

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

**WISCONSIN COUNCIL OF COUNTY
AND MUNICIPAL EMPLOYEES NO. 40,
AFSCME, AFL-CIO, Complainant,**

vs.

CITY OF NEW LISBON, Respondent.

Case 11
No. 56539
MP-3431

Decision No. 29557-A

CITY OF NEW LISBON, Complainant,

vs.

**WISCONSIN COUNCIL OF COUNTY
AND MUNICIPAL EMPLOYEES NO. 40,
AFSCME, AFL-CIO, Respondent.**

Case 12
No. 56665
MP-3444

Decision No. 29558-A

Appearances:

Mr. David White, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 8033 Excelsior Drive, Suite "B", Madison, Wisconsin 53717-1903, on behalf of Wisconsin Council 40, AFSCME, AFL-CIO.

Curran, Hollenbeck & Orton, S.C., Attorneys at Law, by **Mr. Fred D. Hollenbeck**, 111 Oak Street, P.O. Box 140, Mauston, Wisconsin 53948-0140, on behalf of the City of New Lisbon.

No. 29557-A
No. 29558-A

FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

Wisconsin Council of County and Municipal Employees No. 40, AFSCME, AFL-CIO, on June 1, 1998, filed a complaint of prohibited practices with the Wisconsin Employment Relations Commission alleging that the City of New Lisbon had committed prohibited practices within the meaning of Sec. 111.70, Stats. On July 23, 1998, the City of New Lisbon filed a response and cross-complaint of prohibited practices with the Commission alleging that Wisconsin Council of County and Municipal Employees No. 40, AFSCME, AFL-CIO had committed prohibited practices within the meaning of Sec. 111.70, Stats. Attempts to resolve the matters were unsuccessful and on February 23, 1999, the Commission issued its order consolidating the matters for purpose of hearing and appointing the undersigned, David E. Shaw, a member of the Commission's staff, to act as Examiner and make and issue Findings of Fact, Conclusions of Law and Orders in these matters. Hearing was held before the undersigned on March 31, 1999, in Mauston, Wisconsin. A stenographic transcript was made of the hearing and received on April 6, 1999. At hearing, the parties entered into certain stipulations of fact and submission of exhibits, and made provision for the post-hearing submission of additional evidence. The parties completed the submission of post-hearing arguments and additional evidence by September 24, 1999. Having considered the evidence and the arguments of the parties, the Examiner now makes and issues the following Findings of Fact, Conclusions of Law and Orders.

FINDINGS OF FACT

1. The City of New Lisbon, hereinafter the City, is a municipal employer with its principal offices located at City Hall, 404 State Street, New Lisbon, Wisconsin 53950. At all times material herein, Kenneth Southworth has been the City's mayor, and Attorney Fred Hollenbeck has been the City's legal counsel.

2. Wisconsin Council 40, AFSCME, AFL-CIO, hereinafter the Union, is a labor organization with its principal offices located at 8033 Excelsior Drive, Suite B, Madison, Wisconsin 53717-1903. At all times material herein, David White has been the Staff Representative with the Union assigned to represent the Union's local affiliate, New Lisbon City Employees Union, Local 569-A, AFSCME, AFL-CIO, in collective bargaining and contract administration. At all times material herein, the Union has been the exclusive collective bargaining representative for the bargaining unit consisting of "all regular full-time and regular part-time employees of the City of New Lisbon, including craft employees, but excluding confidential, supervisory, managerial and professional employees."

3. The City and the Union have been parties to a series of collective bargaining agreements covering the employees in the bargaining unit set forth in Finding of Fact 2. In October of 1994, the parties exchanged initial proposals for a successor collective bargaining agreement covering the years 1995 through 1997. The Union subsequently filed a petition for interest-arbitration under Sec. 111.70(4)(cm)6, Stats., in March of 1995, and a member of the Commission's staff was assigned to conduct an investigation. The investigator conducted informal investigation sessions with the parties on June 13, 1995 and June 19, 1996.

By letter of October 9, 1996, White notified the investigator that the Union had no modification to make in its final offer dated October 20, 1995 and requested that the City file its final offer.

By letter of October 21, 1996, Hollenbeck submitted the City's final offer which read, in relevant part, as follows:

At any rate, the City's final offer is as follows:

1. The language in Article I, paragraph B, in the master agreement should be changed to read: "Notwithstanding the foregoing, it is understood and agreed that the City Supervisor may continue to work as in the past."

