreements and which neither party has proposed to modify. When this approval process occurs, local agreements of unspecified duration acquire a duration consistent with the master contract and remain in force and effect for the term of the next master contract unless the local agreement itself gives the parties the option of modifying or terminating the agreement prior to the master contract's expiration.

Applying the foregoing framework to the facts as pled in this case, we conclude that this Local Agreement, last amended in October 1983, was implicitly renewed when the Legislature approved the 1985-1987 Master Contract. Through this renewal process, the Local Agreement acquired a duration consistent with the 1985-1987 Master Agreement unless modified or terminated by the parties pursuant to the terms of the Local Agreement itself . . . Through this renewal process, the Local Agreement was not a contract of unlimited indefinite duration which would raise issues regarding the impact of Secs. 111.92(3) and (4), Stats., but instead a contract whose duration would mirror that of the Master Agreement unless the parties exercise of their rights under the Local Agreement produced a different result. In September 1986, during the term of the 1985-1987 Master Agreement, the parties began to bargain over modifications to the Local Agreement. This bargaining had not produced a new Local Agreement by the time the 1987-1989 agreement was reached by the parties on a new Master Agreement. Under our analytical framework set forth above and contrary to the Complainants' argument herein, legislative approval of the 1987-1989 Master Agreement did not constitute implicit approval of the Local Agreement for 1987-1989 because the terms of said Agreement were being disputed by the parties at the time legislative approval occurred. Thus, the Local Agreement expired on June 30, 1987 with the expiration of the 1985-1987 Master Agreement. However, the July 11, 1988 memo from the Respondent State to the Complainant Union, which is set forth in the complaint, alleges that following the June 30, 1987 expiration of the Local Agreement, said Agreement was extended. Extension of the Local Agreement presumably required some bilateral agreement between the parties and the terms of the extension agreement clearly have a direct impact on whether the State could terminate the Local Agreement on June 30, 1988.

Given the foregoing, we are satisfied that under certain interpretations of the facts alleged in the complaint and its subsequent amendment, the Local Agreement is potentially enforceable under Sec. 111.84(1)(e), Stats. . . . The Respondent State apparently contends that the extension agreement allowed either party to terminate the existing Local Agreement when negotiations between the parties on a new Local Agreement were unsuccessful. The Complainant

> Union apparently contends that under the duration language quoted above, the advisory arbitration language in the 1987-89 Master Agreement, and any extension the terms of the Local Agreement beyond July 30, 1988. Our remand will allow the parties to present facts and/or further argument to the Examiner as how this difference of opinion between the parties should be resolved and as to the availability of grievance/arbitration as an enforcement mechanism of the Local Agreement. The Examiner will then proceed to issue a decision.

3. In a letter to the parties dated September 17, 1990, I stated "(I)t is appropriate that each of you be allowed to offer argument on what issues are posed for hearing." Richard V. Graylow, counsel for the Union responded in a letter to me dated September 27, 1990, which states:

> It seems to me that the new issue is whether or not the Local Agreement is enforceable in arbitration.
>
> If you agree, I ask that you be appointed by the Commission as Arbitrator and resolve the matter.

Teel D. Haas, counsel for the State, responded in a letter to me dated October 5, 1990, which states:

> You have asked me to respond to Mr. Graylow's letter dated September 27, 1990, suggesting that you be appointed as arbitrator to resolve the remand of the above case.
>
> My interpretation of the Commission's Order is that the matter was being remanded to you as examiner to determine the following issues:
>
> > 1. Did the parties agree to extend the local agreement beyond June 30, 1987 (when the 85-87 Master Agreement expired)?
> >
> > 2. If so, what were the terms of the extension agreement?
> >
> > 3. Could the extension agreement be terminated unilaterally by either party?
> >
> > 4. If there was an agreement to extend the local agreement, is the grievance/arbitration procedure available to enforce that local agreement?
>
> Since this case was filed as an unfair labor practice complaint under s. 111.84(1)(a),(d),or (e), Stats., I do not believe the Commission's own rules provide for the use of an arbitrator to resolve the matter. (See Ch. ERB 22 compared to Ch. ERB 23, Wis. Adm. Code, and Sec. 111.86, Stats.) It is my position that referral to an arbitrator may occur in this case only after the examiner has made findings on the four issues set out above and answers Issue #4 in the affirmative.

