

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of

AFSCME, LOCAL 1432-B, HARTFORD  
MUNICIPAL EMPLOYEES UNION

To Initiate Arbitration Between  
Said Petitioner and

CITY OF HARTFORD

Case 44  
No. 53597 INT/ARB-7856  
Decision No. 28872

Appearances:

Davis & Kuelthau, S.C., Attorneys at Law, by Mr. Roger E. Walsh, 111 East Kilbourn Avenue, Suite 1400, Milwaukee, Wisconsin, 53202-6613, for the City.

Mr. Sam Froiland, Staff Representative, P. O. Box 944, Waukesha, Wisconsin, 53187-0944, for the Union.

ORDER SETTING ASIDE NOTICE OF CLOSE OF INVESTIGATION

On December 22, 1995, the above captioned Union filed a Petition for Arbitration pursuant to Sec. 111.70(4)(cm)6, Stats., with the Wisconsin Employment Relations Commission as to negotiations between said Union and the City of Hartford regarding certain employees of the City. On May 21, 1996, Investigator Debra Wojtowski from the Commission's staff conducted an informal investigation of the Petition, which included an effort to mediate a settlement of the dispute. That effort was unsuccessful and the Investigator asked the parties to begin the exchange of final offers.

On June 3, 1996, the Investigator received a final offer from the Union along with a cover letter stating: "The Union is prepared for the certification of final offers by the Commission."

On June 10, 1996, the Investigator received a final offer from the City.

On July 5, 1996, the Investigator sent the City the following letter:

July 5, 1996

Mr. Kevin O'Donnell

No. 28872

City Administrator  
City of Hartford  
Hartford City Hall  
109 North Main Street  
Hartford, WI 53027

Re: City of Hartford  
Case 44 No. 53597  
INT/ARB-7856  
Case 45 No. 53598 MIA-  
2034  
Case 46 No. 53599  
INT/ARB-7857

Dear Mr. O'Donnell:

I received your telephone message regarding changes you will be making to your final offers in the above cases. Can you send your offers along to me or let me know how much time you need to prepare them? As I indicated to your secretary today, I will be out of the office until July 18th. If you need to talk about this case with anyone during my absence, please call Marshall Gratz at 414-963-4695.

Very truly yours,  
WISCONSIN EMPLOYMENT RELATIONS COMMISSION  
Debra L. Wojtowski  
Investigator

c: Mr. Sam Froiland, Staff Representative, Wisconsin Council  
40, AFSCME, AFL-CIO

On July 19, 1996, the Investigator sent the City the following letter:

July 19, 1996

Mr. Kevin O'Donnell  
City Administrator  
City of Hartford  
Hartford City Hall  
109 North Main Street  
Hartford, WI 53027

Re: City of Hartford

No. 28872

Case 44 No. 53597  
INT/ARB-7856  
Case 45 No. 53598 MIA-  
2034  
Case 46 No. 53599  
INT/ARB-7857

Dear Mr. O'Donnell:

This is to confirm our phone conversation of Friday, July 19th. Based on our conversation I will be looking to receive your updated final offer, possibly Monday, July 22, 1996 by fax or at the latest Tuesday, July 23rd.

As usual, if there any other questions on this matter I can be reached at 608-266-5865.

Sincerely,  
WISCONSIN EMPLOYMENT RELATIONS COMMISSION  
Debra J. Wojtowski  
Investigator

cc: Mr. Sam Froiland, Staff Representative, Wisconsin Council 40,  
AFSCME, AFL-CIO

On July 23, 1996, the Investigator received a modified final offer from the City.

