STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

WISCONSIN PROFESSIONAL POLICE ASSOCIATION/LAW ENFORCEMENT EMPLOYEE RELATIONS DIVISION, Complainant, vs. CITY OF COLUMBUS (POLICE DEPARTMENT), Respondent.	Case 23 No. 48212 MP-2651 Decision No. 27853-B

Appearances:

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

von Briesen & Purtell, S.C., Attorneys at Law, by Mr. James R. Korom, 411 East Wisconsin Avenue, Suite 700, Milwaukee, WI 53202-4470, appearing on behalf of the City.

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

On April 20, 1994, Examiner Lionel L. Crowley issued Findings of Fact, Conclusions of Law and Order with Accompanying Memorandum in the above matter. He concluded Respondent City of Columbus had not committed prohibited practices within the meaning of Secs. 111.70(3)(a)4 and 1, Stats., by its conduct during the ratification process applicable to a tentative agreement between the City and Complainant Wisconsin Professional Police Association/Law Enforcement Employee Relations Division. He therefore dismissed the complaint.

On May 9, 1994, Complainant timely filed a petition with the Wisconsin Employment Relations Commission seeking review of the Examiner's decision pursuant to Secs. 111.70(4)(a)

and 111.07(5), Stats. The parties thereafter filed written argument in support of and in opposition to the petition, the last of which was received July 8, 1994.

Having reviewed the record, the Examiner's decision, and the positions of the parties on review, we make and issue the following:

ORDER 1/

A. Examiner Findings of Fact 1 - 2 are affirmed.

B. Examiner Finding of Fact 3 is modified by the addition of the underlined words and the deletion of the stricken-through words.

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

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

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

(a) Proceedings for review shall be instituted by serving a petition therefore personally or by certified mail upon the agency or one of its officials, and filing the petition in the office of the clerk of the circuit court for the county where the judicial review proceedings are to be held. Unless a rehearing is requested under s. 227.49, petitions for review under this paragraph shall be served and filed within 30 days after the service of the decision of the agency upon all parties under s. 227.48. If a rehearing is requested under s. 227.49, any party desiring judicial review shall serve and file a

(footnote 1 continued on page 3)

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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 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.

3. The Association and the City commenced negotiations for a successor agreement to the 1990-91 agreement in late 1991 or early 1992. The parties ~~were unable to reach an agreement and an investigator was called in and after two mediation sessions, the parties~~ reached a tentative agreement on August 18, 1992 with the assistance of an Investigator from the Wisconsin Employment Relations Commission. At the conclusion of the August 18, 1992 meeting, a joint session was ~~held with~~ convened by the Investigator ~~mediator.~~ Present for the City were Bruce K. Patterson, Employee Relations Consultant, who was the City's Chief Negotiator; Ernest Platz, Alderperson and Chair of the Wage, Salary and Personnel Committee and member of the negotiating team; Karen Henn, Alderperson and member of the Wage, Salary and Personnel Committee and member of the negotiating team; Tom Christiansen, Mayor, who was not a member of the negotiating team; the WERC Investigator ~~mediator~~; S. James Kluss, the Association's spokesman; Scott Rychnovski, Mike Smith, Pete Gasser and Craig Keninger, all members of the Association's bargaining team.

At the conclusion of the joint session, as the participants were preparing to leave, ~~Sometime during this meeting~~ Bruce Patterson asked Ernest Platz if the City needed him at the City Council meeting where ratification would be taken up. Platz told Patterson he was not needed and the Mayor also said he did not need to appear. ~~What, if anything, the Mayor stated after this is in dispute. Kluss and Rychnovski testified that the Mayor stated that, if necessary, in case of a tie vote, he would cast his vote in favor of the tentative agreement. Mayor Christiansen, Ernest Platz and Bruce Patterson denied that the Mayor made this statement and Karen Henn could not recall what was said. The evidence failed to establish that the Mayor made the statement.~~ Alderperson Tompach, a member of the Wage, Salary and Personnel Committee and member of the negotiating team was not present for the August 18, 1992 meeting. The City did not advise the Association as to the impact, if any, of Tompach's absence on the status of the tentative agreement.

C. Examiner Finding of Fact 4 is modified by the addition of the underlined words and the deletion of the stricken-through letters or words.