In a letter to the parties dated October 11, 1990, I stated the following: "Since Mr. Graylow's request that I be 'appointed by the Commission as Arbitrator and resolve the matter' seeks action beyond my authority to grant, I have referred the file to the Commission for a response." The Commission, in a letter to the parties dated October 30, 1990, from Peter G. Davis, its General Counsel, stated the following:

> I write on behalf of the Commission regarding your disagreement as to the issues before Examiner McLaughlin on remand.
>
> It is the Commission's view that Ms. Haas' October 5, 1990 letter accurately reflects the issues on remand. The file has been returned to Examiner McLaughlin.
>
> The Commission's review of its decision produced discovery of a missing line of text at the bottom of page 8. The sentence at the bottom of page 8 and top of page 9 should read:
>
> > The Complainant Union apparently contends that under the duration language quoted above the advisory arbitration language in the 1987-89 Master Agreement, and any extension agreement, Respondent State was obligated to honor the terms of the Local Agreement beyond July 30, 1988.

. . .

4. In a Labor-Management meeting on March 6, 1986, involving representatives of Oakhill and of the Union, Rita Smick, the Personnel Manager at Oakhill, informed Union representatives that Oakhill believed that the Local Agreement could not be in effect longer than the nominal expiration date of the Master Agreement. Smick sought the Union's position on whether a new Local Agreement could be negotiated. Smick issued a letter to the Union's then incumbent President dated March 19, 1986, which stated:

> This letter is written to remind you that concurrent with the effective date of the 1985-87 WSEU contract on October 31, 1985, our local labor agreement negotiated under the previous Master Contract has expired.
>
> If Local #3021 wishes to negotiate a successor agreement pursuant to the provisions of the 1985-87 Master Agreement, please let me know by March 26, 1986. A new agreement can be negotiated containing either the same or different terms from the last agreement. To assure that our labor management relations are not disrupted, we will make no changes prior to the reply date in our current practices on matters covered by our last agreement.

John Thompson, the Union's current President, advised Smick that the Union wished to negotiate regarding the Local Agreement. Smick sought written proposals from the Union in written memos to Thompson dated April 1 and 28, 1986. The parties exchanged correspondence over the summer of 1986, but did

not meet face to face to negotiate on the Local Agreement until early September of 1986. Prior to that meeting, the Oakhill management provided the Union with a written compilation of their proposals. That compilation expressly stated the duration of the then-current Master Agreement, and contained a duration clause which stated the effective date of the proposed successor to the Local Agreement as well as a statement that the successor "shall expire upon the termination of the 1985-87 Master Agreement unless extended by agreement between representatives of AFSCME, Council 24, WSEU and the State of Wisconsin, represented by the Department of Employment Relations."

5. Thompson, in a memo to Farrey dated September 12, 1986, stated:

> I have talked with different Union members and in the best interest of the staff we have decided that until we get a new local agreement settled we have to go by the Master Agreement.

Farrey responded in a memo to Thompson dated September 15, 1986, which states:

> Upon receipt of your letter this morning (September 15, 1986), I consulted with Dr. Hamdy Ezalarab, Director of the Office of Human Resources in the Division of Corrections, Central Office. He advised me that until new local agreements are negotiated and approved at the institutions that the old local agreements remain in effect.
>
> Given the above, I am not authorized at this point in time to consider your request. Thus, the "Agreement Between Oakhill Correctional Institution-Local Number 3021" dated March 25, 1981, will remain in effect.
>
> If you have any questions or comments on this, please feel free to contact me.

Union and Oakhill representatives met to discuss the Local Agreement in late September and in early October. By October 21, 1986, Thompson informed Smick that he did not feel further meetings would be helpful in resolving the remaining issues. Those issues included language stating the term of a successor to the Local Agreement. Smick summarized the status of the negotiations in a memo to Thompson dated October 24, 1986, which states:

. . .

> I would have no objection to meeting again but at this point there appears to be four items that we cannot resolve.
>
> I believe you are aware of management's position on these issues. If after a review of these items you feel the union could accept them please let me know by October 29, 1986. If I do not hear from you I will assume the union's position remains the same. The institution will then notify you of the procedures that will be implemented in the absence of new local agreement.

. . .

6. Oakhill management met with Union representatives in November and

in December in an attempt to resolve the remaining issues. Thompson had consulted with Donald Frisch, a WSEU Field Representative, prior to such meetings, in part to discuss with Frisch his concern that the State wished to insert a fixed expiration date into the successor to the Local Agreement. Little, if any, progress was made, and the parties continued to dispute the language to be included in a term of agreement clause.

