STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the matter of the Petition of EAU CLAIRE FIRE FIGHTERS LOCAL 487 For Final and Binding Arbitration Involving Fire Fighting Personnel in the Employ of THE CITY OF EAU CLAIRE	Case 215 No. 49805 MIA-1828 Decision No. 27941

Appearances:

Mr. Frederick W. Fischer, City Attorney, P.O. Box 5148, Eau Claire, WI 54702-5148, for the City.

Shneidman, Myers, Dowling & Blumenfeld, Attorneys at Law, by Mr. John B. Kiel, 700 West Michigan Avenue, Suite 500, P.O. Box 442, Milwaukee, WI 53201-0442, for the Union.

ORDER DENYING MOTION TO DISMISS PETITION FOR INTEREST ARBITRATION

On September 21, 1993, Eau Claire Fire Fighters Local 487 filed a petition with the Wisconsin Employment Relations Commission seeking final and binding interest arbitration pursuant to Sec. 111.77, Stats., over a successor to an existing collective bargaining agreement between Local 487 and the City of Eau Claire. By letter dated October 20, 1993, the City advised the Commission that it believed it had no obligation to bargain with Local 487 over a successor agreement and thus had no obligation to proceed to interest arbitration over same. The Commission then advised the parties that it would treat the City's October 20, 1993 letter as a motion to dismiss the interest arbitration petition. The parties thereafter waived hearing and filed written argument, the last of which was received on December 21, 1993.

Having considered the matter and being fully advised in the premises, the Commission makes and issues the following

FINDINGS OF FACT

1. The City of Eau Claire, herein the City, is a municipal employer having its principal offices at 203 South Farwell Street, Eau Claire, Wisconsin 54702.

2. Eau Claire Fire Fighters Local 487, herein the Union, is a labor organization having its principal offices at 217 Skyline Drive, Eau Claire, Wisconsin 54703.

3. The July 1, 1991-June 30, 1993 collective bargaining agreement between the City and the Union included the following provisions:

Article XXXII, Section 1

"The party requesting negotiations on the terms of a successor agreement shall notify the other party in writing of its requests by March 1 of any year. Within two (2) weeks of the receipt of such notice from one party to the other, an initial meeting shall be mutually agreed upon. Meetings shall be regularly scheduled by mutual agreement until an agreement is reached by the parties."

Article XXXII, Section 2

"In the event no amicable agreement is reached by May 1 of the year in question, the parties shall consider whether the matters in dispute shall be submitted to final and binding arbitration in accordance with Section 111.77 of the Wisconsin State Statutes."

Article XXXVII

"This Agreement shall be effective as of July 1, 1991, and shall remain in full force and effect until its expiration date, June 30, 1993. If, during the term of this Agreement, problems arise with respect to the interpretation or application of any language in this Agreement, the City and the Union may jointly agree to enter into negotiations relating only to such specific problem. Any solution thereof, whenever reached, after such negotiations, shall become effective after July, 1993, and shall not affect this Agreement."

4. By letter dated March 12, 1993, the Union advised the City as follows:

> This letter is to notify you that Local 487 is ready to begin negotiations for the contract year starting July 1, 1993.
>
> Please advise as to when it would be convenient for you to meet with Local 487's Working Relation Committee. My number is 835-1157.

5. By letter dated May 12, 1993, the City advised the Union as follows:

> Under the provision of the labor agreement between the City of Eau Claire and Eau Claire Fire Fighters Local 487 Article XXXII, Section 1, one party must notify the other party on or before March 1 of its intent to negotiate a successor agreement. The City did not desire to open negotiations and, accordingly, did not send such a notice. Your letter dated March 12, 1993, received on March 15, 1993, requesting the reopening of negotiations did not meet the stated deadline. Accordingly, based on prior Wisconsin Employment Relations Commission decisions, the contract automatically is renewed and extended through June 30, 1994.
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> While the City will not be negotiating with Local 487 under the provision of Wisconsin Statutes 111.70 or 111.77 on the terms of a successor agreement, it is nevertheless willing to meet and confer to discuss fair and equitable wages, benefits, and conditions for employment for Eau Claire Fire Fighters.
>
> Please contact my office if Local 487 desires to meet.

6. The parties' efforts to voluntarily resolve their dispute were unsuccessful and on September 21, 1993, the Union filed a petition for final and binding interest arbitration pursuant to Sec. 111.77, Stats., with the Wisconsin Employment Relations Commission. The City moved to dismiss the petition.

