STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of

OFFICE & PROFESSIONAL EMPLOYEES INTERNATIONAL UNION, LOCAL 35

To Initiate Arbitration Between Said Petitioner and

OZAUKEE COUNTY

Case 56
No. 61845
INT/ARB-9802

Decision No. 30561-A

In the Matter of the Petition of

OZAUKEE COUNTY

To Initiate Arbitration Between Said Petitioner and

OZAUKEE COUNTY HIGHWAY EMPLOYEES ASSOCIATION

Case 58
No. 61962
INT/ARB-9845

Decision No. 30562-A

Appearances:

Michael, Best & Friedrich, by **Attorney Robert Mulcahy,** 100 East Wisconsin Avenue, Suite 3300, Milwaukee, Wisconsin 53202-4108, appearing on behalf of Ozaukee County.

Shneidman, Hawks & Ehlke, S.C., by **Attorney Michele Peters,** 700 West Michigan, Suite 500, P.O. Box 442, Milwaukee, Wisconsin 53201-0442, appearing on behalf of Ozaukee County Highway Employees Association.

Murphy, Gillick, Wicht & Prachthauser, by **Attorney George Graf,** Bluemound Center, 22370 West Bluemound Road, Suite 204, Waukesha, Wisconsin 53186 and **Ms. Judy Burnick,** OPEIU Local 35, 5235 North 124th Street, Butler, Wisconsin 53007, appearing on behalf of Office and Professional Employees International Union, Local 35.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On February 26, 2003, the Wisconsin Employment Relations Commission issued an Order in the above matters holding in abeyance the requests of Office and Professional Employees Union Local 35 and the Ozaukee County Highway Employees Association that the Commission review a Commission investigator's determinations that an impasse existed in the contract negotiations with Ozaukee County. The Commission therein advised the parties that: (1) it is the Commission that determines whether the parties are at impasse after receipt and consideration of the investigator's report and; (2) the merits of the requests of Local 35 and the Association will be ripe for Commission consideration when and if the Commission receives a report from the investigator.

By letters dated March 27, 2003 (Case 58) and April 3, 2003 (Case 56), the Commission advised the parties that it had received Investigator Emery's Report to Commission and Notice of Close of Investigation; that it intended to make the prohibited practice complaints (Cases 59-60) pending before Examiner Burns part of the record it will consider when deciding the merits of the requests of Local 35 and the Association; and that it wanted to give the parties the opportunity to file additional written argument.

The parties did file additional written argument -- the last of which was received May 1, 2003.

Supplemental argument was received from the County on May 27 and June 11, 2003 and from the Association on May 30, 2003.

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

FINDINGS OF FACT

1. Ozaukee County, herein the County, is a municipal employer having its principal offices in Port Washington, Wisconsin.

2. Ozaukee County Highway Employees Association, herein the Association, is a labor organization that serves as the collective bargaining representative of certain County employees.

3. Office and Professional Employees International Union Local 35, herein Local 35, is a labor organization that serves as the exclusive collective bargaining representative of certain County employees.

4. On December 2, 2002, Local 35 filed a petition for arbitration with the Wisconsin Employment Relations Commission pursuant to Sec. 111.70(4)(cm)6, Stats., asking that the Commission conduct an investigation to determine whether a successor collective bargaining agreement between Local 35 and the County should be established by an interest arbitrator's award.

The Commission thereafter assigned John Emery, a member of its staff, to investigate the petition by: (1) providing mediation services to assist the parties in their efforts to reach a voluntary agreement; and (2) if a voluntary agreement was not reached, receiving the parties' final offers on all unresolved issues for submission to an interest arbitrator.

On January 2, 2003, Local 35 filed a prohibited practice complaint with the Commission alleging the County had violated its duty to bargain in good faith with Local 35 by unilaterally changing employee insurance benefits.

Emery met with the parties on January 14 and January 29, 2003 and a voluntary agreement on the terms of a successor contract was not reached. By letter dated January 31, 2003, Emery directed the parties to provide him with final offers on all unresolved issues so that he could close his investigation and recommend to the Commission that the dispute proceed to interest arbitration.

By letter dated February 4, 2003, Local 35 advised Emery that it believed the parties could not reach an impasse in their negotiations until the prohibited practice complaint filed on January 2, 2003 had been resolved.

By letter dated February 5, 2003, Local 35 asked the Commission to review Emery's determination that the dispute over the terms of the successor agreement could proceed to interest arbitration despite the pendency of the January 2, 2003 prohibited practice complaint.