7. The parties exchanged proposals in January of 1987, and met again to negotiate a successor to the Local Agreement in early February of 1987. Smick summarized the results of this meeting in a letter to Thompson dated February 11, 1987. In that letter Smick asked Thompson to respond "by February 20th with your responses of if you wish to schedule a meeting notify me as soon as possible . . . " Smick again sought a response from the Union at a March 12, 1987, Labor-Management meeting and in a March 25, 1987, memo to Thompson. Smick summarized the status of the matter in her notes of a Labor-Management meeting of April 16, 1987. Those notes state:

> Ms. Smick indicated she had not heard from the union regarding local negotiation since managements responses had been sent February 11th. John Thompson indicated Mr. Frisch had not gotten back to him as yet. Mr. Thompson felt as long as the new master was so close to being negotiated we might as well wait until after that is complete. Ms. Smick felt much time had been devoted getting as far as we are with local agreement and she would not favor redoing the whole thing. As it has been several months, Ms. Smick said she would be advising the Superintendent of available options such as - 1) using old local, 2) implement all or part of what has been negotiated 3) implement what is felt best for OCI operation or 4) wait until new master agreement has been completed.

No events of substance regarding the Local Agreement negotiations occurred between the issuance of these notes and December of 1987.

8. The parties again met to negotiate the Local Agreement in December of 1987, and in January and February of 1988. Sometime during this period, Thompson issued Smick a letter which included the following proposal:

> Delete last line first paragraph and substitute it with this language: Local Agreement will continue until replaced by a new Local Agreement unless the Master Agreement prohibits an extension of this agreement.

By March 10, 1988, the Union and OCI management had compiled a draft local agreement which was to be placed before the membership of the Union for a ratification vote. Smick's notes from the Labor-Management meeting of March 10, 1988, summarize the status of the matter thus:

> Union indicated a ratification vote would take place before the end of March. Management will post a copy of the local agreement on the bulletin board upstairs in Cottage 1 for staff who may wish to review it. Rita said to let us know when the union would need a place for voting.

Smick responded to Thompson's duration proposal with a counter proposal dated March 11, 1988. Neither proposal was included in the draft Local Agreement submitted to the Union for a ratification vote. That document stated the

following duration clause:

> This Local Agreement shall take effect _____, 1988, and shall expire upon the termination of the 1987-89 Master Agreement unless extended by agreement between representatives of AFSCME, Council 24, WSEU and the State of Wisconsin, represented by the Department of Employment Relations. Local negotiations may commence within 30 days after effective date of Master Agreement. Upon termination, all obligations are automatically cancelled.

The Union voted not to ratify the draft proposal.

9. Smick issued a memo to Thompson dated April 5, 1988, which sought confirmation of the rejection Smick had, at that time, only heard rumors of, and which sought guidance on "what, if any, suggestions you have for acquiring a local agreement at OCI." Smick did not receive any such suggestions. In a memo to Thompson dated May 3, 1988, Smick asked for "those issues that you felt precluded ratification of local agreement." Smick summarized the status of the matter in her notes of the June 16, 1988, Labor-Management meeting. Those notes state:

> Rita Smick announced that since there has been no ratification on local agreement and no response from the union regarding the issues since April, provisions of the old local will no longer be in effect as of July 17, 1988. We will revert to the Master Contract. We will be sending the local a memorandum that will list the procedures we feel we need to put in place in order to operate that are not covered by the Master.

Farrey's July 11, 1988, memo (see Finding of Fact 6, Dec. No. 25978-A [McLaughlin, 12/89], incorporated into this decision at Finding of Fact 1 above), advised the Union that "we believe we are at an impasse . . . and are formally notifying Local 3021 that the 1981 agreement will no longer be effective as of 11:59 p.m. on July 30, 1988."

10. OCI negotiators, at no point in the negotiations summarized above, had the authority as a branch of State management, to agree to a successor to the Local Agreement without first securing the approval of the Department of Employment Relations (DER) and of the Department of Health and Human Services (HSS). Smick consulted agents of HSS to secure such review of proposals and of options available to OCI in making proposals. Representatives of HSS have attempted, since the mid-1980's, to tighten such review procedures to standardize local agreements. As of 1977, roughly one-third of all local agreements had no fixed expiration date. By 1991, few, if any, local agreements, other than that at issue here, have no fixed expiration date.

