STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

GENERAL TEAMSTERS UNION LOCAL NO. 662, Complainant,

vs.

CITY OF MARSHFIELD, WASTE WATER TREATMENT PLANT, Respondent.

Case 125
No. 54509
MP-3225

DECISION NO. 28973-A

Appearances:

Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., Attorneys at Law, 1555 North RiverCenter Drive, Suite 202, P.O. Box 12993, Milwaukee, Wisconsin 53212, by **Ms. Naomi E. Soldon,** on behalf of General Teamsters Union Local No. 662.

Ruder, Ware & Michler, S.C., Attorneys at Law, 500 Third Street, P.O. Box 8050, Wausau, Wisconsin 54402-8050, by **Mr. Dean R. Dietrich,** on behalf of City of Marshfield, Waste Water Treatment Plant.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On October 7, 1996, General Teamsters Union Local No. 662 filed a complaint with the Wisconsin Employment Relations Commission alleging that the City of Marshfield, Waste Water Treatment Plant had committed prohibited practices within the meaning of Sec. 111.70(3)(a)4 of the Municipal Employment Relations Act when it agreed to a 3 percent wage increase with the Complainant in bargaining, then later "advised employes that if they accepted a 3 percent wage increase there would be layoffs of four weeks in each of the three years of the agreement, but if the employes would accept a 2.75 percent wage increase for each year of the agreement, there would be no layoffs." The complaint added: after the employes ratified the tentative agreement which contained a 3 percent yearly wage increase, the Respondent informed "bargaining unit employes that the layoffs which it had threatened will begin in November, 1996." The Commission appointed Dennis P. McGilligan, a member of its staff, 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. Hearing on the complaint was held on July 1, 1997 in Marshfield, Wisconsin. The hearing was transcribed. The parties completed their briefing schedule on October 15, 1997.

No. 28973-A

The Examiner, having considered the evidence and argument of the parties and being fully advised in the premises, makes and files the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1.General Teamsters Union Local No. 662, hereinafter referred to as the Complainant or Union, is a labor organization within the meaning of Section 111.70(1)(h), Stats., and has its principal place of business at 2220 Division Street, P.O. Box 163, Stevens Point, Wisconsin, 54481-0163.

2.City of Marshfield (Waste Water Treatment Plant), hereinafter referred to as the Respondent or City, is a municipal employer within the meaning of Sec. 111.70(1)(j), Stats., and has its principal place of business at 630 South Central Avenue, Marshfield, Wisconsin, 54449-0727.

3.At all times material hereto, the Union has been the exclusive bargaining representative of certain Waste Water Treatment Plant employes of the City's Waste Water Treatment Plant.

4.On June 27, 1995, the City's Common Council held a meeting and discussed the City's budget parameters and guidelines for the 1996 year. The Common Council determined that:

> [t]he 1996 budget should limit the growth in Personal Services category expenditures (i.e. salaries, wages, benefits) to no more than can be sustained from our actual growth in assessed valuation (i.e. we should not increase the tax levy rate to finance increased personnel costs).

The Waste Water Treatment Plant and its personnel were subject to this directive.

1.In the fall of 1995, the City's Common Council determined that a wage increase of 2.75 percent would be granted City employes for the 1996 year and that if a higher wage increase was obtained by employes, layoffs would occur to reduce the effective wage increase to 2.75 percent. Nicole Onder, Human Resources Specialist and the City's representative in collective bargaining, conveyed this information to the various bargaining units in the City of Marshfield.

1.The City and the Union commenced negotiations for a successor 1996 collective bargaining agreement on November 17, 1995. Nicole Onder served as the City's Chief Spokesperson in the negotiations. Ron Dickrell, Waste Water Treatment Plant Superintendent, also served on the City's bargaining team, and attended all bargaining sessions. Reggie Konop, Business Representative, served as the Union's Chief Spokesperson in the negotiations. Konop had talked with AFSCME representatives prior to these negotiations regarding the status of their

bargain with the City including "what they were offering, going forth from the City. I should say, what their proposals were."

7. As of December, 1995, the parties were still discussing non-economic issues and benefits such as sick leave and compensatory time. They had not yet begun discussing a wage increase.

8. The parties met in a negotiation session on December 18 or 19, 1995. The primary topic of discussion was the benefit package including sick leave accumulation and a comp time bank for employes to pay insurance premiums upon retirement. The meeting gave rise to a heated discussion between Onder and Konop about sick leave. Shortly before the meeting ended, Onder offered on behalf of the City a 2.75 percent wage increase. The Union did not respond because it first wanted to resolve the benefit package.

9. After the above meeting, Onder met with Randy Allen, City Administrator, and informed him of what had been discussed in the negotiations, including the City's wage offer and position that there would be employe layoffs for any wage increase over 2.75 percent.