On February 10, 2003, Emery received the County's final offer.

By decision issued February 26, 2003, the Commission advised the parties that the February 5, 2003 Local 35 request was not ripe for decision because: (1) it is the Commission that determines whether the parties are at impasse after receipt and consideration of the investigator's report and; (2) the merits of the Local 35 request will be ripe for Commission consideration when and if the Commission receives a report from the investigator.

On March 31, 2003, Emery received Local 35's final offer which included the following statement:

> OPEIU Local 35 submits this first final offer for the sole purpose of complying with Wis. Stat. 111.70(4)(cm)6. This submission is subject to OPEIU Local 35's reservation of all of its rights under 111.70. In particular, it is not intended to constitute a waiver of, or have any effect whatsoever on, OPEIU Local 35's position that the County has violated its duty to bargain in good faith and 111.70(3)(a)4 by unilaterally implementing the health insurance changes contained in its proposal effective 1/1/03. Further, this submission is not intended to constitute a waiver of, or have any effect whatsoever on, OPEIU Local 35's position that no impasse can be declared for purposes of 111.70(4)(cm)6.am., until the County's unlawful refusal to bargain in good faith has been undone and effectively remedied and the parties have a reasonable opportunity to engage in further good faith bargaining thereafter.

On March 31, 2003, Emery provided his Report to Commission and Notice of Close of Investigation to the Commission and the parties in Case 56 which stated in pertinent part:

> 1. The undersigned is satisfied that there has been substantial compliance with the requirements of Section 111.70(4)(cm) in this case.
>
> 2. No timely written objection has been filed by either party that the final offer of the other party contains a proposal or proposals relating to non-mandatory subjects of bargaining and neither party has requested an extension of time in which to file such an objection.
>
> 3. The investigation in the captioned matter is closed and that the undersigned recommends to the Commission that an order directing arbitration be issued.

By letter dated April 3, 2003, the Commission advised the parties that given its receipt of Emery's Report, it was now prepared to decide the merits of the Local 35 position that impasse cannot exist during the pendency of the prohibited practice complaint.

5. On December 23, 2002, the County filed a petition for arbitration with the Wisconsin Employment Relations Commission pursuant to Sec. 111.70(4)(cm)6, Stats., asking that the Commission conduct an investigation to determine whether a successor collective

bargaining agreement between the Association and the County should be established by an interest arbitrator's award.

The Commission thereafter assigned John Emery, a member of its staff, to investigate the petition by: (1) providing mediation services to assist the parties in their efforts to reach a voluntary agreement; and (2) if a voluntary agreement was not reached, receiving the parties' final offers on all unresolved issues for submission to an interest arbitrator.

On December 27, 2002, the Association filed a prohibited practice complaint with the Commission alleging the County had violated its duty to bargain in good faith with the Association by unilaterally changing employee insurance benefits.

Emery met with the parties on January 14, 2003 and a voluntary agreement on the terms of a successor contract was not reached. By letter dated January 31, 2003, Emery directed the parties to provide him with final offers on all unresolved issues so that he could close his investigation and recommend to the Commission that the dispute proceed to interest arbitration.

By correspondence dated February 10, 2003, the Association asked the Commission to review Emery's determination that the dispute over the terms of the successor agreement could proceed to interest arbitration despite the pendency of the December 27, 2002 prohibited practice complaint.

On February 10, 2003, Emery received the County's final offer.

By decision issued February 26, 2003, the Commission advised the parties that the February 10, 2003 Association request was not ripe for decision because: (1) it is the Commission that determines whether the parties are at impasse after receipt and consideration of the investigator's report and; (2) the merits of the Association's request will be ripe for Commission consideration when and if the Commission receives a report from the investigator.

On March 4, 2003, Emery received the Association's final offer which included the following statement:

> The Association submits this first final offer for the sole purpose of complying with Wis. Stat. Secs. 111.70(4)(cm)6. This submission is subject to the Association's reservation of all of its rights under Sec. 111.70. In particular, it is not intended to constitute a waiver of, or have any effect whatever on, the Association's position that the County has violated its duty to bargain in good faith and Sec. 111.70(3)(a)4 by unilaterally implementing the health insurance changes contained in its proposal effective January 1, 2002. Further, this

submission is not intended to constitute a waiver of, or have any effect whatever on, the Association's position that no impasse can be declared for purposes of Sec. 111.70(4)(cm)6.am., until the County's unlawful refusal to bargain in good faith has been undone and effectively remedied and the parties have had a reasonable opportunity to engage in further good faith bargaining thereafter.