11. The parties did not discuss the terms of any extension agreement during the bargaining summarized above. Both Frisch and Thompson believe that the parties' conduct between 1981 and the 1986-88 negotiations and the duration clause of the Local Agreement preclude the unilateral termination of the Local Agreement. From 1981 through July 30, 1988, OCI the State, and the Union processed grievances questioning the application of the Local Agreement. Such grievances were processed under the provisions of the grievance procedure contained in the Master Agreement, up to and including the step providing for grievance arbitration. After July 30, 1988, the parties continued to discuss such grievances, but OCI management and the State denied such grievances based on their belief that the Local Agreement was no longer in effect.

12. The parties did not expressly agree to extend the Local Agreement beyond June 30, 1987, when the 1985-87 Master Agreement expired. The parties did, by their conduct, continue to honor the Local Agreement until the State's termination of the Local Agreement effective 11:59 p.m., July 30, 1988. The extension of the Local Agreement was based on the parties' mutual conduct, and the extension did not, as a result, have any terms. The extension agreement could be terminated by either party discontinuing its conduct honoring the terms of the Local Agreement beyond June 30, 1987. While the Local Agreement was in effect by its terms, or by the parties' mutual conduct in honoring its terms after June 30, 1987, the grievance/arbitration procedure of the Master Agreement was available to enforce the Local Agreement.

CONCLUSIONS OF LAW

1. Conclusions of Law 1 and 2 from State of Wisconsin, and Oakhill Correctional Institution, Dec. No. 25978-A (McLaughlin, 12/89), aff'd Dec. No. 25978-B (WERC, 7/90) are, by this conclusion, incorporated into this decision.

2. The State's refusal to honor the terms of the Local Agreement regarding events after 11:59 p.m., July 30, 1988, does not constitute a violation of Sec. 111.84(1)(e), Stats.

ORDER 1/

The complaint filed on January 6, 1989, and its subsequent amendments, are dismissed.

Dated at Madison, Wisconsin this 24th day of October, 1991.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Richard B. McLaughlin, Examiner

(See footnote 1/ on page 11)

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.

MEMORANDUM ACCOMPANYING
FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

BACKGROUND

The Commission's remand established that the sole statutory provision left at issue is Sec. 111.84(1)(e), Stats. The Commission concluded that the Local Agreement was a "collective bargaining agreement" within the meaning of Sec. 111.84(1)(e), Stats., and that the Local Agreement could be enforced under that section if it had not been terminated and if grievance arbitration under the Master Agreement was not available to enforce its terms.

The parties' view of the facts requiring hearing, and the procedure for adducing those facts, varied widely following the remand. This dispute was resolved by the issuance of the October 30, 1990, letter, which confirmed the Commission's agreement with Haas' letter of October 5, 1990. That letter establishes four questions, discussed below, as the essence of the remand.

THE PARTIES' POSITIONS

The Union's Initial Brief

The Union initially notes that the ultimate facts and the issues posed on those facts are not in dispute. In support of its contention that the State has violated the law, the Union argues that the "Agreement, by its terms, explicitly continues in full force and effect" until a new local agreement has been negotiated. This conclusion, the Union argues, is consistent with Farrey's September 15, 1986, letter to Thompson, and with the "past practice or history between the parties". More specifically, the Union asserts that of the "literally hundreds" of local agreements, the one at issue here "is the first and only time that a locally negotiated Agreement was unilaterally repudiated by the Employer." That the State participated in grievance arbitration of the local agreement in 1979, 1981 and in 1984 underscores, according to the Union, that the parties mutually understood the local agreement to continue in full force and effect.

Noting that the Master Agreement provides for advisory arbitration, the Union asserts that Commission case law requires this procedure to be exhausted before the unilateral repudiation of a local agreement. This conclusion, the Union urges, "is totally consistent with the fact that a master Collective Bargaining Agreement was in full force and effect" at all times relevant to this proceeding.

Viewing the record as a whole the Union concludes:

> The parties bilateral conduct in interpreting the questioned language is highly probative . . . Both the Union and the State considered the Local Agreement in full force and effect through, at least, July 29, 1988. At that time it was subsequently extended by operation of law. It is still in full force and effect.
>
> The Local Agreement was extended by operation of law when the 1985-87 master Collective Bargaining Agreement was ratified and became effective. It was extended on exactly the same terms and conditions then in effect. Neither party to a bilateral agreement can/could

> terminate same. The agreement to arbitrate is judicially enforceable in those proceedings.