10. On December 20, 1995, the Union filed a Petition for Interest Arbitration with the Wisconsin Employment Relations Commission, herein Commission. Included with the Petition was a wage offer by the Union of 3.5 percent for each year of the contract. On January 5, 1996, the City filed its preliminary final offer with respect to the aforesaid Petition. In its preliminary final offer, the City proposed a 2.75 percent wage increase for the 1996, 1997 and 1998 contract years.

11. On February 12, 1996, the City's Finance, Budget, and Personnel Committee held a meeting. At that meeting, the Committee reviewed the status of the contract negotiations with the Union. Onder advised the Committee that the Union was requesting a 3.5 percent wage increase for each year of the agreement in its preliminary final offer. Onder also advised the committee that she had advised the Union that any increase over 2.75 percent would result in layoffs. The Committee approved offering a 3 percent wage increase "to the union as a final offer, but it would still result in layoffs." The Committee reiterated the City's position that a wage increase above 2.75 percent would result in employe layoffs to reduce the effective wage increase to 2.75 percent. The Committee advised Onder to sent a strong message in this regard.

12. Onder met with the Common Council "throughout negotiations to brief them on negotiations and get further direction from them." However, Onder left the City's employment on or about February 12, 1996, and had no further involvement in negotiations.

13. A mediation/investigation session was subsequently conducted by a member of the Commission's staff. During the mediation/investigation session, the City proposed through the mediator a 3 percent annual wage increase for the 1996, 1997 and 1998 contract years. The Union accepted that proposal without much discussion on the subject between the parties. The

parties were able to reach a number of tentative agreements with respect to other terms of a successor 1996-1998 collective bargaining agreement. However, the parties were unable to reach

agreement to all of the terms of the successor collective bargaining agreement.

14. At or about this same time City Administrator Allen, who was also involved in the labor negotiations, left the City's employment. Dean R. Dietrich of Ruder, Ware & Michler, A Limited Liability S.C., was then retained to assist the City in negotiations with the Union. During the months of June and July, 1996, Dietrich and Konop were able to negotiate and to agree to all of the terms of a successor 1996-1998 collective bargaining agreement. This included the annual 3 percent wage increase for the 1996-1998 contract term.

15. On August 26, 1996, the City's Finance, Budget, and Personnel Committee held a meeting. At that meeting, the City's new Administrator reviewed with the Committee a summary of the tentative agreements reached with the Union. The Committee then ratified the terms of the tentative agreement.

16. Also on August 26, 1996, the Administrator met with Waste Water Treatment Plant Superintendent Ron Dickrell and went over a draft of a letter that he had intended on sending out in regard to layoffs. The Administrator recommended that Dickrell go over this draft with the Union prior to their ratification vote.

17. On the next day, August 27, 1996, Dickrell read the following memorandum to Waste Water Treatment Plant bargaining unit employes at a meeting:

> By now, each of you are aware that the City must temporarily reduce staffing levels to meet budgetary mandates set by the Common Council. These layoffs are a result of a declining economic base which is resulting from minimal increases in our property taxes. During the time employes are laid off all benefits will be continued except contributions to the Wisconsin Retirement System, the Workers' Compensation fund and social security.
>
> Department heads are now determining the number of layoffs necessary to comply with the fiscal constraints they must work within. It has been suggested that some employes might desire voluntary layoffs. Therefore, this memo is to offer any employes who may want to volunteer, the opportunity to do so. We will require a signed consent form indicating that the employee is aware that this layoff is voluntary. A form will be provided by your immediate supervisor. Therefore, if anyone is interested please contact your individual supervisor no later than 2:30 p.m. September 20. Also, if any of you have questions, please feel free to contact me.

Dickrell also explained to the employes that he had been directed by one of the Council members to inform the bargaining unit that acceptance of a 3 percent wage increase would result

in employe layoffs, whereas acceptance of a 2.75 percent increase would not result in employe layoffs.

Dan Mrotek and Harold Tauschek, Union Stewards, were among the bargaining unit employes present at the meeting. Mrotek subsequently telephoned Konop and advised him of the City's position with respect to the 3 percent versus 2.75 percent wage increase noted above.

1.The City did not advise Konop of the above meeting, even though Konop was the Business Representative and the Chief Spokesperson for the Union. Konop did not learn of the meeting until the morning of the ratification meeting when Mrotek told him about it as noted above. Konop was aware, however, that the Marshfield Common Council had already approved the tentative agreement that was set for ratification.

1.On August 28, 1996, the Waste Water Treatment Plant bargaining unit employes met to review the terms of the tentative agreement with respect to the 1996-1998 collective bargaining agreement. The employes voted to accept the terms of the agreement, including a 3 percent wage increase for each year of the three year contract.

