STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

**GENERAL TEAMSTERS LOCAL 662,
INTERNATIONAL BROTHERHOOD OF TEAMSTERS,**

vs.

VILLAGE OF ALLOUEZ, Respondent.

Case 46
No. 68633
MP-4479

Decision No. 32701-A

Appearances:

Scott D. Soldon, with **Kyle A. McCoy** on the brief, Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., Attorneys at Law, 1555 North Rivercenter Drive, Suite 202, P.O. Box 12993, Milwaukee, Wisconsin 53212, for General Teamsters Local 662, International Brotherhood of Teamsters.

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FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On February 4, 2009, Complainant filed with the Commission a Complaint, alleging that Respondent had violated Secs. 111.70(1)(a)(g)(m) and (3)(a)4 and 5, Stats., by refusing to execute a collective bargaining agreement with Complainant. After an attempt to informally conciliate the complaint proved unsuccessful, the Commission, on March 30, appointed Richard B. McLaughlin, a member of its staff, to act as Examiner. On April 30, Respondent filed its answer to the complaint and on May 7, hearing was conducted in Allouez, Wisconsin. At the hearing, Complainant amended the complaint to allege violations of Secs. 111.70(3)(a)1, 2, 3 and 4, Stats., and to withdraw the remaining allegations of the complaint. The parties filed briefs and reply briefs by July 17.

FINDINGS OF FACT

1. General Teamsters Local 662, International Brotherhood of Teamsters, referred to below as the Union, is a labor organization which maintains its offices at 1546 Main Street, Green Bay, Wisconsin 54302. The Union employs Michael Williquette and Beth Kirchman as Business Representatives.

2. Village of Allouez, referred to below as the Village, is a municipal employer, which maintains its offices at 1649 South Webster Avenue, Green Bay, Wisconsin 54301-2499. The Village's authority to transact the business authorized by Wisconsin Statutes is ultimately located in its Board of Trustees, which is referred to below as the Board. The Board consists of seven members. The Village employs Susan Foxworthy as its Administrator. The Village retains Dennis Duffy and James Kalny as legal counsel concerning certain transactions, including the negotiation of collective bargaining agreements.

3. The Union serves as the exclusive collective bargaining representative for two bargaining units of Village employees. One includes Village employees within the Street, Water and Parks Departments. That unit is referred to below as the DPW unit. The other unit includes certain office and clerical employees within various departments and is referred to below as the Office unit. The Union and Village have been parties to collective bargaining agreements for these two units for at least thirty years. The Village also collectively bargains with two units of employees of its Fire Department, neither of which is represented by the Union. The Union and the Village are parties to a collective bargaining agreement which expired, by its terms, on December 31, 2006.

4. The collective bargaining to reach a successor to the agreement noted in Finding of Fact 3 was protracted. The Union's negotiating committee included Williquette, Kirchman, Steve Neuville, Jerry Watzka, Mark St. Laurent and Pat Smith. Neuville, Watzka and St. Laurent were Union Stewards in the departments comprising the DPW unit. Smith is a member of the Office unit. The Village's negotiating team consisted of Foxworthy and Duffy during face-to-face negotiations, and included Kalny, on a consulting basis, later in the process. The Village's negotiating team did not include any Board members. No Board members participated in the face-to-face bargaining process. The parties' bargaining teams met jointly throughout the bargaining for a successor agreement, separately identifying issues unique to each unit. Their common expectation throughout the process was that the bargaining would extend to both units, but that each unit would be covered by a separate collective bargaining agreement. The bargaining process for a successor agreement started in September of 2006 and continued into April of 2008. Issues related to changes in the units' health insurance coverage was a significant factor in the extended bargaining. The Village's initial written proposal to the Union covered three years, from 2007 through 2009; sought to require that employees contribute fifteen percent toward the health insurance premium; and offered a wage increase of two percent. Face-to-face bargaining on the issues proved difficult, with the Village seeking to increase the insurance deductibles in addition to increasing employee participation in premium costs. The parties explored changing insurance plans. The process

was sufficiently lengthy and expensive that, in November of 2007, the Village's negotiating team met with the Board to determine whether it was advisable to add a proposal covering calendar year 2010. At a negotiating session on February 27, 2008, the Village noted to the Union its willingness to commit to a wage increase for 2010. The Union responded that it would discuss with its members a wage increase of 3.25% to cover 2010. The Board ratified a tentative agreement with the two Fire Department units at a meeting held on March 5, 2008, noting its wish to seek uniformity in application of the final year of the contracts. At a session on April 3, 2008, the Board made a written proposal to the Union, which proposed a one year contract covering 2007 and a three year contract covering 2008, 2009 and 2010. The Village noted to the Union at that session that the two Fire Department units had accepted this proposal. After considerable discussion, the bargaining teams resolved all the issues separating them. Their tentative agreement was for a three-year agreement covering 2007 through 2009, with a one-year agreement covering 2010. The 2010 agreement included no change to any provision of the labor agreements other than an increase in wages of 3.25%. The Union noted to the Village that it would vote the 2010 agreement if and as authorized by the members of each unit.

