STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

NEENAH JOINT SCHOOL DISTRICT, Complainant,

vs.

NEENAH EDUCATIONAL SUPPORT PERSONNEL ASSOCIATION, Respondent.

Case 16
No. 68265
MP-4451

Decision No. 32773-C

Appearances:

James R. Macy, Davis & Kuelthau, S.C., 219 Washington Avenue, Oshkosh, Wisconsin 54901, appearing on behalf of Neenah Joint School District.

Melissa Thiel Collar, Legal Counsel, Wisconsin Education Association Council, 2256 Main Street, Green Bay, Wisconsin 54311, appearing on behalf of Neenah Educational Support Personnel Association.

ORDER ON REVIEW OF EXAMINER'S DECISION

On January 27, 2010, Examiner John R. Emery issued Findings of Fact, Conclusions of Law, and Order in the above-captioned matter, concluding that the Respondent Neenah Educational Support Personnel Association (NESPA) had refused to bargain in good faith with the Neenah Joint School District (District) by "inordinately delaying" the filing of a preliminary final offer for some two and one half months after the District had filed an interest arbitration petition. The Examiner dismissed other District allegations of bad faith bargaining on the part of NESPA.

Both the District and NESPA filed timely petitions seeking review of the Examiner's decision pursuant to Secs. 111.07(05) and 111.70(4)(a), Stats. Both parties filed briefs and reply briefs in support of their respective positions, the last of which was received on April 5, 2010. For the reasons set forth in the Memorandum accompanying this order, the Commission affirms the Examiner's Findings of Fact with the modifications described below and affirms his conclusions that NESPA did not engage in various dilatory tactics in violation of its duty to

bargain in good faith with the District. The Commission reverses the Examiner's conclusion that NESPA violated Sec. 111.70(3)(b)3, Stats., by the timing of its submission of a preliminary final.

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

ORDER

A. The Examiner's Findings of Fact 1 and 2 are affirmed.

B. The Examiner's Finding of Fact 3 is modified by adding the italicized language below and as modified is affirmed: [1]

> 3. The Complainant and Respondent are in a collective bargaining relationship. *The bargaining unit represented by the Respondent NESPA is a "wall to wall" unit that includes full time and part time employees in numerous classifications, such as cooks, custodians, maintenance, secretarial and educational aides*. At the time the progression of events referenced herein commenced, the collective bargaining agreement covering the period from July 1, 2005 through June 30, 2008 was still in effect, but expired while the parties were in negotiations over a successor agreement.

C. The Examiner's Findings of Fact 4 through 11 are affirmed. [2]

D. The Examiner's Finding of Fact 12 is amended by adding the two following two sentences: [3]

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[1] Finding of Fact 3 is modified in order to include information about the diverse nature of the bargaining unit, as that information plays a role in the analysis set forth in the Memorandum that follows this Order.

[2] In its petition for review, the District requested that Finding of Fact 11 be amended to include the fact that NESPA's letter to bargaining unit members, quoted in full in Finding of Fact 10, was actually sent to the NESPA membership following the June 19, 2008 bargaining session. While true, this additional fact is of little importance to the arguments of the parties or the outcome of the case. Hence, we merely note it here but do not amend the findings.

[3] The first additional sentence below is added at the District's request. It is undisputed and material to the discussion of the issue regarding the 14 day time period for submission of responsive preliminary final offers. The second additional sentence is added because the information provides some relevant context for considering the parties' conduct in this case.

12. The Commission's form for initiating interest arbitration includes, *inter alia*, the following language: "The other party shall, within 14 calendar days of the Commission's receipt of the petitioner's preliminary final offer, submit its responsive preliminary final offer to the Petitioner and the Commission." This was the first time in the parties' approximately 20-year bargaining history that either party had invoked the Commission's mediation or interest arbitration procedures.

E. The Examiner's Finding of Fact 13 is affirmed.

F. The Examiner's Findings of Fact 14 through 16 are set aside and the following Findings of Fact 14 through 16 are made: [4]

14. Towards the end of July, Holt had one or more discussions with NESPA local president Prosek about the District's desire to meet for mediation during the summer and about her (Holt's) belief that Trimbell had failed to respond to Commission investigator