On August 5, 1996, the Union modified its final offer through the following letter:

August 2, 1996

Ms. Debra Wojtowski  
WERC  
P.O. Box 7870  
Madison, WI 53707-7870

Re: City of Hartford and AFSCME Locals 1432, 1432-A and 1432-B

Dear Ms. Wojtowski:

On behalf of the above captioned AFSCME Locals, this will confirm my telephone message of this date, informing you that the Unions will stipulate to the Dues Deduction language included in the City's most recent final

No. 28872

offers. The remaining issues remain impasse items from our perspective. No further changes in the Unions' final offers will occur. Please certify the final offers of the parties and close the WERC investigation. As always, please contact me in the event that you have any questions in this regard.

Sincerely,  
Sam Froiland

cc: Jeff Petroviak, President, AFSCME Local 1432-B  
Russ Wegner, President, AFSCME Local 1432-A  
Darryl Kranz, President, AFSCME Local 1432

The Investigator then directed the following August 7, 1996, letter to the City.

August 7, 1996

Mr. Kevin O'Donnell  
City Administrator  
City of Hartford  
Hartford City Hall  
109 North Main Street  
Hartford, WI 53027

Re: City of Hartford  
Case 44 No. 53597  
INT/ARB-7856  
Case 45 No. 53598 MIA-  
2034  
Case 46 No. 53599  
INT/ARB-7857

Dear Mr. O'Donnell:

In our telephone conversation of August 2, 1996 I informed you that the Union continues to be ready to close and have the final offers certified in the above cases and moved to arbitration. We agreed at that time that if I did not hear otherwise from the City by the close of the business day on August 6, 1996. I would be asking the Commission to certify final offers.

I have received your voice mail message on this date at the close of the day in which you apologized for not having your changes to me by this date but that you were attempting to cost an issue relating to your final offer.

No. 28872

I presume you were indicating a desire to change your final offer received by the WERC on July 10, 1996, (dated on the document "July 3rd"). In your phone message you also indicated that your work would be completed on Wednesday, August 7th. I appreciate your call to apprise me of the City's position and accept that you will forward any changes to me on that date per your request. Unfortunately, I will be out of the office on that day. Therefore, I have submitted the appropriate closing documents to typing this evening. My signature will be required before the documents are sent forward for a panel selection.

When I return on the morning of Thursday, August 8th, I will check whether the City has faxed to me a new final offer on Wednesday, August 7th. If it has not, I will send the file forward with your offer of July 10, 1996. If you have an amended final offer to me by that time, as you indicated in your phone call, I will certify your most recent offer on August 8th, presuming of course, that the Union does not indicate it has further movement. The Union has indicated several times that it wishes to certify final offers and that it does not anticipate moving any further from its most recent position of June 3, 1996. The certified case also includes the parties' stipulation on the issue of dues deduction as included in the City's offers of July 10th.

My fax number is 608-266-6930.

Very truly yours,  
WISCONSIN EMPLOYMENT RELATIONS COMMISSION  
Debra L. Wojtowski  
Investigator

c: Mr. Sam Froiland, Staff Representative, Wisconsin Council 40,  
AFSCME, AFL-CIO

The Investigator then directed the following letter to the City:

August 8, 1996

Mr. Kevin O'Donnell  
City Administrator  
City of Hartford  
Hartford City Hall  
109 North Main Street  
Hartford, WI 53027

No. 28872

Re: City of Hartford  
Case 44 No. 53597  
INT/ARB-7856  
Case 45 No. 53598 MIA-  
2034  
Case 46 No. 53599  
INT/ARB-7857

Dear Mr. O'Donnell:

I had indicated to you in my fax of Tuesday, August 6, 1996, that pursuant to your call at the end of the business day on August 6th informing me that you would be completing your work on Wednesday, August 7th, I would allow an extension for the provision of the City's final offer until the close of that day, per your request. I indicated that if you had no changes to me on that day I would close the above cases and certify final offers.

When I returned from the field on Thursday, August 8th I had not received a new final offer from the City. I did receive your phone message, however, made at the close of the business day on August 7th, in which you indicated that the City planned to make significant changes to its final offer in the future. You stated that you would not authorize the certification of final offers because of this anticipated movement on the part of the City, but offered no certain date when this movement would take place.

