STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

EAU CLAIRE CITY EMPLOYEES, LOCAL 284, AFSCME, AFL-CIO, Complainant,

vs.

CITY OF EAU CLAIRE, Respondent,

Case 281
No. 68375
MP-4460

(Compliance with Arbitration Award)

DEC. NO: 32730-A

Appearances:

Mr. Stephen Bohrer, Assistant City Attorney, City of Eau Claire, Post Office Box 5148, Eau Claire, WI 54702-5148, appearing on behalf of the Respondent, City of Eau Claire.

Mr. Mark DeLorme, Staff Representative, Wisconsin Council 40, AFSCME, 411 Colfax Street, Apt. 1, Augusta, WI 54722, appearing on behalf of the Complainant, AFSCME Local 284.

ORDER DISMISSING COMPLAINT

Daniel J. Nielsen, Examiner: On November 4, 2008, AFSCME Local 284 filed with the Commission a complaint, alleging that the City of Eau Claire violated one or more provisions of Ch. 111, Wis. Stats. by failing to comply with an Arbitration Award, and a Supplemental Arbitration Award, issued by Arbitrator John Emery under the terms of the parties' collective bargaining agreement. The Commission appointed Daniel Nielsen, an Examiner on its staff, to make and issue appropriate Findings, Conclusions and Orders.

A hearing was held on August 28, 2009, in Eau Claire, Wisconsin, during which the parties presented such testimony, exhibits, other evidence and arguments as were relevant to the dispute.

I. BACKGROUND OF THE ORDER

This dispute concerns the City of Eau Claire's methods of paying out workers compensation and contractual injury leave benefits, and how those issues were resolved by Arbitrator John Emery. See CITY OF EAU CLAIRE, CASE 269, NO. 65588, MA-13259 (EMERY, 10/20/06). In his Award, the arbitrator framed the issues in dispute as being:

> 1. Did the City violate the contract by withholding federal and state income taxes from employees' workers compensation payments starting in 1983? If so, what is the remedy?
>
> 2. Did the City violate Article 26 of the contract by its method of calculation of injury leave payments due to employees on workers compensation? If so, what is the remedy?

The arbitrator relied on three provisions of the collective bargaining agreement in arriving at his Award:

> **ARTICLE 18**
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> Section 6. All employees shall be covered by Worker's Compensation insurance.
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> **ARTICLE 26 – INJURY LEAVE**
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> Section 1. Upon the determination of eligibility, the City shall pay a permanent employee who is injured on the job the difference between 87.5% of their regular salary and their worker's compensation payments, as long as the employee is on injury leave, but not to exceed ninety (90) days for the same injury. Upon the determination of eligibility, the City shall pay a seasonal employee who is injured on the job the difference between 87.5% of their regular salary and their worker's compensation payments, as long as the employee is on injury leave but not to exceed ninety (90) days or until he/she would have been laid off, which ever occurs first.
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> **ARTICLE 29 – GRIEVANCE PROCEDURE**
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> Section 6. The Arbitrator shall have no right to amend, modify, nullify, ignore or add to the provisions of this agreement. The decision of the Arbitrator shall be based solely upon his/her interpretations of the "express language" of the agreement.
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> *Emery – Initial Award, at pages 2 and 3*

In his Award, at page 7, the arbitrator concluded that he had no jurisdiction to determine the propriety of the City's practice of withholding amounts, nominally for taxes, which were actually retained by the City. At pages 7 and 8 he concluded that the City violated the contract by paying 87.5% of net salary, rather than gross salary. At page 8, he found that the City violated the contract by paying employees at 7 hours per day, and one hour of unpaid leave, to arrive at the 87.5% figure, because this had the effect of reducing their WRS and other fringes that are dependent in part on calculations of hours worked. Based on these conclusions, he awarded as follows:

AWARD

1. The City did not violate the contract by withholding federal and state income taxes from employees' workers compensation payments starting in 1983.

