STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of

CITY OF STURGEON BAY (DPW) EMPLOYEES LOCAL 1658, AFSCME, AFL-CIO

Requesting a Declaratory Ruling Pursuant to Section 227.41 Wis. Stats., Involving a Dispute Between Said Petitioner and

CITY OF STURGEON BAY

Case 87
No. 65321
DR(M)-666

Decision No. 31880

Appearances:

Clifford Buelow and **Joel S. Aziere**, Davis & Kuelthau, S.C., Attorneys at Law, 300 North Corporate Drive, Suite 150, Brookfield, Wisconsin 53045, appearing on behalf of the City of Sturgeon Bay.

Aaron N. Halstead and **Danielle L. Carne**, Hawks, Quindel, Ehlke & Perry, S.C., Attorneys at Law, 222 West Washington Avenue, Suite 705, P.O. Box 2155, Madison, Wisconsin 53701-2155, appearing on behalf of City of Sturgeon Bay (DPW) Employees Local 1658, AFSCME, AFL-CIO.

FINDINGS OF FACT, CONCLUSION OF LAW AND DECLARATORY RULING

On November 5, 2005, City of Sturgeon Bay (DPW) Employees, Local 1658, AFSCME, AFL-CIO, filed a petition with the Wisconsin Employment Relations Commission pursuant to Sec. 227.41, Stats. seeking a declaratory ruling as to whether an interest arbitration award issued by Arbitrator Jay E. Grenig on July 25, 2005 is null and void. AFSCME asserted in its petition that Arbitrator Grenig exceeded his powers when issuing his award because he improperly considered an interest arbitration award of Arbitrator William Eich issued after the record had been closed and because the Eich award was itself defective.

On December 5, 2005, the City filed a response the petition arguing that Arbitrator Grenig had not erred and further that the petition should be dismissed a untimely, barred by the doctrine of laches and void because AFSCME had executed the contract in dispute after receiving Arbitrator Grenig's award.

The parties thereafter filed written argument by February 6, 2006.

An evidentiary hearing was subsequently conducted in Sturgeon Bay, Wisconsin on April 27, 2006 by Examiner Peter G. Davis. An exhibit admitted at said hearing was an April 20, 2006 decision by the Door County Circuit Court which denied an AFSCME motion to vacate the Eich interest arbitration award.

Post-hearing briefs were then filed on or before June 5, 2006.

On June 7, 2006, AFSCME advised the Commission and the City that it was not going to pursue an appeal of the April 20, 2006 Door County Circuit Court decision upholding the Eich interest arbitration award.

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 Sturgeon Bay, herein the City, is a municipal employer.

2. City of Sturgeon Bay (DPW) Employees, Local 1658, AFSCME, AFL-CIO, herein AFSCME, is a labor organization that serves as the exclusive collective bargaining representative for certain City employees.

3. The City and AFSCME were unable to reach agreement on all terms to be included in a 2003-2005 collective bargaining agreement and ultimately proceeded to interest arbitration pursuant to Sec. 111.70 (4)(cm) 6 and 7, Stats., before Arbitrator Jay Grenig.

At the conclusion of the April 4, 2005 arbitration hearing before Arbitrator Grenig, Arbitrator Grenig and the parties stated the following:

MR. RAINFORD: No, we don't have any questions. Maybe you do.

ARBITRATOR: Anything else from the employer?

MR. BUELOW: No.

ARBITRATOR: Let's go off the record for a minute on the briefing schedule.

(Off the record discussion)

ARBITRATOR: The parties have agreed that they will do a document check, that is looking at the exhibits to verify if they have any questions about data, and that they will work out between themselves any discrepancies and how to deal with them. And they're supposed to complete the document check by April 18, Monday. The parties will submit briefs. The briefs will be postmarked to the arbitrator not later than May 23. Each party will send the arbitrator two copies of his brief and the arbitrator will effect a simultaneous exchange and declare the hearing closed upon receipt of the briefs.

Is there anything else?

MR. RAINFORD: Did you put in there that we agreed to waive replies?

ARBITRATOR: There will be no reply briefs. I may have, but I'll make sure. Just in case I didn't, there will be no reply briefs. Anything else from either party?

MR. BUELOW: No.

MR. RAINFORD: No.