[4] The Examiner concluded that NESPA's delay in submitting a preliminary final offer (hereafter "PFO") was "inordinate" in part because the Examiner found that "NESPA ignored the District's request for a preliminary final offer for two and one-half months" (Examiner's Decision at 21). Consonant with that conclusion, the Examiner's Finding of Fact 16 had included the statement, "Throughout the summer of 2008, Holt made repeated requests to the NESPA officers for the Association's preliminary final offer." The evidence does not support the Examiner's finding. Evidence regarding District attempts to solicit a PFO is sparse. The record indicates that in late July Holt inquired of Prosek, the local Association president, as to mediation dates and as to the status of the PFO; Prosek in turn conveyed Holt's remarks to Trimbell. Vague but consistent testimony by both Holt and Prosek suggest that Holt may have discussed mediation dates with Prosek on one or more occasions between late July and late August, but there is little evidence of any inquiries focusing on the PFO itself during that period of time, until District representative Macy's August 28 e-mail. That e-mail, which, as set forth in Finding of Fact 17 and footnote 4, below, was misdirected and not received by Trimbell until several days later. We note that the only request for the PFO that was alleged in the District's Second Amended Complaint was Macy's August 28 e-mail. As evidence to support its contention that NESPA delayed submitting its PFO in bad faith, the District refers in its brief to the transcript at pages 50-51, where Holt is asked on direct examination by the District, "And to the best of your knowledge, were the local bargaining team members in contact with Ms. Trimbell regarding the request for a preliminary final offer?" to which Holt responded, "I know that several, more than one, two, or three, had communications with Ms. Trimbell about trying to get that as they had expressed their frustrations to me." Holt's testimony reflects that she remembers having two or three conversations with individual employees about NESPA's PFO and that those employees indicated "frustration." It does not indicate the context of these conversations, with whom or when they took place, and, most importantly, it does not supply firm evidence of repeated demands by Holt for the PFO or even that Holt had asked the employees to convey those demands. As such, the cited portion of Holt's testimony simply is not a persuasive basis for the Examiner's factual finding that the District had conveyed "repeated" requests for the PFO and that Trimbell was or should have been aware of the District's interest in the PFO, prior to Macy's August 28 e-mail. As this factual finding was the basis of the Examiner's ultimate conclusion that NESPA violated the law by intentionally ignoring the District's requests/need for the PFO, we have reviewed the record carefully regarding the evidence and in Findings of Fact 14 through 16, above, have attempted to be precise about the actual communication among the parties and investigator regarding the PFO and the scheduling of mediation meetings over the summer.

Gallagher's requests for meeting dates. Prosek then contacted Trimbell who told him that she had not received any request for dates. During the same conversation, Prosek informed Trimbell that Holt had also inquired about when NESPA would file its preliminary final offer. Trimbell responded that it was not ready and that, based on advice from "attorneys in Madison," the 14-day period "wasn't that important."

15. Shortly after Trimbell's conversation with Prosek, described in Finding of Fact 14, above, Trimbell initiated contact with Gallagher and the two exchanged voice mails. Gallagher left a voice message for Trimbell offering July 30, 31, or August 1 or 5 for meeting dates and also indicated that both August and September were "open." After exchanging voice messages, Trimbell and Gallagher were able to speak with each other on July 30. Trimbell indicated that NESPA was not available on the offered dates (now only days away) and asked for additional dates. Later that same date (July 30), after conferring with the District, Gallagher left Trimbell a voice message suggesting August 19 and 25 as possible dates. Trimbell returned the call on the same date and informed Gallagher that those dates were not available for the full Association team. Trimbell then offered September 10, contingent upon checking with her team. By e-mail to Gallagher dated August 4, Trimbell offered four dates in September, including September 15, and Gallagher conveyed those dates to the District by an e-mail on the same date.

16. By e-mail dated August 4, 2008, [District legal representative] Macy responded to Gallagher about the dates offered by NESPA as follows:

> Sharon, this case, like most, deals with a change in health insurance. I am sensing considerable delay. I cannot believe that based upon the extreme flexibility in dates that you have offered, that the Association is not available. Can we pursue something sooner?

Gallagher responded to Macy by e-mail on the same date (August 4) as follows:

> Jim – I know that part of the problem was that I called you in early July after I was assigned this case and that we both had dates in late July and

> early August which I saved for this case. On that same day that I talked to you, I called Terri and had to leave her a message that we had four unconfirmed dates for them to consider. I thought when we first talked that you had told me that you were going to check with your client and I believe that you then E'd me with the results of that.
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> I am sorry but I believe that I then dropped the ball. Thereafter, I had trouble getting in touch with Terri as she was at WEAC training or unavailable. Then, the Association team did not have any of the early dates we talked about, but now they are open in Sept., as I E'd to you this morning. What I would say is, please take the first date they have suggested that you are open and I can say that I will do my very best to help you conclude the case expeditiously. As you know, I do not have the authority to force the Association to the table earlier here as there is not an outrageous pattern of foot-dragging as would be required for such a move on the Commission's part. I hope this explanation helps. SG

On August 5, 2008, Gallagher confirmed with both parties that a meeting was set for September 15. Prior to August 28, 2008, the District did not attempt to ask Trimbell directly to submit a PFO, although the District was aware that Trimbell was the NESPA representative responsible for responding to the District's petition for interest arbitration and had identified her as such in the petition. Prior to August 28, 2008, the District did not ask Gallagher or the Commission to obtain a PFO from NESPA. Prior to August 28, neither Gallagher nor any other agent of the Commission attempted to obtain a preliminary final offer from NESPA.

G. The Examiner's Findings of Fact 17 through 24 are affirmed. [5]

[5] In its petition for review, the District requested that we modify the Examiner's Findings of Fact to include reference to the comment in the District's e-mail of August 28 that the District needed NESPA's PFO by September 2, 2008, when the Board would be meeting to prepare for the mediation. The Examiner included the substance of this information in his Finding of Fact 17 and we have affirmed that Finding; there is no need for repetition. The District further requested that we redact from Finding of Fact 17 that the District's and Gallagher's e-mails to Trimbell dated August 28, 2008 were sent to an erroneous e-mail address and not received by her. The record, including the e-mails with the erroneous addresses and Trimbell's testimony, fully supports

H. The Examiner's Finding of Fact 25 is modified by adding the following sentence at the end of the finding and as modified is affirmed:

> 25. … Among other arguments to Engmann, NESPA pointed out that the District's proposal regarding health insurance would result in a relatively harsh retroactive liability for Association bargaining unit members. [6]

