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, vs. STATE OF WISCONSIN, and OAKHILL CORRECTIONAL INSTITUTION, Respondents.	Case 263 No. 41528 PP(S)-151 Decision No. 25978-D

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. Teal 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.

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

Examiner Richard B. McLaughlin having, on December 6, 1989, issued Findings of Fact, Conclusions of Law and Order, with Accompanying Memorandum, in the above matter wherein he dismissed the above-captioned complaint pursuant to Respondents' Motion for Summary Judgment based upon his Conclusion of Law that:

> 3. 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 Secs. 111.84(1)(a), (d) or (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 not raise any factual or legal issue remediable under Secs. 111.84(1)(a), (d) or (e), Stats. and Complainants having timely filed a petition with the Commission seeking review of the Examiner's decision pursuant to Secs. 111.07(5) and 111.84(4), Stats.; and the parties having submitted written argument in support of and in opposition to the petition, the last of which was received on February 12, 1990; and the Commission having considered the matter and affirmed the Examiner's dismissal of the alleged violation of Sec. 111.84(1)(d), Stats., but having reversed his dismissal of the alleged violation of Sec. 111.84(1)(e), Stats., and remanded this complaint allegation to the Examiner for further proceedings; and, pursuant to the Commission's remand, the Examiner having conducted further hearing in Madison, Wisconsin, on May 29, 1991; and the parties thereafter having filed briefs and reply briefs with the Examiner by September 13, 1991; and the Examiner having on October 24, 1991, issued Findings of Fact, Conclusions of Law and Order, wherein he concluded that the Respondent State's termination of the Local Agreement did not violate Sec. 111.84(1)(e), Stats.; and Complainants having timely filed a petition with the Commission seeking review of the Examiner's decision pursuant to Secs. 111.07(5) and 111.84(4), Stats.; and the parties thereafter having submitted written argument in support of and in opposition to the petition, the last of which was received on December 30, 1991; and the Commission having considered the matter and being fully advised in the premises, makes and issues the following

ORDER 1/

The Examiner's Findings of Fact, Conclusions of Law and Order are affirmed.

Given under our hands and seal at the City of Madison, Wisconsin this 12th day of February, 1992.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Herman Torosian
Herman Torosian, Commissioner

William K. Strycker /s/
William K. Strycker, Commissioner

Chairman A. Henry Hempe did not participate.

1/ See footnote on Pages 3 and 4.

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 therefor 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 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

(footnote continued on Page 4.)

1/ (footnote continued from Page 3.)

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.

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

The procedural history of this case has already been recited. At this juncture, there remains for our review the question of whether the Examiner properly dismissed the Complainants' allegation that the Respondent State violated Sec. 111.84(1)(e), Stats., when it ceased to honor a Local Agreement.

When remanding the Sec. 111.84(1)(e), Stats., allegation to the Examiner, we commented:

> It is undisputed that the Legislature can and does approve tentative master agreements which by their terms authorize the negotiation of local agreements by labor and management representatives in various State departments or agencies.
>
> What is disputed between the parties in the context of Respondent State's Motion for Summary Judgment is whether this specific Local Agreement can be enforced through Sec. 111.84(1)(e), Stats.
>
> The Local Agreement in question was originally bargained by the parties in 1981, last amended in October 1983, and unilaterally terminated by Respondents in July 1988. The Local Agreement has no stated expiration date but provides:
>
> > Either party may initiate negotiations of proposed additions, deletions or changes to this contract by giving notice of their intent at the regular Labor/Management meetings.
> >
> > This Agreement shall extend until a new local contract between the two (2) parties has been negotiated.
>
> The Complainants argued to the Examiner that in July 1988, the Local Agreement was enforceable under Sec. 111.84(1)(e), Stats., because each fiscal biennium when the Legislature approved a new master collective bargaining agreement between the parties, the Legislature also renewed the Local Agreement in question. Thus, the Complainants asserted that when the Legislature approved the parties' November 6, 1987 to June 30, 1989 master collective bargaining agreement, the Local Agreement was renewed until June 30, 1989 unless the parties' Local Agreement negotiations produced a new Local Agreement.

The Examiner rejected Complainants' argument in this regard concluding:

> The Union's assertion that the Legislature's approval of the Master Agreement 'breathed . . . new life' into the Local Agreement can not (sic) be accepted. The Legislature approved the language of the Master Agreement, which, as noted above, generally authorizes negotiations on the local level, but does not expressly effect (sic) any specific local agree-ment. The Union has not demonstrated how the Legislature's action regarding the Master Agreement can be viewed to make effective the specific terms of the Local Agreement.

