STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

WISCONSIN COUNCIL OF COUNTY AND MUNICIPAL EMPLOYEES #40, AFSCME, AFL-CIO,	
Complainant,	Case 4 No. 50024 MP-2816 Decision No. 27906-A
vs.	
KENNETH SOUTHWORTH and CITY OF NEW LISBON,	
Respondents.	

Appearances:

Lawton & Cates, S.C., Attorneys at Law, 214 West Mifflin Street, P. O. Box 2965, Madison, Wisconsin 53701-2965, by Mr. Bruce F. Ehlke, appearing on behalf of the Complainant.

Lathrop & Clark, Attorneys at Law, 122 West WAshington Avenue, Suite 1000, P. O. Box 1507, Madison, Wisconsin 53701-1507, by Ms. Jill Weber Dean and Ms. Sally Mayne Pederson, appearing on behalf of the Respondents.

ORDER DENYING MOTION TO DISMISS

Wisconsin Council of County and Municipal Employees #40, AFSCME, AFL-CIO, hereinafter referred to as the Complainant or Union, filed a complaint on November 1, 1993, with the Wisconsin Employment Relations Commission alleging that the City of New Lisbon and its Mayor, Kenneth Southworth, hereinafter referred to as Respondents, had committed prohibited practices within the meaning of Secs. 111.70(3)(a)1, 4 and 5 of the Municipal Employment Relations Act by refusing to fully implement the terms and conditions of the parties' initial collective bargaining agreement. The Commission on December 22, 1993, appointed Lionel L. Crowley to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and Order as provided in Sec. 111.07(5), Stats. The Respondents on January 6, 1994, filed a Motion to Dismiss the complaint on the grounds that Complainant had failed to exhaust the contractual grievance procedure and the complaint failed to state facts which support an alleged violation of Sec. 111.70(3)(a)4. The Complainant responded to the Motion to Dismiss on January 24, 1994, and the Respondents submitted a reply to the Complainant's response on January 31, 1994. The Examiner having considered the complaint and the arguments of Counsel concludes that the Motion to Dismiss be denied.

NOW, THEREFORE, it is

ORDERED

That the Motion to Dismiss is denied.

Dated at Madison, Wisconsin, this 1st day of February, 1994.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Lionel L. Crowley /s/
Lionel L. Crowley, Examiner

MEMORANDUM ACCOMPANYING
ORDER DENYING MOTION TO DISMISS

The Respondents contend that the complaint should be dismissed because the Complainant failed to exhaust the contractual grievance procedure. They submit that the complaint alleges a violation of Sec. 111.70(3)(a)5, Stats., by failing to pay back pay as provided in the agreement and the Commission's policy is not to assert jurisdiction over contractual violations where as here the contract has a procedure for addressing the dispute. They argue that the contractual grievance procedures are presumed to be exclusive remedies unless the parties expressly agree that they are not. The Respondents assert that any doubts about coverage be resolved in favor of coverage. They maintain there has been no waiver of the contractual procedures and they ask that the exclusivity of the grievance procedure be honored by the Commission and the complaint be dismissed.

The Respondents claim that although the complaint alleges violations of Secs. 111.70(3)(a)4 and 1, Stats., the facts fail to allege a refusal to bargain. They insist that the very fact the parties reached an agreement, although there was some fine tuning over a short period, does not describe or support a refusal to bargain charge. They further take the position that there can be no Sec. 3(a)1 violation because it is derivative and there is no Sec. 3(a)4, Stats. violation and the Sec. 3(a)5 violation must be deferred to arbitration.

The Complainant responds that on a Motion to Dismiss, the complaint must be liberally construed in favor of Complainant. It restates Sec. 111.70(3)(a)4, Stats., noting that "the refusal to execute a collective bargaining previously agreed upon . . ." is a violation and the word "execute" in its common and ordinary meaning includes the obligation to implement the terms of the contract. It argues that the refusal to implement an agreement which has been ratified by both parties is a prohibited practice within the meaning of Secs. 111.70(3)(a)4 and 1, Stats. It submits that the allegations of paragraph G. of the complaint state facts which clearly constitute a violation of Secs. 111.70(3)(a)4 and 1, Stats. It asserts that exhaustion of the grievance and arbitration procedures is not required and the Motion to Dismiss should be denied.