2. The job title "Utility Clerk" shall be removed from the bargaining unit.

3. A three year contract providing for annual raises of 3.5% for the first year, 3.75% for the second year and 4% for the third year shall be adopted. Such percentage raises will apply to both the hourly rate and the contribution made by the City to the individual retirement accounts for each of the employees.

4. There will be a one week hold back on paychecks – we believe the union has agreed to this.

5. The Wilson Grievance, the Jensen Grievance and the Kallies Grievance will be dismissed.

6. Remove Good Friday and Christmas Eve half day holidays from the contract. Add back one full floating holiday.

7. The City wants a “use it or lose it” provision added to the master contract in connection with vacations.

8. The union has expressed a desire and the city council had indicated no opposition to getting into the Wisconsin Retirement System. The City is willing to bring its employees into the WRS. However, the City is not willing to fund prior service and the City is not willing to go into the Wisconsin Retirement System if that entry costs the City more than its 3.5%, 3.75% and 4% proposed raises would have cost, including the raises in the current IRA contributions.

This sets forth the City’s final offer, so far as I am aware from my notes from more than a year ago. I have taken the liberty of sending a copy of this to the Mayor, City Clerk and all members of the City Council for their review. If you do not hear from me within five days from the date of this letter, you can assume that the above constitutes the City’s final offer in this matter.

By letter of October 28, 1996, White asked the investigator to obtain the City’s position on the “tentative agreements” the Union had submitted with its October 20, 1995, final offer.

By letter of November 5, 1996, White objected to the introductory paragraph in Hollenbeck’s October 21, 1996 letter which also included the City’s final offer and requested that the investigator obtain a final offer from the City that was limited to the issues in dispute.

By letter of December 27, 1996, Hollenbeck submitted the City’s final offer, which was identical to the final offer included in his letter of October 21, 1996, except for the letter’s introductory paragraph. Hollenbeck also indicated in his letter that the City agreed to the stipulated items submitted by the Union with its October 20, 1995 final offer.

On January 6, 1997, the investigator issued the “Report to Commission and Notice of Close of Investigation” in the matter, which was mailed to White and Hollenbeck on that date.

By letter of January 8, 1997, Hollenbeck notified the investigator that the City desired to modify its final offer, and asked that the investigation be reopened to permit it to do so.

On January 22, 1997, the Commission issued its Findings of Fact, Conclusions of Law, Certification of Results of Investigation and Order Requiring Arbitration in the matter.

By letter of January 23, 1997, White notified the Commission that the Union opposed reopening the investigation to permit the City to modify its final offer.

By letter of January 28, 1997, Hollenbeck advised the Commission that the modification the City wished to make in its final offer was the deletion of paragraph 5. By letter of February 3, 1997, White indicated that the Union would agree to permit the City to make that modification in its final offer. Thereafter, the parties selected William G. Callow as the arbitrator in the interest arbitration and hearing before Arbitrator Callow was scheduled for June 4, 1997. The parties proceeded with the June 4, 1997 hearing before Arbitrator Callow in their interest arbitration and submitted post-hearing briefs in support of their respective final offers and explaining their respective positions on the issues. The City's initial brief included the following explanation of its final offer on the issues of vacation of retirement:

City Offer: The City proposes to eliminate the last line in the Vacation Schedule paragraph: "Employees shall be paid for vacation time not taken."

. . .

6. Restructuring of Article 13 – Retirement.

City Offer: The City proposes to maintain the status quo language of the prior Collective Bargaining Agreement, modifying the language to increase the City contribution to employee IRA accounts at the same rate of the employee wage rate increases: 3.5% for 1995, 3.75% for 1996 and 4.0% for 1997.

The City is willing to bring its employees into the Wisconsin Retirement System (WRS), however, it is not willing to fund prior service, nor is it willing to go into the WRS if that entry costs the City more than its proposed raises of 3.5% for 1995, 3.75% for 1996, and 4.0% for 1997, to individual employee IRA accounts.

. . .

4. The Union's final offer contained no proposed changes in the parties' collective bargaining agreement with respect to the issue of "vacations" and proposed that the employees in the bargaining unit be covered by the Wisconsin Retirement System as soon as possible according to the System's rules and that the City pay the employer's share and all but 3 percent of the employee's share and that the City pay for all prior service credits for the employees. The City's final offer with respect to those issues contained proposals in the form of paragraphs 3, 7 and 8 of its final offer, as set forth in the City's December 27, 1996 final offer.