4. After the August 18, 1992 meeting, Kluss prepared the tentative agreement~~s~~ and sent ~~them~~ it to Patterson and ~~to~~ the City Clerk on or about August 20, 1992. One portion of the tentative

agreement was item 4. as follows:

> 4. ARTICLE 5 - GRIEVANCE PROCEDURE
> A. Definition of a Grievance - Add the following at the end of the current language:
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> ...including discipline, suspension, or discharge of any employee for "just cause."

On September 1, 1992, the City's Common Council met and one item on its agenda was the ratification of the tentative agreement ~~contract~~ with the Association. Five of the six members of the Common Council were present including all three Alderpersons, (Henn, Platz and Tompach) on the City's Wage, Salary and Personnel Committee. Prior to the meeting, but after the tentative agreement was reached, the City submitted the tentative agreement to its attorney for review. The City Attorney, Randall Lueders, ~~felt that more discussion was needed on Article 5, set out above~~ advised the Common Council that Article 5 of the tentative agreement was illegal. The City had never advised the Association that the tentative agreement was contingent upon the review of the City Attorney.

Alderperson ~~Alderman~~ Platz moved that ~~for~~ the tentative agreement ~~contract to~~ be ratified ~~accepted as is~~. This motion died for lack of a second. Platz then moved to ratify ~~accept~~ the tentative agreement ~~contract~~ with Article 5 to be clarified and this motion also died for lack of a second. Alderperson ~~Matt~~ Tompach, ~~who was an Alderman and a member of the Wage, Salary and Personnel Committee but was not present at the August 18, 1992 meeting~~ moved to table the consideration of the tentative agreement to the next meeting. The motion was seconded by Alderperson Henn and carried with Platz voting "no."

D. Examiner Findings of Fact 5 - 7 are affirmed.

E. Examiner Finding of Fact 8 is set aside.

F. Examiner Conclusion of Law 1 is reversed and set aside and the following Conclusions of Law are made.

1. The City's duty to bargain in good faith pursuant to Secs. 111.70(1)(a) and (3)(a)4, Stats., obligated all members of the City's Wage, Salary and Personnel Committee who were present August 18, 1992 and who were members of the City's bargaining team to support and vote for the tentative agreement reached on that date.

2. The City's duty to bargain in good faith pursuant to Secs. 111.70(1)(a) and (3)(a)4, Stats., did not obligate Mayor Christiansen to support and vote for the tentative agreement reached on August 18, 1992 because the Mayor was not a member of the City's bargaining team.

3. By the failure of Alderpersons Henn and Platz to support and vote for the tentative agreement on September 1, 1992, September 15, 1992 and December 1, 1992, the City violated its duty to bargain in good faith with the Association and thereby committed prohibited practices within the meaning of Sec. 111.70(3)(a)4, Stats., and derivatively Sec. 111.70(3)(a)1, Stats.

G. Examiner Conclusion of Law 2 is renumbered Conclusion of Law 4 and affirmed.

H. Examiner's Order dismissing the complaint is reversed in part and affirmed in part and the following Order is made

ORDER

IT IS ORDERED THAT the City of Columbus, its officers and agents, shall immediately:

1. Cease and desist from refusing to bargain in good faith within the meaning of Secs. 111.70(1)(a) and (3)(a)4, Stats.

2. Take the following affirmative action which the Wisconsin Employment Relations Commission finds will effectuate the purposes of the Municipal Employment Relations Act.

A. Consistent with its duty to bargain in good faith, the City of Columbus Common Council shall vote on whether to ratify the tentative collective bargaining agreement reached August 18, 1992 between the City and Complainant Association.

B. Notify all employes in the bargaining unit represented by the Wisconsin Professional Police Association/Law Enforcement Employee Relations Division, by posting in conspicuous places on its premises where notices to such employes are usually posted, a copy of the Notice attached hereto and marked "Appendix A." The Notice shall be signed by an authorized representative of the City and shall remain posted for thirty (30) days thereafter. Reasonable steps shall be taken by the City to insure that said Notices are not altered, defaced or covered by other material.

C. Notify the Wisconsin Employment Relations Commission within twenty days of the date of this Order as to what steps it has taken to comply therewith.

It is further ordered that the portion of the complaint alleging the City had violated Secs. 111.70(3)(a)4 and 1, Stats., by the conduct of Mayor Christiansen is dismissed.

