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

Decision No. 32730-B

Appearances:

Mark DeLorme, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 824 York Street, #2, Manitowoc, Wisconsin 54220, appearing on behalf of Eau Claire City Employees, Local 284, AFSCME, AFL-CIO.

Stephen G. Bohrer, Assistant City Attorney, City of Eau Claire, 203 South Farwell Street, P.O. Box 5148, Eau Claire, Wisconsin 54702, appearing on behalf of the City of Eau Claire.

ORDER ON REVIEW OF EXAMINER'S DECISION

On July 20, 2010, Wisconsin Employment Relations Commission Examiner Daniel J. Nielsen issued an Order Dismissing Complaint in a prohibited practice proceeding filed by Eau Claire City Employees, Local 284, AFSCME, AFL-CIO alleging that the City of Eau Claire had violated Sec. 111.70(3)(a) 5, Stats., by failing to comply with an arbitration award issued by John Emery. Examiner Nielsen dismissed the complaint because he concluded that the parties had reached a settlement resolving the alleged prohibited practice and that the City had complied with the terms of said settlement.

On August 6, 2010, Local 284 filed a petition with the Wisconsin Employment Relations Commission seeking review of the Examiner's Order pursuant to Secs. 111.07(5) and 111.70(4)(a), Stats. The parties thereafter filed written argument, the last of which was received on October 4, 2010.

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

ORDER

The Examiner's Order Dismissing Complaint is reversed.

Given under our hands and seal at the City of Madison, Wisconsin, this 17th day of November, 2010.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/
Judith Neumann, Chair

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

Terrance L. Craney /s/
Terrance L. Craney, Commissioner

CITY OF EAU CLAIRE

MEMORANDUM ACCOMPANYING ORDER
ON REVIEW OF EXAMINER'S DECISION

On October 20, 2006, John Emery issued a grievance arbitration award interpreting a collective bargaining agreement between the City of Eau Claire and Eau Claire City Employees, Local 284, AFSCME, AFL-CIO. Emery concluded that the two issues to be resolved by his award were:

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?

As to the first issue, Emery stated the following:

> The first question addresses the City's practice, apparently adopted in 1983, of withholding taxes from employees' worker's compensation benefits. City Exhibit #1, which is a group of memoranda exchanged between management personnel during that period, reveals that the City's intention was to adjust the combination of worker's compensation and injury supplement benefits to correct what the City viewed as a flaw in the system, to wit: because worker's compensation is not taxable, employees receiving worker's comp and the injury supplement were ending up with more net pay than if they were working. The City would then retain the taxes withheld on the worker's compensation portion, since they weren't payable to the government. According to the analysis prepared by City witness Pat Sturz, a certified public accountant, the City's method still resulted in the employees receiving more net pay while injured, because FICA taxes were reimbursed on a quarterly basis, but not as much as if taxes were only withheld on the injury supplement. (City Ex. 5) The City also benefited because monies that otherwise would have gone to the state and federal governments as withholding taxes were retained by the City.
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> . . .
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> It is my sense that this claim is not capable of relief in this forum. Setting aside the fact that this practice has been going on for more than 23 years without complaint, it is a worker's compensation matter, which is a statutory creature subject to administration by the Worker's Compensation Division of the Wisconsin Department of Workforce Development. Article 18, Sec. 6 of the

contract states: “All employees shall be covered by Worker’s Compensation Insurance.” I am further mindful, however, that Article 29, Sec. 6 limits the Arbitrator’s authority to go beyond the “express terms” of the contract in rendering his decision There is no claim here that any of the grievants were not covered by Worker’s Compensation Insurance and it is my view that an inquiry into the City’s practices with regard to how it taxes worker’s compensation benefits goes beyond my authority to construe the language in question. Of course, individual employees receiving worker’s compensation benefits who have questions about the City’s practices may consult with the Worker’s Compensation Division or the federal and state taxing authorities, which would all be appropriate forums for such an inquiry.