The State's Initial Brief

Noting that Sec. 111.84(1)(e), Stats., is the sole remaining unfair labor practice alleged, the State urges that "before a violation of s. 111.84(1)(e) can be found in relation to a local agreement, there must first be a determination that the local agreement at issue was in effect, and enforceable, at the time of the alleged violation." Because "the local agreement was not in effect on July 30, 1988, it was not enforceable", according to the State. It follows from this, the State contends, that "the State's actions in terminating the local agreement and reverting to the Master contract . . . did not constitute a violation of s. 111.84(1)(e), Stats.

The State notes that four fundamental issues are posed on remand, the first of which is whether the parties agreed to extend the local agreement beyond June 30, 1987. A review of the record establishes, according to the State, that "(t)here was no clear mutual agreement on the part of Local 3021 and Oakhill management to extend the local agreement beyond 6/30/87." More specifically, the State asserts that no Union representative could specifically recall such an extension, but simply assumed the agreement would be continued. A review of the record demonstrates, according to the State, that the Union was specifically advised by the State before, and at, the commencement of negotiations on the local agreement in September of 1986, that "local agreements expire with the Master, unless a new local agreement was negotiated before then." The local negotiations proved, however, unexpectedly protracted, and the State acknowledges that "management decided to continue to operate under the existing local agreement (beyond June 30, 1987) for the sake of consistency and to cause as little disruption as possible." The State asserts that this extension was unilateral, and based on the assumption that a new local agreement could be negotiated. Such a tentative agreement was reached in March of 1988, but was not ratified by the Union. This rejection, the State asserts, prompted the State to "cease operating under the expired local agreement, and to revert to the 1987-89 Master agreement." In June and July of 1988, the State directly notified the Union that an impasse had been reached in local negotiations, and it follows, according to the State, that this action effectively terminated the Local Agreement. Because there was no agreement in effect, there can be no violation of the agreement, the State concludes.

This conclusion dictates the answer to the second remand issue, according to the State, for there can be no terms of an extension agreement which was never made.

The third remand issue questions whether "the extension agreement (could) be terminated unilaterally by either party", and the State argues that the parties reached no express understanding on this point. The record does establish, according to the State, that either party could have terminated the agreement in June and July of 1988.

The final remand issue questions whether the "grievance/arbitration procedure (is) available to enforce the local agreement?" While reserving its position that there has been no formal extension agreement, the State notes that it did arbitrate claims concerning the local agreement under the Master Agreement's grievance procedure through July of 1988. After that point, the State notes that grievances regarding the local agreement "were denied on the basis that the local agreement was no longer in effect." Contending that the "Commission has held that if the local agreement was enforceable through . . . the Master contract, then s. 111.84(1)(e) proceedings are not available to the union", the State concludes that it necessarily follows that "s. 111.84(1)(e)

proceedings are not available to the Complainant Union in this case."

Viewing the record as a whole, the State concludes no violation of Sec. 111.84(1)(e), Stats., has been proven.

The Union's Reply Brief

The Union initiates its reply brief by noting that the record establishes only that a series of State witnesses who were not "part of the original negotiating team that consummated the Local Agreement" gratuitously offered their opinion that the local agreement could not be extended indefinitely, but terminated with the Master Agreement. The Union argues that in spite of the opinions of the testifying witnesses, Oakhill management chose, on its own motion, to unilaterally terminate the local agreement on July 30, 1988. That the Department of Employment Relations was silent on this matter is, the Union asserts, "conspicuous". More significant to the Union is the fact that the repudiation "occurred during the term of a M(aster) A(greement)". This fact, the Union asserts, essentially establishes the alleged violation, for the Commission's remand decision noted that:

> (L)ocal agreements of unspecified duration acquire a duration consistent with the master contract and remain in force and effect for the term of the next master contract unless the local agreement itself gives the parties the option of modifying or terminating the agreement prior to the master contract's expiration.

This conclusion establishes, according to the Union, that the State's repudiation of the Local Agreement during the effective term of a Master Agreement constitutes a violation of Sec. 111.84(1)(e), Stats.

The State's Reply Brief

The State contends that the Commission's remand decision specifically rejected the Union's assertion that "when the legislature ratified the new 1987-89 Master Agreement on November 6, 1987, new life was breathed into the existing 1981 local agreement." It follows, the State contends, that this issue is not posed here, and that the remand must focus on the four issues noted above. More specifically, the State contends that the fundamental issue is whether "the parties bilaterally agreed to extend the local agreement beyond June 30, 1987". The record establishes, the State avers, that no such agreement occurred.

That the State arbitrated local agreement issues in 1979, 1983 and 1984 establishes only that "the 1981 Local Agreement was in effect at the time of those decisions", according to the State. Since "there is no argument on that point" it follows, the State concludes, that these decisions are irrelevant, and the essential issue remains: "(W)hat happened after 6/30/87?"