I. The Examiner's Findings of Fact 26 and 27 are affirmed.

J. The Examiner's Finding of Fact 28 is set aside. [7]

K. The Examiner's Findings of Fact 29 through 33 are renumbered 28 through 32 and are affirmed. [8]

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the Examiner's finding and we have affirmed it. The District further asks that we add to Finding of Fact 19 that the information demanded by the Association was the same as information previously provided to the Association. We decline to do so because, although the record reflects that some similar information had previously been provided, it also reflects that NESPA, now assisted by a WEAC negotiator with interest arbitration experience, wanted the information in a comprehensive and up to date format that had not previously been provided. The District further requests that we add to Finding of Fact 19 that Holt, by e-mail to Trimbell dated September 5, 2008, again "notified Trimbell of the District's demand for the Association's Preliminary Final Offer." We decline to do so, because Holt's and Trimbell's e-mail exchanges of September 5 concerned NESPA's request for information and did not include a demand for a responsive PFO. The District also requests that the findings be amended to specify that the Association's offer was filed on September 9, 2008, but this fact is already clearly set forth in Finding of Fact 20. The District also requests that the findings include a statement that that NESPA's PFO, when submitted, was similar to NESPA's initial proposal to the District the previous spring. The record does not include NESPA's initial proposal, which would be necessary in order to find as a fact that it was "similar" to the PFO in substance and detail. Moreover, to the extent the District relies upon this information to support a regressive bargaining argument, the finding is unnecessary because the regressive bargaining claim was not asserted in a timely fashion. See footnote 8, below. Finally, the District would like to rely upon a finding of similarity in the initial and preliminary final offers in order to show that NESPA had no legitimate reason for its delay in submitting a PFO. Even if this finding were appropriate on this record, it does not play a role in our conclusion that NESPA's delay did not violate the law. As is apparent in the discussion, below, our conclusion that NESPA's delay was not in bad faith is based upon our view that the delay was not intended to delay the bargaining or to damage the District's interests, and not upon whether or not NESPA "needed" to delay the PFO.

[6] The District requests the addition of this finding because it relates to the District's argument that NESPA had intentionally delayed the process in order to be able to advance an argument before the interest arbitrator that the delay would exacerbate the onerous effect of selecting the District's final offer, in particular the health insurance contribution aspects of that offer. The Examiner rejected this District argument in his memorandum, and we affirm the Examiner on this issue. However, as the Examiner had not made a specific underlying factual finding on this point, it is appropriate to do so here.

[7] The Examiner's Finding of Fact 28 was an "ultimate" finding, that is, a mixed finding of fact and conclusion of law. We have reversed the Examiner on this issue as explained in the Memorandum that accompanies this Order.

[8] The District has challenged the Examiner's Findings of Fact 27, 31, and 32. Said Findings are really mixed conclusions of fact and law and the District's objection to them is in the nature of a legal argument that we have addressed in the Memorandum following this Order. The District has also requested that the Commission render

L. The Examiner's Conclusions of Law 1 through 3 are affirmed.

M. The Examiner's Conclusion of Law 4 is reversed and the following Conclusion of Law is made:

> 4. NESPA's failure to file a responsive preliminary final offer until September 8, 2008 did not constitute a refusal to bargain collectively with the municipal employer within the meaning of Sec. 111.70(3)(b)3, Stats., under the circumstances present in this case.

N. The Examiner's Conclusions of Law 5 through 7 are affirmed.

O. The Examiner's Conclusion of Law 8 is modified as italicized below and as modified is affirmed: [9]

> 8. NESPA's argument to the interest arbitrator that *the District's proposal regarding health insurance would result in a relatively harsh retroactive liability for Association bargaining unit members, reflecting, in part, the duration of the interest arbitration proceeding,* did not constitute a refusal to bargain collectively with the municipal employer within the meaning of Sec. 111.70(3)(b)3, Stats.

P. The Examiner's Conclusions of Law 9 through 11 are affirmed.

Q. The following Conclusion of Law 12 is made:

> 12. The totality of the circumstances does not establish that NESPA failed to bargain in good faith with the District in the negotiations culminating in interest arbitration of the terms of the 2008-2010 collective bargaining agreement. [10]

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a factual finding that NESPA's affiliate, the Wisconsin Education Association Council (WEAC) was lobbying for legislative changes that would improve its position in interest arbitration, in aid of the District's argument that NESPA engaged in regressive bargaining and intentionally delayed settling the contract in order to await expected benefits from the proposed legislative changes. As noted by the Examiner in footnote 1 of his decision, neither this claim nor the related regressive bargaining claim were advanced in the second amended complaint or offered as amendments to the pleadings at the outset of the hearing. Accordingly, we affirm the Examiner's conclusion that these claims are outside the scope of this case.

[9] The modification to Conclusion of Law 8 is intended to articulate more precisely how delay factored into the Association's arguments to the interest arbitrator.

[10] The District correctly points out that the Examiner concluded that most of the several alleged specific instances of bad faith bargaining did not violate the law in themselves, but the Examiner did not reach a conclusion about

R. The Examiner's Order is reversed and the following Order is made:

The complaint is dismissed in its entirety.

Given under our hands and seal at the City of Madison, Wisconsin, this 19th day of October, 2010.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/
Judith Neumann, Chair

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

Commissioner Terrance L. Craney did not participate

whether those instances and the other circumstances, as a totality, comprised bad faith bargaining. Conclusion of Law 12, above, remedies this omission.