5. On October 20, 1997, Arbitrator Callow issued his award in the parties' interest arbitration of their 1996-1998 Agreement. In said award, Arbitrator Callow described the issues in dispute, in relevant part, as follows:

5. Revision of Article 16, Paragraph B – Vacation Schedule. The City approves vacation schedules and requested changes to assure minimum acceptable staffing so that an acceptable number of employees are available to keep the City departments operational. Requests must be made by March 1. Employees are permitted to schedule vacation time in day or half day increments. All vacation earned must be taken within the calendar year following the year in which it is earned. Employees shall be paid for vacation time not taken. The City proposes elimination of the last line dealing with vacation time not taken. The Union submits no proposal concerning the existing contract agreement.

6. Restructuring of Article 13 – Retirement. The City proposes to maintain the language of the existing contract, modifying only the portion of the contract dealing with the amount of the City's contribution to the employees I.R.A. accounts. The City proposes having those contributions match the City's proposed percentage of employees wage increase. The City acknowledges the Union's proposal that contribution for I.R.A. be eliminated as soon as the City employees can be brought into the Wisconsin Retirement System (1998) by agreeing to apply for admission to the Wisconsin Retirement System if the cost to the City is no more than the City's proposed percentage wage increase and that the City would not be obliged to fund the costs of prior service credit.

The Union proposes an amendment to the Employment Contract that would result in the City's entry into the Wisconsin Retirement System in lieu of contributions to I.R.A. programs and that the City pay the employers share and all but 3% of the employees share of the current costs, with full prior service credits being paid for by the City.

The Arbitrator stated as follows in the award regarding the City's arguments on the issues:

. . . The issue of whether the employee compensation for unused vacation would be paid is fuzzy. There appears to be some indication that the City has changed its position concerning compensation for unused vacation. While the "use it or lose it" provision is clear; the issue of payment for any unused vacation time appears to be unspecified in the City's final proposal. However, the City's

brief clearly indicates the City declines to pay compensation in lieu of unused vacation time. There is no recorded transcript of the hearing for guidance on this issue. Thus, this arbitrator can reach no definitive decision on this issue of compensation.

The retirement issue is the most significant from a cost point of view. The City has indicated a willingness to take all of the New Lisbon employees into the WRS but set conditions that are unacceptable to the Union. The Union proposal calls for the City to pay all but 3% of the employees share. This amount together with the City's share of the current WRS premium would be 8% of wages.

At the hearing the City said it would not pay the premium for prior service credits and would not pay the employees share of the premium. . . .

In his discussion of the issues in the "Award" section of his award, Arbitrator Callow stated, in relevant part, as follows:

The vacation issue was negotiated at earlier contract considerations and I have noted that the matter of compensation for unused vacation appears to be undefined. I do not give much weight to this issue in the ultimate decision on choice of final offers.

The I.R.A. issue follows the wage issue and therefore there is little difference between the City and Union position, other than their differences in the wage proposal. Thus, little weight is given to this issue.

The compelling issue is the terms of the proposed entry into the WRS.

It is obvious that during the many years since members of the Union have been City employees little consideration was given to the issue of retirement benefits. Approximately 10 years ago pension retirement benefits were considered. A program was put in place providing I.R.A. contributions by the City. Wages were negotiated during these ten years and the parties informed me that this is the first interest arbitration. Accordingly I conclude there was a meeting of the minds of the City representatives and its employees.

The parties appear to agree that the City of New Lisbon should join the WRS.

. . .

Arbitrator Callow found in favor of the City, and concluded his award as follows:

Based on the foregoing commentary, this Arbitrator selects the final offer of the City and directs that it be incorporated without modification together with any stipulations of the parties.

Respectfully submitted October 20, 1997

William G. Callow
Arbitrator

6. Following receipt of Arbitrator Callow's award, White prepared a "redline/strikeout" draft of the parties' 1995-1997 Agreement and by letter of October 24, 1997, sent a copy to Hollenbeck for his review. In addition to the existing wording, White's draft included the identical wording from the City's final offer with regard to ARTICLE 13 – RETIREMENT and ARTICLE 16 – VACATIONS, respectively:

The union had expressed a desire and the City Council had indicated no opposition into getting into the Wisconsin Retirement System. The City is willing to bring its employees into the WRS. However, the City is not willing to fund prior service and the City is not willing to go into the Wisconsin Retirement System if that entry costs the City more than 3.5%, 3.75% and 4% proposed raises would have cost, including the raises in the current IRA contributions.