5. On April 9, 2008, the Union met with the DPW and the Office units. Each unit put the 2007-2009 and the 2010 agreements to separate votes. The Office unit voted to ratify the proposed 2007-2009 agreement and the proposed 2010 agreement. The DPW unit voted to ratify the 2007-2009 agreement, but voted against ratifying the 2010 agreement. On April 17, 2008, the Board met and voted to ratify separate 2007-2009 collective bargaining agreements covering the Office and the DPW units. The Board also ratified a 2010 collective bargaining agreement covering the Office unit. The Board did not conduct a vote on a 2010 collective bargaining agreement covering the DPW unit because the Union had not ratified it. The Union and the Village executed a collective bargaining agreement covering the Office unit for 2007-2009, and a separate agreement covering the Office unit for 2010 on April 28, 2008. The Union and the Village executed a collective bargaining agreement covering the DPW unit for 2007-2009 on April 28, 2008.

6. Sometime after April 17, 2008, St. Laurent conducted an informal poll of DPW unit members to determine whether there was a desire to revote the proposed 2010 collective bargaining agreement. He determined there was interest and contacted Williquette to see if the Union could do so. Williquette told St. Laurent the DPW unit should put something in writing to document that the Union was not forcing a revote. After this conversation, St. Laurent approached Foxworthy to determine if the Village was interested in having the DPW unit conduct another ratification vote. Foxworthy responded favorably, adding her hope that the revote could produce a collective bargaining agreement covering 2010. Kirchman conducted a revote by the DPW unit on April 21, 2009 in a break room at the Village Hall. The DPW unit voted to ratify the proposed 2010 collective bargaining agreement. Kirchman and St. Laurent left the break room after the vote, went to Foxworthy's office and informed her that the DPW unit had unanimously voted to ratify the proposed 2010 collective bargaining agreement. Foxworthy indicated her pleasure with the vote and hugged Kirchman.

7. The Village conducted an election in April of 2008 which resulted in the turnover of two of the Board's seven trustees. The two newly elected trustees took office in the third week of April. The Board's next regularly scheduled meeting was May 6, 2008. At that meeting, Foxworthy put the proposed 2010 agreement covering the DPW unit before the Board for ratification. In a closed session, she recommended that they vote favorably to ratify the proposed agreement. The Board voted to reject the proposed agreement, confirming its action in open session. Foxworthy understood their opposition to her recommendation to reflect a view that there was no need to rush to agreement on a 2010 agreement and that it was a bad idea to have all of the collective bargaining agreements expire at the same time. Duffy did not attend the Board's May 6, 2008 meeting.

8. Foxworthy reached Williquette on May 8, 2008 and informed him of the Board's May 6 vote. The Union prepared a 2010 collective bargaining agreement consistent with its understanding of the proposed agreement ratified by the Union on April 21, 2008, and then presented it to Foxworthy for execution by the Village. Foxworthy refused, advising the Union that she could not execute the agreement until the Board voted to ratify it.

10. The Village took no direct action to involve itself in the Union's ratification votes of April 9 and 21, 2008, or in any of the deliberative process undertaken by any Village employee that preceded or accompanied those votes. No member of the Village's negotiating team bore animus toward the Union or any of the members of the DPW unit for the result of the ratification vote on April 9, 2008. The Board's ratification vote did not reflect animus on the Board's part toward the DPW unit for its bargaining conduct, including the April 9, 2008 vote. The Union and the County did not establish formal ground rules regarding the ratification of a tentative agreement and did not formally address whether or how either party would ratify a tentative agreement. Throughout the bargaining process, each member of the Village's negotiating team acted in the good faith belief that they could negotiate to the point of tentative agreement with the Union, and that if a tentative agreement was reached, each was bound to recommend to the Board that it vote to ratify the tentative agreement. The Board never delegated to its negotiating team the authority to bind the Board to a particular offer outside of a ratification vote conducted at an open meeting. Throughout the bargaining process, the Village's bargaining team repeatedly went back to the Board in an attempt to get authority to move closer to the Union's position. The Village's team sometimes broke off bargaining by informing the Union that it lacked the authority either to meet the Union's demands or to commit to an unanticipated idea that arose during bargaining. The Village's team attempted in good faith to communicate to the Union that it could not bind the Board in the absence of a ratification vote. The "tentative" or "proposed" agreement referred to in the Findings of Fact was bargained in good faith and is not reducible to a proposal by either party.

CONCLUSIONS OF LAW

1. The Union is a "Labor organization" within the meaning of Sec. 111.70(1)(h), Stats.

2. The Village is a "Municipal employer" within the meaning of Sec. 111.70(1)(j), Stats.

3. The Village's conduct during the bargaining for collective bargaining agreements to cover the Office and the DPW units, including the Board's May 6, 2008, ratification vote, did not violate Secs. 111.70(3)(a)1, 2, 3 or 4, Stats.

4. Based on the Village Board's ratification vote of May 6, 2008, Foxworthy's refusal to execute a collective bargaining agreement based solely on the Union's ratification vote of April 21, 2008, did not violate Sec. 111.70(3)(a)4, Stats., or, derivatively, Sec. 111.70(3)(a)1, Stats.

ORDER

The complaint, as amended, is dismissed.