Because "the terms of (the) Local Agreement were in dispute when the legislature ratified the new Master Agreement for 1987-89, that ratification effort did not implicitly extend the 1981 Local Agreement", the State argues. From this it follows, according to the State, that the Local Agreement was not in effect on June 30, 1988, and that there can have been no violation of the agreement or of Sec. 111.84(1)(e), Stats.

DISCUSSION

I.

Did The Parties Agree To Extend The Local Agreement Beyond June 30, 1987 (When The 85-87 Master Agreement Expired)?

As preface to an examination of the evidence on this point, it is necessary to address the Union's contention that the implicit "approval process" noted by the Commission establishes that when the Legislature approved the 1987-89 Master Agreement, the Local Agreement was "resurrected and continued". The Commission's remand decision will not support this assertion:

> Under our analytical framework set forth above and contrary to the Complainant's argument herein, legislative approval of the 1987-89 Master Agreement did not constitute implicit approval of the Local Agreement for 1987-89 because the terms of said Agreement were being disputed by the parties at the time legislative approval occurred.

In the spring of 1986, OCI management put the terms of the Local Agreement in dispute. That dispute has yet to be resolved, and its existence at the time of the Legislature's approval of the 1987-89 Master Agreement precludes an implicit extension of the Local Agreement under the Commission's decision.

The Commission's remand focused on the fact that Farrey's July 11, 1988, memo noted the extension of the Local Agreement beyond June 30, 1987. Because the Commission viewed the extension to require "some bilateral agreement" and because the terms of any such agreement "have a direct impact on whether the State could terminate the Local Agreement", the Commission ordered the remand which focuses on the existence of a bilateral agreement as the threshold issue.

The record does not establish the existence of "some bilateral agreement" to extend the Local Agreement beyond June 30, 1987. The parties never openly discussed such an extension. Thompson, Frisch and Smick each testified that the parties never openly discussed the effect on the Local Agreement of the June 30, 1987, expiration of the Master Agreement.

There was, then, no bilateral agreement to extend the Local Agreement beyond June 30, 1987. Rather, the record establishes that neither party effectively acted to terminate the Local Agreement until July 30, 1988. Smick advised the Union as early as March 19, 1986, that OCI management considered the Local Agreement to have no greater a duration than the Master, but that OCI management would continue to honor the Local Agreement to assist in the negotiation of a successor. Thompson's letter of September 12, 1986, put an odd twist on the stated position of OCI management by stating the repudiation Smick's earlier correspondence had hinted at. Farrey's September 15, 1986, response backed off the earlier position stated by Smick, and asserted the position ultimately adopted by the Union. Thompson did not, however, pursue the repudiation stated by his September 12, 1986, memo, and the parties never reached an agreement that the Local Agreement would be continued indefinitely.

Nor will the record offer a persuasive basis to infer an indefinite extension agreement based on the parties' conduct. By Smick's October 24, 1986, letter, OCI was again taking the position that it might terminate the Local Agreement. At the Labor-Management meeting in April of 1987, Smick specifically detailed to the Union the options that OCI management believed it had available to it regarding the Local Agreement's expiration. Continuing the old Local Agreement was one of four options.

The negotiations from April of 1987 through July of 1988 continued the process by which the parties continued to honor the Local Agreement in the hope that doing so would facilitate reaching agreement on a successor. This

continuation was not, however, based on an express understanding. Rather, each party, for their own reasons, chose not to complicate the protracted local negotiations with the repudiation of the Local Agreement.

The Union's rejection of a proposed successor to the Local Agreement in March of 1988 changed the course of the negotiations. From that point on, agreement on a successor became increasingly unlikely, and by July 11, 1988, the State, through Farrey, informed the Union that impasse had been reached and that it would terminate the Local Agreement at the end of July.

This review of the evidence points out that the first remand issue poses a direct question which can not be evaluated against a similarly direct record. The parties were, of necessity, unaware of the "approval process" articulated by the Commission as a legal doctrine well after the conclusion of the negotiations giving rise to this complaint. As a result, neither party's conduct regarding the expiration date of the Local Agreement is entirely consistent. Rather, each party's position shifted with their interests in the unexpectedly protracted negotiations.

Whatever may be said of the parties' conflicting views of the duration of the Local Agreement, it is apparent that the parties never reached a bilateral agreement to extend the Local Agreement beyond June 30, 1987. At most, the parties, by their conduct until July 30, 1988, "agreed not to end the agreement." 2/

II.