. . .

The City wants a "use it or lose it" provision added to the master contract in connection with vacations.

By the following letter of October 27, 1997 to White, Hollenbeck responded to the Union's draft of the 1995-1997 Agreement:

RE: City of New Lisbon

Dear Dave:

I reviewed the proposed contract as you amended it and my initial reaction regarding changes is set forth below. I am submitting this to the Mayor and City Clerk for their review and I will get back to you with our official position after they have reviewed it with the Council.

I suggest that the second paragraph you added to Article 13 be deleted.

I suggest that the last sentence of Article 16 be changed to read as follows: "Employees shall not be paid for vacation time not taken". Obviously, the sentence which you added to Article 16(b) is not necessary if the contract is amended as I am proposing.

Very truly yours,

CURRAN, HOLLENBECK & ORTON, S.C.

Fred Hollenbeck /s/

White responded to Hollenbeck by the following letter of October 29, 1997:

**RE: New Lisbon City Employees' Union
Redline/Strikeout Draft of 1995-1997 Contract**

Dear Mr. Hollenbeck:

Thank you for your prompt response to my recent letter regarding the 1995-1997 New Lisbon contract. I have reviewed the modifications you have suggested to the document which I sent to you, in an effort to determine if my draft inaccurately reflected the City's final offer. I have concluded that my draft is accurate. Therefore, I must decline to accept the modifications that you have suggested. The draft that I have sent you incorporates the terms of the City's final offer precisely as they had been written. It would be inappropriate for the parties to deviate from the express terms of the City's final offer. It is possible to move the second paragraph of Article 13 and the last sentence of Article 16, paragraph B to some other place in the contract, or to place them in a "side letter" attached to the Agreement. However, what I have included in the draft is the wording of the City's final offer, and it is these words which must be incorporated into the Agreement, and no others.

Please advise me of the date upon which the new wage rates will be implemented and the date the employees may expect to receive their back wages. I would also like to receive an itemized statement of these back wages, indicating for each employee the number of straight time hours paid for each year, the number of overtime hours paid for each year, and the IRA payments for each year. We expect that the employees' money will be paid to them promptly and without delay.

Your prompt response to this request is greatly appreciated.

Sincerely,

David White /s/
David White
Staff Representative

On January 15, 1998, the Union prepared and issued signature drafts of the Agreement which incorporated the exact wording of the City's final offer with respect to "vacations" and "retirement", which it presented to Hollenbeck. Thereafter the City refused to sign that draft of the Agreement and requested that Arbitrator Callow resolve the parties' dispute as to the wording of their 1995-1997 Agreement. The Union objected that Arbitrator Callow no longer had jurisdiction in the matter. Arbitrator Callow thereafter suggested that the parties seek guidance from the Commission regarding his jurisdiction in the matter. The City sought such guidance from the Commission and the Union indicated its view that Arbitrator Callow no longer had jurisdiction in the parties' dispute and that Sec. 111.70(4)(cm)6,d, Stats., required that the arbitrator "shall adopt without further modification the final offer of one of the parties on all disputed issues. . ." Thereafter, the City responded that the statute did not require the "exact verbiage of the successful party's final offer. . ."

On January 6, 1998, the Commission, through its General Counsel, issued its opinion that Arbitrator Callow's jurisdiction in the parties' dispute ended when he issued his award, but that the parties could mutually agree to give him jurisdiction. The Commission also offered its mediation services to the parties, as well as noted that it is a prohibited practice under Secs. 111.70(3)(a) and (3)(b)6, Stats., to fail to implement an interest arbitration award.

The Union prepared and signed a signature draft of the 1995-1997 Agreement which included the exact wording of the City's final offer with respect to the issues of "vacations" and "retirement", and presented said draft to Hollenbeck on January 15, 1998. The City thereafter refused, and continues to refuse, to sign said draft of the Agreement.

7. On June 1, 1998, the Union filed a prohibited practice complaint with the Commission wherein it alleged that the City has refused to sign the parties' 1995-1997 Agreement containing the exact language of the City's final offer regarding the Retirement and Vacations provisions in the Agreement as well as failed to implement the IRA payments to the employees for years 1995 and 1996, in violation of Secs. 111.70(3)(a)1, 4 and 7, Stats.

