STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

CITY OF PARK FALLS, Complainant,

vs.

PRICE COUNTY PUBLIC EMPLOYEES LOCAL UNION 1405-A, AFSCME, AFL-CIO REPRESENTING CITY OF PARK FALLS PUBLIC WORKS UNIT, Respondent.

Case 23
No. 60210
MP-3755

Decision No. 30207-A

Appearances:

Slaby, Deda, Marshall, Reinhard & Fuhr, by **Attorney David B. Deda**, 215 North Lake Avenue, P.O. Box 7, Phillips, Wisconsin 54555-0007, appearing on behalf of the Complainant.

Mr. Philip Salamone, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 7111 Wall Street, Schofield, Wisconsin 54476, appearing on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On August 9, 2001 the City of Park Falls filed a complaint of prohibited practices with the Wisconsin Employment Relations Commission. In this complaint, the City of Park Falls alleged that Price County Public Employees Local Union 1405-A, AFSCME, AFL-CIO, (Public Works Unit) had refused to execute a collective bargaining agreement in violation of the Municipal Employment Relations Act. The Commission appointed Coleen A. Burns, a member of its staff, to act as Examiner in this matter and to make and issue Findings of Fact, Conclusions of Law and Order, as provided in Sec. 111.07(5), Stats. A hearing was held in Park Falls, Wisconsin, on September 25, 2001, and the record was closed on October 24, 2001. The Examiner, having considered the evidence and arguments of Counsel makes and issues the following:

FINDINGS OF FACT

1. The City of Park Falls, hereinafter City or Complainant, is a municipal employer with offices located at 400 Fourth Avenue S., Park Falls, Wisconsin 54522. Attorney David Deda represents the City for the purposes of collective bargaining.

2. Price County Public Employees Local Union 1405-A, AFSCME, AFL-CIO, (Public Works Unit), hereinafter Union or Respondent, is a labor organization with offices located at 7111 Wall Street, Schofield, Wisconsin 54476. The Union is the exclusive collective bargaining representative of a Department of Public Works (DPW) bargaining unit consisting of ten (10) employees of the City. Philip Salamone, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, represents the Union for the purposes of collective bargaining.

3. The City and the Union are parties to a collective bargaining agreement, which by its terms, expired December 31, 2000. On March 27, 2001, the parties met to negotiate an agreement to succeed this expired agreement. As with previous negotiation sessions on this successor agreement, the DPW bargaining unit was represented by Salamone. The DPW unit did not have a formal bargaining team and whatever bargaining unit members attended the negotiation session were permitted to participate in the negotiation session. Salamone was present at the start of the negotiation session on March 27, 2001, as were eight members of the DPW bargaining unit, including Scott Hilgart. Six of the eight DPW bargaining unit members were present throughout this negotiation session, one of who was Hilgart. Two of the eight DPW bargaining unit members left prior to the conclusion of this negotiation session. Salamone, Deda, members of the City's Personnel Committee, including Chairman Gerald Jorgenson, and City Mayor Eugene Schneider were present throughout this negotiation session. Neil Hagmann, the City Clerk and City Treasurer, was present at the start of this negotiation session, but left prior to the conclusion of the session.

4. At the conclusion of the March 27, 2001 negotiation session, Union and City representatives believed that a tentative agreement had been reached on a 2001-2003 collective bargaining agreement. In the presence of Salamone and the six remaining DPW bargaining unit members, Deda dictated a summary of the tentative agreement into a tape recorder. The six remaining DPW bargaining unit members were, de facto, the DPW unit's bargaining team. Neither Salamone, nor any member of the DPW bargaining unit, objected to Deda's summary of the tentative agreement at the negotiation session of March 27, 2001. Hilgart, however, believed that he and the other DPW bargaining unit members had the right to vote upon the ratification of any tentative agreement. A member of Deda's staff transcribed the tape of Deda's summary of the tentative agreement. The tape of Deda's summary of the tentative agreement no longer exists. This transcription, entitled "Settlement, March 27, 2001" includes the following:

. . .

> The second item on this CEP stuff that we would accept your suggested change to our proposed language so what we would add is language that says, "As long as the provisions of this paragraph are being complied with, the Union must sign paperwork consenting to the City using summer, temporary, part-time and/or casual help through government programs such as the CEP program for work in the Park and Recreation Department only.
>
> . . .
>
> In the comp time, which is Article 11, what we are doing is in paragraph B and in paragraph C, which is a sewage disposal operator and the custodian, we are increasing the hours from 20 to 40 and making no other change, other than that the end of each paragraph, we are adding a sentence that says, "If the employee reaches 40 hours of comp time, then the employer can schedule comp time off without the mutual consent of the employee."
>
> . . .
>
> Add a paragraph in Article XI for Assistant Water Plant Superintendent that would read the same as the current language for sewer disposal plant operator, which would match the status quo of what they are doing now.
>
> . . .