Dated at Madison, Wisconsin, this 12th day of August, 2009.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Richard B. McLaughlin /s/
Richard B. McLaughlin, Examiner

VILLAGE OF ALLOUEZ

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

THE PARTIES' POSITIONS

The Union's Initial Brief

"The basic facts are not in dispute", and establish that the parties, consistent with standard practice, bargained with two units simultaneously and, in February of 2008, reached a tentative agreement on agreements to cover each unit. The bargaining took over eighteen months, but produced an agreement for a contract to cover 2007 through 2009. The protracted bargaining prompted the Village to make "a separate offer for a 2010 3.25% wage increase." Neither of the Village's bargaining team "told the Union that ratification by the Board was necessary." Separate votes by the Office and DPW units on April 9, 2008, produced ratification of two agreements covering 2007 through 2009. The DPW unit, unlike the Office unit, rejected the 2010 offer. The Village Board, on April 17, ratified each of the agreements but did not vote regarding the rejected 2010 agreement to cover the DPW unit. Less than a week later, encouraged by the Village bargaining team, the DPW conducted another ratification vote, unanimously ratifying the 2010 offer.

Commission case law requires bargaining team representatives who reach a tentative agreement on a successor labor agreement to support its ratification under CITY OF PARK FALLS, DEC. NO. 30207-A (Burns, 4/02), AFF'D BY OPERATION OF LAW, DEC. NO. 30207-B (WERC, 5/02). The Village made the 2010 offer, which was never subject to a counter-offer, and encouraged the Union to revote. These "circumstances and actions bound both the Village's bargaining party and the Village Board to support the ratification of the offer" under CITY OF COLUMBUS, DEC. NO. 27853-B (WERC, 6/95). Similarly, RICE LAKE ELECTRIC UTILITY, DEC. NO. 29380-A (Shaw, 1/99) AFF'D BY OPERATION OF LAW DEC. NO. 29380-B (WERC, 1/99) creates a "reasonable reliance" that an offer will not be rescinded by a party at a subsequent ratification vote without some reservation of "their right to later reject it." Private sector precedent confirms this under PEPSI COLA BOTTLING CO., V. NLRB, 108 LRRM 2454 (8TH CIR., 1981) as well as confirming that "the absence of ratification does not allow an accepted offer to be withdrawn", under SIERRA PUBLISHING COMPANY, 296 NLRB NO. 65, 132 LRRM 1189 (1989).

Against this background, the Village's withdrawal of the 2010 offer, "absent any intervening event which would excuse implementation" violates MERA. The Village's "no" vote is the sole intervening event. It offers no defense, but shows "evidence that an effort to penalize this particular unit was the true, prohibited reason", similar to NORTHEAST WISCONSIN TECHNICAL COLLEGE, DEC. NO. 11352-A (SCHURKE, 9/73) The Union concludes by requesting "an order finding that the Village of Allouez's failure to honor . . . its offer constitutes bad faith bargaining, discouragement of membership in the Union and interference

with members' exercise of statutory rights, thereby violating Wis. Stats. Section 111.70(3)(a)(1), (2), (3) & (4)."

The Village's Initial Brief

After a review of the evidence, the Village contends that the record will not support finding a violation of Sec. 111.70(3)(a)1, Stats., since there is no proof of Village conduct containing "either some threat of reprisal or promise of benefit which would tend to interfere with employes' exercise of rights guaranteed by MERA." Considering the Village's bargaining conduct and the circumstances surrounding it fails to show anything which could have a reasonable tendency to interfere with employee exercise of MERA rights. Any possible violation would be derivative in nature, since "there has not been any action . . . by the Village . . . to do anything but encourage the full exercise of MERA rights by the Union." Foxworthy was "very cooperative" with St. Laurent regarding the revote. In fact, she encouraged it. There is no shred of evidence of Village action to involve itself in the Union's conduct of the ratification votes. The "dangerous" implications of the Union's position should not be ignored. If open consideration of a ratification vote is viewed as impermissible, then the "right/duty of the municipal employer to consider a tentative agreement and bring the tentative agreement to public vote is undermined." The law is and should be that each party "is entitled to review and ratify tentative agreements" made by their agents.

Nor will the record support finding a violation of Sec. 111.70(3)(a)2, Stats. This claim also appears derivative in nature since "there is nothing in the record that demonstrates any attempt by the Village to dominate or interfere with the formation or administration of a labor organization." The evidence establishes nothing other than Village deference to Union internal procedures. The Union's attempt to elevate rejection of a tentative agreement to a prohibited practice because "a similar offer was approved" for other units is unpersuasive. No intent to punish exists. A vote to ratify inevitably involves an act of discretion, and the discretion of the Village Board to stagger its agreements must be respected if bargaining is to have meaning.

The record will support no finding of Village animus against lawful, concerted activity necessary to establish a violation of Sec. 111.70(3)(a)3, Stats. The vague assertion of Village punishment of the DPW unit "is illogical". There is no evident benefit to the Village for the "punishment." The Village proposed the fourth year, evidently believing it was in its own interest. There is nothing in the record that would show how the benefit to the Village vanished and some interest to punish took its place. The revote did nothing but put the Village in the same place it would have been had there not been a DPW unit "no" vote. It had to take the same ratification vote in either case. No evidence shows how the Village benefited from punishing the Union. Any view of the parties' conduct in bargaining or at hearing shows the existence of a long-term, healthy bargaining relationship. Foxworthy encouraged the revote. Foxworthy and Duffy did all they could to get the Board to ratify the 2010 agreement.

The Union's arguments conveniently ignore that the subsequent ratification vote took place in front of a newly elected Village Board that was altered through the election process.