NEENAH JOINT SCHOOL DISTRICT

MEMORANDUM ACCOMPANYING ORDER

The District's Claims and the Examiner's Decision

Before the Examiner, the District contended that NESPA's dilatory conduct during the negotiations process culminating in interest arbitration to settle the terms of the 2008-2010 collective bargaining agreement violated NESPA's duty to bargain in good faith with the District. The District alleged eight discrete instances of NESPA's alleged misconduct as unlawful in themselves and in the aggregate. Leaving aside the two allegations that were not properly advanced before the Examiner (see footnote 6, above), the allegations and Examiner's disposition are as follows:

(1) NESPA failed to comply with the statutory directive to file a responsive preliminary final offer (PFO) within 14 days after receiving the District's Petition for Interest Arbitration, which was not only a *per se* violation of the law but in this case was intentionally delayed in order to undermine the District's ability to prepare for the investigation of its petition. The Examiner held that NESPA inordinately delayed filing its PFO in violation of the law. NESPA has petitioned for review of that conclusion.

(2) NESPA deliberately "took the summer off" and refused to make itself available for investigation of the District's petition, as part of NESPA's attempt to prolong negotiations and gain the benefit of the "*status quo*" on health insurance. The Examiner dismissed this allegation and the District seeks review.

(3) NESPA's September 4, 2008 request for information was not in good faith but instead a tactic to delay the processing of the District's arbitration petition. The Examiner dismissed this allegation and the District seeks review.

(4) NESPA's September 4 request for information was accompanied by a "threat" to reschedule the September 15 investigation meeting. The Examiner dismissed this allegation and the District seeks review.

(5) NESPA's conduct during the exchange of final offers between September 15 and the close of the investigation, a period of some three months, was designed to forestall the arbitration and take advantage of the *status quo*. The Examiner dismissed this allegation and the District seeks review.

(6) NESPA attempted to capitalize on its own deliberate delay by arguing at the interest arbitration hearing that the delay would create an unfair financial burden on bargaining unit members if the arbitrator were to select the District's final offer. The Examiner dismissed this allegation and the District seeks review.

(7) Even if none of the discrete conduct set forth above violated NESPA's duty to bargain in good faith, the "totality of circumstances" demonstrates that NESPA engaged in dilatory tactics in order to take advantage of the *status quo*, in violation of its duty to bargain in good faith. The Examiner did not specifically address this allegation and we do so here.

We have affirmed the Examiner on issues (2) through (6) and we also rule against the District on the last, "totality of circumstances," claim. We reverse the Examiner and hold that NESPA did not violate the law, on the facts of this case, by delaying its submission of its responsive PFO. We will address the PFO issue last in the discussion below.

Discussion

Taking the Summer Off

The Examiner rejected the District's claim that NESPA "took the summer off" and deliberately refused to make itself available for a meeting during July and August. The Examiner pointed out that Commission investigator Gallagher had made an initial contact with the District [11] in early July and did not follow up until close to the end of July. At that point – late July – the record is clear that Trimbell was very responsive both to the investigator and to local NESPA officer Prosek. Although Trimbell could not meet on either of the two August dates that the District had offered Gallagher, Trimbell counterproposed a September 15 date that, by August 5, all parties had agreed upon (albeit reluctantly on the part of the District). As the Examiner noted, Gallagher acknowledged in an August 4 e-mail that the delay between early July and early August was due in part to her own "dropping the ball." Further, as the Examiner noted, while Holt asked Prosek about scheduling mediation, no one from or on behalf of the District attempted to contact Trimbell, whom they knew to be NESPA's representative. The Examiner further properly noted:

[11] It is not clear on this record whether, when, or how Gallagher attempted to contact Trimbell in early July about establishing mediation dates. Gallagher's e-mail to Macy, dated August 4, indicates that she had called Trimbell in early July and left her a message. However, Gallagher also indicates in that same e-mail that she had "dropped the ball." Prosek testified that when he contacted Trimbell in late July about meeting dates, Trimbell told Prosek that she had not heard from the District or Gallagher. The record shows that Trimbell was very responsive to Gallagher when efforts resumed in late July for meeting dates and Holt acknowledged that she generally found Trimbell to be responsive to communication.

> It does not appear … that, despite its inquiries to the local president, the District indicated any real urgency for a quick meeting, even to the Investigator, hence she did not pursue the matter more insistently with NESPA until August. Therefore, there would have been no reason for Trimbell to believe she needed to rearrange her schedule or find substitute representation.

Examiner's decision at 21. Accordingly, the Examiner concluded that the delay in scheduling a meeting over the summer was not entirely NESPA's fault nor did it constitute bad faith in violation of the law. We agree with the Examiner's conclusion and reasoning on this issue and affirm it without further discussion.

NESPA's September 4 Request for Information

The Examiner also dismissed the District's claim that NESPA's September 4 request for information was not made in good faith, but instead was designed to excuse NESPA's delay in filing its PFO and as a tactic to prolong the investigation. Before the Examiner, the District had also argued that NESPA made its September 4 request also at least partly in retaliation for the District's instant complaint of prohibited practice, which had been filed on September 3.

The Examiner found no evidence to support a retaliatory motive on Trimbell's part and the District has not advanced this argument in connection with its petition for review. Rather the District focuses here on its contention that the information requested on September 4 largely replicated information NESPA had already received from the District; therefore it must have been intended to serve a different purpose, namely to mask NESPA's delay in submitting a PFO and perhaps to compel a rescheduling of the September 15 mediation meeting.