The "Article XI" paragraph on the Assistant Water Plant Superintendent appears several paragraphs after the "Article 11" paragraph on the sewage disposal operator and custodian. Deda relied upon this transcription and his memory to prepare a "Summary of Changes in Working Agreement Between City of Park Falls and Price County Public Employees Local 1405-A (Public Works Unit)" and a January 1, 2001-December 31, 2003 collective bargaining agreement. The 2001-2003 collective bargaining agreement prepared by Deda reflected the City's understanding of the tentative agreement reached by the parties on March 27, 2001. On or about April 19, 2001, Deda faxed a copy of the "Summary of Changes in Working Agreement Between City of Park Falls and Price County Public Employees Local 1405-A (Public Works Unit)" to Salamone. This summary includes, in relevant part, the following:

. . .

> 4. Page 5 Article IV, Section 3 – Added Section 3 regarding the CEP program

. . .

10. Page 9 Article XI – Added paragraph D regarding compensatory time for the assistant water plant superintendent.

. . .

17. Page 19 Addendum 1 – Wage Rates – Wages were recalculated by multiplying the year 2000 rate by 1.02 and rounding to the nearest penny for the year 2001 rate and the years 2001 and 2002 by 1.025 and rounding to the nearest penny for the years 2002 and 2003 rates.

Deda provided Salamone with a copy of the January 1, 2001 - December 31, 2003 collective bargaining agreement that Deda had prepared. Article IV of this 2001-2003 collective bargaining agreement contains the following:

> **Section 3.** As long as the provisions of Section 2 of this article are complied with, the Union must sign paperwork consenting to the City using summer, temporary, part-time, and/or casual help through government programs such as the CEP program for work in the Parks and Recreation Department. This paragraph is not intended to reduce the rights that the Employer has under Section 2.

Article XI, Section 1, of this 2001-2003 collective bargaining agreement contains the following:

. . .

> B. It shall be the responsibility of the sewage disposal plant operator to make the necessary inspection of the plant on Sundays. The operator will also be responsible for any work at the plant during off duty hours during the entire work week. Compensatory time is to be taken during the normal work week for any work on Saturday at the rate of one and a half times the hours worked and any work on Sundays or holidays at the rate of two times the hours worked. Work on Monday through Friday outside the normal work day is to result in compensatory time hour for hour unless the employee works over eight (8) hours in a day, in which case the compensatory time is to be at a rate of one and one half times the hours worked over eight (8) hours. No more than forty (40) hours of compensatory time is to be accumulated at any one time. Compensatory time off is to be taken at times mutually agreed upon by the employee and Employer. The provisions of this section also apply to the assistant plant operator for work done in the position of assistant plant operator

outside the normal work week. If the employee reaches forty (40) hours of compensatory time, then the employer can require the employee to take time off work to get the compensatory time down to forty (40) hours without the mutual consent of the employee.

C. The custodian shall work forty (40) hours in five (5) days, Monday through Friday, and shall be responsible for the care of the building on Saturday and Sunday as necessary. Compensatory time is to be taken during the normal work week for any work on Saturday at the rate of one and one half times the hours worked and any work on Sundays or holidays at the rate of two times the hours worked. Work on Monday through Friday outside the normal work day is to result in compensatory time hour for hour unless the employee works over eight (8) hours in a day, in which case the compensatory time is to be at the rate of one and one-half times the hours worked over eight (8) hours. No more than forty (40) hours of compensatory time is to be accumulated at any one time. Compensatory time off is to be taken at times mutually agreed upon by the employee and Employer. If the employee reaches forty (40) hours of compensatory time, then the employer can require the employee to take time off work to get the compensatory time down to forty (40) hours without the mutual consent of the employee.

D. It shall be the responsibility of the assistant water plant superintendent to make the necessary inspection of the plant on Sundays. The assistant water plant superintendent will also be responsible for any work at the plant during off duty hours during the entire work week. Compensatory time is to be taken during the normal work week for any work on Saturday at the rate of one and a half times the hours worked and any work on Sundays or holidays at the rate of two times the hours worked. Work on Monday through Friday outside the normal work day is to result in compensatory time hour for hour unless the employee works over eight (8) hours in a day, in which case the compensatory time is to be at a rate of one and one half times the hours worked over eight (8) hours. No more than forty (40) hours of compensatory time is to be accumulated at any one time. Compensatory time off is to be taken at times mutually agreed upon by the employee and Employer. The provisions of this section also apply to the assistant plant operator for work done in the position of assistant plant operator outside the normal work week. If the employee reaches forty (40) hours of compensatory time, then the employer can require the employee to take time off work to get the compensatory time down to forty (40) hours without the mutual consent of the employee.