On July 23, 1998, the City filed an answer to the Union's complaint and a cross-complaint with the Commission wherein it alleged that the language in the City's final offer regarding Vacations (Item 7) and Retirement (Item 8) was not intended to be, nor were they, incorporated word-for-word in the Arbitrator's decision, that the City "refuses to sign the contract proffered by the Union because said contract, as drafted, contains direct contradictions, and is vague and uncertain", and denied that it had failed to implement any economic provisions of the Agreement. The City's cross-complaint also alleged that the Union has violated Sec. 111.70, Stats., by failing to sign "a contract which incorporates the mandatory decision of the arbitrator."

8. The Union has refused, and continues to refuse, to sign any draft of the 1995-1997 Agreement containing the City's proposed modification of the wording of the City's final offer with regard to ARTICLE 13 – RETIREMENT and ARTICLE 16 – VACATIONS.

9. The City made the retroactive increases in IRA payments for the employees in the bargaining unit for the years 1995 and 1996 sometime in October of 1998, the exact date being uncertain.

10. By refusing to sign the draft of the parties' 1995-1997 Agreement that resulted from Arbitrator Callow's interest arbitration award, and which incorporated the exact wording of the City's final offer with regard to ARTICLE 16 – VACATIONS and ARTICLE 13 – RETIREMENT, without further modification of those provisions, and by failing to make the retroactive increases in the IRA payments for the years 1995 and 1996 until October of 1998, the City failed to implement Arbitrator Callow's October 20, 1997 award and failed to execute a collective bargaining agreement previously agreed upon.

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

CONCLUSIONS OF LAW

1. Arbitrator Callow's interest arbitration award involving the City and the Union and issued on October 20, 1997, was lawfully made under Sec. 111.70(4)(cm), Stats.

2. By refusing to sign the draft of the parties' 1995-1997 Agreement incorporating the exact wording of the City's final offer with regard to ARTICLE 13 – RETIREMENT and ARTICLE 16 – VACATIONS, without further modification to the wording of those provisions, and by failing to pay the retroactive increases in the IRA payments for the years 1995 and 1996 until October of 1998, the City of New Lisbon, its officers and agents, have failed to implement an arbitration award lawfully made under Sec. 111.70(4)(cm), Stats., in violation of Sec. 111.70(3)(a)7, Stats. Said conduct also constitutes a refusal to execute a collective bargaining agreement previously agreed upon in violation of Sec. 111.70(3)(a)4, and derivatively, Sec. 111.70(3)(a)1, Stats.

3. Wisconsin Council 40, AFSCME, AFL-CIO, its officers and agents, and New Lisbon City Employees Union, Local 569-A, AFSCME, AFL-CIO, its officers and agents, by refusing to sign a draft of the parties' 1995-1997 Agreement other than that incorporating the exact wording of the City's final offer with regard to ARTICLE 13 – RETIREMENT and ARTICLE 16 – VACATIONS, has not refused or failed to implement an arbitration award lawfully made under Sec. 111.70(4)(cm)6, Stats., and, therefore, has not violated Sec. 111.70(3)(b)6, Stats., and has not refused to execute a collective bargaining agreement previously agreed upon in violation of Sec. 111.70(3)(b)3, Stats.

4. The rate of interest set forth in Sec. 814.04(4), Stats., at the time the complaint in Case 11, No. 56539 was filed was twelve per cent (12%) per year.

Based upon the foregoing Findings of Fact and Conclusions of Law, the Examiner makes and issues the following

ORDER

1. The complaint filed in Case 12 is hereby dismissed in its entirety.
2. The Respondent, City of New Lisbon, its officers and agents, shall immediately:
 - a. Cease and desist from refusing to implement Arbitrator Callow's October 20, 1997 interest arbitration award, and from refusing to execute the draft of its 1995-1997 Collective Bargaining Agreement with Complainant resulting from that award and incorporating the exact wording of the City's final offer without further modification.
 - b. Take the following affirmative action which the Examiner finds will effectuate the policies of the Municipal Employment Relations Act:

1. Implement Arbitrator Callow's October 20, 1997 interest arbitration award by signing and otherwise executing the draft of the 1995-1997 Collective Bargaining Agreement between the City of New Lisbon and the Complainant which contains the exact wording of the City's final offer without further modification.
2. Pay interest at the rate of twelve percent (12%) per year to the employees covered by said Agreement on the retroactive IRA payments for the years 1995 and 1996 for those employees for a one year period from October of 1997 to October of 1998 when those monies were paid into those employees' IRA accounts.
3. Reimburse Wisconsin Council 40, AFSCME, AFL-CIO, for the filing fee and postage costs involved in filing its complaint.
4. Notify its employees in the bargaining unit represented by City of New Lisbon Employees, Local 569-A, AFSCME, AFL-CIO, by posting in conspicuous places on its premises, where notices to such employees are usually posted, a copy of the notice attached hereto and marked "Appendix A". Such copy shall be signed by an authorized representative of the City of New Lisbon and shall be posted immediately upon receipt of a copy of this Order, and shall remain posted for a period of thirty (30) days thereafter. Reasonable steps shall be taken to insure that said notice is not altered, defaced or covered by other material.
5. Notify the Commission within twenty (20) days of the date of this decision as to the steps taken to comply herewith.

Dated at Madison, Wisconsin this 20th day of October, 1999.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

David E. Shaw /s/

David E. Shaw, Examiner

APPENDIX A

NOTICE TO ALL EMPLOYEES

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

WE WILL implement the award of Arbitrator Callow dated October 20, 1997 by signing and executing the draft of the 1995-1997 Collective Bargaining Agreement between the City and Local 569-A, AFSCME, AFL-CIO, incorporating the exact wording of the City's final offer without further modification.

WE WILL pay interest at the rate of twelve percent (12%) per year to those employees covered by said Agreement on the retroactive IRA payments for the years 1995 and 1996 for those employees for the one year period running from October of 1997 to October of 1998.

Dated at New Lisbon, Wisconsin this 20th day of October, 1999.

By _____
For the City of New Lisbon

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

CITY OF NEW LISBON
WISCONSIN COUNCIL 40, WCCME, AFSCME, AFL-CIO

MEMORANDUM ACCOMPANYING FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

The Union filed a complaint of prohibited practices alleging that the City has violated MERA by refusing to sign the draft of the parties' 1995-1997 Agreement that incorporated the exact wording of the City's final offer selected by the Arbitrator in the interest arbitration and by failing to make the retroactive payments to the employees' retirement accounts for the years 1995 and 1996.

The City filed a cross-complaint alleging that the Union was violating MERA by refusing to sign a draft of the 1995-1997 Agreement that "incorporates the mandatory decision of the arbitrator", and alleging in that regard that the language found in items 7 (vacation) and 8 (retirement) in the City's final offer "were not intended to be nor were the same incorporated, word for word, in the arbitrator's decision," and that language in the draft offered by the Union "contains direct contradictions and is vague and uncertain."

The City also denied that it had failed to implement any economic provisions of the agreement; however, at hearing the City agreed to provide the Union with records to substantiate that the retroactive IRA payments had been paid, and further agreed that if the payments had not been paid, the City was obligated to make those payments and to pay interest if the payments had not been paid in a timely manner. The record was held open for the purpose of reviewing such records and the same were subsequently submitted by the Union. Those records indicate that the retroactive IRA payments to the employees' retirement accounts were not made until October of 1998, and there is no longer a factual dispute in that regard.

City

The City asserts that the Union has failed to implement the terms of the arbitrated agreement in that it failed to implement the "use it or lose it" provision of the City's final offer, and continues to insist upon the inclusion of certain language that makes no sense as submitted. The Union assumes that the relevant statute required the City to submit a final offer in exactly the language which was to be incorporated in the arbitrator's award. The Commission accepted the City's final offer as submitted, implicitly recognizing that the statute does not require word-for-word submissions, and submitted that final offer to arbitration. The Arbitrator ruled for the City and accepted the City's final offer. The Union now refuses to adopt the "use it or lose it" language in connection with the new agreement.

The City asserts that the language set forth in its post-October 24, 1997 letter should be incorporated into the agreement. Since the City won in arbitration, any question regarding verbiage to be included in the new agreement must be decided in the City's favor. To accept the Union's suggestion would mean the City lost the arbitration.