2.By memorandum dated September 27, 1996, Dickrell informed two Waste Water Treatment Plant employes, Mark Kivela and Harold Tauschek, that they would be laid off for a total of 40 hours each commencing on November 10, 1996 and ending on November 16, 1996. The Union immediately filed a grievance protesting same. During the processing of the grievance, Konop met with the City Finance Committee to discuss the layoffs. During this discussion, Konop informed the members of the Finance Committee that during the negotiations the Union understood "that our people were going to get a solid three percent increase and there was noting that was going to affect them." Konop also informed the Committee that it was not until the day before the aforesaid ratification meeting that the bargaining unit employes were informed that if they took the 3 percent then there would be layoffs, but if they settled at 2.75 percent there would be no layoffs. Konop also argued that the City should instead layoff a secretary in the Department who was a member of a different union but who had less seniority than bargaining unit employes. One of the Aldermen said something to the effect "there's got to be something in here that tells that these people were told of a layoff, there just has to be." Konop responded if there was it wasn't presented to the Union. Dickrell then checked the bargaining notes and minutes, but found nothing in writing to this effect.

3.The City laid off the two bargaining unit members for one week in 1996 as noted above.

4.The City has also implemented layoffs for 1996 with the AFSCME bargaining units including the clerical employees and DPW, an independent police union affiliated with WPPA, LEER and the Ordinance Enforcement and Dispatcher bargaining unit represented by the Labor Association of Wisconsin. In addition, the firefighter union is involved in a pending arbitration proceeding for the calendar years 1996 and 1997.

5.The City did not inform the Union either at the December 18 or 19, 1995 negotiation session, or at any time material herein, except just prior to ratification, that if they accepted a wage increase higher than 2.75 percent i.e. a 3 percent wage offer employe layoffs would occur to reduce the effective wage increase to 2.75 percent.

Upon the basis of the foregoing Findings of Fact, the Examiner makes and files the following

CONCLUSIONS OF LAW

6.City of Marshfield, by its failure to inform General Teamsters Union Local No. 662 prior to August 27, 1996 that acceptance of a 3 percent wage increase would cause layoffs, but if employes accepted a 2.75 percent wage increase for each year of the proposed agreement, there would be no layoffs, did not refuse to bargain collectively with the Union, and thus the City did not commit prohibited practices within the meaning of Sec. 111.70(3)(a)4, Stats., or derivatively, Sec. 111.70(3)(a)1, Stats.

7.Given the fact that the City of Marshfield's bargaining team did not reach a tentative agreement with the General Teamsters Union Local No. 662 bargaining committee at any time material herein regarding the 3 percent wage increase, the City of Marshfield, and its agents, particularly Ron Dickrell, did not engage in bad faith bargaining by discontinuing support of a tentative agreement, and thus the City did not commit prohibited practices within the meaning of Sec. 111.70(3)(a)4, Stats., or derivatively, Sec. 111.70(3)(a)1, Stats.

8.City of Marshfield, by reading the Memorandum set forth in Finding of Fact No. 17 to bargaining unit employes on August 27, 1996, and by informing them on said date that acceptance of a 3 percent wage increase would result in employe layoffs, whereas acceptance of a 2.75 percent increase would not result in employe layoffs, did not engage in individual bargaining with employes represented by the Union, and therefore, did not violate Secs. 111.70(3)(a)4, Stats., or derivatively, Sec. 111.70(3)(a)1, Stats.

Upon the basis of the foregoing Findings of Fact and Conclusions of Law, the Examiner makes and issues the following

ORDER

IT IS ORDERED that the Complaint filed herein be, and the same hereby is, dismissed in its entirety.

Dated at Madison, Wisconsin this 18th day of November, 1997.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Dennis P. McGilligan /s/

Dennis P. McGilligan, Examiner

City of Marshfield, Waste Water Treatment Plant

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

POSITIONS OF THE PARTIES

Complainant's Position

Complainant, in its brief, argues that the Respondent engaged in bad faith bargaining by withholding relevant information. In support thereof, Complainant first points out that the duty to bargain in good faith includes the obligation to furnish information that is reasonably necessary to the Union's performance of its responsibilities as bargaining representative. Complainant states the record evidence established that the Respondent knew months before the tentative agreement was reached that anything more than a 2.75 percent wage increase could cause layoffs, but withheld that information from the Union. Complainant adds that Respondent knew that its own final offer of 3 percent would result in layoffs but failed to tell the Union of same. Complainant concludes that the fact a 3 percent wage increase could cause layoffs is relevant information that it needed in order to effectively collectively bargain.

Complainant next argues that Respondent engaged in bad faith bargaining by discontinuing support of a tentative agreement. In particular, Complainant complains that Respondent's bargaining agents violated the duty to bargain in good faith when they failed to continue to support the tentative agreement that they approved and instead urged the Union's own members the day before ratification to sabotage the agreement by voting against it.

Finally, Complainant argues that Respondent engaged in illegal direct dealing when it went behind the Union's back and urged bargaining unit employes to reject the agreement after bargaining had been concluded.

For relief, Complainant requests "declaratory relief and an order that the City make the laid-off employes whole."