Unlike its predecessor, the newly elected Board saw the wisdom of staggering the labor agreements and had not had to live through the time and expense of the negotiations' process. Beyond this, the agreement put before the new Board was not identical to the agreements that had been ratified by the predecessor Board. The Union sought and the Village agreed to structure the DPW agreement as a three-year agreement for 2007 through 2009 with a one-year agreement for 2010. This is not what the Fire Department unit voted on. This may reflect Union belief that its members would not affirm a fourth year. In any event, it highlights that the revote was a discretionary act undertaken by a new Board, not the culmination of an attempt to punish the DPW unit.

There is no actual evidence of animus. Why would the Board resent a revote? It ratified each of the other agreements. What about the DPW agreement would prompt resentment? The more plausible explanation is that the revote gave a new Board the opportunity to reconsider the actions of its predecessor. Given the opportunity to stagger the labor agreements, the new Board opted to take the option its predecessor had rejected. The Union changed its mind over two votes. So did the Board. There is no animus in either case.

The evidence shows no violation of the Village's duty to bargain under Sec. 111.70(3)(a)4, Stats. That statute, read in light of Commission case law, under WAUNAKEE SCHOOL DISTRICT, DEC. NO. 27837-A (Jones, 4/94), AFF'D DEC. NO. 27837-B (WERC, 6/95) and OCONTO COUNTY, DEC. NO. 26289-A (Gratz, 7/90) AFF'D BY OPERATION OF LAW, DEC. NO. 26289-B (WERC, 8/90), places a duty on the members of a bargaining team to favorably present a tentative agreement for ratification. After mutual ratification, the law places a duty on the parties to execute the tentative agreement as a collective bargaining agreement. Here, no duty to execute arose because the tentative agreement was never ratified, cf. LAFAYETTE COUNTY, DEC. NO. 28770-A (Burns, 4/97), AFF'D BY OPERATION OF LAW, DEC. NO. 28770-B (WERC, 5/97).

The Union's attempt to create a duty to execute in the absence of a ratification vote is unpersuasive. Customary meaning of "tentative agreement" is that "an agreement has been reached on a particular item or items which is intended to be binding, provided any necessary, subsequent condition or conditions are met." A ratification vote by the Union is such a condition. Adoption of a tentative agreement after an open meeting is such a condition for an employer. The parties can impose conditions of their own, but there are no such conditions posed in this record.

Against this background, it is unremarkable that both parties failed to ratify the tentative agreement at their initial ratification vote. Examination of witness testimony establishes that it came as no surprise to any member of either party's bargaining team that the tentative agreement had to be ratified before it became binding. The evidence establishes beyond question that Foxworthy and Duffy fulfilled their duty to support the tentative agreement before the Village Board.

Significantly, the Village's bargaining team, as a matter of law, lacks the authority to bind the elected Village Board in the absence of a ratification vote. There is no evidence the Board delegated such authority to its bargaining team. Substantial case law precludes a municipality's agent from binding it in the absence of a prior delegation of authority to do so, KOCINSKI V. HOME INS. CO., 154 Wis.2D 56 (1990); PROBST V. MENASHA, 245 Wis. 90 (1944); and HALZBAUER V. SAFWAY STEEL PRODUCTS, INC. 288 Wis.2D 250 (Ct. App., 2005). The bargaining team was without authority to bind the Village Board on a financial obligation in the absence of a ratification vote.

The Wisconsin Supreme Court, in BD. OF SCHOOL DIRECTORS OF CITY OF MILWAUKEE V. WERC, 42 Wis.2D 637, 653 (1969) ruled that an "open meeting is the necessary and final step in the 'negotiation' process" between a municipal employer and a union representing its employees. Sec. 19.85(3), Stats., codified this principle. This establishes "the public interest in and makes mandatory a public vote as a necessary component to the ratification of a collective bargaining agreement." The Village Board's negotiating team could not legally bind the Board to an offer which was not subject to an open ratification vote.

Against this background, the Village concludes that the Commission must "allow the Village to have the discretion to make its own legitimate, good faith ratification decisions, by dismissing this matter."

The Union's Reply Brief

The "revote" resulted in a "different decision" by the Village, but the Village's revocation of its offer was not "decided by 'different decision makers.'" The remaining components of this dispute are whether a "new Village Board voted not to ratify and whether that vote violated the Union's rights under Sec. 111.70(3)(a), Stats.

The Village Board consists of seven members, five of whom voted to approve making the 2010 offer. The unanimous vote of the "new" Board thus included the reversal of five member's votes. Once the Union voted to accept the 2010 offer, these five members had "a statutory duty to 'execute a collective bargaining agreement previously agreed upon'" under the precedent cited in the Union's initial brief.

The Village's argument that two members created a "seismic" change in the Board in the course of one week points not to a "new" decision, but to animus. The Union's democratic processes frustrated the Board, and led the "new" Board to punish the DPW for its first vote. The "animus did not stem from the encouraged revote but rather to the 'no' vote, when the Union did *not* 'do what the Village wanted them to do.'" The Village's "encouragement and revocation nullified the rights of Union members because their use of statutory, democratic rights became an impetus for the Village to revoke the 2010 offer."

The Village's assertion that the Union's inference of animus is "illogical" mistakes the Union's burden as well as mistaking that animus defies logic. In any event, the Union's case

demands simply that "revoking an accepted offer" violates MERA because the "statutes provide a duty which 'bound' the Board to 'support and vote for the tentative agreement.'" This is more than the Village acting as the Union did. Rather, it involves the Village rescinding its own offer in a manner that undermined "the efforts of the Union" and made the "bargaining representative appear ineffective" in violation of Secs. 111.70(3)(a)2 and 3, Stats.