The record does not support the District's claim that the information (wage and benefit information for all members of the bargaining unit) was entirely duplicative of information provided earlier. Indeed, the record merely indicates that some of the requested information had been provided earlier, in a different form and pertaining to a potentially different set of employees from the previous (rather than the current) school year. The record reflects that after NESPA, which had never before participated in an interest arbitration process, had received the District's petition for arbitration, it called upon the services of an experienced negotiations consultant. The consultant wanted updated information about the bargaining unit, based upon the new school year's unit composition, in order to prepare a professionally sound PFO and get up to speed for the upcoming investigation/mediation meeting. This strikes us, as it did the Examiner, as conventional and unremarkable, rather than as evidence of bad faith.

Accordingly, we affirm the Examiner's conclusion that the record does not support the District's view that NESPA's request for information on September 4 was intended to interfere with or delay the interest arbitration process.

The Alleged Threat to Cancel the September 15 Mediation

The District claims that, in conjunction with NESPA's September 4 request for information, NESPA threatened to cancel the scheduled September 15 investigation because giving the District time to respond to the request for information might delay NESPA's ability to produce a PFO until shortly before the meeting. In dismissing this claim, the Examiner properly quoted the exact communications between Trimbell and District officials as to the effect of the information request on the scheduled meeting. Trimbell's September 4 message to District business manager Hauffe stated: "As stated earlier, we have asked for the base salary information before and without the data it may be necessary to reschedule the mediation/arbitration on September 15th." When Holt responded the next day that she viewed Trimbell's message as a "threat" to further delay the process, Trimbell immediately replied, "… we have no intentions to cancel the scheduled mediation date. I only offered that as a suggestion should the District need more time upon receiving our preliminary final offer."

The Examiner properly interpreted Trimbell's prompt clarification, sent before the District had assembled and provided the requested information, as sufficient to dispel any implication of tactical delay that may have been spawned by the first communication. We affirm his conclusion that "there is not proof of bad faith on this basis by a clear and satisfactory preponderance of the evidence."

Delay in Exchanging Final Offers

As to the District's allegation that NESPA unduly and intentionally delayed the process by how it conducted itself during the exchange of final offers, the Examiner set forth the following appropriately fact-intensive analysis:

> The District's next contention is that NESPA unduly delayed the process of exchanging final offers after the investigation meeting, again in order to extend the length of the case. Here, the Investigator, Marshall Gratz, who had replaced Sharon Gallagher just prior to the investigation meeting, set a schedule for the initial exchange calling for the District to file its final offer on or before October 1 and NESPA to file its final offer on or before October 8. The District had sought a quicker exchange, but NESPA indicated it needed more time. Both parties filed their final offers on the specified dates. Thereafter, the District filed an amended final offer on October 17, which it clarified on October 28, after an inquiry by NESPA. NESPA responded on November 11. The District filed another amended offer on November 21 which was substantially the same as its October 28 offer, to which NESPA's bargaining consultant, Dennis Eisenberg, indicated NESPA would have a response some time after Thanksgiving. On December 10, Trimbell notified Gratz that NESPA would be filing another amended offer, but that it had been delayed by a funeral in her family. Ultimately, NESPA filed its amended offer on December 20, whereupon the investigation was closed.

> The District's frustration with the length of this process is palpable, and understandable, given that it was already concerned about the length of time it took to schedule the investigation. Nevertheless, here again there is not sufficient evidence of a pattern of calculated delay, nor inordinate delay, such that I can make a finding of bad faith. The exchanges appear to have progressed at a reasonable pace up to the filing of the District's offer on November 21. Thereafter, NESPA did not respond until December 20. Admittedly, a month is a fairly long time for response, especially since the District's November 21 offer did not significantly differ from its previous offer. The District's offer was sent just before the Thanksgiving break, however, making it difficult for the NESPA team to meet and confer immediately. Then, after the break the death in Trimbell's family further hampered NESPA's ability to meet. Given these intervening events, the evidence does not support a finding that NESPA deliberately delayed the exchange process, nor that the delay in exchanging offers was so inordinate that a finding of bad faith is warranted.

Examiner's Decision at 22.

To the foregoing analysis, we add that the record explains in some detail the difficulties NESPA encountered in developing a final offer that would satisfy all of the subgroups within NESPA's diverse wall-to-wall bargaining unit, which included some job groups that were primarily full time and some that were primarily part time. The record further demonstrates that, since NESPA was new to the interest arbitration process and since both final offers included concessions on health insurance, NESPA's advisers from WEAC spent unusual amounts of time forging a consensus on a "winnable" final offer. While in some circumstances we might look askance upon delays similar to those here, this record supplies a persuasive explanation for what transpired. We therefore affirm the Examiner's dismissal of this claim.

NESPA's Argument to the Interest Arbitrator

The District next contends that NESPA unlawfully attempted to use its own delay to persuade the interest arbitrator to accept NESPA's offer. That is, NESPA argued that accepting its own proposed premium contribution rate, which, while greater than under the previous contract, was less than the District was proposing, would have a less drastic retroactive effect upon unit employees and therefore should be selected.

As the Examiner correctly commented, this argument presupposes a deliberate tactical delay by NESPA prior to the interest arbitration hearing in order to render its offer less harsh and perforce more attractive. As determined above, however, the record does not support the District's view about NESPA's tactical delays. Instead, the delays are explained by other attributes of this particular bargaining relationship and bargaining process. Accordingly, we affirm the Examiner's dismissal of this claim, as well.