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

CONCLUSION OF LAW

The Union continues to have the statutory right to proceed to interest arbitration under Sec. 111.77, Stats., as to a successor collective bargaining agreement even though the Union did not request "negotiations on the terms of a successor agreement" by March 1, 1993 or provide the City with the 180-day notice set forth in Sec. 111.77(1)(a), Stats.

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

ORDER

The motion to dismiss the interest arbitration petition is denied.

Given under our hands and seal at the City of Madison, Wisconsin this 7th day of February, 1994.

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

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

There is no factual dispute here. It is uncontested that the Union did not timely provide contractual or statutory notice to the City of the Union's interest in bargaining a successor agreement. What is disputed are the consequences of that failure.

POSITIONS OF THE PARTIES

The City

The City argues that the Union's failure to meet the March 1 contractual deadline constituted a waiver of the Union's right to bargain over the terms of a successor agreement. The City contends that as a result of said waiver, the terms of the 1991-1993 agreement remain in place for an additional one-year period. Because it has no obligation to bargain over the terms of a successor agreement, the City asserts that the Union has no access to interest arbitration under Sec. 111.77, Stats. The City contends that the Union's petition should therefore be dismissed.

The City argues that the Commission and the National Labor Relations Board have consistently ruled that where a party fails to meet a contractual negotiation timeline, automatic extension of the existing collective bargaining agreement is appropriate. In this regard, the City cites Se-Ma-No Electric Cooperative, 284 NLRB No. 109 (1987); Anchorage Laundry and Drycleaning Association, 216 NLRB No. 22 (1975); Chetek School District, Dec. No. 12418-A, B, C (Schurke, 1974); and Menomonie County, Dec. No. 22872-B (Honeyman, 1/86), aff'd Dec. No. 22872-C (WERC, 3/86).

The City argues that if the Commission concludes that deviation from the deadline is permitted, the deadline becomes meaningless and notice could then be given even later in the contract year, which would in turn further frustrate bargaining.

Contrary to the Union, the City argues that the holding of Eau Claire County, Dec. No. 14080-A (Malamud, 11/76), aff'd by operation of law, Dec. No. 14080-B (WERC, 12/76) supports the City's position. In Eau Claire, a contractual deadline was missed and the contract was not found to automatically renew. However, the City asserts that in Eau Claire, prior contracts had contained the automatic renewal language and that said language had been deleted by the parties. The City contends that this deletion played a key role in the outcome in Eau Claire. The City also notes that in Eau Claire, the notification deadline consisted of a specific date and year. Here, the City asserts that the absence of a specific year in the contract language (i.e., "by March 1 of any year") is supportive of a conclusion that the parties intended an automatic one-year renewal if the March 1 timeline is missed. Lastly, the City argues that in Eau Claire, there was some discussion by the Examiner of a distinction between a contractual duty to bargain and a statutory duty to bargain. Here, the City contends that the Union has also failed to meet the statutory deadline for requesting negotiations established by Sec. 111.77(1)(a), Stats., (i.e., written notice to the City 180 days prior to the expiration of the contract).

Contrary to the Union, the City also contends that the Commission's decision in the City of Eau Claire, Dec. No. 11573 (WERC, 1/73) is not supportive of the Union's position. The City argues that the result in that case turned on the question of whether the statutory notice requirements set forth in Sec. 111.77, Stats., were "directory" rather that "mandatory". Here, the City points out that the primary issue is the Union's failure to meet a

contractual timeline, not just a statutory deadline.

Given all of the foregoing, the City asserts that it has no duty to bargain with the Union over a successor agreement and asks that the Union's petition for interest arbitration be dismissed.

The Union

The Union argues that its failure to comply with the statutory and contractual deadlines does not relieve the City of the obligation to bargain over a successor agreement or, if necessary, to proceed to interest arbitration.

As to the statutory notice issue, the Union cites City of Eau Claire, supra, for the proposition that failure to meet the statutory notice provisions does not deprive the Union of the right to proceed to interest arbitration. The Union argues that a contrary conclusion would be inconsistent with the statutes' purpose of promoting labor peace. The Union also points to the language of Sec. 111.77(3), Stats., which provides that if the Commission concludes that compliance with "procedures" has not occurred, it "may" require such compliance as a prerequisite to ordering arbitration. The Union argues that it is thus within the Commission's discretion to order arbitration even if statutory notice requirements are not met or cured. Thus, the Union asserts that its failure to strictly comply with the statutory timelines does not relieve the City of its duty to bargain or deprive the Commission of the authority to order the parties to arbitration.