"Addendum 1" of the 2001-2003 collective bargaining agreement prepared by Deda identifies each bargaining unit position and assigns an hourly wage rate to that position for each of the three years covered by the agreement. "Addendum 1" of the 1998-2000 collective bargaining

agreement identifies each bargaining unit position and assigns an hourly rate to each of these positions. Additionally, the 1998-2000 collective bargaining agreement, unlike the 2001-2003 collective bargaining agreement prepared by Deda, assigns a monthly and bi-weekly wage rate to the positions of Disposal Plant Operator, Asst. Plant Operator, and Custodian.

5. Following the meeting of March 27, 2001, members of the DPW bargaining unit met to ratify the tentative agreement. At that time, bargaining unit members had copies of the "Summary of Changes in Working Agreement Between City of Park Falls and Price County Public Employees Local 1405-A (Public Works Unit)" and the 2001-2003 collective bargaining agreement that had been prepared by Deda. These bargaining unit members also had a copy of a 2001-2003 collective bargaining agreement that had been prepared by Deda, which showed how the language of the expired collective bargaining agreement had been modified in the 2001-2003 collective bargaining agreement. The DPW bargaining unit members voted upon, but did not ratify, the 2001-2003 collective bargaining agreement prepared by Deda. The Union and the members of its DPW bargaining unit have not executed the 2001-2003 collective bargaining agreement prepared by Deda.

6. In a letter dated May 29, 2001, addressed to Salamone, Deda advised Salamone that, inasmuch as six of the ten DPW bargaining unit members were present in the room when the final agreement was reached and no objections or reservations were expressed by any of the six, that Deda believed "under the law, that is a ratification of the contract." Deda further advised Salamone that Deda would present the 2001-2003 contract that he had prepared to the City Council for ratification. Salamone responded in a letter dated June 11, 2001. In this letter, Salamone advised Deda that Salamone would not recommend that the Union execute the DPW collective bargaining agreement that had been prepared by Deda. Salamone did not state the reason why he was not recommending that the Union execute this collective bargaining agreement. Salamone further advised Deda of the following:

> However, I disagree with your construction of the law indicating that the fact that a majority of the bargaining unit were (sic) present when the tentative agreement was reached automatically constitutes a ratification by the Union. It was my understanding, and I believe that the City either knew (or should have known) it to be the case, that final agreement was subject to ratification by the Union. As you know, the Membership met and decided not to ratify the tentative agreement.

7. On March 27, 2001, the Union did not agree to delete the monthly and bi-weekly wage rates from "Addendum 1" of the 2001-2003 collective bargaining agreement. On March 27, 2001, the Union did not agree to the language of Article IV, Section 3, contained in the 2001-2003 collective bargaining agreement prepared by Deda.

On the basis of the above and foregoing Findings of Fact, the Examiner makes the following

CONCLUSIONS OF LAW

1. The Respondent, Price County Public Employees Local Union 1405-A, AFSCME, AFL-CIO, (Public Works Unit), is a labor organization within the meaning of Sec. 111.70(1)(h), Stats., and the Public Works employees represented by Respondent are municipal employees within the meaning of Sec. 111.70(1)(i), Stats.

2. The Complainant, City of Park Falls, is a municipal employer within the meaning of Sec. 111.70(1)(j), Stats., and Attorney David Deda is an agent of the City of Park Falls.

3. A clear and satisfactory preponderance of the evidence does not establish that, on March 27, 2001, the Respondent's bargaining team agreed to the language contained in Article XI, Section 1(D), of the 2001-2003 collective bargaining agreement prepared by David Deda.

4. A clear and satisfactory preponderance of the evidence does not establish that the 2001-2003 collective bargaining agreement prepared by David Deda is a tentative agreement that was reached by the Respondent and the Complainant on March 27, 2001.

5. A clear and satisfactory preponderance of the evidence does not establish that, on March 27, 2001, the Respondent and the Complainant reached any tentative agreement with respect to the terms and conditions to be included in a successor contract to their expired 1998-2000 labor contract.

6. The members of the Respondent's DPW collective bargaining unit who were present at the conclusion of the March 27, 2001 negotiation session do not have a statutory duty to support, or vote in favor of, the ratification of the 2001-2003 collective bargaining agreement prepared by David Deda.