In reply, the Respondents' assert that the complaint liberally construed merely states a garden-variety violation of the collective bargaining agreement which warrants application of the Commission's deferral policy. They submit that when the complaint was filed, the agreement had been ratified and signed, and it has a grievance procedure culminating in arbitration, so deferral is clear. The Respondents cite a number of Commission decisions where refusal to bargain claims and derivative interference allegations were deferred to arbitration as the arbitration process predominated over the statutory issues. The Respondents argue that the Complainant's claim, that the refusal to execute a collective bargaining agreement actually means refusal to implement provisions of a collective bargaining agreement already in effect, is patent nonsense. It claims that reference to the dictionary is not necessary as the term execute means sign, not implement, and it refers to a number of Commission decisions where the issue was a refusal to sign a previously agreed-upon contract. The Respondent asserts that acceptance of the Complainants' assertion would convert every breach-of-contract claim into a refusal to bargain claim and the Commission would become the forum of first resort for all disputes over implementation of bargaining agreements which in turn would undermine the policy favoring resolution of contractual disputes. Despite the

labels, the Respondents assert that all that is alleged is a contractual dispute which should be referred to grievance arbitration. They suggest that jurisdiction can be retained while the matter is resolved in arbitration. The Respondents request that Kenneth Southworth be stricken as a Respondent. They note there are no allegations against him and naming him personally or in a representative capacity does not serve any purpose.

DISCUSSION

As pointed out by the Complainant, on a motion to dismiss, the complaint must be liberally construed in favor of the complainant and the motion must be denied except where no interpretation of the facts alleged would enable the complainant to relief. 1/ Respondents assert that the complaint should be deferred to the contractual arbitration procedure in accordance with the Commission's longstanding policy of deferral. Generally, when a complaint as here alleges a violation of Sec. 111.70(3)(a)5, Stats., the Commission will not exercise its jurisdiction to determine the merits of a claim where the parties have a grievance procedure which provides for final and binding arbitration in order to give effect to the parties' agreed-upon procedures for resolving contractual disputes. 2/ The complaint alleges a Sec. 111.70(3)(a)5, Stats., violation and deferral may be appropriate if that was the only allegation. However, the complaint also asserts a violation of Sec. 111.70(3)(a)4, and it appears, derivatively 111.70(3)(a)1, Stats. Sec. 111.70(3)(a)4, Stats., provides that it is a prohibited practice to refuse "to execute a collective bargaining agreement previously agreed upon." The Respondents have argued that the facts alleged fail to show that there has been a refusal to bargain. A review of the complaint alleges that agreement was reached in mediation, that there were delays in ratification by the Respondent City and that the Respondents failed to fully implement the terms and conditions of the agreement. Construing the complaint most favorably to the Complainant, it appears that the allegations of the complaint are a refusal to bargain in good faith. The ordinary meaning of the word "execute" means more than merely ratifying and signing the contract but means to implement its terms and conditions. Sec. 111.70(3)(a)7, Stats., uses the word "implement" to indicate that where ratification and signing is not required, a refusal to implement is a prohibited practice. Otherwise, an employer could agree to a contract, ratify it, and sign it, and not implement any terms and arbitration would not be required on each provision not implemented because the conduct of not implementing the contract would be an evident refusal to bargain just as if the employer had no intent to ever reach agreement with the Union. The Respondents' assertion that "execute" merely means to "sign" the contract is rejected. Assertion of jurisdiction over a refusal to implement will not make the Commission responsible for every garden-variety contract dispute just as Sec. 111.70(3)(a)7, Stats., has not made the Commission responsible for every case of a contractual dispute over terms.

1/ Racine Unified School District, Dec. No. 15915-B (Hoornstra, 12/77).

2/ Joint School District No. 1, City of Green Bay, et al., Dec. No. 16753-A,B (WERC, 12/70); Board of School Directors of Milwaukee, Dec. No. 15825-B (WERC, 6/79); Oostburg Joint School District, Dec. No. 11196-A,B (WERC, 12/79).

Therefore, the Motion to Dismiss has been denied. The Respondents have asked to dismiss Kenneth Southworth as a Respondent. The Examiner will take this under advisement and rule on this Motion to Strike at the hearing or the end of the hearing.

The time for Respondents to answer the complaint is extended to February 8, 1994, and the hearing will take place as previously scheduled on February 14, 1994.

Dated at Madison, Wisconsin, this 1st day of February, 1994.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Lionel L. Crowley /s/
Lionel L. Crowley, Examiner