Thus, as to the first issue, Emery held:

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

As to the second issue, Emery stated the following:

Injury Supplement Reduction

This issue addresses the City’s interpretation and implementation of the language in Article 26 regarding calculation of the injury supplement to be paid in addition to worker’s compensation benefits. As noted above, prior to 1992 the Article provided for payment of an injury supplement to injured employees receiving worker’s compensation representing the difference between their worker’s compensation benefits and their regular salary. In 1992, the City bargained for new language in Article 26, Section 1 that reduced the injury supplement to “…the difference between 87.5% of their regular salary and their worker’s compensation payments…not to exceed ninety (90) days for the same injury.” At the same time, a new Section 6 was added that defined “days” for purposes of calculating benefits as regularly scheduled working days, whereas previously calendar days were used. As also noted, the City did not implement the language until 2004 and, when it did so, interpreted the language to refer to net pay, rather than gross. For the reasons set forth below, I disagree with the City’s position.

The City asserts that the language of Article 26, Section 1, is clear on its face. It refers to 87.5% of regular salary and makes no qualifying reference to “gross.” In the alternative, the City argues that bargaining history supports its interpretation of the language. I agree with the City’s initial premise that the language is clear on its face.

Article 26 ties the injury supplement benefit to the difference between worker's compensation payments and "regular salary." Every other reference to wages in the contract clearly refers to gross pay. There is no dispute that the wage rates set forth in the Pay Plan on pages 31-34 of the contract are in terms of gross wages. Therefore, the percentage wage increases referenced there are percentages of gross, not net, wages, as are the contributions to the Wisconsin Retirement System. Likewise, Article 14 specifies that employees working overtime shall receive one and one-half times their regular rate of pay for all hours worked and two times their regular rate of pay for Sundays and holidays. Here, again, there is no dispute that overtime is computed on the gross wage rate, not the net, with taxes deducted afterward. There is nothing in Article 26 to lead one to believe that the reference to regular salary there meant anything other than the meaning given to all other references to pay rate in the contract, which is gross wages.

The City tried to create ambiguity by asserting that the bargaining history clearly evinces its intent to reduce the benefit, but that is not inconsistent with my finding. In 1992 the contract called for employees to receive equal to the difference between the worker's compensation benefit and 100% of their gross pay, notwithstanding the City's novel approach to withholding taxes, so any reduction in percentage the City was able to negotiate would reduce the benefit and decrease any incentive employees might have had to not return to work. Had the City achieved its target of 70% of regular salary, the benefit would clearly have been below the regular pay rate, whether computed as gross or net. Nonetheless, agreement was reached at 87.5%, which, even as a percentage of gross wages, clearly reduced the benefit and increased the incentive to return to work.

It is likewise irrelevant whether or not the change in the definition of days in the contract was given as a quid pro quo for the reduction in the percentage. Again, whether the rate was gross or net, the reduction to 87.5% was clearly a concession on the part of the Union and a quid pro quo in return for it would not be unusual. Thus, whether or not the change was a quid pro quo does not bear at all on the question of whether the term "regular salary" was intended to refer to gross or net. In any event, as previously noted, within the four corners of the contract there is no basis for finding that the reference to pay rate in Article 26 was intended to have any other meaning than it has elsewhere in the contract, which is gross wages.

There is also a dispute about the system the City used for computing the injury supplement, as well as the amount. Apparently, for ease of bookkeeping, the City simply records 7 hours worked per day and one hour of leave without pay for employees on injury leave, which is, then, 87.5% paid time. The City is able to do this because it self insures for worker's compensation so all the

> bookkeeping and disbursements are handled in house. According to the testimony of Union witnesses, however, this method has had an unintended negative affect on WRS contributions and other contractual benefits which are figured as a function of work time. This may have been an oversight occasioned by the City's desire to manage its payroll by the most efficient means. Nevertheless, desire for efficiency cannot be a basis for denying bargaining unit members benefits to which they are contractually entitled.