7. A clear and satisfactory preponderance of the evidence does not establish that Respondent and Respondent's DPW bargaining unit members have agreed to the 2001-2003 collective bargaining agreement prepared by David Deda.

8. Respondent and Respondent's DPW bargaining unit members do not have a statutory duty to execute the 2001-2003 collective bargaining agreement prepared by David Deda.

9. By failing to support, or vote in favor of, the ratification of the 2001-2003 collective bargaining agreement prepared by David Deda, the Respondent's DPW bargaining unit members have not violated Sections 111.70(3)(a)4, 111.70(3)(b)3, or 111.70(3)(c), Stats.

10. By failing to execute the 2001-2003 collective bargaining agreement prepared by David Deda, the Respondent and its DPW bargaining unit members have not violated Sections 111.70(3)(a)4, 111.70(3)(b)3, or 111.70(3)(c), Stats.

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

ORDER

The Complaint of the City of Park Falls is hereby dismissed in its entirety.

Dated at Madison, Wisconsin, this 2nd day of April, 2002.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Coleen A. Burns /s/

Coleen A. Burns, Examiner

CITY OF PARK FALLS

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The City filed a complaint of prohibited practices with the Commission alleging that the Union violated Secs. 111.70(3)(c), 111.70(3)(a)(4) and 111.70 (3)(b)(3) Stats., when the Union failed to execute a collective bargaining agreement. The Union denies that it has violated the Municipal Employment Relations Act as alleged by the City.

POSITIONS OF THE PARTIES

City

The City maintains that, on March 27, 2001, there was a "meeting of the minds" with respect to a tentative agreement on the terms and conditions to be contained in the parties' 2001-2003 collective bargaining agreement. The City further maintains that, in all material respects, this tentative agreement is accurately reflected in the copy of the 2001-2003 collective bargaining agreement that was prepared by City representative David Deda.

The City argues that the six members of the Union's bargaining unit that were present when the parties reached the tentative agreement on March 27, 2001, have a statutory duty to vote for the ratification of this tentative agreement. The City further argues that, inasmuch as these six members constitute a majority of the bargaining unit, the ratification of the tentative agreement is a fait accompli and the 2001-2003 collective bargaining agreement prepared by City representative David Deda must be executed by the Union.

The City argues that, by failing to execute the 2001-2003 collective bargaining agreement prepared by City representative David Deda, the Union and its DPW bargaining unit members have violated Secs. 111.70(3)(c), 111.70(3)(a)(4) and 111.70(3)(b)(3), Stats. In remedy of these statutory violations, the City asks that the Union be ordered to execute the 2001-2003 collective bargaining agreement prepared by City representative David Deda.

Union

The Union asserts that the written agreement presented to the Union for ratification does not reflect a tentative agreement that was reached by the parties. The Union maintains, therefore, that its bargaining unit members are not obligated to support ratification of this written agreement and the Union is not required to execute the 2001-2003 collective bargaining agreement prepared by City representative David Deda. The Union further maintains that the complaint of prohibited practices is without merit and should be dismissed.

DISCUSSION

At the conclusion of the negotiation session of March 27, 2001, Union and City representatives believed that they had reached a tentative agreement on the terms and conditions to be included in their successor 2001-2003 collective bargaining agreement. Thereafter, City representative David Deda prepared a 2001-2003 collective bargaining agreement that reflected the City's understanding of the tentative agreement that was reached on March 27, 2001.

The Union's DPW bargaining unit members voted upon, but did not ratify, the 2001-2003 collective bargaining agreement prepared by Deda. The Union and its DPW bargaining unit members did not execute the 2001-2003 collective bargaining agreement prepared by Deda.

At the start of the negotiation session of March 27, 2001, eight of the ten members of the DPW bargaining unit were in attendance. Six of these bargaining unit members remained throughout the negotiation session. The City, contrary to the Union, argues that, inasmuch as these employees did not object when the tentative agreement was summarized in the presence of the City and Union representatives, all six of these employees have a statutory duty to support the ratification of the tentative agreement.

The City further argues that, inasmuch as these six employees comprise a majority of the bargaining unit, the ratification of this tentative agreement is a fait accompli and, thus, the Union has a statutory duty to execute the 2001-2003 collective bargaining agreement that had been prepared by Deda. The City, contrary to the Union, argues that the bargaining unit's failure to ratify this agreement, as well as the Union's failure to execute this agreement, violates Secs. 111.70(3)(a)4, 111.70(3)(b)3, and 111.70(3)(c) of the Municipal Employment Relations Act.