2. The City did violate Article 26 of the contract by its method of calculation of injury leave payments due to employees on workers compensation. Henceforth, the City shall calculate the injury supplement referenced in Article 26 as the difference between an employee's worker's compensation payments and 87.5% of his or her regular gross salary for an 8 hour work day. Furthermore, as to all bargaining unit members receiving injury supplement benefits between July 1, 2004 and the date of this award, the City shall recalculate their benefits based on gross, rather than net wages, and make them whole for any loss in wages or other benefits.

The Arbitrator will retain jurisdiction over this award for a period of 60 days to resolve any issues arising in the implementation of this award.

. . .

The parties did have disputes following the issuance of the Award, and invoked the arbitrator's retained jurisdiction. On January 31, 2007 the arbitrator conducted a supplementary proceeding, at which he rendered a Supplementary Bench Award. On May 20, 2008, the arbitrator sent a letter to the parties, memorializing that Award:

. . .

Gentlemen:

This letter will serve to memorialize the Supplementary Bench Award that I issued in this matter on January 31, 2007. As you will recall, after issuance of the original award the Union raised objections as to the City's compliance with the award and requested that I conduct a supplementary hearing to address those concerns. The supplementary hearing was conducted at the Eau Claire City Hall on January 31, 2007. At that time, the parties made presentations of their positions regarding the proper interpretation and implementation of the remedy I ordered in the original award.

In sum, it is my ruling that under the language of Article 26, Section 1, the City's obligation is to pay a qualifying employee "…the difference between 87.5% of their regular salary and their worker's compensation payments, as long as the employee is on injury leave, but not to exceed ninety (90) days." The language is clear that the City's obligation is to make up the difference between the 66.67% of their gross wages paid out as worker's compensation benefits and 87.5% of their gross wages. Thus, between a qualified employee's worker's compensation benefits and injury supplement, he or she is entitled to a gross amount equivalent to 87.5% of his or her regular gross wages.

So, for example, an employee who regularly receives a gross salary of $1000.00 would receive worker's compensation benefits of $666.67, which under federal law, is not taxable. The injury supplement would make up the difference between the worker's compensation payment and $875.00, or $208.33, which would be taxable. Under the contract language, therefore, the employee's net pay would, in my view, be the equivalent of the worker's compensation payment plus the supplement, after withholding of the appropriate taxes.

An ancillary issue arose as to whether such an employee might receive more net wages under this formula than if he or she was working, due to the fact that taxes aren't withheld on the worker's compensation portion. The City is concerned that this will create a disincentive to return to work. Thus, the question was raised as to whether the City was, in fact, withholding taxes on the entire benefit to avoid a windfall to the employee and, if so, whether it had authority to do so. The City's obligation to withhold taxes from employees' wages, and how those amounts are computed, are matters controlled by state and federal statutes. My authority and jurisdiction in this matter extends only to interpretation of the contract language, which does not address the tax consequences of the formula, but merely establishes 87.5% of gross as the amount to which the qualified employee is entitled. To render judgment on the appropriate taxation of those benefits would, in my view, exceed my authority and I decline to do so. If the proper application of the contract language results in an unanticipated benefit to the employee, so be it. The City's recourse is to seek a change through bargaining. If the City is incorrectly withholding taxes from the employees' benefits, those questions are appropriately referred to the state and federal taxing authorities for redress. The Union is entitled, however, to full disclosure as to how the City has computed and paid out benefits in the past and how it intends to do so in the future, so that it may assess the tax implications in an informed manner. It is, therefore my SUPPLEMENTARY AWARD that:

1. The City's obligation under Article 26, Section 1, is to pay a qualifying employee an injury supplement representing the difference between his or her worker's compensation benefits and 87.5% of his or her gross regular wages.

2. The City shall apply the foregoing formula prospectively and shall also recompute injury supplement benefits paid to all employees since July 1, 2004 and make whole any employee who was paid less than the amount required under the foregoing formula, with statutory interest.

3. The City shall also permit the Union to inspect its records concerning its calculation and payments of injury supplement benefits to qualifying bargaining unit members.

. . .