Complainant, in its reply brief, points out that Respondent's case depends on Onder's unsupported testimony that she told the Union during negotiations that a 3 percent wage increase would result in layoffs. Complainant adds:

> By assuming this fact as true and failing to argue any other facts in the alternative, the City has tacitly acknowledged that if Onder did not inform the Union that a 3 percent wage increase would lead to lay-offs, the City engaged in a prohibited practice.

Complainant opines: "The evidence contradicts Onder's testimony, and the City's defense therefore lacks a factual basis."

Complainant also points out that Respondent did not even address the charge of direct dealing in its brief and asserts that the only explanation for said omission is that Respondent has no defense to this charge. Complainant also rejects any assertion by Respondent that once the unit notified Konop of the illegal meeting, Complainant had a duty to either request renegotiation of the tentative agreement before the ratification meeting or recommend rejection of the tentative agreement it had achieved through months of negotiation and mediation with Respondent. To the contrary, Complainant believes that if Respondent wanted to revisit the tentative agreement at the eleventh hour, at the very least, Respondent had a duty under MERA to request bargaining with the Union's representative, or in the alternative, a duty to continue their support of the agreement.

Based on all of the above, Complainant requests that Examiner find that Respondent committed prohibited practices by the conduct noted above and order the appropriate relief.

Respondent's Position

In its brief, Respondent basically argues that it did not commit any prohibited practices within the meaning of Section 111.70(3)(a)4, Stats., by its actions herein. In support thereof, Respondent first argues that a review of relevant case law supports its position. In this regard, Respondent first points out that the Commission considers the totality of a party's conduct in determining whether a party has failed to bargain in good faith. ADAMS COUNTY, DEC. NO. 11307-A (SCHURKE, 4/73), AFF'D BY OPERATION OF LAW, DEC. NO. 11307-B (WERC, 5/73) Respondent adds that Complainant must prove a violation of the duty to bargain by a "clear and satisfactory preponderance of the evidence."

Respondent next notes that in CITY OF BELOIT, DEC. NO. 27779-A (MCGILLIGAN, 3/94) the Examiner found that the City had not committed a prohibited practice when it laid off certain employes because said action was based on "fiscal constraints and policy decisions not related to any hostility toward the Union." (Emphasis supplied) On review of said decision, Respondent points out that the Commission observed:

> . . . In our view, it is generally appropriate for one party to advise the other during the collective bargaining process of the potential negative consequences if a proposal or position ultimately is included in the collective bargaining agreement. Thus, for instance, if an employer advises a union that acceptance of the union's wage demands might or would require the layoff of employes and the totality of the circumstances surrounding the employer's statement establish that the employer is not motivated by a desire to threaten employes for the exercise of their right to collectively bargain, that employer is acting in a legal manner consistent with the collective bargaining process. The employer in such

> circumstances is not seeking to deter employes from exercising rights but rather seeking to persuade employes to change the position they are taking at the collective bargaining table when exercising their rights. Simply put, parties are generally free to take whatever positions they wish at the collective bargaining table, but cannot expect to be insulated from any consequences if they are successful in having those proposals become part of the collective bargaining agreement. . . . (Emphasis supplied) CITY OF BELOIT, DEC. NO. 27779-B (WERC, 9/94), at 10.

before concluding:

> . . . we are persuaded that the Examiner correctly concluded that the City was not motivated by hostility but rather by legitimate management decisions and public policy choices regarding service levels and financial constraints. Supra at 11. (Emphasis supplied)

Respondent also notes that in CITY OF MEDFORD ELECTRIC UTILITY, DEC. NO. 28440-D (NIELSEN, 5/97) the Examiner found that the City had not committed a prohibited practice by transferring work from the City's Electric Utility, subsequently subcontracting that work to a third party, and then reducing the work hours of an employe. In arriving at that decision, the Examiner stated:

> . . . even where employes are informed across the bargaining table that success in negotiating higher wages will result in layoffs – a far more direct linkage between the protected activity and the detrimental consequence than exists in this case – no illegal motive is automatically inferred. If the employer's motive in transferring work or laying off employes is to save money relative to negotiated wage rates, that motive may trigger a bargaining obligation, but it is not an illegal motive for purposes of Section 111.70(3)(a)3. Supra at 45. (Emphasis supplied).

Respondent further notes in CITY OF BROOKFIELD, DEC. NO. 20691-A (BIELARCZYK, 5/93), the Examiner concluded that the City had not committed a prohibited practice by laying off certain library employes and amending its civil service ordinance to exclude employes from that ordinance who were represented by a collective bargaining representative because the City's decisions had a legitimate basis and there was no evidence of union hostility. Respondent points out that in affirming the Examiner's decision the Commission ruled that the evidence failed to prove by a clear and satisfactory preponderance of the evidence that the City's actions were motivated, in part, by anti-union considerations. Respondent adds that the Commission noted that the layoffs were based on the City's decision to stay within the library's budget allocation. SUPRA AT 8.

