STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of CITY OF BROOKFIELD To Initiate Final and Binding Arbitration Between Said Petitioner and BROOKFIELD PROFESSIONAL FIREFIGHTERS ASSOCIATION, LOCAL 2051, IAFF, AFL-CIO	Case 72 No. 42187 MIA-1431 Decision No. 26243

Appearances:

Mr. Roger E. Walsh, Lindner & Marsack, S.C., Attorneys at Law, 411 East Wisconsin Avenue, Milwaukee, Wisconsin 53202, appearing on behalf of the City.

Mr. Timothy E. Hawks, Shneidman, Myers, Dowling & Blumenfield, Attorneys at Law, P.O. Box 442, Milwaukee, Wisconsin 53201-0442, appearing on behalf of the Union.

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

On January 26, 1987, the Brookfield Professional Firefighters Association, Local 2051, IAFF, AFL-CIO, filed with the Commission a petition alleging that Local 2051 and the City had reached a collective bargaining impasse in their fire fighter unit on wages, hours and conditions of employment to be incorporated in a 1987-88 collective bargaining agreement, and requesting the Commission to proceed under its authority under Sec. 111.77, Stats., to conduct an investigation and to certify the results thereof and to determine whether final and binding arbitration under Sec. 111.77(4)(b), Stats. should be initiated.

During the course of the Commission's investigation, the parties resolved all but one issue as to which the City submitted a timely objection that the subject--City contributions toward health insurance benefits for employes who retire--was not a mandatory subject of bargaining. No further processing of the interest arbitration petition was undertaken during the pendency of the declaratory ruling proceeding before the Commission.

On June 10, 1988, the Commission issued a declaratory ruling (Dec. No. 25517) holding that the Union's proposal was a mandatory subject of bargaining. The City appealed that declaratory ruling to Waukesha County Circuit Court. On December 21, 1988, Circuit Judge Zick affirmed the Commission's decision. The City subsequently appealed Judge Zick's Order to the Court of Appeals. On November 8, 1989, the Court of Appeals, District II, affirmed Judge Zick (Case 89-0345, publication recommended).

In its written response to the Commission investigator's efforts to resume the investigation following the Commission's issuance of the above-noted declaratory ruling, the City requested that the interest arbitration proceeding be stayed pending the final resolution of the City's appeal of the Commission's declaratory ruling. On January 10, 1989, the Commission issued an Order denying the City's request and directing the City to submit a final offer to the Commission's investigator.

On February 3, 1989, the City submitted a final offer dated January 31, 1989. By letter dated February 17, 1989, the Union advised the Commission's investigator that it objected to the City's January 31 offer as being outside the scope of the issue the parties had agreed to arbitrate. On August 4, 1989, the Commission issued a decision directing the City to submit a new final offer (Dec. No. 25517).

On May 16, 1989, during the pendency of the foregoing proceedings, the City filed an interest arbitration petition pursuant to Sec. 111.77, Stats., as to the parties negotiations over a 1989-90 agreement. During the course of the Commission's investigation of the City's petition, Local 2051 advised the City that the Union did not wish to proceed further with the investigation of the City's petition or submit a final offer for a 1989-90 agreement until the interest arbitration proceeding as to the 1987-88 contract was complete. On June 20, 1989, the City then filed a Motion to Compel the Union to Immediately Proceed Further in Investigation and to Submit a Final Offer. Hearing on the Motion was held in Brookfield, Wisconsin, on July 7, 1989 before Examiner Peter G. Davis. A post-hearing briefing schedule was completed on September 19, 1989. Having considered the matter being fully advised in the premises, the Commission makes and issues the following

FINDINGS OF FACT

1. That the City of Brookfield, herein the City, is a municipal employer having its principal offices at 2000 North Calhoun Road, Brookfield, Wisconsin 53005; and that among its functions the City operates a Fire Department.

2. That the Brookfield Professional Firefighters Association, herein the Union, is a labor organization which functions as the collective bargaining representative of certain individuals employed by the City in the Fire Department and has its principal offices at 118 North Avenue, Hartland, Wisconsin 53029.

3. That at all time material herein, an interest arbitration petition filed by the Union on January 26, 1987 pursuant to Sec. 111.77, Stats., regarding negotiations for the 1987-88 agreement has been pending with the Wisconsin Employment Relations Commission; that with the assistance of the Commission Investigator Marshall L. Gratz, the parties were able to reach agreement on all matters to be included in a 1987-88 contract with the exception of an issue regarding City contributions toward health insurance benefits for employes who retire; and that this health insurance issue remains unresolved.