This complaint was filed on November 4, 2008, contending that the City was failing to comply with the arbitration award. A hearing was held in Eau Claire on August 29, 2009. Following the presentation of the Complainant's case, and a portion of the Respondent's, a recess was taken to allow for talks between the parties and the Examiner to determine the scope of the dispute and explore the possibility of settlement. A settlement was reached, and was memorialized on pages 119 to 122 of the transcript as follows:

EXAMINER NIELSEN: The parties have had some discussions and have reached an agreement in concept at least that the City's obligation under the Emery award is to pay a gross amount of 87.5 percent of the employee's normal gross salary, and if the City does that, they are complying with the award. The City has agreed that it will provide information to the Union showing the gross amount that has been paid, the portion of that that is attributed to Worker's Compensation and the deductions taken from the employees' checks. The parties are going to work together on the exact parameters of that information, but, assuming the provision of that information and assuming that that information then confirms that 87 and a half percent gross is being paid, then the Union would agree that the City is in compliance with the Emery award and at that point this matter would be dismissed.

That dismissal will take place 60 days after the issuance of a written version of what I'm describing here, which I would anticipate would go out sometime next week. Either party in the course of that 60 days may contact the Examiner to invoke his retained jurisdiction if they feel that the other party is not complying with what I've described as the terms of the settlement. Is that a fair description of what we've just discussed?

MR. DeLORME: Yes, it is.

MR. PETERS: My -- my only minor concern with that is that when you -- when you said if the information demonstrates that 87 and a half percent of the gross is paid, how -- how you go about, what numbers get used to prove that we're paying 87 and a half percent because I have some concern that the Union is going to bring the tax issue back into this to demonstrate that they're not getting paid 87 and a half percent.

EXAMINER NIELSEN: Well, except we're talking about gross and not net and the tax goes to net.

MR. PETERS: Okay.

EXAMINER NIELSEN: I mean, everyone understands the tax goes to net. We all acknowledge there is an underlying dispute here between the parties as to the tax treatment of these amounts and that there may be additional discussion, negotiation, litigation, argument, whatever about that tax issue, and it may well be that the information flowing from this resolution gets used in that. That's not a surprise to anyone. But with respect to the Emery awards, all we're talking about is do you have 87 and a half percent gross being paid and are you providing information that he said the Union was entitled to? The only two things that I have jurisdiction over and those are the only two things that are being addressed in this settlement.

MR. PETERS: I appreciate that clarification. Thank you.

MR. DeLORME: That's right.

EXAMINER NIELSEN: Mr. Bohrer?

MR. BOHRER: Very good. *All right. Is there anything further for the Examiner?*[1]

MR. DeLORME: Not for the Union.

EXAMINER NIELSEN: All right. This hearing is in recess.

. . .

The Examiner prepared a draft Order and forwarded it to the parties for comment:

ORDER CONDITIONALLY DISMISSING COMPLAINT

. . .

A hearing was held on August 28, 2009, in Eau Claire, Wisconsin, during which the parties presented such testimony, exhibits, other evidence and arguments as were relevant to the dispute. In the course of the hearing, evidence was presented which allowed the nature of the parties' disagreement to be more fully appreciated, and the parties engaged in discussions, leading to an agreement in principle on the underlying issues. Based on that agreement, the parties requested that the Examiner issue an Order, setting forth their understandings and, contingent upon the provision of satisfactory information related to the dispute, dismissing the Complaint.

[1] It appears that the court reporter inadvertently attributed the italicized statements by the Examiner to Attorney Bohrer.

On the basis of the understandings of the parties, and the record as a whole, NOW THEREFORE, it is

ORDERED

1. That the City of Eau Claire complies with the Emery Award when it pays workers on the Injury Leave benefit an amount of gross pay which is 87.5% of the worker's normal gross pay;

2. That the City of Eau Claire complies with the Emery Award when it provides the Union records of the gross pay, the amount of that gross pay representing workers' compensation payments, and all deductions from that gross pay, for workers who have received the Injury Leave benefit, from July 1, 2004 through the date of this Order;

3. That the hearing in this matter is recessed, and the Examiner will retain jurisdiction over this matter for a period of sixty days from the date of this Order, during which time the City will provide the information referenced in paragraph 2 of this Order, and the Union will review that information to insure its completeness and to insure that workers have, in fact, received 87.5% of their normal gross pay, as referenced in paragraph 1 of this Order;

4. That unless either party invokes the retained jurisdiction of the Examiner within the sixty day period, the instant complaint will be dismissed in its entirety.