Application of the above legal standards to the facts of this case demonstrates, according to Respondent, that no violation of Section 111.70(3)(a)4, Stats., occurred when the City

temporarily laid off two Wastewater Treatment Plant employes. Respondent reaches this conclusion for the following reasons. One, the City did not engage in bad faith bargaining with the Union with respect to a wage increase for the 1996 contract year because it informed the employes and the Union that acceptance of a wage increase above 2.75 percent would result in employe layoffs in a meeting in December of 1995 as well as the day before the ratification. Respondent adds that "when the employes voted on August 27, 1996, to ratify the contract settlement, the employes and the Union were fully aware of the effect of ratifying a 3 percent wage increase for the 1996 contract year." By failing to withdraw the tentative agreements that were before the employes for consideration and canceling the meeting, and/or by rejecting the tentative agreement and requesting further bargaining on the wage issue, Respondent claims "the Union and the employes accepted with full knowledge, the consequences of the employe layoffs which resulted from the 3 percent wage increase."

Two, the City's decision to layoff the two employes in question was based on legitimate business reasons. In this regard, Respondent notes that the City's decision to limit wage increases to 2.75 percent for the 1996 year was made before contract negotiations commenced with the Union for a successor collective bargaining agreement and was based on a desire not to increase the tax levy rate to finance increased personnel costs. (Emphasis supplied) Respondent adds that other evidence in this dispute indicates it did not bargain in bad faith or act based on hostility towards the Union i.e. layoffs were city-wide and did not focus solely on the Union and the City treated all bargaining units the same.

For the foregoing reasons, Respondent requests that the Examiner dismiss the complaint in its entirety.

In its reply brief, Respondent first argues that Complainant has mischaracterized the facts in this case. In this regard, Respondent argues that the record supports a finding that in December, 1995, Onder advised Konop that a wage increase above 2.7 percent would result in employe layoffs, and that Konop and Mrotek were unable to produce any negotiation notes or documents which supported their testimony to the contrary.

Respondent next argues that Complainant has failed to meet its burden of proof that the City engaged in bad faith bargaining. In support thereof, Respondent first argues that it did not intentionally fail to advise the Complainant that a wage increase above 2.75 percent would result in employe layoffs. (Emphasis supplied) In this regard, Respondent notes that prior to the December 18 or 19, 1995 negotiation session, the parties did not have an opportunity to discuss a wage increase for the 1996 contract year. Respondent believes that Onder brought up the consequences of a pay raise over 2.75 percent with the Complainant at the aforesaid December meeting. Respondent adds that Dickrell also advised the bargaining unit prior to ratification that acceptance of a 3 percent wage increase for the 1996 contract year would result in employe layoffs, whereas acceptance of a 2.75 percent wage increase would not result in such layoffs. Respondent again points out that Union Stewards informed Konop of the City's position on the wage increase prior to ratification. Respondent concludes that when employes voted to ratify the

contract settlement they, and the Union, were fully aware of the consequences of ratifying a 3 percent wage increase; and the City did not withhold that information.

Citing federal case law, Respondent points out that since Complainant never requested information as to how a 3 percent wage increase would be funded or how such an increase would impact on employes, Respondent was under no obligation to provide that information.

Respondent also rejects Complainant's allegation that the City engaged in bad faith bargaining in that its agents did not support the tentative agreement reached by the parties with respect to a wage increase for the 1996 contract year. In this regard, Respondent argues that there is no evidence that Dickrell argued in favor of a 2.75 percent versus a 3 percent wage increase. In Respondent's opinion, "Dickrell simply provided the employes with the information that had been presented to him from the City Administrator and he shared that information with the Department employes as he always did."

Finally, Respondent maintains that Complainant's claim that the City engaged in unlawful individual bargaining is without merit and contrary to the evidence. In this regard, Respondent claims that Dickrell did not threaten layoffs if the employees ratified the tentative agreement; "he simply shared with the employes the memorandum, which was sent to all represented employes, and which indicated that the City had to temporarily reduce staffing levels to meet the budgetary mandates" set by the Council. Nor is there any evidence that Dickrell attempted to "bargain" individually with employes according to Respondent. Respondent again points out that all that Dickrell did was to provide information to the employes so that they understood the impact of the City's proposed 3 percent wage increase. Respondent opines that an employer can communicate truthful comments directly to its employes with respect to bargaining proposals citing ST. CROIX COUNTY, DEC. NO. 28791-A AT 10 (CROWLEY, 5/97) in support thereof. Respondent adds that such an action does not constitute unlawful individual bargaining. ASHWAUBENON SCHOOL DISTRICT, DEC. NO. 14774-A (WERC 10/97). Respondent also adds that Complainant had its agents present at the job site (Union Stewards were present and communicated the information in question to Konop). Respondent further points out that individual bargaining does not occur simply because an employer conducts an informational meeting with its employes without the Union business agent being present.