4. That on May 16, 1989, the City filed an interest arbitration petition with the Commission pursuant to Sec. 111.77, Stats., regarding negotiations for a 1989-90 contract between the parties; that on June 16, 1989, during a mediation session conducted by Commission Investigator Karen J. Mawhinney, the Union advised the City that it was unwilling to proceed further with the investigation or to submit a final offer until the Union's interest arbitration petition relating to the unresolved portion of the 1987-88 contract was finally resolved.

Based upon the above and foregoing Findings of Fact, the Commission makes and issues the following

CONCLUSION OF LAW

That until all portions of the parties' 1987-88 collective bargaining agreement have been established through voluntary agreement or interest arbitration award, neither party can be compelled to participate in a Sec. 111.77, Stats., interest arbitration proceeding regarding a 1989-90 collective bargaining agreement.

Based upon the above and foregoing Findings of Fact and Conclusion of Law, the Commission makes and issues the following

ORDER

That the City's Motion to Compel the Union to Immediately Proceed Further in the Investigation and to Submit a Final Offer is denied.

Given under our hands and seal at the City of Madison, Wisconsin this 21st day of November, 1989.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____

A. Henry Hempe, Chairman

Herman Torosian, Commissioner

William K. Strycker, Commissioner

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

The background and fact applicable to this case have been set forth previously herein.

POSITIONS OF THE PARTIES:

The City

The City urges the Commission to conclude that the parties are at impasse in their negotiations for a 1989-90 contract and that the Union therefore must be compelled to proceed with the investigation and submit a final offer on the issues still in dispute between the parties. The City contends that the ultimate disposition of the 1987-88 negotiations as to retiree health insurance has no bearing on the ability of the parties to formulate proposals on this and other issues in the 1989-90 bargain. The City further alleges that the 1987-88 contract will not establish a "status quo" relevant to the parties' respective burdens of proof in any interest arbitration proceeding because the 1987-88 contract has expired and no employe has retired since January 1, 1987.

The City asserts that the Commission rejected the Union's defense herein when, in Village of West Milwaukee, Dec. No. 17927-A (WERC, 9/80), the Commission found the desire to await the outcome of a related interest arbitration proceeding was not a valid basis for a claim that no impasse exists. Similarly, the City contends that if the Commission applies the rationale it used when compelling the City to proceed to interest arbitration during the pendency of the City's appeal of the Commission's declaratory ruling decision, the Union should be compelled to proceed with the investigation. Like the duration of the City appeal, the 1987-88 interest arbitration has the potential for lasting an indefinite period of time. To be consistent, the Commission should conclude that neither matter will delay the applicable arbitration proceeding.

Given the foregoing, the City asks that the Commission grant the Motion to compel the Union to proceed.

The Union

The Union urges the Commission to reject the City's Motion and conclude that the investigation should be held in abeyance pending resolution of the 1987-88 contract or, alternatively, the Union should at most be required to submit a contingent preliminary final offer until the 1987-88 dispute is resolved.

The Union contends that impasse cannot be found under the circumstances of this case because a portion of the 1987-88 contract remains unknown. Neither party is in a position to agree to continuation of the 1987-88 contract as to retiree health insurance or even to propose how the prior contract is to be amended. In the Union's view, a proposal for the 1989-90 contract is necessarily a function of the terms of the past contract. The Union believes this is true whether the matter is seen in terms of what either party believes to be an inherently reasonable contract or of what would be viewed as reasonable in the eyes of an interest arbitrator.

Lastly, the Union asserts the City is estopped from insisting that the Union proceed because the City's own conduct during the course of the 1987-88 bargain has been dilatory. The Union argues that the City should not receive the equitable relief it seeks herein and thereby be rewarded for the delay the City has caused.

Given the foregoing, the Union asks that the City's Motion be denied.