Given under our hands and seal at the City of Madison, Wisconsin, this 15th day of June, 1995.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By A. Henry Hempe /s/
A. Henry Hempe, Chairperson

Herman Torosian /s/
Herman Torosian, Commissioner

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

APPENDIX A

NOTICE TO ALL EMPLOYES

Pursuant to an Order of the Wisconsin Employment Relations Commission, and in order to effectuate the purposes of the Municipal Employment Relations Act, we hereby notify our employes that:

WE WILL NOT refuse to bargain in good faith with the Wisconsin Professional Police Association/Law Enforcement Employee Relations Division.

WE WILL vote on whether to ratify the tentative agreement reached on August 18, 1992 with the Wisconsin Professional Police Association/Law Enforcement Employee Relations Division.

CITY OF COLUMBUS

By _____

Dated this _____ day of _____, 1995.

THIS NOTICE MUST REMAIN POSTED FOR 30 DAYS FROM THE DATE HEREOF, AND MUST NOT BE ALTERED, DEFACED OR COVERED BY ANY OTHER MATERIAL.

CITY OF COLUMBUS

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

THE EXAMINER'S DECISION

The Examiner dismissed the Association's complaint that the City had violated its duty to bargain by the failure of the City bargaining team to appropriately support ratification of a tentative agreement and ultimately by the City's failure to ratify the tentative agreement.

In his Memorandum, the Examiner stated:

> Section 111.70(3)(a)4, Stats., provides that it is a prohibited practice for a municipal employer to refuse to bargain collectively with a representative of a majority of its employes in an appropriate bargaining unit including the refusal to execute a collective bargaining agreement previously agreed upon. It is a refusal to bargain prohibited practice for a municipal employer's bargaining representatives to fail to follow through on their agreement to present and recommend ratification of tentative agreements reached in collective bargaining to the municipal employer's governing body. 2/ It is undisputed that the parties reached a tentative agreement on August 18, 1992, and it was the City's negotiating team's responsibility to present and recommend ratification to the City Council and vote in favor of the tentative agreement. On September 1, 1992, Alderman Platz moved to

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2/ Oconto County, Dec. No. 26289-A (Gratz, 7/90), aff'd by operation of law, Dec. No. 26289-B (WERC, 8/90); Florence County, Dec. No. 13896-A (McGilligan, 4/76), aff'd by operation of law, Dec. No. 13896-B (WERC, 5/76); City of Green Bay, Dec. No. 21785-A (Roberts, 10/84), aff'd by operation of law, Dec. No. 21785-C (WERC, 11/84).

accept the tentative agreement but this motion died for lack of a second. 3/ Alderperson Henn testified that she did not second the motion because the City Attorney had told the Council the provision on just cause was illegal and that is why she did not second the motion. 4/ Platz made a second motion to accept the contract with Article V clarified and that too died for a lack of a second. 5/ A motion was then made to table the agreement until the next meeting, seconded by Henn and it passed with Platz voting against the motion. 6/

Although the Association claimed that the City committed prohibited practices on September 1, 1992, the undersigned does not so find. Essentially, a question was raised about a provision in the tentative agreement and it was neither approved nor rejected at this meeting but merely delayed until the next meeting where it would again be taken up. A delay of two weeks, in light of the City Attorney's opinion, for the City Council to consider it further does not appear to constitute bad faith bargaining with respect to the bargaining committee's duty to sponsor and support ratification of the tentative agreement.

At the September 15, 1992 City Council meeting, Platz moved and Henn seconded a motion to approve the tentative agreement with certain changes. 7/ Once a tentative agreement is reached, a new issue cannot be introduced into the process, but the tentative agreement reached between the parties must be acted on. 8/ The City's arguments that this was not bad faith bargaining but an attempt to show its good faith by indicating that it could

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3/ Ex. 23.

4/ Tr. 147, 148.

5/ Ex. 23.

6/ Id.

7/ Id.

8/ City of Green Bay, Dec. No. 21785-A (Roberts, 10/84), aff'd by operation of law, Dec. No. 21785-C (WERC, 11/84).

agree to all the provisions except the just cause provision is not

persuasive. The City could have voted on the tentative agreement which Platz and Henn had to support and, if it was voted down by the Council, then it could have informed the Association that it was willing to accept all provisions previously agreed upon except the just cause provision and the latter method would have been bargaining in good faith, whereas the former procedure was not.

On December 1, 1992, the City Council again acted on the tentative agreement with Platz moving and Henn seconding a motion to rescind the Council's actions on September 15, 1992, approving the tentative agreement with four changes. 9/ In paragraph 3 of the Association's amended complaint, it states in part as follows: "...except that to the extent such complaint alleged illegal conduct by the City in adopting the "police contract with four changes," that allegation is withdraw (sic) by virtue of the City's act of nullification as described in paragraph 6(c) above.