Nor can the Village's assertion that it could bear no animus to the Union for giving it the chance to reconsider its action be credited. It ignores that over seventy percent of the Village Board remained after the election. This is thus the same Board "second guessing" itself. The record establishes bad faith bargaining in violation of Secs. 111.70(3)(a)1, 2, 3 and 4, Stats.

The Village's Reply Brief

The Union's citation of precedent is unpersuasive as a matter of fact and of law. The precedent establishes that the "employer's negotiating team" must "recommend and support approval and ratification of tentative agreements reached in collective bargaining." This underscores that a tentative agreement is tentative and demands ratification by both parties. Here, there is no dispute the negotiating team recommended Board ratification of the tentative agreement. The Union's position that the negotiating team can bind its governing body without ratification is directly contradicted by WAUNAKEE SCHOOL DISTRICT, *supra*. None of the Village Board members were present for negotiations, and none can be placed under the duty demanded of their bargaining team.

In fact, the "law and its intent are clear." It recognizes that "it is different to deal with someone face-to-face and then back out of a deal." It does not "seek to handcuff the discretion of local legislators by binding them to a deal they did not negotiate." The Union's view flies directly in the face of Commission and legal precedent. It would place a greater duty on a negotiating team than on the ratifying body that is not present for negotiations.

Examination of CITY OF PARK FALLS *supra*., will not support the Union's view. That case establishes no more than that presence at the bargaining table "creates the bargaining team" and the team's duty to support a tentative agreement. RICE LAKE ELECTRIC UTILITY *supra*., is similar, and reinforces that "the participation by members in the negotiation sessions who reach the tentative agreement (imposes) the ratification obligation." Significantly in this case, the DPW unit proposed structuring the agreements as a three-year agreement followed by a one-year agreement. This underscores that the Village was never in a place to rescind its own offer, because the Union had altered the Village's offer. This further undermines the Union's attempt to bind non-participating Board members to a tentative agreement.

Beyond this, the Union's action segregated the insurance changes from the wage increases that had prompted the Village's bargaining team to seek more authority over the course of the one and one-half years of bargaining. This offered the Board the chance to revisit the wisdom of staggering the agreements. The DPW put itself in a position in which

"there was less incentive for the Village to ratify the 2010 agreement." If such tactical decisions become prohibited practices, there is no incentive for bargaining parties to deal with each other face-to-face on a level playing field. The Union seeks to "punish" the Village for its own decisions. Whatever is said of the Union's view, it flies directly in the face of CITY OF COLUMBUS, *supra* . Beyond this, it flies in the face of the evidence. The Board "only granted authority to its bargaining team to add" an additional year's wage offer to the three-year agreement tentatively agreed to. This falls short of promising a "stand-alone fourth year contract." Thus, the Union's view would have the Commission "hold the Board to assent to an offer it did not even put on the table." Significantly, the Union seeks, by remedy, the compulsion of the execution of a labor agreement rather than an appropriately run ratification vote. This goes far beyond any authority cited by the Union. Whatever may be said of the NLRB authority cited by the Union, the underlying obligation of a public employer cannot be reduced to those of a private company.

The Union's citation of NORTHEAST WISCONSIN TECHNICAL COLLEGE, *supra*., does not alter the analysis governing the complaint. That case establishes that, "Just as the establishment of authority for a municipal employer's bargaining team is an essential part of the collective bargaining process, so is ratification." Contrary to the Union's view, if "there is to be a public vote . . . it should not be a sham." The Board's constitutional obligations must be honored. Those obligations are recognized in the statutory definition of collective bargaining and should be respected in this litigation. The Board's act of discretion to reject the tentative agreement should be acknowledged through the dismissal of the complaint.

DISCUSSION

The Amended Complaint alleges Village violations of Secs. 111.70(3)(a)1, 2, 3 and 4, Stats. Ultimately, the complaint turns on the application of Sec. 111.70(3)(a)4, Stats., and more specifically, on its establishment of a prohibited practice for a municipal employer's "refusal to execute a collective bargaining agreement previously agreed upon." The necessary preface to this is the application of the remaining allegations.

The Alleged Violation of Sec. 111.70(3)(a)1, Stats.

Sec. 111.70(3)(a)1, Stats., makes it a prohibited practice for the Village, "To interfere with, restrain or coerce municipal employees in the exercise of their rights guaranteed in sub. (2)." Village conduct which "had a reasonable tendency to interfere with, restrain or coerce employees in the exercise of rights under Sec. 111.70(2), Stats.," would constitute an independent violation of that provision, CEDAR GROVE-BELGIUM AREA SCHOOL DISTRICT, DEC. 25849-B (WERC, 5/91) AT 16. The standard is objective, EDGERTON FIRE PROTECTION DISTRICT, DEC. NO. 30686-B (WERC, 2/05).

The sole conduct put into dispute by the Union is the May 6, 2008 Board rejection of the tentative agreement. There is no other act of interference that could support an independent violation of Sec. 111.70(3)(a)1, Stats. There is no persuasive evidence of any Village

involvement in any Union ratification vote. The revote was Union-initiated. Foxworthy indicated her support of the revote to St. Laurent, but suggested he speak with Williquette. The revote took place at the Village Hall, and after the ratification, Foxworthy and Kirchman hugged, indicating their mutual relief at the results of the revote. Foxworthy supported the tentative agreement at the Board's May 6, 2008 meeting.