Totality of the Circumstances

In addition to alleging the foregoing discrete violations, the District also argues that NESPA's conduct – viewed as a totality - demonstrates a lack of good faith. The District has summarized this argument as follows:

> Here the circumstances converge to compel the conclusion that the Association's dilatory conduct was not consistent with good faith. The Association started by delaying the first bargaining session. It then regressed in bargaining, including preparation of a letter to its membership ending bargaining, before an established bargaining session was even held by the parties.
>
> Upon the filing of a petition for interest arbitration by the District, the Association decided it had no obligation to bargain during the summer and refused to establish a date for investigation.
>
> The Association further ignored its statutory duty to file a preliminary final offer for two and one-half months. It attempted to further delay the process further by making an extensive request for information, most of which it already possessed, suggesting the District could postpone the investigation further if it was unable to provide the information to the Association within one (1) day.
>
> Three business days prior to the investigation session, the Association finally filed a preliminary final offer which regressed back to its initial proposal in bargaining. After the parties were finally able to meet for the investigation session, the Association again delayed the process through the exchange of final offers.
>
> The full effect of the Association's dilatory tactics became abundantly clear at the parties' interest arbitration hearing, in which the Association argued, in part, that its final offer was preferable due to the delay in the investigative process, caused by its own conduct. Furthermore, the delay altered the statutory criteria under which the offers were considered a mater concurrently lobbied for by the Association.
>
> The totality of the circumstances plainly shows that the Association treated this negotiation as a 'poker game,' seeking to bleed the District as much as possible with no regard for its statutory duty to bargain in good faith, and at considerable cost to the taxpayers. …

District's March 4, 2010 Brief at pages 15-16.

To prevail on this contention, the District would have to establish that the totality of the conduct of the Union amounted to subjective bad faith. See EDGERTON FIRE PROTECTION DISTRICT, DEC. NO. 30686-B (WERC, 2/05), at 25; CITY OF GREEN BAY, DEC. NO. 18731-B (WERC, 6/83), at 11. The statute itself defines "collective bargaining" to include the duty "to meet and confer at reasonable times ... with the intention of reaching an agreement." Sec. 111.70(1)(a), Stats. It becomes a question of close factual inquiry whether a party has been willing to meet at "reasonable times" and with the requisite good intentions. As we noted in EDGERTON, SUPRA, "Bad faith bargaining' is a fact-intensive, highly circumstantial claim that is relatively difficult to establish. Typically the evidence reveals a prolonged pattern of ... proposals with little or no substantive response and/or a series of unsuccessful attempts to schedule a meeting." ID. at 26.

A review of the case law shows that the Commission approaches claims of bad faith bargaining with careful factual analysis. In EDGERTON, despite taking "a dim view" of some of the respondent employer's conduct in that case – such as taking six weeks to meet for the first time after the union was elected and being unprepared at that session to present an offer or to respond to the Union's issues – the Commission ultimately concluded that, "the [respondent] clearly was not a model of proactive bargaining effort, [but] there is scant evidence that it deliberately evaded ... efforts to meet and negotiate." ID. at 26. Similarly, the examiner in MARQUETTE COUNTY, DEC. NO. 31257-A (Gratz, 10/05), AFF'D BY OPER. OF LAW, DEC. NO. 31257-B (WERC, 11/05), rejected the employer's hypothesis that the union had engaged in various delays, including being unavailable for an interest arbitration hearing for several weeks beyond the dates on which the employer was available, as a tactic to take advantage of the *status quo* on health insurance. The examiner in that case carefully considered the union's explanations for its delays and determined that they were sufficiently logical to defeat the employer's portrayal of a union purposely seeking delays. In contrast, in CITY OF JANESVILLE, DEC. NO. 22981-A (Honeyman, 3/86), AFF'D BY OPER. OF LAW, DEC. NO. 22981-B (WERC, 4/86), the respondent's conduct was not able to withstand the intense factual scrutiny:

> [T]he City's overall conduct does imply an unwillingness to apply itself the business of negotiation a labor agreement ... The City's unbroken refusal to comment on Union proposals or to explain its own, combined with the extreme slowness of its preparation of said proposals, threatens to delay actual bargaining indefinitely; and the City's intent is confirmed by its admitted refusal, upon the Union's request, to furnish the proposals to the Union by mail or even to supply an estimated date by which its proposals would be complete. ... The overall impression created is one of an employer which insists on producing its initial proposals at a pace which can only be described as glacial, together with a total lack of explanation of its reasons either for the substance or the manner of its presentation.

ID. at 6. See also, JEROME FILBRANDT PLUMBING & HEATING, DEC. NO. 27045-C (WERC, 9/92), holding that the employer bargained in bad faith by making itself unavailable for negotiations at regular intervals such that only six nonproductive meetings occurred during the one year after the union was certified, making the union vulnerable to decertification.