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. 2/ 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 (sic) exercise of their rights under the Local Agreement produced a different result. In September 1986, during

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2/ In its July 1988 memo to Complainants, Respondents appear to have adopted a position consistent with this analysis. Thus, although the Local Agreement was last amended in October 1983, the Respondents nonetheless asserted that the Local Agreement was in effect during the term of the 1985-1987 Master Agreement.

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. 3/ 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 agreement, Respondent State was obligated to honor 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.

3/ If the Local Agreement is determined to be enforceable through the grievance/arbitration provisions of the Master Contract, then Sec. 111.84(1)(e) proceedings are unavailable to the Union. Absent agreement of the parties or repudiation by one of the parties of the grievance/ arbitration process, the Commission will not exercise its Sec. 111.84(1)(e) jurisdiction over a complaint filed by a party to the contract where a contractual mechanism for resolution of contract compliance issues exists. State of Wisconsin, Dec. No. 20830-B (WERC, 8/85).

At the request of the Examiner, during the remand procedure we confirmed that the issues to be resolved were as follows:

1. Did the parties agree to extend the Local Agreement beyond June 30, 1987 (when the 1985-87 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?

The Examiner's decision contains the following Finding of Fact which reflects his determinations as to the four issues noted above:

> 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 Agree-ment.

In his Memorandum, the Examiner summarized his views on the first three issues on remand as follows:

> 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.

As to the issue regarding the availability of grievance/arbitration to enforce the Local Agreement, the Examiner, as reflected in his Finding of Fact 12, concluded that while the Local Agreement was in effect, the grievance procedure of the Master Agreement was available to enforce its terms.

As to the Union argument that the Local Agreement was extended by operation of the advisory arbitration process contained in the 1987-89 Master Agreement, the Examiner concluded that this argument was relevant only to the scope of the Respondent State's duty to bargain, not the alleged violation of Sec. 111.84(1)(e), Stats. Thus, he rejected same. For the same reason, the Examiner rejected Complainant's assertion that a City of Brookfield 2/ analysis was applicable.

POSITIONS OF THE PARTIES:

On review, Complainants argue that the Examiner erred when he rejected Complainants' argument that Respondents could not unilaterally repudiate the Local Agreement without having first exhausted the advisory arbitration procedure contained in the Master Agreement. Complainants further argue that the dismissal of the violation of contract allegation is at odds with the duration language of the Local Agreement which stated that:

> This agreement shall extend until a new local contract between the two (2) parties has been negotiated.

In this regard, Complainants argue that when the Local Agreement was repudiated by the State, a new Local Agreement had not been negotiated.

Given the foregoing, Complainants asked that the Commission reverse the Examiner and find a violation of Sec. 111.84(1)(e), Stats.

Respondents urge the Commission to affirm the Examiner. Respondents contend that the Examiner correctly concluded that there was no bilateral agreement to extend the Local Agreement beyond June 30, 1987; that there was no basis to infer an indefinite extension of the Local Agreement based upon the parties' conduct; that there were no terms to any extension agreement, since there was no such agreement; and that there was therefore no violation of Sec. 111.84(1)(e), Stats., by the Respondent.

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

Respondents contend that the Complainants' advisory arbitration assertions are outside the scope of the issues on remand and were properly viewed as irrelevant by the Examiner. Even if the issue of advisory arbitration were relevant, Respondents argue that this procedure was available to the Complainants to the same extent that it was available to the Respondents. Respondents assert that the Complainants chose not to utilize the advisory arbitration process. As to the Complainants' Brookfield arguments, Respondents assert that Brookfield is inapplicable because it involves specific statutory provisions not applicable to the parties' dispute herein.

Given the foregoing, the Respondents urge the Commission to affirm the Examiner.

DISCUSSION:

Section 111.84(1)(e), Stats., prohibits the Respondent State from violating "any collective bargaining agreement previously agreed upon" with Complainants. For Complainants to prevail under Sec. 111.84(1)(e), Stats., in the context of this case, they must establish that Respondents had a contractual obligation to continue to honor the Local Agreement beyond June 30, 1988.