As to the contractual issue, the Union argues that the waiver of a statutory right must be specific and should not be lightly inferred. Citing Eau Claire County, supra, the Union argues that its failure to timely provide contractual notice does not constitute a clear and unequivocal waiver of its right and the City's obligation to bargain over a successor agreement. Like the language in Eau Claire County, the parties contract herein does not contain an automatic renewal provision. Absent such a provision, the Union argues that the Commission should not conclude that automatic renewal is appropriate.

Given the foregoing, the Union urges the Commission to deny the City's motion to dismiss.

DISCUSSION

The primary issue before us is whether the Union's admitted failure to meet the March 1 contractual deadline produced an automatic one-year renewal of the existing contract and thus eliminated the Union's right to collectively bargain a successor agreement and, if necessary, proceed to interest arbitration. We conclude that the Union's failure to meet the contractual deadline did not produce a successor agreement and that the Union thus has the right, and the City the obligation, to bargain collectively over a successor to the parties' 1991-1993 contract and, if necessary, proceed to interest arbitration.

It is clear as a general matter that an exclusive bargaining representative has the statutory right to bargain a successor to an existing contract and, if necessary, utilize any available statutory interest arbitration process. It is also well-established that a waiver of a statutory right to bargain must be clear and unambiguous. 1/ The Union would have waived its right to bargain a successor agreement if the contract language provided for automatic renewal of the existing contract if contractually established

1/ City of Richland Center, Dec. No. 22912-B (WERC, 8/86); Brown County, Dec. Nos. 20620, 20623 (WERC, 5/83); Racine Unified School District, Dec. No. 18848 (WERC, 6/82).

deadlines are not met. However, such "renewal" language is not present and we do not believe the existing contract deadlines can reasonably be interpreted in a manner which produces renewal and thus waiver of the statutory right.

In all of the "automatic renewal" cases cited by the City, the contract language explicitly stated that failure to meet a deadline would produce automatic renewal of the contract. 2/ Obviously, such language is lacking here. While there may be circumstances where evidence of bargaining history or past practice would satisfy us that it was the parties' intent that the contract automatically renew even without such explicit language, we have no such evidence of a bargaining history or a past practice here. Given the language alone, we find no clear and unambiguous waiver of the statutory right.

The City has fairly asked what are the consequences of a failure to meet the contractual deadline if the contract is not renewed. As noted by Examiner Malamud in Eau Claire County, supra, failure to meet the contractual deadline may have contractual consequences as to the parties' obligations to honor other

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2/ For instance, in SE-MA-NO Electric, supra the language stated:

> (A) The effective date of this agreement shall be January 1, 1983 ... for a three-year period of up to and including December 31, 1985 and shall continue in full force and effect from year to year thereafter unless written notice is given by either party hereto to the other before sixty (60) days prior to any termination date notifying the other party of its desire to amend or cancel this Agreement.

In Chetek, supra, the contract provided:

> If any party desires to modify or amend this agreement, it shall give written notice to this effect within a 30-day period beginning October 1, 1973. Failing such notice, the agreement shall automatically be renewed on a yearly basis until such notice is given within any October period.

(footnote 2/ continued on page 7)

2/ (Continued)

In Menomonie, supra, the parties had agreed:

> A. This Agreement shall be effective as of January 1, 1983, and remain in full force and effect until December 31, 1984 and shall automatically renew itself from year to year unless either party notifies the other party in writing by August 1 of the year of contract expiration of its intent to inaugurate changes.

In Anchorage Laundry, supra, the contract provided:

> Under this agreement, any party desiring to negotiate changes or modifications, or to terminate the agreement, was to notify the other party 60 days prior to the expiration date of the agreement. If such notice was not given, the agreement was to continue in effect from year to year.

deadlines contained within the same contract provision. More importantly, we believe the parties' language can most reasonably be interpreted as an expression of the timing of negotiations the parties anticipate following rather than iron clad deadlines. Thus, we are satisfied that our result does not render the deadline as meaningless and is consistent with the most reasonable interpretation of the contract.