Here, the District theorizes that NESPA was motivated to delay the process in order to take advantage of the *status quo* consonant with GREEN COUNTY, DEC. NO. 20308-B (WERC, 11/84). GREEN COUNTY requires an employer to refrain from changing employees' wages, hours, or working conditions – including health insurance – until completion of bargaining up to and through interest arbitration. In OZAUKEE COUNTY, DEC. NO. 30551-B (WERC, 2/04), we commented on the potential for tactical abuse of the GREEN COUNTY rule:

> In deciding GREEN COUNTY, the Commission recognized that its decision could offer a tactical advantage to a party willing to delay the interest arbitration process in order to prolong a *status quo* that the party perceived as beneficial. … The Commission addressed the potential for tactical delays by suggesting that evidence of 'unlawful abusive delay of the statutory process' might justify a unilateral change prior to the conclusion of the process.

ID. at 10.

In this case, the District was seeking a substantial change in health insurance, most prominently an increase in employee contribution toward premiums. During negotiations and all the way through the interest arbitration process, GREEN COUNTY requires the District to maintain the pre-existing insurance benefits, including the pre-existing (and lower) rates of employee premium contributions. For this reason, the District contends that NESPA had something to gain by delaying the new contract as long as possible and therefore engaged in deliberately dilatory tactics.

The evidence, however, does not substantiate the District's suspicions regarding NESPA's motives. First, because the outcome of the interest arbitration award would have included retroactive adjustments, NESPA members ultimately would not gain financially from delay nor would delay increase the District's exposure. As the examiner noted in responding to a similar argument in MARQUETTE COUNTY, SUPRA:

> [I]f the County prevailed in the arbitration, the contribution increases proposed by the County for those employees would take effect retroactively as a set off against the County's payments to those employees of retroactive wages increases. In those circumstances, the Union and any affected employees do not appear to have very much to gain from a delay in the time when the higher contribution levels for new employees proposed by the County would be implemented if the County offer were selected.

Dec. No. 31257-A at 28.

The District also notes, as discussed earlier, that a relatively large retroactive effect might subjectively influence the interest arbitrator against the District's proposal and, here, NESPA advanced an argument to that effect at the arbitration hearing. However, as noted earlier in responding to the District's discrete allegation to that effect, that argument

presupposes that the delays are actually attributable to NESPA's tactical maneuvering rather than to good faith explanations. Here the record supplies ample good faith explanations for the delays. As the Examiner noted, and unlike the situation in JANESVILLE, SUPRA, NESPA responded with reasonable diligence to the investigator's scheduling efforts, which did not begin in earnest until late July. It is evident that genuine scheduling conflicts, some stemming from the size of NESPA's negotiating team, made scheduling difficult in August, that the District did not attempt to communicate directly with Trimbell to schedule a meeting over the summer months, and that a mistaken e-mail address resulted in Macy's August 28 e-mail not reaching Trimbell until September 4. Further, as discussed above, NESPA's request for information in early September was genuinely aimed at preparing for mediation. NESPA and its professional representatives had genuine difficulties in developing a "winnable" final offer, owing to the complexities of the unit, the unit's inexperience with the interest arbitration process, and the concessionary nature of the negotiations. As discussed below, and contrary to the Examiner, we do not find unlawful or abusive delay in NESPA's submission of its PFO. In short, while the process took more time than ideal and was frustrating for the District, the record simply does not show that NESPA's conduct in the totality of these circumstances lacked good faith.

Accordingly, largely for the same reasons that the various discrete allegations were rejected, the "totality of circumstances" also fails to reflect that NESPA bargained in bad faith over the terms of the 2008-2010 collective bargaining agreement.

NESPA's Delay in Submitting a Preliminary Final Offer

We turn then to the question of whether NESPA violated its duty to bargain in good faith by failing to submit a timely PFO. The District has advanced two theories: (1) that the 14-day time period set forth in Sec. 111.70(4)(cm)6, Stats., for filing a responsive PFO is mandatory and its violation is a *per se* prohibited practice in violation of Sec. 111.70(3)(b)3, Stats.; (2) even if the 14 days is not applied as the District urges, NESPA's failure to file its PFO for 81 days here constitutes "inordinate delay" in violation of NESPA's duty to bargain in good faith.

A. Whether the time limits are mandatory.

The Examiner viewed the 14-day time period in (4)(cm)6 as mandatory, but rejected the argument that this requirement should be enforced as a *per se* prohibited practice. However, the Examiner opined that "inordinately dilatory conduct may ultimately constitute bad faith bargaining." Examiner's Decision at 21. Here, the Examiner found that "the record is clear that the District did raise the issue repeatedly," that "there is no apparent reason that [Trimbell] should not have known, nor is there evidence that she did not know, that the District was anxious to receive NESPA's preliminary final offer," and "there is no legitimate reason that NESPA could not have supplied a preliminary final offer in less than two and one-half months." ID. Based on these findings, the Examiner concluded that "NESPA ignored the District's requests for a preliminary final offer for two and one-half months, and only

ultimately provided its offer on the eve of the investigation, [which] seems to me to come within the definition of inordinate delay, and I so find." ID.

We agree with the Examiner that failure to comply with the 14-day language in (4)(cm)6 does not *per se* violate Sec. 111.70(3)(b)3, Stats. We also agree with the Examiner that in some circumstances a party's dilatory conduct regarding its PFO could violate the law in itself or as part of a pattern of circumstances reflecting bad faith. We do not agree with the Examiner that NESPA's conduct regarding its responsive PFO in this case violated the law, primarily because we view the evidence quite differently than did the Examiner, as previously indicated in footnote 3, above.