4. Following the receipt of all written argument, on July 5, 2005, the City sent Arbitrator Grenig the following motion to reopen the record:

> Pursuant to Sec. 111.70(4)(cm)7r.i., Wis. Stats., the City moves to reopen the record for purposes of offering into evidence the interest arbitration award of Judge William Eich dated July 8, 2005, involving the City's police bargaining unit. While the City acknowledges that it is unusual to reopen the record after it has been closed, the City believes it is appropriate and necessary to do so under the circumstances, in part, to maintain consistency amongst the internal comparables.

Arbitrator Grenig sought AFSCME's position as to the City's July 5, 2005 motion to reopen the record and received the following July 12, 2005 response:

Thank you for awaiting the Union's response before making a decision regarding the Employer's request to reopen the record to admit a decision in the Police arbitration case to the record in the instant proceeding. The Union objects to the City's request to reopen the record to admit the decision in the police dispute. On April 4, 2005 the parties specifically agreed to close the hearing upon receipt of the briefs. (Tr. Pg. 81) Both the City and the Union, in entering into this agreement, were well aware that such an agreement effectively sealed off the possibility of a decision in the Police dispute affecting the outcome in the instant dispute. The City's attempt to go back on this agreement should not be allowed.

The City's arguments regarding the maintenance and consistency among the internal comparables are also unpersuasive. The DPW unit and the Police unit are distinct units, they do not share the same external comparables, and they are not subject to the same statutory criteria and process for interest arbitration.

In a recent decision in OMRO SCHOOLS, Arbitrator Yaeger was faced with a similar situation and decided not to allow another decision into the record after the hearing was closed because neither party had asked, at the hearing, to keep the record open to receive any awards.

When the parties agree to close the process for further admission of evidence at the hearing, they well understand that they are asking each Arbitrator to make a decision independent of any other arbitrator's decision which may become available in the future. That is what has been agreed upon in this instance and there is no good reason to allow the Employer to break that agreement.

The City then replied with the following July 12, 2005 statement:

I believe the decision of Judge Eich is a public record which the Arbitrator may take notice of like any other published interest arbitration award.

On July 12, 2005, Arbitrator Grenig advised the parties as follows:

I believe Mr. Buelow is correct –- it is a public record like a court opinion (although not binding precedent). Therefore, I believe I can consider that Eich award like I would any other award. However, I do need a copy of the award since I doubt it is on the WERC website yet.

On July 25, 2005, Arbitrator Grenig issued his interest arbitration award and selected the final offer of the City. In the award, Arbitrator Grenig's rationale for selecting the City's offer was based in part on the interest arbitration award of Arbitrator Eich.

5. On April 20, 2006, the Door County Circuit Court denied AFSCME's motion to vacate the Eich award and AFSCME did not appeal the Court's decision.

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

CONCLUSION OF LAW

When issuing his July 25, 2005 interest arbitration award, Arbitrator Grenig did not err by considering the Eich interest arbitration award.

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

DECLARATORY RULING

The July 25, 2005 interest arbitration award of Arbitrator Jay Grenig was lawfully made within the meaning of Sec. 111.70 (4)(cm) 6 and 7, Stats. and ERC 32.16.

Given under our hands and seal at the City of Madison, Wisconsin, this 26th day of October, 2006.

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

CITY OF STURGEON BAY

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSION OF LAW AND DECLARATORY RULING

Unlike interest arbitration awards issued pursuant to Sec. 111.77, Stats, as to police and firefighting employees, issues as to whether an interest arbitration award issued pursuant to Sec. 111.70(4)(cm) 6 and 7, Stats. was lawfully made are resolved by the Commission rather than the courts. See Sec. 111.77 (7), Stats. and MANITOWOC V. MANITOWOC POLICE DEPT. 70 Wis. 2D 1006 (1975) as contrasted with Sec. 111.70 (4)(cm) 8.d., Stats. and ERC 32.16.

When a labor organization seeks a Commission decision as to whether an interest arbitration award issued pursuant to Sec. 111.70 (4)(cm) 6 and 7, Stats., was lawfully made, it files a petition for declaratory ruling pursuant to Sec. 227. 41, Stats. See WAUSAUKEE SCHOOLS, DEC. NO. 17576 (WERC, 1/80); NEKOOSA SCHOOLS, DEC. NO. 25876 (WERC, 2/89) ; WAUKESHA COUNTY, DEC. NO. 29929-A (WERC, 11/00).