Thus, the Council's action to rescind its prior interjection of other matters in the tentative agreement was a repudiation of its prior conduct and because the Association withdrew its allegation, this issue is moot.

However, the City then went on to reject the tentative agreement in its entirety. 10/ This again, was bad faith bargaining because the tentative agreement was not recommended or supported by the bargaining team members as required by their obligation to bargain in good faith. 11/

The City Council met again on December 15, 1992, and rescinded its action to reject the tentative agreement. 12/ Platz then moved and Tompach seconded a motion to approve the tentative agreement. Platz, Tompach and Henn voted for approval

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9/ Ex. 23.

10/ Id.

11/ n. 2, supra.

12/ Ex. 23.

whereas the other three alderpersons voted against it and Mayor Christiansen voted against it and the tentative agreement was therefore not approved. 13/

The Association contends that the City committed a prohibited practice based on the Mayor's voting no based on a statement he made at the final joint session on August 18, 1992. Section 111.07(3), Stats., provides that the party on whom the burden of proof rests shall be required to sustain such burden by a clear and satisfactory preponderance of the evidence. In this case, the Mayor denied making the statement, 14/ Platz did not recall this statement nor did Patterson, 15/ and Henn had no recall of it. 16/ On the other hand, Kluss 17/ and Rychnovski 18/ testified that he said it. There is just not enough of a clear and satisfactory preponderance of the evidence to find that he said it, so it has been found that the evidence failed to prove he said it.

But even if he did, it would be irrelevant. The Mayor was not on the negotiating team, so it was only Platz and Henn that had an obligation to take back any tentative agreement to the City Council and the Mayor would only vote if there was need for a tie breaker. Additionally, the Mayor's alleged statement came after the tentative agreement was reached so there was not reliance on it by the Association in reaching a tentative agreement. Most importantly, however, is the fact that the Mayor's alleged statement was in response to an inquiry by Chief Negotiator Patterson whether the City wanted him to attend the Council meeting when ratification would be taken up. The response was

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13/ Id.

14/ Tr. 67, 75-76.

15/ Tr. 99, 167, 182.

16/ Tr. 144.

17/ Tr. 25, 53-54.

18/ Tr. 186.

directed to him and not to the Association. The Association merely listened in on a conversation that the City's Chief Negotiator was having with City officials and the Mayor certainly cannot be bound by what he responds to the City Negotiator's question as to the Negotiator's appearance at a Council meeting. This is somewhat comparable to a political speech to constituents where members of the Association are present. The speech is not binding on the speaker as to his/her position with respect to any agreement reached by the City's negotiating team. Thus, it is concluded that the Mayor's alleged statement, even if he made it, is irrelevant.

The Association asserts that the December 15, 1992 Council vote was a sham orchestrated by the City Attorney. The evidence fails to prove that City Council's vote was controlled by the City Attorney. The City Council may have followed his advice but all were free to vote as they saw fit and this allegation is simply not proven by the record. Additionally, a great amount of argument was devoted to whether the City Attorney was correct or not. Again this is irrelevant. The three dissenters and Mayor may have not liked the language because it decreased the power of the PFC and rejection of the tentative agreement on that basis is not improper.

Generally, when the Commission has concluded that there has been a refusal to recommend the vote for a tentative agreement, the remedy has been to order the bargaining team to take the tentative agreement to the governing body and recommend it and vote for ratification. 19/ This has already been done and the tentative agreement has been rejected so no further remedy need be ordered. 20/

19/ Oconto County, Dec. No. 26289-A (Gratz, 7/90), aff'd by operation of law, Dec. No. 26289-B (WERC, 8/90).

20/ Florence County, Dec. No. 13896-A (McGilligan, 4/76), aff'd by operation of law, Dec. No. 13896-B (WERC, 5/76).
The tentative agreement was presented to the City Council, albeit belatedly, on December 15, 1992, and the bargaining team recommended it and voted in favor of it, but it did not pass. It is

> concluded that the City did what is required by law and in accord with any remedy that would be ordered for their prior conduct, and the City's action in not approving the contract was not violative of Sec. 111.70(3)(a)4, Stats., or derivatively of Sec. 111.70(3)(a)1, Stats. Therefore, the complaint, as amended, has been dismissed.