In our remand decision, we determined that the Local Agreement had a duration consistent with that of the 1985-1987 Master Agreement which authorized its existence unless modified or terminated by the parties' exercise of rights under the Local Agreement. In reaching that determination, we concluded that in the context of Secs. 111.92(3) and (4), Stats., and the biennial legislative approval of the Master Agreement, the language in the Local Agreement which stated:

> This Agreement shall extend until a new local contract between the two (2) parties has been negotiated.

should not be interpreted as creating a contract of indefinite unlimited duration. On review, Complainants again cite the above-quoted language, arguing that because no new Local Agreement had been negotiated by June 30, 1988, the existing Local Agreement was still in effect. We reaffirm our prior conclusion and thus again reject Complainants' argument that said language imposed a contractual obligation on the Respondent State to honor the Local Agreement beyond June 30, 1987.

On review, Complainants also argue that because the Master Agreement contains an advisory arbitration clause applicable to local agreements, 3/ Respondents could not repudiate the Local Agreement in question at least until the arbitration process had been utilized. As noted by the Examiner, to the extent Complainants' argument is premised upon Respondents' obligations during a contractual hiatus, 4/ said arguments are only relevant to a duty to bargain allegation, 5/ not to the violation of contract claim before us. To the extent Complainants' argument asserts a claim that the existence of advisory arbitration extends the term of the Local Agreement, it is rejected. As discussed earlier herein, within the context of biennial ratification and Secs. 111.92(3) and (4), Stats., we have concluded that the Local Agreement expired June 30, 1987. Nothing in the advisory arbitration language of the Master Agreement persuades us that this conclusion is incorrect. While the arbitration language provides either party with an additional tool to utilize when bargaining a new agreement, the presence of the process (which neither side utilized herein) does not serve to extend the term of the existing Local Agreement.

Given the foregoing, we have concluded that neither the terms of the Local Agreement itself nor the presence of advisory arbitration served to extend the Local Agreement beyond June 30, 1987. However, there remains the question of whether the parties had a separate extension agreement which gave the Local Agreement a continued contractual existence after June 30, 1987. We remanded the Sec. 111.84(1)(e) violation of contract allegation to the Examiner because the facts pled in the complaint could be viewed as establishing such an agreement by the parties. The potential for an extension

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3/ The advisory arbitration language states:

> (9A)(SPS) Negotiate hours of work, work schedules, overtime assignments and the procedures for the administrative investigation of citizen complaints. In the event no agreement is reached, either party may appeal to arbitration pursuant to the procedures of Article IV, Section 2, step Four except that the decision of the arbitrator shall be advisory. If the advisory award is not implemented by local management, a representative of the department, a representative of the Department of Employment Relations, and a representative of the Wisconsin State Employees Union, District Council 24, will meet to discuss the implementation of the award.

4/ In the context of this litigation, Complainants have not asserted that any contractual hiatus existed.

5/ Because we have no duty to bargain allegation before us, we, like the Examiner, find it unnecessary to determine whether our analysis in City of Brookfield, Dec. No. 19822-C (WERC, 11/84) has any application herein.

agreement in turn raised the possibility that, pursuant to such an agreement, the Local Agreement was still in effect when the Respondent State ceased to honor same on June 30, 1988. Thus, we were persuaded Complainants were entitled to an opportunity to establish the existence of an extension agreement through an evidentiary hearing.

After conducting an evidentiary hearing, the Examiner determined that no extension agreement existed. Instead, he determined that the parties had simply found it in their mutual interest to continue to honor the terms of the Local Agreement after its expiration on June 30, 1987. Under such circumstances, he concluded that Respondent State did not violate the Local Agreement when it unilaterally ceased to honor its terms on June 30, 1988.

We affirm the Examiner's determination. There was no written or verbal extension agreement. At best, Complainants could argue the parties shared an assumption that the Local Agreement remained in effect and that this shared assumption should translate into an extension agreement. However, as found by the Examiner, the record establishes only that the parties continued to honor the terms of the Local Agreement because such conduct best suited their specific interests, not because they assumed the Agreement had been extended.

Given the foregoing, we conclude that Respondents were not contractually obligated to honor the Local Agreement on or after June 30, 1988. Thus, we affirm the Examiner's conclusion that when Respondents ceased to honor the terms of the Local Agreement, no violation of Sec. 111.84(1)(e), Stats., occurred.

Dated at Madison, Wisconsin this 12th day of February, 1992.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Herman Torosian /s/
Herman Torosian, Commissioner

William K. Strycker /s/
William K. Strycker, Commissioner

Chairman A. Henry Hempe did not participate.