

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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In the Matter of the Petition of

**INTERNATIONAL BROTHERHOOD OF  
ELECTRICAL WORKERS LOCAL 965**

To Initiate Arbitration Between Said Petitioner and

**CITY OF FENNIMORE**

Case 4  
No. 61106  
INT/ARB-9622

**Decision No. 30454-B**

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**Appearances:**

**Christopher J. Blythe**, Attorney at Law, Lawton & Cates, S.C., Ten East Doty Street, Suite 400, Madison, WI 53703, appearing on behalf of the City of Fennimore.

**Eileen Brownlee**, Attorney at Law, Kramer, Brownlee & Infield, LLC, 1038 Lincoln Avenue P.O. Box 87, Fennimore, WI 53809-0087, appearing on behalf of International Brotherhood of Electrical Workers Local 965.

**FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER**

During interest arbitration proceedings before Arbitrator Howard S. Bellman, a dispute arose between International Brotherhood of Electrical Workers Local 965 and the City of Fennimore as to whether Local 965's final offer contained an error that should be corrected before the Arbitrator completed his deliberations and issued his award. Arbitrator Bellman advised the parties that unless they could voluntarily resolve this dispute, he would refer the matter to the Wisconsin Employment Relations Commission. The parties were unable to resolve the dispute.

Hearing as to the dispute was held on July 10, 2003 in Fennimore, Wisconsin by Examiner Peter Davis. The parties made oral argument at the conclusion of the hearing and a transcript of the proceedings was received July 28, 2003.

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Having reviewed the record and being fully advised in the premises, the Commission makes and issues the following

**FINDINGS OF FACT**

1. The City of Fennimore, herein the City, is a municipal employer having its principal offices at 860 Lincoln Avenue, Fennimore, Wisconsin.

2. International Brotherhood of Electrical Workers Local 965, herein Local 965, is a labor organization serving as the exclusive collective bargaining representative of certain City employees.

3. The City and Local 965 were unsuccessful in their efforts to reach agreement on all terms of a 2002-2003 agreement and proceeded to interest arbitration under Sec. 111.70 (4)(cm) 6, Stats., before Arbitrator Howard S. Bellman to resolve those issues that remained in dispute.

One of the disputed issues between the parties was longevity pay. Local 965's final offer before Arbitrator Bellman states the following as to longevity pay:

Longevity shall be paid as follows:

0-4 years of service	none
5-11 years of service	\$ 2.00
12-20 years of service	\$ 3.50

Rates shall be per month times the years of service paid out annually.

During proceedings before Arbitrator Bellman, Local 965 asserted that its longevity pay offer contained an error because the "12-20 years of service" portion of the offer should have read "12 or more years of service." During said proceedings, the City did not agree to allow Local 965 to change its final offer as to longevity pay and asserted that the Arbitrator lacked authority to allow Local 965 to make the change over the City's objection.

4. Local 965 intended that its final offer as to longevity read as follows:

Longevity shall be paid as follows:

0-4 years of service	none
5-11 years of service	\$ 2.00
12 or more years of service	\$ 3.50

Rates shall be per month times the years of service paid out annually.

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

**CONCLUSIONS OF LAW**

1. The Wisconsin Employment Relations Commission has the statutory authority under Sec. 111.70(4)(cm) 6, Stats., to allow a party to correct its final offer to conform to its intent.
2. The correction Local 965 seeks to make in its final offer will conform the offer to its intent.

Based on the above and foregoing Findings of Fact and Conclusions of Law, the Commission makes and issues the following

**ORDER**

1. The final offer of Local 965 is corrected to read as recited in Finding of Fact 4.
2. The City of Fennimore and Local 965 shall have the right to submit supplemental evidence and argument to Arbitrator Bellman to address the impact of the correction.

Given under our hands and seal at the City of Madison, Wisconsin, this 26th day of September, 2003.

**WISCONSIN EMPLOYMENT RELATIONS COMMISSION**

Judith Neumann /s/

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Judith Neumann, Chair

Paul Gordon /s/

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Paul Gordon, Commissioner

Susan J. M. Bauman /s/

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Susan J. M. Bauman, Commissioner

City of Fennimore

MEMORANDUM ACCOMPANYING FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND ORDER

The final offer interest arbitration provisions of Sec. 111.70(4)(cm), Stats., provide a mechanism for establishing the terms of a contract where collective bargaining has not been successful in achieving that result. However, to encourage voluntary resolution of the contract by the parties themselves, the Legislature chose to maximize the risk in use of the interest arbitration process by providing that the interest arbitrator must select one side's final offer in its entirety and that neither side can modify its final offer without the consent of the other party. 1/

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1/ *As the Court held in MILWAUKEE DEPUTY SHERIFF'S ASS'N v. MILWAUKEE COUNTY, 64 Wis.2D 651, 675-76 (1974) as to similar final offer interest arbitration provisions of Sec. 111.77, Stats.*

*If a party is allowed to back-pedal from its positions in a final offer instead of defending those positions before an arbitrator, the incentive for a party "to develop the most reasonable position" prior to arbitration is lost.*

*"The overriding purpose of the final-offer procedure . . . is to induce the parties to make their own compromises by posing potentially severe costs if they do not agree. In other words, a successful final-offer procedure is one that is not used; one that induces direct agreement during the proceedings; or, using a less rigorous definition of success, one that substantially narrows the area of disagreement."*

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Thus, although Sec. 111.70(4)(cm)6.b., Stats., leaves the door ajar for further bargaining between the parties, it explicitly provides as follows that a party may modify its offer only with the consent of the other party:

b. 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.