Thus, as to the second issue, Emery held:

> 2. The City did violate Article 26 of the contract by its method of calculation of injury leave benefits 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 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 and benefits.
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> 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.

Thereafter, the parties disagreed over how to implement the October 26, 2006 award and Emery convened a supplemental hearing on January 31, 2007 and verbally made a "Supplementary Bench Award". Sixteen months later, on May 20, 2008, Emery reduced that "Supplementary Bench Award" to writing as follows:

> 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 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 the time, the parties made presentations of their positions regarding the proper interpretation and implementation of the remedy I ordered in the original award.
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> 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 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 ancilliary 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 employee's 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 employee's 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.

On November 4, 2008, Local 284 filed a complaint with the Commission alleging that the City was not complying with the Emery awards. In the complaint, Local 284 alleged that the City had advised Local 284 that "it [the City] did not need to make any changes to its current practices to comply with Arbitrator Emery's initial or supplemental awards." In the complaint, Local 284 asked that the City be ordered to "comply with Arbitrator Emery's initial and supplemental awards."

Efforts by a Commission conciliator to settle the matter were unsuccessful and on February 18, 2009, the complaint was assigned to Commission Examiner Daniel J. Nielsen for hearing and decision.

Prior to hearing, the City filed an answer denying that it had failed to comply with the Emery awards and affirmatively moving to dismiss the complaint on other grounds.

A hearing on the complaint was commenced on August 28, 2009. At the beginning of hearing, Local 284 made the following opening statement:

> MR. DeLORME: Although this seems like a complicated case, especially since we're here in Part 3 of this, in the Union's estimation, it really isn't. It boils down to two issues, the calculation of the injury supplement payment and whether – and the question of documents that should be provided by the City that thus far haven't been.
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> I'll start briefly with the Motion to Dismiss regarding the Statute of Limitations. Contrary to the April 17th, 2009 letter of Mr. Bohrer, Steve Day, the prior Staff Representative for this area, did not request a written supplementary award of May 16th, 2008. Actually, Arbitrator Emery indicated he would be providing a supplementary bench award at the hearing on January 31st, 2007.
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> The reason for that is self-explanatory. The supplementary hearing was held because there was a difference regarding the interpretation and implementation of the original award. That was something that, hopefully, could be avoided, and, unfortunately, we're here today because it wasn't avoided.
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> There was also a concern by the Union that because the bench award was not in writing, that it was not enforceable, and the inaction of the Union during the period between the supplementary hearing and the written award is partially because of the question of whether it's enforceable.

In addition, Arbitrator Emery represented that he had a substantial caseload and the award would be sometime down the road, and, in fact, the award did not come until reminded by the prior Staff Representative of his agreement to provide one. In fact, as the City pointed out, leading up to the January 31, 2007 hearing, there was a large number of e-mail discussion about the award's remedy, and then for 16 months after that there was no communication from the Union, demonstrating the understanding of the Union that an award was forthcoming, a written award, and the enforcement of that award would come after the written award was received. We'll have testimony to that effect from several witnesses.

The second part of the Motion to Dismiss is failure to state a claim. That's the main reason we're here today, and that will be addressed in the argument.

The third part of the Motion to Dismiss is laches, and in the Motion to Dismiss the City contends that there was an unreasonable delay which prejudiced the City from defending this action. In the motion there is no – the City hasn't demonstrated any way that they were prejudiced, and the Union believes this is especially true, given the City's position that it has not needed to change its calculation payment of the injury supplemental pay, that it's always paid that way, and it has already complied with Emery's award.

Regarding the award, the first and second parts of the supplementary award, which is Joint 2, referred to the calculation of the injury supplement and the – the make-whole award for certain employees that have been affected by this since July 1st, 2004, and Arbitrator Emery was thoughtful enough because of the confusion over the interpretation and implementation of his decision that he actually put a formula in the supplementary award.