What evidence there is surrounding the May 6, 2008 vote indicates that the Board wished to avoid having all of its labor agreements expire on the same date, and that the Board, unlike its negotiating team, did not view the cost and delay in the negotiations process to warrant extending a Village wage offer into 2010. The reconstituted Board reacted to the same considerations the bargaining team had in reaching the tentative agreement. They differed on their conclusions.

Whatever is said of the objective validity of these differing conclusions, there is no basis to find an independent violation of Sec. 111.70(3)(a)1, Stats. There is no dispute that Sec. 19.85(3), Stats., requires the Village to ratify a tentative agreement at an open session:

> Nothing in this subchapter shall be construed to authorize a governmental body to consider at a meeting in closed session the final ratification or approval of a collective bargaining agreement under subch. I, IV or V of ch. 111 which has been negotiated by such body or on its behalf.

Against this background, the existence of the Village's ratification vote cannot be considered an independent act of interference. Thus, the Board's rejection of the tentative agreement on May 6, 2008, is statutorily infirm only if it violated some other provision of MERA, thus making any violation of Sec. 111.70(3)(a)1, Stats., derivative in nature.

The Alleged Violation of Sec. 111.70(3)(a)2, Stats.

Sec. 111.70(3)(a)2, Stats., makes it a prohibited practice for the Village, "To initiate, create, dominate or interfere with the formation or administration of any labor organization or contribute financial support to it . . ." There is no evidence of financial support of the Union by the Village. The Union and the Village share a collective bargaining relationship extending over at least thirty years, with no evidence of Village involvement in the Union's creation or administration. Under Commission case law, application of this "section assumes interference of a magnitude which threatens the independence of a labor organization as the representative of employee interests" COLUMBIA COUNTY, DEC. NO. 22683-B (WERC, 1/87) AT 13. The factual considerations noted in the preceding section make it unpersuasive to find a violation of this section. Outside of the May 6, 2008 Board vote, there is no act of interference by the Village against the Union. There is no evidence that the Board's May 6, 2008 vote reflects any considerations beyond those noted in the preceding section.

The Union's assertion that the vote "punished" the DPW unit focuses application of this section on the Board vote. Foxworthy recommended that the Board ratify the tentative agreement. The Board voted to reject her recommendation. There were no Board members on

its negotiating team, and there is no dispute that Sec. 19.85(3), Stats., made the ratification vote in open session necessary. The Wisconsin Supreme Court has addressed that point thus:

> The open meeting is the necessary and final step in the 'negotiation' process between the school board and the majority teachers' union.
>
> The proposed agreement submitted by the school board's bargaining committee does not have to be accepted by the school board. If the recommendations of the committee automatically were approved by the school board, then the anti-secrecy law has been violated and the open meeting in nothing but a sham. BOARD OF SCH. DIRECTORS OF MILWAUKEE V. WERC, 42 Wis. 2D 637, 653 (1969).

The "anti-secrecy" law referred to by the Court is the predecessor of Sec. 19.85(3), Stats. Sec. 111.70(1)(j), Stats., defines "Municipal employer" to include "any village (or) . . . "school district . . . that engages the services of an employee".

Against this background, to find a violation of Sec. 111.70(3)(a)2, Stats., it is necessary to find not the vote, but the result reached by the Board, as statutorily infirm. In the absence of a specific act of interference or domination that threatened the Union's independence, such a result is unpersuasive.

The Alleged Violation of Sec. 111.70(3)(a)3, Stats.

Sec. 111.70(3)(a)3, Stats., makes it a prohibited practice for the Village, "To encourage or discourage a membership in any labor organization by discrimination in regard to hiring, tenure, or other terms or conditions of employment. . ." As noted in WISCONSIN RAPIDS SCHOOL DISTRICT, DEC. NO. 30965-B (WERC, 1/09) AT 4, proof of a violation of Sec. 111.70(3)(a)3, Stats., "requires that four elements be established by a clear and satisfactory preponderance of the evidence: (a) that the employee has engaged in lawful concerted activity (or was believed to have so engaged); (b) that the employer was aware of (or believed it was aware of) such activity at the time of the adverse action; (c) that the employer bore animus toward the activity; and (d) that the employer's adverse action against the employee was motivated *at least in part* by that animus, even if other legitimate factors contributed to the employer's adverse action. MUSKEGO-NORWAY SCHOOL DISTRICT V. WERB, 35 WIS.2D 540 (1967) and EMPLOYMENT RELATIONS DEPT. V. WERC, 122 WIS.2D 132 (1985)."

What issue there is on the application of this section turns on the final two elements. The factual considerations noted in the two sections above highlight the absence of evidence of anti-Union hostility. As noted above, there is no persuasive evidence that the reconstituted Board considered any factors not considered by its predecessor. That the reconstituted Board was not as sensitive as its predecessor to the cost and time spent in the protracted negotiation process by its negotiating team does not manifest anti-union hostility. There is no persuasive evidence that the Village's negotiating team bore any hostility to the Union. The existence of the tentative agreement and Foxworthy's support of it manifest good faith.