To the extent the City herein relies upon the Union's failure to provide the 180-day notice specified in the Sec. 111.77(1)(a), Stats., 3/ we find the rationale in City of Eau Claire to be persuasive. The specific issue in Eau Claire was non-compliance with Sec. 111.77(1)(c), Stats. 4/ which obligates a party to give notice to the Commission within 90 days of the Sec. 111.77(1)(a) notice at issue herein. The Commission therein concluded that the (c) notice provision was "directory" and not "mandatory" and thus that non-compliance did not preclude the Commission from ordering arbitration, if necessary. The Commission reasoned:

> The issue boils down as to whether such notice requirement is directory or mandatory. If it is directory, the failure to serve the notice does not preclude the Commission from ordering arbitration. On the other hand, if it is mandatory, the Commission would not have jurisdiction to order arbitration.
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> Our Supreme Court in Worachek v. Stephenson Town School Dist. 1/ articulated the following test as to whether a statutory provision is mandatory or directory:
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> > "There is no well-defined rule by which directory provisions in a statute may, in all circumstances, be distinguished from those which are mandatory. In the determination of this question, as of every other question of statutory construction, the prime object is to ascertain the legislative intention as disclosed by the terms of the statute, in relation to the scope, history, context, provisions, and subject matter of the legislation, the spirit or nature of the act, the evil intended to be remedied, and the general object sought to be accomplished."
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> In Muskego-Norway vs. WERB 2/ our Supreme Court stated as follows:
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> > "The overall purpose of ch. 111, Stats., which must be given overriding consideration, is the promotion of industrial peace through the maintenance of fair, friendly and mutually satisfactory employment relations. This purpose is to be accomplished by the

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3/ **111.77 Settlement of disputes in collective bargaining units composed of law enforcement personnel and fire fighters.** In fire departments and city and county law enforcement agencies municipal employers and employes have the duty to bargain collectively in good faith including the duty to refrain from strikes or lockouts and to comply with the procedures set forth below:

(1) If a contract is in effect, the duty to bargain collectively means that a party to such contract shall not terminate or modify such contract unless the party desiring such termination or modification:

(a) Serves written notice upon the other party to the contract of the proposed termination or modification 180 days prior to the expiration date thereof or, if the contract contains no expiration date, 60 days prior to the time it is proposed to make such termination or modification. This paragraph shall not apply to negotiations initiated or occurring in 1971.

4/ (c) Notifies the commission within 90 days after the notice provided for in par. (a) of the existence of a dispute.

maintenance of suitable machinery for the peaceful adjustment of controversies."

1/ 270 Wis 116 (1955)

2/ 32 Wis 2d 485 at page 485c (1967)

As has been noted previously in this Memorandum, Section 111.70 sets forth the policy of the State in municipal employment labor relations, as does the Commission's rules set forth in ERB 30.02. If the Commission were to adopt the Municipal Employer's rationale that the notice requirements set forth in Section 111.77 are mandatory, the application of such a principle would conflict with the policy of the State with respect to the resolution of disputes arising in municipal employment bargaining, and especially those involving law enforcement and firefighter personnel.

. . .

Unless the parties agree otherwise, the Commission's policy is not to order such a dispute to final and binding arbitration until it has attempted to mediate the dispute involved, and has determined that the parties are at impasse, for the best resolution of such disputes are those which the parties themselves resolve rather than having a settlement imposed upon the parties through final and binding arbitration. Where mediation is not successful, the legislature has seen fit to permit the parties to proceed to final and binding arbitration for the final resolution of the dispute rather than permitting either of the parties to engage in self-help, which may result in a violation of the statute and which would, no doubt, create issues which were not present at the time of impasse.

To conclude that the notice requirements set forth in Section 111.77(1)(c)(2) were mandatory rather than directory would not effectuate the policy of this State to promote peaceful labor relations in collective bargaining involving law enforcement and firefighter personnel, nor would a determination that the rules established by the Commission, as set forth previously herein with reference to notice requirements and reference thereto in the petition requesting arbitration are mandatory, effectuate the policies of the Act or of our own rules.

As was true in City of Eau Claire, finding the (1)(a) notice provisions "mandatory" would not effectuate the legislature's intent to promote peaceful labor relations in firefighting units. Thus, this Union failure also does not preclude access to interest arbitration.

Given all of the foregoing, we have denied the City's motion to dismiss.

Dated at Madison, Wisconsin this 7th day of February, 1994.

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