In our phone conversation of this morning, Thursday, August 9th, I explained that as the investigator in this matter it is my responsibility to determine when the parties have reached impasse and then to send the cases on to arbitration. I indicated I needed to know what prevented the City from communicating its changed position to the Union and the Commission and when you anticipated that these changes would be presented. We discussed the areas in which the City's anticipated offer would differ from its previous offers and you told me that the extension was needed because the City was doing some costing of those changes. You state that the offer would be communicated to the Commission no later than August 14th.

Based on the City's communications and the possibility that movement in the City's position may result in a voluntary settlement in the above cases, I will anticipate receiving the City's offer no later than 4:00 pm on Wednesday, August 14th. If, however, I do not receive the City's final offer or receive only the representation that the City will be changing its final offer the next day, or at some point in the future, I will close the investigation and conclude that the parties are, in fact, at impasse.

No. 28872

Very truly yours,  
WISCONSIN EMPLOYMENT RELATIONS COMMISSION  
Debra L. Wojtowski  
Investigator

- c. Mr. Sam Froiland, Staff Representative, Wisconsin Council 40,  
AFSCME, AFL-CIO

On August 15, 1996, prior to the close of the Commission's normal business day (i.e., 4:30 p.m.), the City left the following telephone message for the Investigator:

Deb, this is Roger Walsh calling on behalf of Kevin O'Donnell over at the City of Hartford. Just want to make sure that you have not closed that investigation. We are still working on a revised final offer and plan to submit it. Today is Thursday. I'd hoped to have it out yesterday, but that didn't work. We should be probably tomorrow. Uh, I will get back to you. The City is not ready to close the investigation. If you have any questions, call me, 255-1440. Thank you.

On August 15, 1996, at the end of the Commission's normal business day, the Investigator issued a Report to Commission and Notice of Close of Investigation through placement of that document in the mail. On August 16, 1996, the Investigator received a revised final offer from the City.

On August 16, 1996, the Investigator directed the following letter to the City:

August 16, 1996

Mr. Roger E. Walsh  
Davis & Kuelthau, S.C.  
Attorneys at Law  
111 East Kilbourn Avenue, Suite 1400  
Milwaukee, WI 53202-6613

Re: City of Hartford (Public Works)  
Case 46 No. 53599 INT/ARB-7857

Dear Mr. Walsh:

I received your phone message on Thursday afternoon August 15th, in which you stated that you hoped that I had not closed the above case and that you believed the City might have a new offer ready this week or the

No. 28872

next. Subsequently, I received the City's offer on Friday August 16th. As I indicated in my letter to the City of August 8th, I extended the period for the amendment of offers until the afternoon of August 14th. I received no communication or offer from the City at that time, and therefore closed the cases. You should have received the documents or they are in the mail and will shortly arrive. As you know, the union could voluntarily permit the reopening of the case. I called Sam Froiland this morning, however, and he indicated that the union is not interested in reopening, but wished to proceed to arbitration.

If you have any questions, you may contact Peter Davis at 608 -266-2993.

Very truly yours,  
WISCONSIN EMPLOYMENT RELATIONS COMMISSION  
Debra Wojtowski  
Investigator

cc: Mr. Sam Froiland, Staff Representative, Wisconsin Council 40,  
AFSCME, AFL-CIO

On August 21, 1996, the Commission's General Counsel directed the following letter to the City and the Union:

August 21, 1996

Mr. Sam Froiland  
Staff Representative  
Wisconsin Council 40  
P. O. Box 944  
Waukesha WI 53187-0944

Mr. Roger E. Walsh  
Attorney  
Davis & Kuelthau S.C.  
111 East Kilbourn Avenue, #1400  
Milwaukee WI 53202

Re: City of Hartford  
Case 44 No. 53597 INT/ARB-7856  
Case 45 No. 53598 MIA-2034  
Case 46 No. 53599 INT/ARB-7857

Gentlemen:

I write to confirm Mr. Walsh's telephonic objection to me on August 20, 1996, regarding closure of the investigation in the above matters. During that telephone conversation, I asked Mr. Walsh to reduce his objections to writing. He agreed, but asked for the opportunity to first

No. 28872



discuss the matter with Mr. Froiland (on Monday or Tuesday when Mr. Froiland returns from vacation) to see if some informal resolution was possible. I agreed with that suggestion and await the result of that discussion.