The City also argues that the issue of including the language regarding the City not objecting to joining the Wisconsin Retirement System under certain circumstances is entirely fatuous. The City's offer was to give employees a 3% increase on their contributions to their IRA's and that is the provision which was adopted by application by the arbitrator. The language the Union wants in the agreement is surplus and cannot be included.

In its reply brief, the City views the Union as having conceded that the statute does not require exact contract language to be included in the final offer. The City reasserts that it won the right to have a "use it or lose it" clause in the vacation provision of the agreement. The language proposed by the Union is not "contract-type language" and its continued insistence on that language constitutes a failure to implement the arbitrator's award. Further, the Union's insistence upon the language regarding the City's not objecting to joining the Wisconsin Retirement System is a prohibited practice, as adding such language to the agreement makes no sense in the context of the City's proposal to raise IRA contributions by the percentage raises described in the agreement.

The City concludes that the Union has failed to implement the Arbitrator's award and requests that appropriate relief should be awarded.

Union

The Union argues that the claim the statute does not require exact contract language to be included in a final offer would be more understandable if the proposal in question clearly stated what is being proposed, e.g., "Item 3: increase all wages by 5% per year of the agreement." If that final offer were adopted, the wage schedules in the agreement would be modified by increasing rates by 5%. In this case, the elements of the City's final offer that are in question are of a substantially different character. A party wishing to change specific contract language is required to set forth the language in a clear manner. Here, the City claims to have the right to come up with the specific language *after* the award is issued, and argues that any question regarding the wording must be decided in the City's favor since it won the arbitration. That argument is nonsense. The statute clearly states that the arbitrator is to adopt one of the two final offers before him and that he may not modify either offer. The City must live with what it proposed in its final offer.

As to the City's counterclaim, there is no evidence, and the City has not argued, that the Union has at any time refused to execute a collective bargaining agreement pursuant to the Arbitrator's award. Therefore, the claim should be dismissed.

111.70(3)(a)7 and (3)(b)6, Stats.

Section 111.70(3)(a)7, Stats., and its counterpart, 111.70(3)(b)6, Stats., provide that it is a prohibited practice for a municipal employer or municipal employees:

"To refuse or otherwise fail to implement an arbitration decision lawfully made under sub. (4)(cm)."

The relevant portions of Sec. 111.70(4)(cm), Stats., provide:

6. 'Interest Arbitration'. . .

am. Upon receipt of a petition to initiate arbitration, the commission shall make an investigation, with or without a formal hearing, to determine whether arbitration should be commenced. . .Prior to the close of the investigation each party shall submit in writing to the commission its single final offer containing its final proposals on all issues in dispute that are subject to interest arbitration under this subdivision or under subd. 5s in collective bargaining units to which subd. 5s applies. If a party fails to submit a single, ultimate final offer, the commission shall close the investigation based on the last written position of the party. . .No later than such time, the parties shall also submit to the commission a stipulation, in writing, with respect to all matters which are agreed upon for inclusion in the new or amended collective bargaining agreement. The commission, after receiving a report from its investigator and determining that arbitration should be commenced, shall issue an order requiring arbitration and immediately submit to the parties a list of 7 arbitrators. . .

b. The arbitrator shall, within 10 days of his or her appointment, establish a date and place for the conduct of the arbitration hearing. . .The final offers of the parties, as transmitted by the commission to the arbitrator, shall serve as the basis for continued negotiations, if any, between the parties with respect to the issues in dispute. At any time prior to the arbitration hearing, either party, with the consent of the other party, may modify its final offer in writing.

...

d. Before issuing his or her arbitration decision, the arbitrator shall, on his or her own motion or at the request of either party, conduct a meeting open to the public for the purpose of providing the opportunity to both parties to explain or present supporting arguments for their complete offer on all matters to be covered by the proposed agreement. The arbitrator shall adopt without further modification the final offer of one of the parties on all disputed issues submitted under subd. 6. am., except those items that the commission determines not to be mandatory subjects of bargaining and those items which have not been treated as mandatory subjects by the parties, and including any prior modifications of such offer mutually agreed upon by the parties under subd. 6., which decision shall be final and binding on both parties and shall be incorporated into a written collective bargaining agreement. The arbitrator shall serve a copy of his or her decision on both parties and the commission.

...