Focusing on the May 6, 2008 vote fails to establish the required hostility. That the Union's argument demands finding proscribed hostility in the rejection of the same tentative agreement the DPW initially rejected highlights the difficulty posed. It is not evident what was infirm in the May 6, 2008 Board vote that was not infirm in the April 9, 2008 DPW unit vote. The rejection of a tentative agreement, standing alone, fails to establish anti-union animus. Interest arbitration awards have, for a considerable period of time, had to deal with the effect, if any, of a rejected tentative agreement. See, for example, KENOSHA SCHOOL DISTRICT, DEC. NO. 17638-A (Kerkman, 4/80); GREEN COUNTY, DEC. NO. 17775-A (Petrie, 9/80); CITY OF WEST BEND, DEC. NO. 29223 (Vernon, 7/98); CITY OF WAUPUN, DEC. NO. 29465 (Michelstetter, 5/99); MARATHON COUNTY, DEC. NO. 29518-A (Honeyman, 10/99); MARATHON COUNTY, DEC. NO. 29519-A (Torosian, 10/99); HUMAN SERVICES BOARD OF FOREST, ONEIDA AND VILAS COUNTIES, DEC. NO. 30718-A, (Hempe, 5/04); DEC. NO. 30700-A (Weisberger, 5/04); and SAWYER COUNTY, DEC. NO. 31520-B (Krinsky, 10/06). This is not to assert the interest awards are dispositive on the legal point posed here. However, the time spanned and the number of the decisions highlight that a rejected tentative agreement is not, standing alone, a remarkable event in the collective bargaining process under MERA.

To be remarkable on this record, the Village's rejection of the tentative agreement must manifest, as a matter of fact, proscribed animus. The evidence does not support such a finding. Rather, the evidence shows that the Village's negotiating team was as frustrated with the rejected ratification vote as was the Union's. There is no persuasive evidence that the Village Board, on May 6, 2008, acted on any other reasons than its desire to stagger the duration of unit contracts and its unwillingness to make a financial commitment regarding 2010 in the Spring of 2008.

The Alleged Violation of Sec. 111.70(3)(a)4, Stats.

The considerations noted above underscore that the record does not establish active bad faith on the part of the Village's negotiating team. The protracted length of negotiations reflects the intractability of the underlying issues and particularly of the issues regarding changes in the health insurance plan and in the allocation of premium contributions. As highlighted by the definition of "Collective bargaining" at Sec. 111.70(1)(a), Stats., "The duty to bargain, however, does not compel either party to agree to a proposal or require the making of a concession." The statutory definition establishes "the performance of the mutual obligation of a municipal employer, through its officers and agents, and the representative of its municipal employees in a collective bargaining unit, to meet and confer at reasonable times, in good faith, with the intention of reaching an agreement." There is no significant dispute that the parties mutually met this duty up to the point of the Board's May 6, 2008 vote.

This highlights the strength of the Union's case, which focuses on that portion of Sec. 111.70(3)(a)4, Stats., which makes a Municipal employer's "refusal to execute a collective bargaining agreement previously agreed upon" a prohibited practice. As the examination of the other allegations establishes, the Union's argument on this point is more legal than factual. It asserts that when the Board authorized an offer of a 2010 wage increase, and when

Foxworthy informed St. Laurent that the Village's team continued to stand behind the tentative agreement rejected by the DPW unit on April 9, this constituted a Village offer accepted by the DPW unit's April 21, 2008 revote. Under the Union's view, this constitutes a "collective bargaining agreement previously agreed upon" which the Village was obligated to execute under Sec. 111.70(3)(a)4, Stats. To permit the Village to renege on the agreement through the May 6, 2008 ratification vote makes face-to-face bargaining pointless.

Anyone who has participated in protracted bargaining understands the appeal of this view as a policy matter. The Union adds the support, cited above, in the administration of the National Labor Relations Act. In PEPSI-COLA, the Eighth Circuit Court of Appeals noted, "the common law rule that a rejection or counterproposal necessarily terminates the offer has little relevance in the collective bargaining setting" (108 LRRM AT 2456). The court noted the common law rule governs "a private commercial setting", allowing "the offering party . . . to strike a bargain elsewhere, with no danger of being bound to more than one contract." (108 LRRM at 2455-2456). The common law rule, in the court's opinion, "runs counter to federal labor policy which encourages the formation of collective bargaining agreements." (108 LRRM at 2456).

This policy view is not as transferable to the statutes governing the Village and the Union as the Union contends. The federal authority cited by the Union addresses collective bargaining among private commercial entities, and thus cannot account for the difference in the statutory settings between entities with "self-help" rights to resolve collective bargaining impasses and the statutory setting governing the Village and the Union. As underscored by the interest awards cited above, this record poses no issue regarding "the formation of collective bargaining agreements." The long-term bargaining relationship involved here is under no risk of the Village "striking a bargain elsewhere." If the tentative agreement is not made permanent, interest arbitration will resolve any impasse in the parties' negotiations. The rejected tentative agreement poses complications for the parties' bargaining, but poses in itself no risk to the existence of the bargaining relationship.