Mr. Walsh also asked that I provide him with copies of the City offers which the Investigator had forwarded to the Commission with her recommendation that the disputes proceed to interest arbitration. The Investigator has provided me the attached "Appendix A" (page 2 of a July 23, 1996, FAX) as the City's offer for the Local 1432-A unit and attached pages 4-10 of the same FAX transmission as the City's offer for the Local 1432-B unit. The Investigator has been unable to locate the third offer, but believes it to be page 3 of the July 23, FAX transmission.

Very truly yours,  
WISCONSIN EMPLOYMENT RELATIONS COMMISSION  
Peter G. Davis  
General Counsel

Enclosures

cc - Ms. Debra Wojtowski, WERC (no enclosures)  
Mr. Kevin O'Donnell, City Administrator, City of Hartford

DISCUSSION:

ERC 32.09(2) provides in pertinent part:

The commission or its agent may not close the investigation until the commission or its agent is satisfied that neither party, having knowledge of the content of the final offer of the other party, would amend any proposal contained in its final offer . . . .

Thus, where the investigator knows of the desire to amend the final offer prior to the close of the investigation, we have historically held that it is not appropriate to deny said party that opportunity. 1/

In this case, the investigation was closed at the end of the Commission's business day on August 15, 1996. 2/ Prior to the close of the investigation, the City had communicated its continuing interest in revising its final offer. Thus, under existing precedent and practice, the Investigator would be obligated to allow the City to amend its offer.

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1/ See School District No. 5, Franklin, Dec. No. 22211 (WERC, 12/84); Milwaukee Board of Vocational, Technical & Adult Education District No. 9, Dec. No. 17402 (WERC, 11/79)

2/ See Franklin, supra, and Kenosha County, Dec. No. 28640 (WERC, 1/96) No. 28872

However, here, in her August 8, 1996, letter to the parties, the Investigator advised the City that her knowledge of City interest in revising an existing offer would no longer be a sufficient basis for her keeping the investigation open. From the text of her August 8 letter, it is apparent the Investigator was frustrated with the City's seeming inability to provide a date certain by which a revised final offer would be submitted. 3/

However, under the facts of this case, we need not and do not reach the question of whether there may be appropriate circumstances in which an investigator can legitimately close an investigation even when aware of a party's interest in amending an existing offer. This is because in the instant matter the Union chose to modify its final offer on August 2, 1996. Under this circumstance, the City was thereafter entitled to a reasonable period of time to consider the ramifications of the change. While there is room for disagreement as to how much more time the City deserved (given the relatively small modification in the Union's August 2 offer), we are not persuaded that the time provided by the Investigator was sufficient.

Therefore, we issue the following

ORDER

1. The Notice of Close of Investigation is set aside and the investigation is reopened as to the Petition.
2. The Investigator is directed to immediately continue her investigation of the Petition until the dispute is voluntarily resolved or she has obtained final offers in a manner consistent with Sec. 111.70(4)(cm), Stats., ERC 32.09(2), and this decision.

Given under our hands and seal at the City of Madison, Wisconsin,  
this 29th day of November 1996.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By James R. Meier /s/  
James R. Meier, Chairperson

A. Henry Hempe /s/  
A. Henry Hempe, Commissioner

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~~By~~ Indeed, the City contends in its brief that contrary to the Investigator's August 8, 1996, 28872-D letter, it never committed to an August 14 deadline for submission of its final offer. No. 28872