DISCUSSION

Failure to Provide Information

Complainant initially argues that Respondent engaged in bad faith bargaining by withholding relevant information. In this regard, Complainant maintains that the duty to bargain in good faith includes the obligation to furnish information that is reasonably necessary to the Union's performance of its responsibilities as a bargaining representative citing several Commission decisions in support thereof. 1/ However, the cases relied upon by Complainant all provide that the aforesaid relevant information must be provided upon request. (Emphasis

added) Here the record is undisputed that Complainant made no such request. This despite the fact that Complainant's bargaining representative, Reggie Konop, had talked prior to the start of negotiations with the AFSCME representative and stewards about the course of their bargain including what the proposals were from both AFSCME and the City. 2/ Since the City conveyed the same message – that any wage increase over 2.75 percent would result in employe layoffs -- to all six bargaining units in the City, the Examiner finds it reasonable to conclude that Konop had knowledge of the aforesaid City position, but decided for whatever reason not to ask the City whether its 3 percent wage increase proposal included employe layoffs. As pointed out by Respondent, without a request for such information, the City is under no obligation to provide that information. 3/

In addition, the record is undisputed that the City informed bargaining unit employes on August 27, 1996 that acceptance of a 3 percent wage increase would result in employe layoffs, whereas acceptance of a 2.75 percent increase would not result in employe layoffs. 4/ Two Union stewards were present at said meetings. Stewards are the Union's agents at the job site. 5/ Said stewards were also members of the Union's bargaining team. 6/ Thus, the Examiner finds it reasonable to conclude that the Union was notified on the aforesaid date that acceptance of a wage increase over 2.75 percent would lead to employe layoffs. And, in fact, the stewards informed Konop prior to ratification of the City's position relative to a wage increase and employe layoffs. 7/ So, when the employes voted on August 28, 1996 to ratify the contract settlement, they and the Union were fully aware of the effect of ratifying a 3 percent wage increase for the 1996 contract year. As pointed out by Respondent, by "ratifying the 3 percent wage increase with knowledge of the consequences of doing so, the Union and the employes accepted . . . the consequences of the employe layoffs which resulted from the 3 percent wage increase."

Based on the foregoing, the Examiner rejects the first claim of Complainant.

Discontinuing Support of a Tentative Agreement

Complainant next argues that Respondent engaged in bad faith bargaining by discontinuing support of a tentative agreement. In this regard, Complainant notes that the duty to bargain requires the City's bargaining agents to continue to support the tentative agreement that they approved. 8/ In particular, Complainant complains that City representative Ron Dickrell went to the Union's own members the day before ratification to sabotage the agreement. Complainant adds: "Dickrell attempted to coerce the unit into voting against the agreement by telling them they would be laid off if they accepted the agreement's 3 percent wage increase, but would not be laid off if they accepted a 2.75 percent increase." Complainant concludes that the City's "last minute efforts to torpedo support for the tentative agreement" through the efforts of Dickrell who had participated in all of the negotiations and mediation and who "had pledged his support for the tentative agreement", constitutes bad faith bargaining.

The problem with this argument is that it starts from the premise that there was a tentative agreement between the parties the City's bargaining representatives were obligated to support. To the contrary, the record indicates that there was "no meeting of the minds" between the City and Union regarding a 3 percent wage increase. In this regard, the Examiner notes that the City's representatives believed that Onder had informed the Union at the December, 1995, meeting that any wage increase over 2.75 percent would lead to employe layoffs. Consequently, they did not raise the issue again either at the mediation session where the Union accepted a City proposal for a 3 percent annual wage increase for three years without much discussion on the subject or at any time material thereafter. In addition, the record is clear that the Union understood that its bargaining unit members "were going to get a solid 3 percent increase and there was nothing that was going to affect them" both as a result of the mediation meeting, 9/ and at all times material herein prior to the day before ratification. 10/ Based on the foregoing, it is clear to the Examiner that although the parties agreed to a 3 percent wage increase for 1996, etc. said wage increase meant different things to each of them. The Union believed it was getting a straight 3 percent wage increase with no strings attached while the City believed that the Union accepted a 3 percent increase understanding that such an increase entailed employe layoffs. Absent a bargaining history that the parties understood the meaning that the other side attached to the 3 percent wage increase, the Examiner finds, as noted above, that there was no "meeting of the minds" on the subject. Since the parties did not reach a tentative agreement over same, the City's representatives, including Ron Dickrell, were not obligated to continue their support of the 3 percent wage increase.

Complainant also attacks Diskrell's attempt to torpedo the tentative agreement by encouraging the employes to vote against same. For the reasons discussed below, the Examiner rejects this allegation of Complainant finding instead that Dickrell simply shared information with the bargaining unit and did not attempt to "bargain" with the employes or coerce them into rejecting the tentative agreement.

Based on the above, the Examiner rejects the second claim of Complainant.