If So, What Were The Terms Of The Extension Agreement?

This question makes evident that the remand seeks the "bilateral agreement" the Commission sought "the terms" of. As discussed above, no such bilateral agreement ever occurred. As a result, there are no terms to the agreement. Frisch and Thompson both acknowledged this fact in their testimony.

III.

Could The Extension Agreement Be Terminated Unilaterally By Either Party?

There was no bilateral agreement. The agreement thus had no terms. From this it must follow that there were no terms governing the termination of the extension agreement.

Frisch and Thompson each testified that the Local Agreement could not be terminated unilaterally. They did not, however, base this view on the terms of an extension agreement, but on "the last paragraph in the local agreement" 3/ and "past practice". 4/

This view has some support in the remand decision. The Commission stated its implicit renewal process made the Local Agreement "not a contract of

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2/ Testimony of Donald Frisch: Transcript (Tr.) at 13.

3/ Tr. at 14. Confirmed by Thompson, Tr. at 22.

4/ Tr. at 24; see Tr. at 14 for Frisch's confirmation of the point.

unlimited indefinite duration . . . but instead a contract whose duration would mirror that of the Master Agreement unless the parties exercise of their rights under the Local Agreement produced a different result."

The duration clause cited by Frisch and Thompson can not, however, be the source of the rights the Union asserts, since the Commission unequivocally stated: "the Local Agreement expired on June 30, 1987". Since, as noted above, the parties did not enter into any extension agreement to supplement the effect of the duration clause from the Local Agreement, that clause can not be given the indefinite duration asserted in Frisch's and Thompson's testimony without contradicting the Commission's conclusion in the remand decision. 5/ The Union's assertion that the terms of the Local Agreement or any past practice can preclude the unilateral termination of the Local Agreement must, then, be rejected.

In sum, the Commission's remand decision established that the Local Agreement was a collective bargaining agreement, within the meaning of Sec. 111.84(1)(e), Stats., which expired on June 30, 1987, "unless the parties exercise of their rights under the Local Agreement produced a different result." The parties never expressly agreed to extend the Local Agreement beyond that date, but each mutually continued to honor the agreement, for their own reasons, until the State terminated the Local Agreement effective July 30, 1988. The sole basis for the extension of the Local Agreement was the parties' shared conduct in honoring its terms. When that conduct was no longer shared, the agreement lost whatever binding contractual force it had. Either party could, then, terminate the Local Agreement at any time after June 30, 1987.

IV.

If There Was An Agreement To Extend The Local Agreement, Is The Grievance/Arbitration Procedure Available To Enforce That Local Agreement?

As noted above, there was no formal agreement to extend the Local Agreement. While the parties, by conduct, continued to honor the Local Agreement after June 30, 1987, the grievance/arbitration procedure of the Master Agreement was available to enforce the Local Agreement. This changed after the State's termination of the Local Agreement. From that point on, the State would discuss grievances regarding conditions at Oakhill, but would not agree to submit such grievances to arbitration regarding the enforcement of the Local Agreement, which the State viewed as no longer in effect. Thus, the record establishes, at a minimum, that while the Local Agreement was in effect, the grievance procedure of the Master Agreement was available to enforce its terms.

The Commission's original, and supplemented, remand decision imply that the record may pose an issue regarding whether the Local Agreement has some binding effect beyond July 30, 1988. The Commission, in its supplement to the remand decision, stated the Union's arguments thus:

> The Complainant Union apparently contends that under the duration language quoted above, the advisory arbitration language in the 1987-89 Master Agreement,

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5/ See also Dec. No. 25978-A at Footnote 5/ and related text. The indefinite duration clause asserted by the Union is inconsistent with Secs. 111.92(3) and (4), Stats., and with relevant Commission case law. To the extent a contract of indefinite extension is created by law, the policy issue of how meaningful bargaining can occur in the absence of either party's ability to terminate the agreement must be addressed.

> and any extension agreement, Respondent State was obligated to honor the terms of the Local Agreement beyond July 30, 1988.

This statement implies the Union has posed a line of argument which, if accepted, could preclude the State's termination of the Local Agreement. The Commission's original remand decision, after a summary of the Union's and the State's arguments, stated "(o)ur remand will allow the parties to present facts and/or further argument to the Examiner as how this difference of opinion between the parties should be resolved". This statement obligates a response on this remand as to the arguments posed.