I put this portion of my opening in writing. The first formula is right out of the Emery award that indicates two-thirds of a worker's gross salary would be Worker's Compensation. The injury supplement would be the difference between the Worker's Compensation benefit and 87.5% of the employee's gross wages, and he gave the example of $1,000 gross salary, two-thirds of which, 666.67 at 87.5 percent, the employee's due $875. The difference between the injury or the 87.5 which is the contractual agreement, and the 667.66 would be 208.33.

In the City's e-mail of 12-15, 2006 – this is not – not an exact copy of that, but for ease of reference to compare the two, this is essentially what it reads – an employee who makes $10 an hour eight hours a day, whether he received $80 a day, the City calculates 85 percent of that at $70 subject to taxes. What it does is it combines the Worker's Compensation and the injury

supplement into one sum and multiplies that by 87.5 percent. The Emery calculation for $80 a day splits the Worker's Compensation and the injury supplement so that it's clear that the $80 a day example, 53.33 would be Worker's Compensation, $70 would represent the employee's share of the total of the 87.5 percent, the difference being 16.67 of the injury supplement.

The reason this is important is that Arbitrator Emery specifically said that the calculation has to be separate. Worker's Compensation has to be one number. The injury supplement has to be another number, and he specifically said that the calculation combining the two was, even though it might be administratively better for the City to do it that way, more efficient, that's – basically, that's too bad. Do it the right way. Essentially, the City's calculation works out to be payment of seven hours out of an eight-hour day, and Arbitrator Emery in his initial decision specifically said you can't calculate it this way. The City calculation, 70 out of 80, a payment of 70 out of 80 is essentially the same thing.

One thing I'd like to state at this point is that we're looking at the injury supplement today. Although we're talking about separating the numbers, Worker's Compensation and the injury supplement, we want to make sure we focus on the injury supplement. Arbitrator Emery in both awards made it clear that the tax issue – he would not rule on the tax issue, and we can talk about that in a separate forum.

What we're here for today is talking about the calculation of the injury supplement and the splitting of the Worker's Comp number and the injury supplement number. One of the rationales that the City has used is that there's a fear that somebody might receive more net wages under this formula than if he or she were working. Then Arbitrator Emery wrote in his supplementary award that an unfair windfall – that the City might think is a nonfair windfall is something to be dealt with in bargaining and is not something to unilaterally deal with.

Regarding the third part of the award, Arbitrator Emery – this is the supplementary award – the award said, Number 3, the City should also permit the Union to inspect its, meaning the City's, records concerning its calculation of payment of injury supplements benefits to qualifying bargaining unit members.

The City produced a letter and a – and information which is part of – I believe it's part of the Complaint, the attachment to the Complaint, which indicates the gross salary and the 87.5 percent of the gross salary. The reason this is insufficient is because the City has not provided the information about what the employee actually received. We don't see the net and we don't see the

> deductions that the City made. We don't know what the tax deduction was. We don't know what other deductions are and we don't know where that money went. Without that information, we don't know what the make-whole remedy is. It hasn't been provided and we need that to determine what the make-whole remedy is. So today, if you asked us, we don't know. We couldn't tell you.
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> In a nutshell, that's – that's the Union's position. We believe it's very straightforward. We believe that Arbitrator Emery made a very clear ruling in the first award, an even clearer ruling in the second award and, hopefully, this can be resolved the third time around. Maybe that's the charm, but that's what I have for my opening.

The Union presented evidence in support of its position and rested. The City presented some testimony and then the parties had settlement discussions. Examiner Nielsen subsequently provided the parties with a draft order which summarized his understanding of an agreement the parties had reached and stated in pertinent part:

> 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;
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> 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 received the Injury Leave benefit, from July 1, 2004 through the date of this Order;
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> 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 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;
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> 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.