POSITIONS OF THE PARTIES

The Association

The Association initially argues that the Examiner erred when finding the Mayor did not agree to vote to ratify the tentative agreement. The Association contends that a careful review of the testimony and the factual context of the Mayor's remarks requires Commission reversal of the Examiner's finding in this regard. The Association further alleges that the Mayor was obligated to honor his agreement to support ratification even though he was not a member of the bargaining team. The Association asserts that it relied on the Mayor's remark when reaching tentative agreement and that the doctrine of apparent authority binds the Mayor and the City.

The Association also asserts the Examiner erred when finding that the City Attorney did not manipulate the December 15, 1992 ratification vote and that the City's conduct on that date was consistent with its duty to bargain in good faith. The record clearly establishes that the City Attorney orchestrated the tie vote as a means of avoiding the consequences of the City bargaining team's prior wrongdoing. The Association contends the City's bad faith is apparent.

Given the foregoing, the Association asks that the Examiner be reversed and that the City be ordered to ratify and execute the contract.

The City

The City urges the Commission to affirm the Examiner.

The record fully supports the Examiner's finding that the Mayor did not promise to support the tentative agreement and that the City Attorney did not control the outcome of the ratification vote. Instead, the record establishes both the Common Council and the Mayor acted in good faith upon the advice of the City Attorney. The City contends the City Attorney's advice about the legality of the tentative agreement constituted a "bona fide" reason for both the Common Council and the Mayor to vote against ratification. The City further argues the Association's "apparent authority" contentions must be rejected as factually unsupported.

Given the foregoing, the City requests affirmance of the Examiner.

DISCUSSION

The Bargaining Team's Reliance on the City Attorney

Two prior Commission cases are of particular use in resolving the issue of whether Common Council bargaining team members present when the tentative agreement was reached could rely on the subsequent advice of the City Attorney as a valid basis for failing to support and vote for the tentative agreement.

In Joint School District No. 5, City of Whitehall, Dec. No. 10812-A (Torosian, 9/73) aff'd in pertinent part, Dec. No. 10812-B (WERC, 12/73), the Commission held that there could be a "bona fide reason" which would allow bargaining team members to oppose a tentative agreement they had reached without violating their duty to bargain in good faith.

In Hartford Union High School District, Dec. No. 11002-A (Fleischli, 2/74) aff'd in pertinent part, Dec. No. 11002-B (WERC, 9/74), the Commission held that if one party does not advise the other during bargaining that any tentative agreement reached is subject to the review of an attorney or other advisor, that party violates its duty to bargain in good faith where submission of the tentative agreement to an attorney or other advisor creates new issues which that party insists on resolving. The Commission stated:

> The decision of the Commission herein is not to be interpreted as preventing either party from seeking advice or counsel from others during their negotiations on a collective bargaining agreement. As a matter of fact, professional expertise at the bargaining table is likely to assist the collective bargaining process rather than impede it. However, the timing of seeking such advice and counsel may very well be determinative of whether the parties seeking such advice and counsel are bargaining in good faith as contemplated in the Municipal Employment Relations Act. If such advice and counsel is sought after the parties have reached a tentative agreement on substantive proposals submitted by both parties during the course of negotiations, as was done in this case, the Commission must find that the party seeking such advice and counsel, at such time, had not bargained in good faith where new issues are created by such advice and counsel and said party thereafter insists upon the implementation of the advice. Various concessions made by either party, prior to reaching tentative agreement, may not have been made had the party making such a concession been aware that new substantive issues would be introduced into the negotiations following the tentative agreement between the bargaining teams involved. To interject new issues following the tentative agreement would open a Pandora's box in the collective bargaining process.
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> If either party intends to have a tentative agreement reviewed for both language changes and substantive proposals, it has the duty to so advise the other party prior to reaching a tentative agreement on

> all issues. Good faith bargaining does not contemplate advice and counsel in absentia after the parties have reached a tentative agreement on all proposals presented at the bargaining table.

Whitehall and Hartford establish that the advice of an attorney can provide bargaining team members with a "bona fide" reason to withhold support for a tentative agreement they previously reached if the other party is given proper notice during bargaining that such advice will be sought and that the existence of the tentative agreement is subject to that advice. Here, the City did not advise the Association that any tentative agreement reached was subject to the review and advice of the City Attorney. Thus, we conclude the review and advice of the City Attorney did not provide a "bona fide" basis for the Common Council bargaining team members present August 18, 1992 to fail to support the parties' tentative agreement reached that date through their conduct and votes. 2/ Therefore, it is clear that on September 1, 1992, September 15, 1992 and December 1, 1992, the City violated its duty to bargain when the Common Council bargaining team members who were present August 18, 1992 failed to support the tentative agreement, in reliance on the City Attorney's advice.