On March 24, 2003, Emery provided his Report to Commission and Notice of Close of Investigation to the Commission and the parties in Case 58 which stated in pertinent part:

1. The undersigned is satisfied that there has been substantial compliance with the requirements of Section 111.70(4)(cm) in this case.

2. No timely written objection has been filed by either party that the final offer of the other party contains a proposal or proposals relating to non-mandatory subjects of bargaining and neither party has requested an extension of time in which to file such an objection.

3. The investigation in the captioned matter is closed and that the undersigned recommends to the Commission that an order directing arbitration be issued.

By letter dated March 27, 2003, the Commission advised the parties that given its receipt of Emery's Report, it was now prepared to decide the merits of the Association position that impasse cannot exist during the pendency of the prohibited practice complaint.

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

CONCLUSIONS OF LAW

1. Section 111.70(4)(cm)6.e., Stats., provides:

   e. Arbitration proceedings shall not be interrupted or terminated by reason of any prohibited practice complaint filed by either party at any time.

2. Section 111.70(4)(cm)6.e., Stats., mandates that the interest arbitration proceedings in Cases 56 and 58 proceed despite the pendency of the prohibited practice complaints.

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

ORDER

The request that the interest arbitration proceedings in Cases 56 and 58 be interrupted is denied.

Given under our hands and seal at the City of Madison, Wisconsin, this 9th day of July, 2003.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/
Judith Neumann, Chair

Paul Gordon /s/
Paul Gordon, Commissioner

Susan J. M. Bauman /s/
Susan J. M. Bauman, Commissioner

Ozaukee County

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

As reflected in our Findings of Fact, Local 35 and the Association generally contend that where, as here, there is an unresolved allegation of bad faith bargaining, an impasse cannot exist and thus proceedings before an interest arbitrator cannot commence. More specifically, they take issue with the contention in Emery's Reports that "there has been substantial compliance with the requirements of Section 111.70(4)(cm) in this case." They assert that there cannot be "substantial compliance with the requirements of Section 111.70(4)(cm)" unless there has been good faith bargaining. Until the merits of the pending bad faith bargaining prohibited practice complaints are decided and any appropriate remedies imposed, Local 35 and the Association contend that the interest arbitration cases must be held in abeyance.

The County responds by arguing that given the clear language of Sec. 111.70(4)(cm)6.e., Stats., the pending prohibited practice complaints are irrelevant to the question of whether the interest arbitration proceedings should proceed.

Moreover, the County asserts that there are no public policy considerations that militate in favor of the Commission even looking for a way to avoid the plain language of the statute. The County contends that Sec. 111.70(4)(cm)6.e., Stats., exists to prevent either party from using prohibited practice complaints to delay interest arbitration proceedings -- conduct contrary to the legislatively established public policy of encouraging voluntary settlement of labor disputes. If prohibited practice complaints can block interest arbitration proceedings, the County argues that the value of interest arbitration as a viable means to peacefully resolve labor disputes will be significantly impaired. If prohibited practice complaints can block interest arbitration proceedings, the County asks how long will the block continue -- until all appeals of the examiner/Commission decision are resolved? The County asserts that any such delay has unacceptable long term ramifications for collective bargaining -- ramifications that Local 35 and the Association likely do not intend.

Lastly, should the Commission wrongly conclude that the pending prohibited practice complaints have some relevance, the County argues that both Local 35 and the Association admitted during the prohibited practice hearing that the parties were at impasse when the interest arbitration petitions were filed and the allegedly unlawful unilateral County conduct occurred.

Given all of the foregoing, the County asks that the interest arbitration cases be allowed to proceed.

DISCUSSION

The Commission has interpreted Sec. 111.70(4)(cm)6.e., Stats., in two prior decisions.