Consistent with Sec. 111.70(4)(cm)6. b., Stats., ERC 32.10(3) provides in pertinent part:

Following the close of the investigation, a party may modify its final offer only with the consent of the other party.

Here, the City has not consented to allow Local 965 to modify its final offer. The question before us is whether we may allow what the City will not.

We begin by noting that we act in this matter pursuant to our general responsibility and jurisdiction to administer the interest arbitration provisions of Sec. 111.70(4)(cm)6, Stats. CITY OF MADISON, DEC. NO. 30009-B (WERC, 9/01).

One of the specific responsibilities the Legislature has given the Commission is to serve as the forum for resolving disputes over whether an interest arbitration award is unenforceable because the arbitrator exceeded his authority. See Sec. 111.70(4)(cm)8.d., Stats.; ERC 32.16(1)(d). An arbitrator exceeds his/her authority if the arbitrator selects a final offer that was not properly before him. *LA CROSSE PROF. POLICE V. CITY OF LACROSSE*, 212 WIS.2D 90 (CT. PP. 1997). Therefore, the final offer dispute presently before us is one which we would be obligated to decide *de novo* after Arbitrator Bellman issued his award if he had resolved the issue in a manner that either party believed to be incorrect. Because (1) the dispute is one which ultimately could reach us, (2) the arbitrator has referred the dispute to us, and (3) resolution of this issue now allows the parties and the arbitrator to proceed with greater certainty as to the legitimacy of the award ultimately issued, we conclude it is appropriate exercise of our overall administrative authority to resolve this dispute now. We proceed to do so.

Local 965 asserts that the longevity portion of its offer contains a typographical error and that the interests of equity and justice support the correction of the error. It argues that it is seeking to correct its offer -- not to modify it.

The City argues that it is not apparent on the face of the Local 965 offer that the longevity portion thereof contains a typographical error. However, even if it is assumed that such an error exists, the City points to the undesirable delay and expense that allowing for a correction has and will produce -- particularly where the assertion of error comes so late in the process.

The threshold question for us to answer is how broadly to define the statutory term "modify." Does it prohibit any change in an offer or does it allow for the correction of an offer to conform with a party's intent? We conclude that the correction of error is not statutorily prohibited and is appropriate where necessary to conform the offer to the intent of party. As the Court pointed out in *CITY OF MANITOWOC V. MANITOWOC POLICE DEP'T*, 70 WIS.2D 1006, 1013 (1975):

Although sec. 111.77(4)(b), Stats., the form of arbitration under which the parties were proceeding, declares that the arbitrator shall select the final offer of one of the parties and then issue an award incorporating that offer "without modification," such language does not forbid restatement of the offer to comprise a proper, final arbitration award. The statutory language clearly refers

to alterations of items in the offer contrary to the intent of the offering party.

While the Court's comments come in the context of the interest arbitrator's authority under Sec. 111.77, Stats., to modify an offer to conform to the intent of a party 2/, we find the Court's comments persuasive as to how we should interpret the scope of "modify" in Sec. 111.70(4)(cm)6.b., Stats. A party cannot be allowed to change its offer to modify its intent, but may be allowed to change its offer to conform it to its intent.

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*2/ The Court's holding as to the authority of a Sec. 111.77, Stats., interest arbitrator is equally applicable to a Sec. 111.70(4)(cm)6., Stats., interest arbitrator. Thus, Arbitrator Bellman had the authority to resolve this issue, subject to the potential for de novo review by the Commission after he issued his award. WAUKESHA COUNTY, DEC. NO. 29929-A (WERC, 11/00).*

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In reaching this conclusion, we have considered the City's arguments regarding the delay and expense which allowing error correction can and has produced for the parties. These arguments are not without merit. However, we are satisfied that the overriding statutory interest is in having the interest arbitrator select between final offers which are consistent with the intent of the parties who made them, both so the arbitrator can best measure those offers against the statutory criterion for selection and so the offer ultimately selected can be directly incorporated into a collective bargaining agreement with less potential for subsequent post-award litigation.

Having concluded that it is appropriate to allow Local 965 to correct its offer so long as it is not seeking to modify its intent, we turn to the question of whether Local 965 is seeking to correct its offer or to modify it.

A review of the record makes it clear to us that Local 965 intended its final offer to provide longevity benefits at the specified level for employees with "12 or more years of service" rather than limiting those benefits to those employees with "12-20 years." The testimony of the Local 965 business agent credibly explains that in response to the urging of the Commission mediator not to be "pigs", the Local intended to lower its longevity offer from:

12-20 years of service	\$ 3.50
20 or more years of service	\$ 4.50

to:

12 or more years of service	\$ 3.50
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but that when he deleted the “20 or more years of service” line he inadvertently failed to make the related change of correcting the “12-20 years of service” line to read “12 or more years of service.” Thus, while the City is correct that the existing offer is functional on its face, the testimony of the business agent as to the Local’s intent and the circumstances surrounding the error satisfies us that the offer does not conform to Local 965's intent.

Therefore, we have granted Local 965's request that its offer be corrected as reflected in Finding of Fact 4. However, because the City was entitled to rely upon the Local 965 offer then pending when it litigated the issue before the Arbitrator, the parties are entitled to respond to the correction through additional proceedings before the Arbitrator, if necessary.

Dated at Madison, Wisconsin, this 26th day of September, 2003.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/

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Judith Neumann, Chair

Paul Gordon /s/

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Paul Gordon, Commissioner

Susan J. M. Bauman /s/

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Susan J. M. Bauman, Commissioner

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