Two of the three bases of Union argument summarized by the Commission have been addressed -- the "duration language" and "any extension agreement". The final basis concerns "the advisory arbitration language in the 1987-89 Master Agreement". The Union has, in its brief, made a related argument based on the principles of City of Brookfield. 6/

The Union's assertion is that the State could not unilaterally terminate the Local Agreement without first exhausting the advisory arbitration process, and alternatively that the State lacks the authority to unilaterally terminate the Local Agreement under the principles of Brookfield.

The Union's arguments question the scope of the State's duty to bargain, and can not be reached here, since the alleged violation of Sec. 111.84(1)(d), Stats., has been dismissed.

More specifically, the existence of advisory arbitration is irrelevant to the jurisdictional point posed here. The issue posed here is the enforceability of the Local Agreement as a matter of contract under Sec. 111.84(1)(e), Stats. Under that section, only a "collective bargaining agreement previously agreed upon" can be enforced. A bargaining party can not be compelled through arbitration, or under Sec. 111.84(1)(e), Stats., to assume an obligation never bargained for. 7/ The "previously agreed upon" reference thus can not be read to bind the parties to any agreement, without regard to its bargained, or statutorily imposed, effective dates. 8/ Whether the Local Agreement, in light of the July 11, 1988, letter, and the State's ultimate termination of it, can continue to constitute an agreement enforceable through Sec. 111.84(1)(e), Stats., is, then, a jurisdictional issue. No decision reached through the advisory arbitration provisions of the Master Agreement, as a matter of contract, regarding the enforceability of the Local Agreement can bind the Commission, as a matter of law. 9/

6/ Dec. No. 19822-C (WERC, 11/84).

7/ This principle underlies the enforcement of agreements to arbitrate. See, generally, United Steelworkers v. Warrior & Gulf Navigation Co., 363 US 574; 46 LRRM 2416 (1960). The principles of this and the remaining parts of the "Steelworkers Trilogy", regarding the determination of arbitrability, were adopted by the Wisconsin Supreme Court in Dehnart v. Waukesha Brewing Co., Inc., 17 Wis2d. 44 (1962).

8/ See, for example, Racine Unified School District, Dec. No. 24272-B (WERC, 3/88). The "previously agreed upon" reference also appears in Sec. 111.70(3)(a)5, Stats.

9/ Issues of substantive arbitrability are issues of law. See, generally, Jt. School Dist. No. 10 v. Jefferson Education Association, 78 Wis2d. 94 (1977).

Assuming the converse would not change the result here. If the advisory arbitration could bind the Commission regarding the enforceability of the Local Agreement, then no enforcement of the Local Agreement is available through Sec. 111.84(1)(e), Stats., in light of Footnote 3/ of the Commission's remand decision.

Nor can the Union's citation of Brookfield be considered persuasive. That decision concerned a municipal employer's right to unilaterally implement its final offer in a contract hiatus governed by Sec. 111.70(4)(cm), Stats. That decision is, at best, analogous authority here, since the Legislature has chosen not to apply the interest arbitration process to employes governed by the SELRA. More to the point, Brookfield did not address issues of contract enforcement, but of an employer's duty to maintain certain terms and conditions of employment as a matter of law under the statutory duty to bargain. No such issues have been posed in this litigation. In the initial action, the Union unsuccessfully alleged that no contract hiatus had occurred due to the language of the Local Agreement's duration clause and the action of the Legislature in approving Master Agreements. Because of this, and because no issue of bad faith bargaining was posed, the initial and the remand decision dismissed any allegation under Sec. 111.84(1)(d), Stats.

What the State's rights may be to unilaterally implement changes in terms and conditions of employment in a contract hiatus must be left to be addressed on appropriate facts. In this case, the issue posed is whether a bargaining party can withdraw from an expired agreement. This record poses no apparent issue regarding a contract hiatus. In fact, the parties' conduct regarding the termination of the Local Agreement shows, on the present record, agreement on the effect of the termination of the Local Agreement. When the Union proposed to terminate the Local Agreement, it proposed a reversion to the Master Agreement. While the State considered several options, the option it ultimately selected was a reversion to the Master Agreement. This record will not, then, support a more general inquiry into the nature and extent of OCI management's ability to unilaterally change conditions of employment in the absence of an effective local agreement.

Because the record establishes that there was no Local Agreement in effect after July 30, 1988, there can be no Sec. 111.84(1)(e), Stats., action to enforce that agreement. The complaint has, therefore, been dismissed.

Dated at Madison, Wisconsin this 24th day of October, 1991.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Richard B. McLaughlin, Examiner