In SCHOOL DISTRICT OF MARINETTE, DEC. NO. 20406 (WERC, 3/83), the municipal employer argued to the Commission that the union's pending bad faith bargaining prohibited practice complaint should be resolved before the union's interest arbitration petition was further processed. The Commission stated:

> The Union correctly asserts that the Commission has previously found the subcontracting proposal at issue herein to be a mandatory subject of bargaining. CITY OF OCONOMOWOC, SUPRA. The District does not appear to contest the continuing validity of our conclusion in that regard, but rather seeks to focus the Commission's attention upon the circumstances existent between the parties which are currently the subject of a pending prohibited practice proceeding. While there clearly is a relationship between the events which are subject to that proceeding and the Union's desire to submit a subcontracting proposal to a mediator-arbitrator if the parties are unable to reach a voluntary agreement, the legislature has clearly established through the content of Sec. 111.70(4)(cm)6.e. that the mediation-arbitration process shall not be interrupted or terminated by reason of any prohibited practice complaint filed by either party at any time. Application of that statutory requirement to the District's theory mandates a conclusion that the District's arguments should be rejected. As to the District's contention regarding the Union's compliance with the statutuory (sic) conditions precedent to mediation-arbitration, we would note that the complaint proceeding will not establish whether there has been a reasonable period of negotiations over a new contract but rather will focus on the existence of a bargaining dispute which arose during the term of an existing contract. Thus, we find no merit in this argument. We have therefore reaffirmed our conclusion in CITY OF OCONOMOWOC, SUPRA, that a proposal such as that submitted by the Union herein, is a mandatory subject of bargaining and have directed the Commission's investigator to contact the parties so that the mediation-arbitration arbitration process can continue.

In CITY OF STURGEON BAY, DEC. NO. 25549-B (WERC, 11/88), the union had filed a prohibited practice complaint alleging bad faith bargaining by the employer and argued that an

interest arbitration hearing should be stayed and the investigation reopened to determine whether the employer had acted in bad faith and, if so, whether the parties should be allowed to modify their final offers. The Commission held:

> However, given the content of Sec. 111.70(4)(cm)6.e, Stats., we are satisfied that Local 310's petition must be denied. That statutory provision provides:
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> > Arbitration proceedings shall not be interrupted or terminated by reason of any prohibited practice complaint filed by either party at any time.
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> This statute establishes a legislative judgement that even if allegations are raised in a prohibited practice complaint which, if proven, could significantly impact upon the legitimacy of an ongoing interest arbitration proceeding, the arbitration process should be allowed to continue. If we were to allow Local 310's petition to interrupt the arbitration proceedings, we would be rendering this legislative judgement meaningless. Thus we must deny same. 2/

2/ However, we would also note that the breadth of our remedial authority under Secs. 111.07 and 111.70(4)(a), Stats., will be sufficient to provide meaningful relief even after an arbitration award is issued if such relief is warranted and necessary to effectuate the purposes of the Municipal Employment Relations Act.

From these decisions, it is apparent that the Commission has: (1) viewed Sec. 111.70(4)(cm)6.e, Stats., as an expression of legislative intent that the processing of an interest arbitration petition should not be interrupted by the filing of a prohibited practice complaint -- even where the complaint alleges bad faith bargaining which, if proven, would establish the absence of an impasse and thus the absence of the statutory prerequisite for interest arbitration; and (2) concluded that the breadth of its remedial authority in the complaint proceeding allows for meaningful relief (even after an arbitration award is issued) should the bad faith bargaining be proven.

This existing precedent continues to be persuasive. Without the statutory language of Sec. 111.70(4)(cm)6.e, Stats., any party interested in delaying the arbitration proceedings would have an unfettered opportunity to do so by simply filing a bad faith bargaining

complaint and alleging that arbitration cannot proceed because impasse cannot be found until the allegations are resolved. Such a result would be at odds with that portion of Sec. 111.70(6), Stats., that declares it to be the public policy of the State of Wisconsin that "fair, **speedy**, effective" (emphasis added) procedures be available for resolution of labor disputes. Thus, we conclude the language of Sec. 111.70(4)(cm)6.e, Stats., reflects an affirmative legislative judgment that this otherwise available "delay loophole" should be closed -- even at the expense of those instances in which the bad faith bargaining complaint allegations prove to have merit. In those instances, the Legislature could reasonably conclude that our remedial authority in the complaint proceeding provides a sufficient guarantee that a party will not ultimately be advantaged by its illegal conduct.

Given all of the foregoing, we deny the request of Local 35 and the Association that the arbitration proceedings be interrupted until after the complaint allegations before Examiner Burns are resolved.

Dated at Madison, Wisconsin, this 9th day of July, 2003.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/
Judith Neumann, Chair

Paul Gordon /s/
Paul Gordon, Commissioner

Susan J. M. Bauman /s/
Susan J. M. Bauman, Commissioner

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