. . .

The parties exchanged information over the following months. The Union requested an extension of the period of retained jurisdiction through the end of November to allow for a review of the information provided by the City, and the City did not object. At the end of November, another extension through the end of the year was requested. In explanation of the request, the staff representative explained that the Local's executive board had formulated a recommendation to the membership and would present it for approval at the December meeting. Although the City questioned the need for an additional extension, it did not object. The Examiner granted the additional extension, but inquired about the purpose of a review by the general membership:

Gentlemen:

I do not have a problem with extending the retained jurisdiction, but I am a touch confused by what the purpose of the review by the Union membership is. The resolution was premised on the provision of information by the City, and an agreement on how employees would be compensated in instances of injury leave. Is there a question as to the sufficiency of the information provided, or the percentage of gross pay being paid to those on injury leave?

Dan Nielsen

In response, the Union's staff representative explained that the Union questioned the legitimacy of the amounts deducted from the gross pay, nominally for the purpose of taxes, since those amounts were not actually being applied to taxes:

> . . . Anyway, I believe the data is sufficient although that will be a conversation at the Union meeting. The struggle for the Union is with the question of compensation. After reviewing the data provided by the City as well as the transcript, it is clear that the deduction made by the City is not a tax. As Mr. Peters testified, it is a windfall deduction retained by the City which equals the amount that would be taxed if it were regular income. As discussed at hearing, this isn't a tax issue as the money is not going to any taxing authority, but a question of whether withholding this money violated the contract and Emery's ruling. Emery ruled "the City shall calculate the injury supplement referenced in Article 26 as the difference between an employee's worker's compensation payments and 87.5% of his or her regular gross salary for an 8 hour work day." The Union takes the position that if the City pays an employee less than 87.5% based on deductions made that violate the contract, the employee is not receiving 87.5% of his gross salary. We believe this was Emery's point when he found that "The City did violate Article 26 of the contract by its method of calculation of injury leave payments due to employees on workers compensation." For example, if an employee is owed $1000 and the employer illegally deducts $100, is the employer paying the employee $1000 of his gross salary? The Union takes the position the employer is not paying the appropriate gross salary. This example is analogous to what's happening here. After the windfall reduction of an employee's pay, the employee is receiving less than 87.5% of his gross salary.
>
> It is not my intent to write a brief on this matter, but to give a short answer to your question. The Union will be reviewing this matter at its meeting and I will contact you with our position.
>
> Thanks,
>
> Mark DeLorme, Staff Representative

The City responded, objecting to the resurrection of the tax issue:

> Examiner Nielsen:
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> I am not clear why the Union membership needs further review. For your information, and on November 25, Mark wrote to me stating "concerning the worker's compensation complaint, we don't intend to request another extension and will let Nielsen close the matter with [sic] consistent with his order at the end of the [sic] November." Shortly afterwards, the local union president called me and stated that the members needed to further discuss this with Mark. I agreed to the local leadership's request. However, I do not see any reason for the Union's further review and further delay.

> Your Order states that contingent upon the provision of satisfactory information by the City, the Complaint will be dismissed. On September 17, 2009, and on October 8, 2009, the City provided to the Union detailed written data and stated that if the data does not satisfy the Order, for the Union to provide a written request detailing its deficiencies. There has been no response. On December 5, you ask the Union whether there is a question as to the sufficiency of the information provided. Today, and on December 8, 2009, Mark responds that the data "is sufficient," but that he must yet again meet with the members.
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> While I appreciate Mark's need for dialogue with the local, and his advocacy, it seems to me that further time, and further regurgitation of what was heard on August 28, is unnecessary. If the data provided is sufficient, then the City has complied with the Order and the matter should be dismissed.
>
> Steve Bohrer

The Union rejected the City's claim that it had fully complied with the Order, and asserted that the membership needed to review the question of whether the City was in fact paying an amount that ultimately yielded 87.5% of the workers' normal gross salary. On December 16, the Union advised the Examiner and the City that it believed that, while the City had complied with the Order insofar as the provision of information was concerned, the City's nominal tax deductions had the effect of providing less than the amount required by the collective bargaining agreement:

> Gentlemen:
>
> I have had the opportunity to discuss this matter with the leadership of the Union and our position is 1) the Union is satisfied with the information provided by the City, and 2) workers on the Injury Leave benefit have not received 87.5% of their normal gross pay. Therefore, the City is not in compliance with the Examiner's Order in this matter. I have stated much of the Union's basis for this position in a prior e-mail. In addition, we believe our analysis is consistent with Arbitrator Emery's Supplementary Award. We do not believe Arbitrator Emery intended to deliver a Declaratory Ruling when he issued his Award and Supplementary Award finding the City had violated the contract.
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> The City has withheld monies from workers on worker's compensation to avoid paying them a windfall. This is not a tax withholding and the discussion of taxes has clouded the issue. The only relationship to taxes is that the City calculates the windfall reduction by the amount of taxes which would be withheld if worker's compensation were taxable. As we heard at hearing, this is not tax withholding, but the City's plan to avoid paying the workers a windfall. However, as Arbitrator Emery wrote, "If the proper application of the contract language results in an unanticipated benefit to the employee, so be it. The City's recourse is to seek a change through bargaining." Arbitrator Emery made it very clear that if an argument is to be made regarding taxes, the WERC does

not have the authority to address this. Since this is clearly not a tax issue, the WERC is the appropriate forum to hear this matter. If the Union were to go to the taxing authorities, they may take the view that this is a contract issue, since the City is not claiming to be taxing worker's compensation, but reducing the amount of the Injury Leave benefit.

Emery's award states "The City's obligation under Article 26, Section 1, is to pay a qualifying employee an injury supplement representing the difference between his or her worker's compensation benefits and 87.5% of his or her gross regular wages". The arbitrator even included an example to ensure the City's compliance.

So, for example, an employee who regularly receives a gross salary of $100,000 would receive workers compensation benefits of $666.67, which under federal law, is not taxable. The injury supplement would make up the difference between the worker's compensation payment and $875.00, or $208.33, which would be taxable. Under the contract language, therefore, the employee's net pay would, in my view, be the equivalent of the worker's compensation payment plus the supplement, after withholding of the appropriate taxes.

The City is not complying with the Award because it is reducing the injury supplement payment based on an employee's gross salary. The amount it reduces the payment and how it calculates it is immaterial. The City's payment is not "an injury supplement representing the difference between his or her worker's compensation benefits and 87.5% of his or her gross regular wage" because the injury supplement has been reduced to avoid a windfall. The fact that the amount paid to a worker is less than the amount stated in Emery's decision is a clear violation and resulted in the instant complaint. The WERC is the appropriate forum to enforce Emery's decision and the Union requests the Examiner schedule another hearing date to address the issues raised by the Union regarding the City's noncompliance with Emery's Supplemental Award.

Sincerely,

Mark DeLorme, Staff Representative

In response, the City objected, asserting that it had fully complied with the Order, and that the matter should be dismissed.

II. DISCUSSION

This case springs from earlier Awards issued by an Arbitrator, finding that the City was obligated to pay injured workers on the basis of 87.5% of their normal gross, less the amount of workers compensation received by the worker. The Union challenged a number of aspects of the City's administration of the benefit, including the City's practice of withholding amounts from the workers' pay which were nominally tax deductions, but which were not actually then paid over to

the taxing authorities. The City did this in order to account for the non-taxable nature of workers compensation payments, so as to avoid paying a windfall to injured employees. Arbitrator Emery concluded that he had no jurisdiction over the nominal tax deductions, and his Award stated that "The City did not violate the contract by withholding federal and state income taxes from employees' workers compensation payments starting in 1983." In a Supplemental Award clarifying the original Award, Arbitrator Emery found that the City had misapplied his original Award, and was obligated to pay an injury supplement equal to "the difference between his or her worker's compensation benefits and 87.5% of his or her gross regular wages." He also ruled that the Union was entitled to inspect the City's records regarding the calculation and payment of injury supplements, to insure compliance with the contract.