Applicable Statutes

Sec. 111.70(3)(a)4

Section 111.70(3)(a)4, Stats., states, in relevant part, that it is a prohibited practice for a municipal employer:

> To refuse to bargain collectively with a representative of a majority of its employees in an appropriate collective bargaining unit. . . .

Sec. 111.70(3)(b)3

Section 111.70(3)(b)3, Stats., provides that it is a prohibited practice for a municipal employee, individually or in concert with others:

> 3. To refuse to bargain collectively with the duly authorized officer or agent of a municipal employer, provided it is the recognized or certified exclusive collective bargaining representative of employees in an appropriate collective bargaining unit. Such refusal to bargain shall include, but not be limited to, the refusal to execute a collective bargaining agreement previously agreed upon.

Section 111.07(3), Stats., which is made applicable to this proceeding by Sec. 111.70(4)(a), Stats., provides that "the party on whom the burden of proof rests shall be required to sustain such burden by a clear and satisfactory preponderance of the evidence."

Sec. 111.70(3)(c)

Section 111.70(3)(c), Stats., provides:

> (c) It is a prohibited practice for any person to do or cause to be done on behalf of or in the interest of municipal employers or municipal employees, or in connection with or to influence the outcome of any controversy as to employment relations, any act prohibited by par. (a) or (b).

Section 111.70(1)(k), Stats., defines a "Person" as "one or more individuals, labor organizations, associations, corporations or legal representatives."

Merits

The City is objecting to the bargaining conduct of the Union and certain City employees that are members of the DPW unit that is represented by the Union. Inasmuch as Sec. 111.70(3)(a)4, Stats., governs the bargaining conduct of a municipal employer, it is not applicable to this dispute.

Section 111.70(3)(b)3, Stats., governs the bargaining conduct of municipal employees, such as those in the DPW collective bargaining unit, and of the Union, in its capacity as the exclusive collective bargaining representative of the municipal employees in the DPW unit. Given the City's allegations, a violation of Sec. 111.70(3)(c), Stats., would arise if the Union and/or the members of the Union's DPW bargaining unit, acting as a "person" within the meaning of Sec. 111.70(3)(c), Stats., rather than as a "municipal employee" within the meaning of Sec. 111.70(1)(i), Stats., engaged in conduct that violates Sec. 111.70(3)(b)3, Stats. Thus, the Examiner turns to the issue of whether or not there has been a violation of Sec. 111.70(3)(b)3, Stats.

The Union did not have a formal bargaining team and whatever members of the DPW bargaining unit attended a negotiation session were permitted to participate in the negotiation session. Given these circumstances, the Examiner is persuaded that the DPW bargaining unit members that were in attendance at the conclusion of the March 27, 2001 negotiation session were, de facto, the DPW unit's bargaining team. This being the case, these DPW bargaining unit members had a duty to support the ratification of any tentative agreement on the successor labor contract that was reached by both parties on March 27, 2001, unless the Union made clear to the City's bargaining team that these DPW bargaining unit members were reserving their right to accept or reject such tentative agreement. RICE LAKE ELECTRIC UTILITY, DEC. NO. 29380-A (SHAW, 1/99); AFF'D BY OPERATION OF LAW, DEC. NO. 29380-B (WERC, 1/99)

It is not evident that the Union made clear to the City's bargaining team that the DPW bargaining unit members that were in attendance at the conclusion of the March 27, 2001 negotiation session were reserving their right to accept or reject any tentative agreement on the successor labor contract. Thus, if the Union and the City reached a tentative agreement on a successor labor contract on March 27, 2001, then the members of the DPW bargaining unit who were present when this tentative agreement was reached would have a Sec. 111.70(3)(b)3, Stats., duty to support ratification of the tentative agreement. The Examiner turns to the issue of whether or not the parties reached a tentative agreement on the successor labor contract on March 27, 2001.

The Chairman of the City's Personnel Committee, Gerald Jorgenson, was present throughout the negotiation session of March 27, 2001. Jorgenson's testimony demonstrates that, at the conclusion of this session, City representative Deda dictated a summary of the tentative agreement. Jorgenson's testimony further demonstrates that this dictation was done in the presence of City representatives, Union representative Salamone, and the six bargaining unit employees that had remained throughout the negotiation session. The testimony of Scott Hilgart, a member of the DPW bargaining unit, demonstrates that this summary was made without any objection from Salamone, or the remaining six bargaining unit employees.

Deda's testimony demonstrates that his office staff transcribed this dictation. Deda's testimony also demonstrates that Employer Exhibit #7 is the transcription that was produced by his office staff. The tape from which the transcription was made no longer exists.