Beyond this, the policy view rests on a weak factual base. The evidence does not show that Foxworthy offered to keep a Village offer open. While the evidence is less than clear on how the parties arrived at the configuration of a three year agreement for 2007-09 followed by a one-year agreement for 2010, it is evident that this is not what the Village originally proposed. The Fire Department units agreed to a one year agreement for 2007 followed by a three-year agreement running through 2010. Thus, Foxworthy offered to honor a tentative agreement, not to maintain a Village offer. The Union's policy arguments offer no insight on why the Union could conduct a ratification vote on the tentative agreement while the Village could not. Neither the Village Board nor the DPW unit authorized its negotiating team to bind them outside of a ratification vote.

More significantly, this prefaces the impossibility of making the Union's policy argument fit the Wisconsin statutory scheme. The analogy between the financial commitments of private commercial entities and those of municipalities is itself strained. As the Village

points out, existing Wisconsin law makes it impossible for a municipality's agent to make a financially binding contract for the municipality in the absence of prior authorization to do so, see KOCINSKI and HALZBAUER *supra*. The Village Board did not authorize its negotiating team to bind it outside of a ratification vote. Nor does the presence of Sec. 111.70(3)(a)4, Stats., alter this. If that section binds the Village outside of a ratification vote to the "tentative agreement previously agreed upon", it is not evident what purpose the Union's April 9 ratification vote served. More to the point, the Union's policy argument makes the Village ratification vote a sham. This flies in the face of Sec. 19.85(3), Stats., and the Supreme Court's view in MILWAUKEE BD. OF SCH. DIRECTORS, *supra.*

The view that the statutes demand employer ratification at a meaningful open meeting as the culmination of the bargaining process has been solidified in Commission case law over a considerable period of time; NORTHEAST WISCONSIN TECHNICAL COLLEGE, *supra*.,; HARTFORD SCHOOL DISTRICT, DEC. NO. 11002-B (Fleischli, 2/74) AFF'D IN RELEVANT PART, DEC. NO. 11002-B (WERC, 9/74); CITY OF COLUMBUS, *supra.*; AND WAUNAKEE SCHOOL DISTRICT, *supra.* The reference to "meaningful" is to highlight that the open meeting cannot be a sham, consistent with MILWAUKEE BD. OF SCH. DIRECTORS, *supra.*

Commission case law underscores the significance of the vote at an open meeting by focusing the obligation, under Sec. 111.70(3)(a)4, Stats., to support a tentative agreement to those elected officials who are present for face-to-face bargaining:

> In our view, this general presumption of ratification obligations does not extend to team members who are not physically present when the tentative agreement is reached, did not participate in the decision to reach agreement, and did not previously bind themselves to support any tentative agreement reached. We reach this conclusion because we believe that only those who participated in the decision to reach a tentative agreement should be bound (absent explicit statements or agreements to the contrary) by their decision. Team members who do not participate in the decision to reach a tentative agreement are functionally no different than members of the bargaining unit or elected officials not on the team. Their lack of participation in the decision-making of the collective bargaining process frees them to vote as they see fit as to contract ratification. WAUNAKEE SCHOOL DISTRICT, DEC. NO. 27837-B AT 18.

In CITY OF COLUMBUS, DEC. NO. 27853-B AT 17, the Commission put the point thus:

> Team members who do not participate in the decision to reach a tentative agreement are functionally no different than members of the bargaining unit or elected officials not on the team. Their lack of participation in the decision-making of the collective bargaining process frees them to vote as they see fit as to contract ratification.

In CITY OF COLUMBUS, the Commission addressed the bargaining obligation of an elected official who was present at the face-to-face bargaining during which a tentative agreement was reached, but who voted against ratification of the tentative agreement, thus:

> First and foremost, it is clear that the Mayor was not a member of the City's bargaining team. Thus, we are satisfied that he was free to support or not support the tentative agreement, and equally free to change his mind as to support or opposition even if he had publicly taken a position one way of the other. *Ibid.*

This line of cases establishes the impossibility of squaring the Union's policy arguments with Wisconsin law. That the reconstituted Village Board included a majority of members of its predecessor has, as the Union contends, no bearing on the May 6, 2008 vote. However, none of the members of the predecessor or the reconstituted Board was obligated, as a function of Sec. 111.70(3)(a)4, Stats., to ratify the tentative agreement. None had authorized the negotiating team to bind it outside of a ratification vote and none were present at bargaining.

The Commission has noted that the ratification process cannot be used to subvert the obligation to bargain in good faith. Thus, the necessity of a ratification vote cannot be used as a device to introduce new issues, NORTHEAST WISCONSIN TECHNICAL COLLEGE, *supra*., or to undo the course of face-to-face bargaining through the review of advisors not present for bargaining, HARTFORD SCHOOL DISTRICT, *supra*. Neither occurred here. Rather, the Board rejected Foxworthy's good faith recommendation on behalf of its negotiating team. Significantly, in both of the cited cases, the remedy for the employer's breach of its duty to bargain in good faith was a Commission order for the employer to conduct an appropriate ratification vote at an open meeting.

In sum, under Wisconsin statutory and case law, Foxworthy was obligated to support the tentative agreement at the May 6, 2008 meeting. She did. Against this background, the Union's attempt to compel execution of a collective bargaining agreement based only on its own favorable ratification vote cannot be supported. There was not a "collective bargaining agreement previously reached" in the absence of Village Board ratification of the tentative agreement at an open meeting. Accordingly, the complaint, as amended, has been dismissed.

Dated at Madison, Wisconsin, this 12th day of August, 2009.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Richard B. McLaughlin /s/
Richard B. McLaughlin, Examiner

RBM/gjc
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