Illegal Direct Dealing

Finally, Complainant argues that Respondent engaged in illegal direct dealing by deliberately bringing employes into negotiations after negotiations with the exclusive bargaining agent had concluded. In particular, Complainant complains that the City spent months negotiating an agreement only to do an end run around the Union hours before ratification. Complainant alleges the City captivated employes, deliberately excluding the Union, and threatened employes with layoffs if they ratified a contract they believed was supported by both the City and the Union. Complainant concludes that whatever their specific intentions Respondent's direct approach of employes and request they reject the tentative agreement "was a blatant incident of direct dealing."

Section 111.70(3)(a)4, Stats., makes it a prohibited practice for a municipal employer "[t]o refuse to bargain collectively with a representative of a majority of its employes." As pointed out

by Complainant, bargaining with individual employes has been found to constitute such a refusal. 11/

In the instant case, the question before the Examiner is whether Respondent engaged in illegal direct dealing or exercised its First Amendment rights to communicate its views directly to members of the bargaining unit. 12/ For, employers have long enjoyed the right to tell their employes what they have offered to their union in the course of collective bargaining. 13/ And, while employer statements must not constitute bargaining with the employes rather than their majority collective bargaining representative, 14/ even inaccurate employer statements, are not themselves unlawful, since there are instances when an innocent misstatement of fact may be harmless or the union may have the burden of correcting a misstatement. 15/ The test is whether by its statements the Employer has violated the rights of employes, such as by interference, coercion or threats. 16/

A careful examination of the record indicates that Respondent did not engage in illegal direct dealing by its actions and statements on August 27, 1996. In this regard, the Examiner points out that City bargaining representative Ron Dickrell did not "threaten" employes with layoffs if they ratified the tentative agreement. 17/ Rather, he simply shared with the employes a memorandum, which was sent to all represented employes which explained that the City had to temporarily reduce staffing levels to meet the budgetary mandates established by the Common Council.

Dickrell also explained to the employes on said date that a 2.75 percent increase would not result in employe layoffs where a 3 percent wage increase would result in layoffs. However, Dickrell did not attempt to "bargain" with the employes or "coerce" them into rejecting the tentative agreement. Instead, he simply provided the information so that the employes understood the impact of the City's proposed 3 percent wage increase. 18/ As pointed out by Respondent, an employer can communicate truthful comments directly to its employes with respect to its bargaining proposals. 19/

Complainant also argues that Respondent attempted to exclude the Union from this individual bargaining with the employes. It is true that Respondent did not inform Konop of the August 27th meeting prior to its occurrence. 20/ However, as pointed out by Respondent, unlawful individual bargaining does not occur simply because an employer conducts an informational meeting with its employes without the Union Staff Representative/Business Agent being present. 21/ Here, Union stewards Daniel Mrotrek and Harold Taushek, who were members of the Union's bargaining committee, were present at the August 27th meeting. Stewards are the Union's agents at the job site. 22/ Thus, the bargaining unit employes had Union representation, including members of its bargaining team, at the meeting in question. One of the stewards, Mrotek, informed Konop prior to ratification that Dickrell made the aforesaid disputed statements at the August 27th meeting. 23/ Thus, Konop and the Union were aware of

the consequences of accepting a 3 percent wage increase prior to ratifying the agreement, but took no action regarding same. As pointed out by Respondent, "[b]y ratifying the 3 percent wage

increase, the employes accepted the consequences of that increase."

Based on all of the above, the Examiner also rejects this claim of Complainant.

Having reached the above conclusions, the Examiner finds it unnecessary to address the relevance of the long line of cases cited by Respondent for the proposition that it acted properly herein based on legitimate business reasons, not out of any hostility toward Complainant.

Following completion of the parties' initial briefing schedule Respondent on October 6, 1997, submitted a copy of "a recent decision from the WERC which we believe is relevant to the position of the parties in the above matter." 24/ By fax received on October 15, 1997, Complainant argued that said case is distinguishable from the instant dispute on several grounds. Again, having reached the above conclusions, the Examiner finds it unnecessary to address the relevance of said decision.

Based on all of the foregoing, and the record as a whole, the Examiner finds that the allegations of prohibited practices by Complainant are without merit, and the Examiner has dismissed the complaint in its entirety.

Dated at Madison, Wisconsin this 18th day of November, 1997.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Dennis P. McGilligan /s/
Dennis P. McGilligan, Examiner

ENDNOTES

1/ MORAINE PARK VOCATIONAL, TECHNICAL AND ADULT EDUCATION DISTRICT, DEC. NO. 26859-A (NIELSEN, 10/92) AFF'D DEC. NO. 26859-B (WERC, 8/93); MILWAUKEE BOARD OF SCHOOL DIRECTORS, DEC. NO. 24729-A (GRATZ, 5/88), AFF'D DEC. NO. 24729-B (WERC, 9/88; OUTAGAMIE COUNTY PROFESSIONAL POLICE ASSOCIATION, DEC. NO. 17393-B, P. 3 (YAEGER, 4/80) AFF'D BY OPERATION OF LAW, DEC. NO. 17393-C (WERC, 4/80).