Deda's testimony demonstrates that he relied upon Employer Exhibit #7 and his memory to prepare a "Summary of Changes in Working Agreement Between City of Park Falls and Price County Public Employees Local 1405-A (Public Works Unit)" and a January 1, 2001-December 31, 2003 collective bargaining agreement. This 2001-2003 collective bargaining agreement is what was voted upon and rejected by the DPW bargaining unit members.

At hearing, the Union initially took issue with four sections of the 2001-2003 collective bargaining agreement that had been prepared by Deda. As the hearing progressed, however, it became clear that the dispute centered upon three sections of this agreement. These three sections are Article IV, Section 3; Article XI, Section 1(D); and Addendum 1.

Article IV, Section 3

Hilgart was present throughout the March 27, 2001 negotiation session. According to Hilgart, the Article IV, Section 3, language contained in the 2001-2003 collective bargaining agreement prepared by Deda does not reflect the agreement on CEP workers that was reached by the parties on March 27, 2001.

City Mayor Schneider and Jorgenson were also present throughout the negotiation session of March 27, 2001. According to Schneider and Jorgenson, the Article IV, Section 3, language contained in the 2001-2003 collective bargaining agreement prepared by Deda is the language that was agreed to by the parties on March 27, 2001.

Hilgart and Schneider agree that there were extensive discussions between the parties regarding CEP. They also agree that supervision of CEP workers by DPW bargaining unit employees was of concern in these discussions. Hilgart, unlike Schneider or Jorgenson, gave detailed testimony concerning the nature of the CEP discussions.

Hilgart's uncontradicted testimony demonstrates that the City wanted contract language that would require DPW bargaining unit members to sign a piece of paper each year so that the City could use CEP workers. Hilgart's uncontradicted testimony also demonstrates that the Union resisted such language because the DPW bargaining unit members did not want to be responsible for supervising CEP workers.

The Article IV, Section 3, language in dispute states as follows:

> **Section 3.** As long as the provisions of Section 2 of this article are complied with, the Union must sign paperwork consenting to the City using summer, temporary, part-time, and/or casual help through government programs such as

> the CEP program for work in the Parks and Recreation Department. This paragraph is not intended to reduce the rights that the Employer has under Section 2.

Hilgart claims that the above language does not constitute the agreement reached by the parties because it does not include the remainder of the agreement, i.e., that it would be specifically spelled out that DPW bargaining unit members would not have to supervise CEP workers. Schneider responds that it does reflect this latter agreement because it limits CEP workers to the Parks and Recreation Department, which department is separate and distinct from the Public Works Department.

Employer Exhibit #7, which was relied upon by Deda to prepare the Article IV, Section 3, language includes the following:

> The second item on this CEP stuff that we would accept your suggested change to our proposed language so what we would add is language that says, "As long as the provisions of this paragraph are being complied with, the Union must sign paperwork consenting to the City using summer, temporary, part-time and/or casual help through government programs such as the CEP program for work in the Park and Recreation Department only.

The Article IV, Section 3, language prepared by Deda omits the final word "only" that is present in Employer Exhibit #7. Additionally, this Article IV, Section 3, language includes a sentence that is not included in Employer Exhibit #7, i.e., "This paragraph is not intended to reduce the rights that the Employer has under Section 2." Deda did not offer any explanation for the difference in language between Employer Exhibit #7 and the language in Article IV, Section 3.

By omitting the final word "only" from Article IV, Section 3, Deda removed the language that expressly limits the CEP workers to the Park and Recreation Department. This omission of the final word "only" is consistent with Hilgart's testimony, i.e., that the Article IV, Section 3, language drafted by Deda eliminated the portion of the agreement that specifically spelled out that DPW bargaining unit members did not have to supervise CEP workers.

In summary, Jorgenson's testimony and Schneider's testimony that the above-cited Article IV, Section 3, language was agreed to by the parties on March 27, 2001 is contradicted by the testimony of Hilgart. This testimony of Schneider and Jorgenson is inconsistent with Employer Exhibit #7. Hilgart's testimony is consistent with Employer Exhibit #7.

Upon consideration of the record evidence, the Examiner is persuaded that Schneider and Jorgenson are mistaken when they recall that the parties agreed to the language contained in Article IV, Section 3, of the 2001-2003 collective bargaining agreement prepared by Deda. Crediting Hilgart's testimony, the Examiner concludes that the Article IV, Section 3, language contained in the 2001-2003 collective bargaining agreement prepared by Deda was not agreed to by the Union on March 27, 2001.