The Union brought the instant complaint to compel compliance with Emery's Awards. At hearing, the Union presented evidence concerning the payment of injury supplements, much of it related to the City's continued practice of making what were nominally tax deductions from the employees' pay. The Union also demonstrated that the City was not fully sharing its records related to the computation and payment of injury supplements. Following the conclusion of the Union's case, and the presentation of testimony by the City's Assistant City Manager/Human Resources Director, the parties engaged in discussions which led to a settlement of the dispute. The settlement clarified what was required to comply with the Emery Awards. The settlement terms were stated on the record and were subsequently embodied in a Draft Order prepared by the Examiner:

. . .

1. That the City of Eau Claire complies with the Emery Award when it pays workers on the Injury Leave benefit an amount of gross pay which is 87.5% of the worker's normal gross pay;

2. That the City of Eau Claire complies with the Emery Award when it provides the Union records of the gross pay, the amount of that gross pay representing workers' compensation payments, and all deductions from that gross pay, for workers who have received the Injury Leave benefit, from July 1, 2004 through the date of this Order;

. . .

The City thereafter provided all of the required information to the Union. The Union sought several extensions of the Examiner's jurisdiction to review the records, and then asked that the hearing be reconvened on the grounds that the City was not complying with the Draft Order and/or the Emery Awards. The basis of the claim was that the nominal tax deductions resulted in a net payment amount that was different from what the amount would be if no taxes or tax equivalent amounts were withheld, and that Emery's initial finding that he lacked jurisdiction over tax issues was beside the point, since the City conceded that these were not truly tax deductions.

The Union's argument as it stands is simply a rephrasing of its arguments before Emery, and the case it presented at the hearing on this complaint, prior to the settlement. The nature of these deductions was well understood. Arbitrator Emery concluded that a grievance arbitration was the wrong forum for asserting a challenge.[2] Whether this conclusion was clearly right, clearly wrong or simply arguable is beside the point. It was the conclusion of the arbitrator, in a final and binding award. More to the point, however, these parties entered into a settlement, knowing that the issue of nominal tax deductions was not resolved by the settlement. In the description of the settlement on the record at the hearing, the fact that the propriety of the deductions was not being resolved was expressly stated, and both parties indicated their understanding of that fact:

> EXAMINER NIELSEN: I mean, everyone understands the tax goes to net. We all acknowledge there is an underlying dispute here between the parties as to the tax treatment of these amounts and that there may be additional discussion, negotiation, litigation, argument, whatever about that tax issue, and it may well be that the information flowing from this resolution gets used in that. That's not a surprise to anyone. But with respect to the Emery awards, all we're talking about is do you have 87 and a half percent gross being paid and are you providing information that he said the Union was entitled to? The only two things that I have jurisdiction over and those are the only two things that are being addressed in this settlement.
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> MR. PETERS: I appreciate that clarification. Thank you.
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> MR. DeLORME: That's right.
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> EXAMINER NIELSEN: Mr. Bohrer?
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> MR. BOHRER: Very good.. . .

While the Examiner retained jurisdiction, the purpose of the retained jurisdiction was to insure that the requested data was provided, and to allow the Union to confirm that the gross amounts were accurately computed. The Union seeks to invalidate the settlement because it remains dissatisfied with the deductions being made from the gross amounts. That was not one of the conditions of the settlement.

Two conditions were set for the dismissal of this matter. Both conditions have been met. While the members of the bargaining unit may have a concern that the City is manipulating the injury leave benefit through its nominal tax deductions, that practice was considered by the Arbitrator and found to be beyond his jurisdiction. It follows that it cannot be weighed in a compliance proceeding, and that fact was reflected in the settlement agreement.

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[2] See page 6 of the original Award, wherein the Arbitrator noted that the "taxes" being withheld were retained by the City, because they were not payable to the government. Nonetheless, he concluded that the claim "was not capable of relief in this forum." Page 7 of the original Award.

On the basis of the foregoing, and the record as a whole, I have made and entered the following

ORDER

That the instant complaint of prohibited practices be, and the same hereby is, dismissed.

Dated this 20th day of July, 2010 at Racine, Wisconsin.

Daniel J. Nielsen /s/
Daniel J. Nielsen, Examiner