DISCUSSION:

Once again, these parties have presented us with a matter of first impression 1/ under Sec. 111.77, Stats. At issue is whether a party can be

1/ In City of Brookfield, Dec. No. 25843 (WERC, 1/89), we determined as a case of first impression ,that the investigation process under Sec. 111.77, Stats., should not be held in abeyance pending exhaustion of all appeals of a Commission declaratory ruling holding that the Union's early retirement proposal was a mandatory subject of bargaining.

compelled to participate in a Sec. 111.77, Stats., interest arbitration proceeding 2/ for a successor contract, when the terms of predecessor contract have not all been determined. We conclude that a party cannot be so compelled and thus have denied the City's Motion herein.

The City is correct when it argues that it is functionally possible for both parties to formulate final offers for a 1989-90 contract even though a portion of the 1987-88 contract remains unresolved. It is also true that Sec. 111.77, Stats., itself does not explicitly state that the predecessor contract must be resolved before a successor contract can be arbitrated. Thus, the issue before us is best viewed as one of determining whether the policies behind the Municipal Employment Relations Act are best served by compelling a party to proceed to interest arbitration despite the uncertainty produced by an unsettled predecessor agreement or by delaying an interest arbitration procedure until that uncertainty is resolved.

Section 111.70(6), Stats. provides:

> (6) DECLARATION OF POLICY. The public policy of the state as to labor disputes arising in municipal employment is to encourage voluntary settlement through the procedures of collective bargaining. Accordingly, it is in the public interest that municipal employes so desiring be given an opportunity to bargain collectively with the municipal employer through a labor organization or other representative of the employes' own choice. If such procedures fail, the parties should have available to them a fair, speedy, effective and, above all, peaceful procedure for settlement as provided in this subchapter. (emphasis added)

Clearly, the City's position herein best serves the statutorily established interest in "speed".

However, we noted in City of Brookfield, Dec. No. 25843-A (WERC, 8/89) that the terms of an existing contract establish the point from which a successor bargain commences and influence the result of any interest arbitration proceeding. We held therein as follows:

> Furthermore, even though the 1987-88 contract term has expired, the interest arbitration award will establish the point from which the ongoing 1989-90 bargain will commence as to the issue of retiree health insurance benefits. Clearly, whatever benefit level is existent after receipt of the arbitrator's award has a practical impact on the likelihood or lack thereof of the Union's seeking and/or acquiring benefits in excess of those they presently seek either at the bargaining table or through the interest arbitration process.

The foregoing reflects the reality that the collective bargaining and interest arbitration processes best function where the parties and the interest arbitrator know the terms of the predecessor contract. Both processes are at their "fairest" when there is certainty as to the terms of the predecessor agreement.

Thus, the instant case presents an instance in which the legislative interests in fairness and speed are at odds. On balance, we are persuaded that the interest in a "fair" procedure must predominate. We reach this conclusion because in our view delay is more acceptable than establishing a contract through an arbitration process surrounded by critical uncertainty.

The City correctly notes that in Village of West Milwaukee, we concluded that an employer could not successfully base a claim that no impasse exists upon a desire to await the outcome of an interest arbitration proceeding involving another bargaining unit of its employes. However, that is not the situation at issue here. Here, the unresolved interest arbitration proceeding involves the same parties and thus the same bargaining relationship. Therefore, West Milwaukee is clearly distinguishable.

Nor is our conclusion herein inconsistent with our determination in City of Brookfield, Dec. No. 25843, that interest arbitration should not be interrupted during the pendency of an appeal of a declaratory ruling. In that case, we concluded that the legislative purposes of providing a fair, speedy, effective and peaceful procedure for settlement would be inappropriately frustrated if the appeal process were allowed to delay the interest arbitration process. We reasoned in part from explicit legislative direction under

---

2/ We have not had occasion to consider this question under the interest arbitration procedures established by Sec. 111.70(4)(cm), Stats., either.

Sec. 111.70(4)(cm), Stats. that the balance between the uncertainty of an appeal and the delay caused thereby should be struck in favor of speed. Here, we have no explicit legislative direction and, in our view, the uncertainty caused by the absence of a predecessor agreement is far more significant than the uncertainty caused by appeal of a declaratory ruling.

Given the foregoing, we conclude that as a matter of necessity and elemental fairness, a party can insist that it know what a contract provides before it can be compelled to engage in a process which will produce a successor thereto. Thus, we have denied the City's Motion.

Dated at Madison, Wisconsin this 21st day of November, 1989.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
A. Henry Hempe, Chairman

_____
Herman Torosian, Commissioner

_____
William K. Strycker, Commissioner