Article XI, Section 1(D)

City Clerk and Treasurer, Neil Hagmann, left prior to the conclusion of the negotiation session of March 27, 2001. Thus, Hagmann was not present when Deda dictated the summary of the tentative agreement on March 27, 2001.

Schneider and Hagmann both testified that, throughout the negotiations on the successor agreement, the parties had discussed compensatory time for the assistant water plant superintendent and the sewage disposal plant operator. Hagmann and Schneider both stated that the language of Article XI, Section 1(D), mimics the language of Article XI, Section B. Schneider also testified that the changes in compensatory time discussed by the parties were never limited to the sewage disposal plant operator.

Jorgenson's testimony regarding the compensatory time issue is contained in the following exchange:

> Q: Throughout the negotiations when there was discussion of changes in the compensatory time, was that discussion always in regards to both of those positions the sewage disposal plant operator and the assistant water plant superintendent?
> A: Yes, sir.
> Q: Do you recall when the agreement was summarized that it was, in fact, agreed that the language be the same for both of them?
> A: Yes, sir.

Hilgart recalls that, on March 27, 2001, the parties discussed changes in the compensatory time language of Article XI with respect to the sewage disposal plant operator, the assistant sewage disposal plant operator and the janitor. Hilgart further recalls that the parties did not discuss any change in the compensatory time language of Article XI with respect to the assistant water plant operator. According to Hilgart, while Deda was summarizing the changes to Article XI that had been agreed upon by the parties, the assistant water plant operator asked "What about me?" Hilgart's testimony indicates that Deda replied

"Well, we'll have to put something in there about you too." Hilgart maintains, however, that the Union never agreed to the Article XI, Section 1(D), language that is contained in the 2001-2003 collective bargaining agreement prepared by Deda.

The Article XI, Section 1(D), language contained in the 2001-2003 collective bargaining agreement prepared by Deda states as follows:

> D. It shall be the responsibility of the assistant water plant superintendent to make the necessary inspection of the plant on Sundays. The assistant water plant superintendent will also be responsible for any work at the plant during off duty hours during the entire work week. Compensatory time is to be taken during the normal work week for any work on Saturday at the rate of one and a half times the hours worked and any work on Sundays or holidays at the rate of two times the hours worked. Work on Monday through Friday outside the normal work day is to result in compensatory time hour for hour unless the employee works over eight (8) hours in a day, in which case the compensatory time is to be at a rate of one and one half times the hours worked over eight (8) hours. No more than forty (40) hours of compensatory time is to be accumulated at any one time. Compensatory time off is to be taken at times mutually agreed upon by the employee and Employer. The provisions of this section also apply to the assistant plant operator for work done in the position of assistant plant operator outside the normal work week. If the employee reaches forty (40) hours of compensatory time, then the employer can require the employee to take time off work to get the compensatory time down to forty (40) hours without the mutual consent of the employee.

Employer Exhibit #7 includes the following:

> In the comp time, which is Article 11, what we are doing is in paragraph B and in paragraph C, which is a sewage disposal operator and the custodian, we are increasing the hours from 20 to 40 and making no other change, other than that the end of each paragraph, we are adding a sentence that says, "If the employee reaches 40 hours of comp time, then the employer can schedule comp time off without the mutual consent of the employee."

The above language of Employer Exhibit #7 does not reference a new Section D, but rather, addresses change to Section's B and C. Nor does it reference the assistant water plant superintendent. However, several paragraphs later, Employer Exhibit #7 contains the following language:

> Add a paragraph in Article XI for Assistant Water Plant Superintendent that would read the same as the current language for sewer disposal plant operator, which would match the status quo of what they are doing now.

Neither Hagmann, nor Schneider, confirms that, on March 27, 2001, the Union agreed to the language contained in Article XI, Section 1(D). Thus, their testimony does not rebut Hilgart's testimony that the Union never agreed to the Article XI, Section 1(D), language contained in the 2001-2003 collective bargaining agreement prepared by Deda.

Jorgenson's testimony contradicts this testimony of Hilgart. Jorgenson's testimony is consistent with the language of Employer Exhibit #7.

At first blush, Hilgart's testimony appears to be inconsistent with Employer Exhibit #7. According to Hilgart, however, the Employer Exhibit #7 language on the Assistant Water Plant Superintendent was inserted unilaterally by Deda, in response to a question from the assistant water plant operator, and was not agreed to by the Union. Thus, the fact that language on the Assistant Water Plant Superintendent appears in Employer Exhibit #7 is not inconsistent with Hilgart's testimony.