Following receipt of this draft, the City asked by e-mail "for a reference in the draft, or some understanding, that the City's motion to dismiss is still viable." Examiner Nielsen responded with the following e-mail:

> The proposed Order is contingent- it assumes resolution on the grounds outlined therein. I have not made any ruling with respect to the merits of the dispute, nor with respect to the Motion to Dismiss. Should this matter not resolve itself on the basis of the information provided by the City, my view is that the issues presented by the Motion to Dismiss are still on the table for argument and decision.

The City subsequently provided Local 284 with information pursuant to paragraph 2 of the Examiner's draft order. Local 284 then advised the City and the Examiner that, although the information the City had provided was "complete" as contemplated by paragraph 2, the information did not " . . . insure that workers have, in fact, received 87.5 % of their normal gross pay, . . ." as required by paragraph 3.

The Examiner did not find Local 284's contention persuasive and proceeded to dismiss the complaint because he concluded that the City had complied with the terms of the settlement agreement reached during the hearing. He reasoned as follows:

> 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:
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> > 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.

MR. DeLORME: That's right.

EXAMINER NIELSEN: Mr. Bohrer?

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.

As understood by the Examiner and the City, the settlement agreement reached during the hearing called for the complaint to be dismissed if the City provided payroll information. Local 284 asserts that it did not share that understanding. When viewed in the context of the language of the Emery awards and Local 284's consistent position regarding the meaning of the Emery awards and the City's non-compliance, we conclude that the City and Local 284 did not have a shared understanding of the meaning of the settlement agreement. We thus further conclude that said agreement does not provide a valid basis for dismissing the complaint and reverse the Examiner.

As reflected in Emery's October 2006 award, he concluded that the City was violating the parties' contract "by its method of calculation of the injury leave payments due to employees on workers compensation" and ordered the City to change its method of calculation and make employees whole for any losses. As reflected in Emery's May 2008 supplemental award, he reaffirmed the obligation of the City to "apply the foregoing formula prospectively" and "recompute injury supplement benefits paid to all employees." As reflected in its November 2008 complaint, Local 284 believed that the City had not taken any of the action ordered by Emery. Local 284 reaffirmed that view in its opening statement in August 2009. In that context, there is no reasonable basis for concluding that Local 284 would suddenly

abandon whatever victory it had won as to a change in the calculation of the injury benefit in

exchange for no more than the City providing records pursuant to item number 3 in Emery's supplemental award and paragraph 2 of Examiner Nielsen's draft settlement agreement. Rather, we conclude that Local 284 reasonably understood the settlement agreement as providing it with a more informed understanding of any action the City had taken in response to the Emery awards and then with the opportunity to proceed with its complaint if it concluded that the City was not acting in compliance with said awards.

In reaching this conclusion, we acknowledge the above-quoted exchange on the record between the Examiner and the parties which Examiner Nielsen then incorporated and emphasized in his decision dismissing the complaint. When we review the transcript of the hearing in its entirety, we conclude that there was ongoing confusion as to the distinction between the "tax" issue which Emery decided was beyond his jurisdiction (the propriety of the City withholding "taxes" from the workers compensation benefit which the City then retained because there was in fact no tax to be paid on the workers compensation benefit) and Emery's determination that the City has nonetheless been improperly calculating the injury supplement and needed to recalculate the level of this benefit. In the context of this confusion, the above-quoted exchange is less than definitive as to the parties' intent when reaching the settlement agreement -- even if one were to overlook the unlikely proposition that Local 284 would suddenly abandon the opportunity to pursue whatever victory it had obtained from the Emery awards.

Given our decision, the matter now returns to the hearing process for receipt of any additional relevant evidence regarding the issue of compliance with the Emery awards.

Dated at the City of Madison, Wisconsin, this 17th day of November, 2010.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/
Judith Neumann, Chair

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

Terrance L. Craney /s/
Terrance L. Craney, Commissioner

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