2/ T. at 69.

3/ AMF BOWLING CO. V. NLRB, 141 LRRM 2409 (CA4 1992); NLRB V. MOVIE STAR, INC., 62 LRRM 2234 (CA5 1966); NLRB V. BOSTON HERALD, 33 LRRM 2435 (CA1 1954); WESTING HOUSE V. NLRB, 30 LRRM 2169 (CA3 1952).

4/ Contrary to Respondent's assertion, the Examiner finds that Onder did not advise the Union on December 18 or 19, 1995, that if the bargaining unit employes obtained a wage increase higher than 2.75 percent, employe layoffs would occur. In this regard, the Examiner notes that while Onder testified that she informed the Union of this position Tr. at 13 her testimony is unpersuasive. The Examiner reaches this conclusion on the basis that Onder's testimony is replete with examples of inconsistent, vague, contradictory, confusing and unresponsive testimony. See, for example, Tr. at 17, 22-26, 29-30, 32-34, 37 and 40. In addition, although not completely reflected in the written transcript, the Examiner found Onder's testimony erratic – sometimes fast and unintelligible Tr. at 34; other times slow with long pauses before answering the question posed to her. At these times, the Examiner felt Onder was making up her answers to fit her story line i.e. that she informed the Union at the aforesaid December meeting that if the bargaining unit employes obtained a wage increase higher than 2.75 percent , employe layoffs would occur. Finally, Dickrell who was present at the December negotiation meeting was unable to corroborate Onder's testimony. In contrast, Konop testified clearly and persuasively that Onder simply advised him that the City offered a 2.75 percent wage increase "and that was it" at the aforesaid meeting. Tr. at 48. Both Daniel Mrotek Tr. at 74-76 and Harold Tayshek Tr. at 90-91 generally corroborated Konop's testimony.

5/ CITY OF MONONA, DEC. NO. 28405-A (JONES, 3/96) AFF'D BY OPERATION OF LAW, DEC. NO. 28405-B (WERC, 4/96).

6/ Tr. at 74 and 88.

7/ Tr. at 57.

8/ WAUNAKEE TEACHERS ASSOCIATION, DEC. NO. 27837-B (WERC, 6/95); 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. 13897-A (MCGILLIGAN, 4/76), AFF'D BY OPERATION OF LAW, DEC. NO. 13896-B (WERC, 5/76).

9/ Tr. at 50.

10/ Tr at 60.

11/ CITY OF MILWAUKEE, DEC. NO. 26354-A, P. 33 (MCLAUGHLIN, 4/92), AFF'D BY OPERATION OF LAW, DEC. NO. 26354-B (WERC, 5/92); GREENFIELD SCHOOLS, DEC. NO. 14026-B (WERC, 11/77).

12/ ASHWAUBENON SCHOOL DISTRICT, DEC. NO. 14774-A (WERC, 10/77).

13/ SUPRA at 7.

14/ SUPRA at 8.

15/ ID.

16/ WERC V. EVANSVILLE, 69 WIS.2D 140, 151-157, 230 N.W.2D 688 (1975).

17/ Significantly, neither Daniel Mrotrek nor Harold Taushek, Union stewards and members of its bargaining team, testified that Dickrell threatened employes with layoffs if they ratified the tentative agreement or attempted to coerce employes into rejecting the tentative agreement. Rather, they corroborated Dickrell's testimony that he simply "presented" Tr. at 78 and 91 the information to the bargaining unit.

18/ As noted earlier in the Discussion portion of this Decision, the City was under the erroneous impression that it had made a wage proposal which was accepted by the Union with the understanding that said acceptance entailed employe layoffs. Therefore, the City probably believed that it was simply reiterating a position that it had stated earlier in the bargain when Dickrell made the statements in question to bargaining unit employes on August 27, 1996.

19/ ST. CROIX COUNTY, DEC. NO. 28791-A, P. 10 (CROWLEY, 5/97), AFF'D BY OPERATION OF LAW, DEC. NO. 28791-B (WERC, 7/97).

20/ Tr. at 104.

21/ CITY OF MONONA, DEC. NO. 28405-A, P. 39 (JONES, 3/96), AFF'D BY OPERATION OF LAW, DEC. NO. 28405-B (WERC, 4/96). See also BEAVER DAM SCHOOL DISTRICT, DEC. NO. 20283-A (JONES, 10/83) AFF'D DEC. NO. 20283-B (WERC, 5/84).

22/ CITY OF MONONA, SUPRA.

23/ Tr. at 57.

24/ CITY OF MARSHFIELD (POLICE DEPARTMENT), DEC. NO. 28926-A (GALLAGHER, 9/97), AFF'D BY OPERATION OF LAW, DEC. NO. 28926-B (WERC, 10/97).