The Ratification Obligation of Absent Bargaining Team Members

During bargaining, the City was represented by its Wage, Salary and Personnel Committee (Alderpersons Henn, Platz and Tompach) and Bruce Patterson, an Employee Relations Consultant, retained by the City. On August 18, 1992, when the parties reached the tentative agreement, only Henn, Patterson and Platz were present.

The City cites Tompach's absence and argues that Tompach thus had no obligation to support the tentative agreement. The Association asserts Tompach was a member of the Committee and thus was bound to support the tentative agreement reached by the Committee.

As more fully discussed in Waunakee Community School District, Dec. No. 27837-B (WERC, 6/95), ratification obligations do not extend to team members who are not physically present when the tentative agreement is reached, did not participate in the decision to reach agreement, and did not previously bind themselves to support any tentative agreement reached. We reach this conclusion because we believe that only those who participated in the decision to reach a tentative agreement should be bound (absent explicit statements or agreements to the contrary) by their decision. Team members who do not participate in the decision to reach a tentative agreement are functionally no different than members of the bargaining unit or elected officials not on the

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2/ This is not to say that where new relevant circumstances arise following a tentative agreement, it is necessarily inappropriate at that juncture to seek advice from counsel. However, here, the proposal in dispute obviously preceded the tentative agreement and the City could have, but did not, advise the Association of the need to have legal counsel review the matter.

team. Their lack of participation in the decision-making of the collective bargaining process frees them to vote as they see fit as to contract ratification. Team members who are present when a tentative agreement is reached are presumed to have participated in decision-making and are bound to support the decision. Team members who are physically absent but who nonetheless participated in the decision to reach the tentative agreement, or have given their prior assent to any tentative agreement, or who have been bound by their own team's internal decision-making, are also bound to support and vote for the tentative agreement. However, absent participation, prior assent or binding action by others, we are unwilling to extend ratification obligations to team members who were not physically present when the tentative agreement is reached.

Here, there is no persuasive evidence that Tompach participated in the decision to reach a tentative agreement, gave his prior assent to any tentative agreement reached in his absence, or was bound to support the tentative agreement by prior action of his own team or by an agreement with the Association. Thus, he was not obligated to support the tentative agreement.

The Mayor's Obligations

The parties dispute exactly what the Mayor said at the end of the August 18, 1992 meeting which produced the tentative agreement. The Association claims, and the City denies, that the Mayor stated he would cast his vote in favor of the tentative agreement if there was a tie vote before the Common Council. We need not and do not resolve this dispute because we are satisfied the Mayor was not bound by any such statement and thus that his conduct when casting a negative vote was not violative of Sec. 111.70(3)(a)4 or 1, Stats.

We reach this conclusion for several reasons. First and foremost, it is clear that the Mayor was not a member of the City's bargaining team. Thus, we are satisfied that he was free to support or not support the tentative agreement, and equally free to change his mind as to support or opposition even if he had publicly taken a position one way of the other. Further, if the Mayor made the alleged statement, it was not a statement upon which the Association relied when deciding whether it should reach a tentative agreement with the City. The alleged statement occurred at a point in time when the parties had already reached a tentative agreement and were preparing to leave the meeting. The alleged statement only occurred as part of the Mayor's brief response to a question from City Consultant Patterson as to whether he should be present at the City's ratification meeting. Thus, we are not persuaded that the Association acted in reasonable reliance on the Mayor's alleged statement.

Given the foregoing, we are satisfied the Mayor's conduct on December 15, 1992 did not violate Sec. 111.70(3)(a)4 or 1, Stats.

Remedy

To affirmatively remedy the City's conduct, we have ordered the City to again submit the tentative agreement to the Common Council for a ratification vote. We do so because the

December 15, 1992 submission relied upon by the Examiner occurred in the immediate context of three prior improper ratification efforts. Now that the City is aware of its ratification obligations and time has passed, we conclude another ratification vote is appropriate.

Dated at Madison, Wisconsin, this 15th day of June, 1995.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By A. Henry Hempe /s/
A. Henry Hempe, Chairperson

Herman Torosian /s/
Herman Torosian, Commissioner

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