In Employer Exhibit #7, the language on the Assistant Water Plant Superintendent is not placed with the Article XI language on the sewage disposal operator and the custodian, but rather, appears several paragraphs later. Thus, the placement of the Assistant Water Plant Superintendent language within Employer Exhibit #7 is consistent with Hilgart's claim that the language on the assistant water plant operator had not been agreed to by the parties when they agreed upon Article XI changes on compensatory time.

To be sure, neither Salamone, nor any member of the bargaining unit objected to Deda's summary of the tentative agreements. According to Hilgart, he attempted to respond to Deda's statement regarding the assistant water plant operator, but he was "phased out" when others started to talk. Given the lack of sophistication in the DPW unit's bargaining procedures, as well as Hilgart's belief that any tentative agreement was subject to a ratification vote by the DPW bargaining unit, the Examiner is not persuaded that, in this case, a failure to raise an objection to Deda's summary reasonably leads to the conclusion that the Union's "bargaining team" agreed to add Paragraph D to Article XI, Section 1.

Upon consideration of the record evidence, the Examiner is persuaded that there is credible evidence to support the City's position that the Union agreed to the language of Article XI, Section 1 (D) and there is credible evidence to support the Union's position that the Union did not agree to this language. The City has the burden to prove, by a clear and satisfactory preponderance of the evidence, that the language of Article XI, Section 1(D), contained in the 2001-2003 collective bargaining agreement prepared by Deda was agreed to by the Union's bargaining team. The City has not met this burden.

Addendum 1

It is undisputed that, on March 27, 2001, the Union did not agree to remove the monthly and bi-weekly wage rates from Addendum 1 for the positions of Disposal Plant Operator, Asst. Plant Operator, and Custodian. The City's belief that these rates are superfluous because all wages and benefits are paid off the hourly rate does not provide the City with the unilateral right to remove these wage rates from Addendum 1. Nor does the City's offer at hearing, to restore the monthly and bi-weekly rates to Addendum 1, alter the fact that the Union had not agreed to the Addendum 1 contained in the 2001-2003 collective bargaining agreement prepared by Deda.

Conclusion

On March 27, 2001, Union representatives and City representatives believed that they had reached a tentative agreement on the 2001-2003 collective bargaining agreement. A clear and satisfactory preponderance of the evidence, however, fails to establish that, on March 27, 2001, the City and the Union had a "meeting of the minds" with respect to the terms and conditions to be included in a successor contract to their expired 1998-2000 collective bargaining agreement.

A clear and satisfactory preponderance of the record evidence does not establish that the 2001-2003 collective bargaining agreement prepared by Deda is a tentative agreement that was reached by both parties on March 27, 2001. Thus, the members of the Union's DPW bargaining unit that were present throughout the March 27, 2001 negotiation session do not have a statutory duty to support, or vote in favor of, the ratification of this 2001-2003 collective bargaining agreement.

Notwithstanding the City's argument to the contrary, the fact that a majority of the Union's bargaining unit members were present throughout the March 27, 2001 negotiation session does not make the ratification of the 2001-2003 collective bargaining agreement prepared by David Deda a fait accompli. Nor, by failing to ratify the 2001-2003 collective bargaining agreement prepared by Deda, have the Union's DPW bargaining unit members violated Sec. 111.70(3)(b)3, Stats.

Section 111.70(3)(b)3, Stats., requires the Union to execute a collective bargaining agreement previously agreed upon. The clear and satisfactory preponderance of the evidence does not establish that the Union and the Union's DPW bargaining unit members have agreed to the 2001-2003 collective bargaining agreement prepared by David Deda. Accordingly, by failing to execute this collective bargaining agreement, the Union and its DPW bargaining unit members have not violated Sec. 111.70(3)(b)3, Stats.

Whether acting as "municipal employees" within the meaning of Sec. 111.70(1)(i), Stats., or "persons" within the meaning of Sec. 111.70(1)(k), Stats., the Union and the Union's DPW bargaining unit members have not violated Sec. 111.70(3)(b)3, Stats. Accordingly, the Union and the Union's DPW bargaining unit members have not violated Section 111.70(3)(c), Stats., as alleged by the City.

In summary, the Union and the Union's DPW bargaining unit members have not violated Secs. 111.70(3)(a)4, 111.70(3)(b)3, or 111.70(3)(c), Stats., as alleged by the City. Accordingly, the City's complaint of prohibited practices is without merit and has been dismissed in its entirety.

Dated at Madison, Wisconsin, this 2nd day of April, 2002.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Coleen A. Burns /s/
Coleen A. Burns, Examiner

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