(Emphasis added)

The wording of Sec. 111.70(4)(cm)6, am., b, and d, Stats., is clear that once the investigation has been closed, the final offers submitted to arbitration are just that, i.e., final. While a party's final offer may be modified after the close of the investigation, it is only with the consent of the other party. Once such modification is made, as was done in this case, that modified final offer becomes that party's final offer before the arbitrator. The arbitrator must select one party's final offer "without further modification" and his decision is "final and binding" and is to be "incorporated into a written collective bargaining agreement." The clear purpose of that wording is to provide a final resolution to the parties' contract dispute. That purpose is not served by permitting a party to modify the wording of a provision contained in its final offer when incorporating that provision into the resulting written agreement. Even where, as the City did here, a party attempted to explain its intent in the course of the interest arbitration proceedings, it is precluded from clarifying, finalizing or otherwise modifying the wording of the provision as set forth in its final offer, even if the modification is insubstantial. CITY OF OSHKOSH (POLICE DEPARTMENT), DEC. NO. 27946-A (Yaeger, 8/94), aff'd by operation of law (involving an interest arbitration award issued under Sec. 111.77(4)(b), Stats., which contains language similar to that of Sec. 111.70(4)(cm)6, d, Stats.) As Examiner Yaeger noted, if even "insubstantial" changes are permitted, "it would destroy the finality of the interest arbitration process, and create the potential for numerous prohibited practice cases" where the parties disagree as to whether the change was "insubstantial".

While the investigator perhaps should have required the City to clarify or “finalize” the wording of its final offer, the City must be deemed to be aware of what the statute requires in drafting its final offer. The City had a number of opportunities to modify the wording of its final offer before the investigation was closed and chose not to do so, and it may not now finalize the wording *ex post facto*. What the City “won” in arbitration was the incorporation of its final offer into the parties’ written collective bargaining agreement without further modification. The City’s intent with regard to the wording of its proposals as to ARTICLE 13 – RETIREMENT and ARTICLE 16 – VACATIONS is now grist for grievance arbitration, should a dispute develop with regard to application or interpretation of that language.

For the City to refuse to incorporate its final offer, exactly as worded, in the parties’ written agreement is therefore a violation of Sec. 111.70(3)(a)7, Stats. Conversely, the Union’s refusal to sign a draft of the Agreement containing the City’s proposed modification of the wording of its final offer did not violate Sec. 111.70(3)(b)6, Stats.

(3)(a)4

The City’s refusal to sign the draft of the parties’ 1995-1997 Agreement that incorporated the exact wording of its final offer, as opposed to the wording it has proposed with regard to ARTICLE 13 – RETIREMENT and ARTICLE 16 – VACATIONS, also constitutes a “refusal to execute a collective bargaining agreement previously agreed upon” within the meaning of Sec. 111.70(3)(a)4, Stats. While the parties’ “agreement” in this case resulted from an interest arbitration award on the issues in dispute, the Commission has previously held that:

Concluding as we do, that the intent of the procedure contained in sec. 111.77, Stats., is to require the inclusion of any award on the issues in dispute in a collective bargaining agreement along with the other terms of the agreement reached, harmonization of that section with sec. 111.70(1)(d), Stats., and sec. 111.70(3)(a)4, Stats., requires that we find that the failure to sign and execute an “agreement reached,” which includes provisions which are based on an award issued under sec. 111.77, Stats., is a per se refusal to bargain in good faith. . .

SHEBOYGAN COUNTY, DEC. NO. 15380-B (WERC, 4/78), aff’d, Dane Co. Cir. Ct., Case No. 163-032 (1979). Although the Commission’s decision involved an interest arbitration award issued under Sec. 111.77, based upon the Commission’s rationale in that case, there is no apparent basis for finding a different result under Sec. 111.70(4)(cm), Stats.

Remedy

As a remedy in this case, the City has been ordered to immediately implement the arbitration award by signing and otherwise executing the draft of the parties' 1995-97 collective bargaining agreement incorporating the exact wording of the City's final offer, and to pay interest on the retroactive payments to the employees' IRA accounts for the years 1995 and 1996 at the statutory rate of 12% per year. The City has also been ordered to pay the Union's "costs" in filing this enforcement action, as required by Commission Rule ERC 32.16(2), Wis. Adm. Code. Pursuant to Sec. 814.04(2), Stats., "costs" for the purpose of this order shall include the filing fee and postage costs involved in filing the complaint.

Dated at Madison, Wisconsin this 20th day of October, 1999.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

David E. Shaw /s/

David E. Shaw, Examiner

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