When determining whether an interest arbitration award issued pursuant to Sec. 111.70(4)(cm) 6 and 7, Stats., the Commission applies the following provisions of ERC 32.16:

> (a) Where the interest arbitration award was procured by corruption, fraud or undue means;
>
> (b) Where there was evident partiality on the part of the neutral arbitrator or corruption on the part of an arbitrator;
>
> (c) Where the arbitrator was guilty of misconduct in refusing to conduct an arbitration hearing upon request or refusing to postpone the hearing upon sufficient cause shown, or in refusing to hear supporting arguments or evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party may have been prejudiced;
>
> (d) Where the arbitrator exceeded his or her powers, or so imperfectly executed them that a mutual, final and definite interest arbitration award was not made.

AFSCME asserts the Grenig award is unlawful because: (1) he erred by considering the Eich award; and (2) because the Eich award itself was fatally flawed. By virtue of the April 20, 2006 decision of the Door County Circuit Court denying AFSCME's motion to vacate the Eich award, we think it clear that AFSCME argument (2) above can be rejected without further comment. We turn a consideration of argument (1).

Section 111.70 (4)(cm) 7r., Stats. provides that:

> In making any decision under the arbitration procedures authorized by this paragraph, the arbitrator or arbitration panel shall also give weight to the following factors:
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> . . .
>
> e. Comparison of the wages, hours and conditions of employment of the municipal employees involved in the arbitration proceedings with the wages, hours and conditions of employment of other employees generally in public employment in the same community and in comparable communities.
>
> . . .
>
> i. Changes in any of the foregoing circumstances during the pendency of the arbitration proceedings.

In MANITOWOC, *supra*., the Wisconsin Supreme Court concluded in the context of Sec. 111.77(6) (g), Stats. that the statutory phrase "Changes in the foregoing circumstances during the pendency of the arbitration proceedings" allowed for submission of evidence after the arbitration hearing so long as an appropriate motion was made and the opposing party had the opportunity to be heard. The Court further concluded that where a contract settlement was reached by the employer with a union representing other employees after the interest arbitration hearing was held, said settlement was "statutorily relevant evidence" in the context of Sec. 111.77(6), Stats. which required arbitral consideration of:

> (d) Comparison of the wages, hours and conditions of employment of the employees involved in the arbitration proceeding with the wages, hours and conditions of employment of other employees performing similar services and with other employees generally:
>
> 1. In public employment in comparable communities.

Given that the statutory language in Sec. 111.70 (4)(cm) 7r. e. and i. Stats. is the same or virtually the same as the statutory language persuasively interpreted by the Court in MANITOWOC, we think it clear that submission of evidence as to changes in the wages, hours and conditions of employment (whether by voluntary agreement or arbitrator's award) that occur after a Sec. 111.70 (4)(cm) 6 and 7, Stats. interest arbitration hearing is completed is appropriate and should generally be received if the proper motion is made and an opportunity to be heard is afforded.

Here, AFSCME does not dispute the manner in which the City sought to have the award considered. Rather, AFSCME argues that the opportunity to reopen the record for the receipt of such evidence was foreclosed by the arbitrator's statement made at the close of the hearing that:

> . . . the arbitrator will effect a simultaneous exchange and declare the hearing closed upon receipt of the briefs.

We do not find that argument persuasive.

Arbitrator Grenig's statement at the end of the hearing that the "hearing" or "record" is closed upon receipt of briefs was routine, unremarkable and true. In the context of a statutory framework that makes post-hearing changes in wages, hours and conditions of employment relevant evidence that should be considered by the arbitrator, a statement that the "hearing" or "record" is closed cannot reasonably be understood to also mean that the record cannot be reopened, upon motion, for receipt of relevant evidence not available at the time of the hearing.

Given the foregoing, we conclude that Arbitrator Grenig did not err when he considered the Eich award. Because we have rejected the two AFSCME arguments attacking the Grenig award, it follows that we conclude the award was lawfully made. Given our conclusion, we need not decide whether we would have vacated the Grenig award even if he had erred by considering the Eich award. Given our conclusion, we also need not reach the various other defenses raised by the City.

Dated at Madison, Wisconsin, this 26th day of October, 2006.

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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