Turning first to the question of whether the PFO requirement is mandatory and/or enforceable as a *per se* prohibited practice, we begin by placing the PFO provisions of the statute into historical context. Section 111.70(4)(cm) contains the applicable dispute resolution procedures. The portion pertinent to PFOs reads as follows:

> [111.70(4)(cm)6.a., Stats.] ... At the time the petition [for interest arbitration] is filed, the petitioning party shall submit in writing to the other party and the commission its preliminary final offer containing its latest proposals on all issues in dispute. Within 14 calendar days after the date of that submission, the other party shall submit in writing its preliminary final offer on all disputed issues to the petitioning party and the commission.

The most pertinent language governing the commission's role in the interest arbitration process is set forth in the immediately following subsection:

> [111.70(4)(cm)6. am., Stats.] Upon receipt of a petition to initiate arbitration, the commission shall make an investigation, with or without a formal hearing, to determine whether arbitration should be commenced. If in determining whether an impasse exists the commission finds that the procedures set forth in this paragraph have not been complied with and such compliance would tend to result in a settlement, it may order such compliance before ordering arbitration. ... Prior to the close of the investigation each party shall submit in writing to the commission its single final offer containing its final proposals on all issues in dispute that are subject to interest arbitration under this subdivision. ...

The procedures set forth in subsection (4)(cm) are a form of what is known as "last best offer" arbitration, i.e., the arbitrator must select the entire contract proposal of one party or the other, and may not select portions from each (so-called "issue by issue" arbitration), or draft his/her own version of the best contract language (so-called "open" arbitration). The offers each party submits to the arbitrator cannot be modified without mutual consent. In enacting this high-stakes form of dispute resolution, the Legislature wanted to ensure that those disputes that reached arbitration were as narrow as possible. CITY OF MANITOWOC V. MANITOWOC POLICE DEPT., 70 WIS. 2D 1006, 1013 (1975). Toward this end, as set forth in

subparagraph (am.), above, once a petition for arbitration is filed, the Commission conducts an "investigation," designed to ensure that the parties are truly at an impasse, that no further compromises are possible, and that arbitration of what remains in dispute is truly necessary.

As a practical matter, "investigating" whether the parties have any more room for compromise is a process that is virtually indistinguishable from ordinary mediation. The Commission agent meets with the parties on one or more occasions and attempts to resolve or narrow the items in dispute. Before closing the investigation and sending the dispute on to arbitration, the Commission agent must obtain from each party a "single final offer," comprising each party's position on all items in dispute, as well as a written stipulation of items that have been agreed-upon. Sec. 111.70(4)(cm)4 am., Stats. In practice, since neither party is permitted to amend its "single ultimate final offer" once that has been submitted to the arbitrator, producing the "single ultimate final offer" is usually a process encompassing multiple exchanges of "final" offers, each further narrowing or clarifying the issues until such time as the investigator determines that no further progress is possible. This practice is reflected in Commission rule WIS. ADM. CODE, ERC 32.09(1):

> … The commission or investigator shall not close the investigation until the commission or investigator is satisfied that neither party, having knowledge of the content of the final offer of the other party, would amend any proposal contained in its final offer …

Accordingly, even before the statute contained any formal requirement, the exchange process in operation had generally included a series of "preliminary" or "tentative" final offers, whether or not denominated as such.

As originally enacted in c. 178 of the Laws of 1977, the process did not include any requirement for exchanging PFOs. At that time, the statutory procedures were called "mediation-arbitration" or "med-arb." While these procedures, like the current procedures, required the Commission to "investigate" a petition for arbitration, the original statute differed significantly from the current one by mandating the interest arbitrator to conduct a period of mediation, after the Commission's investigation/mediation was completed and before the case went to hearing. If the dispute remained unresolved after that period of mediation, the arbitrator was required to notify the Commission of an intention to proceed to hearing and award.

In 1985, the Legislature amended the statutory procedures by eliminating the requirement that the arbitrator conduct a period of mediation, retooling the process as "interest arbitration" ("int-arb"), and introducing the exchange of PFOs that is contained in the current, above-quoted, statutory language. 1985 WIS. ACT 318. The question here is what role the Legislature intended the PFO exchange to play in the process, which in turn will indicate whether the time limits are to be strictly construed.

We do not agree with the Examiner and the District that the Legislature must have intended the timing requirement to be mandatory simply because the statute uses the term "shall." To the contrary, it is well settled that, even though the word "shall" is presumed mandatory when it appears in a statute, it should be construed as directory if that better carries out the Legislature's intent. KAROW V. MILWAUKEE COUNTY CIVIL SERVICE COMMISSION, 82 WIS.2D 565, 571 (SUP. CT. 1978); STATE EX REL. MARBERRY V. MACHT, 254 WIS.2D 690,701-03 (APP. CT. 2002); and cases cited therein. The Wisconsin Supreme Court has stated that, "'a statute prescribing the time within which public officers are required to perform an official act is merely directory, unless it denies the exercise of power after such time, or the nature of the act, or the statutory language, shows that the time was intended to be a limitation.'" KAROW, SUPRA, citing STATE V. INDUSTRIAL COMM'N, 233 WIS. 461, 466 (1940). For example, the court held long ago that the 60-day time limitation for issuance of Commission decisions, set forth in Sec. 11.07(4), Stats., is directory rather than mandatory despite the use of the term "shall." MUSKEGO-NORWAY CONSOL. SCHOOLS V. TOWN OF MUSKEGO, 32 WIS.2D 478 (1967).

While the time limits at issue here apply to the parties' submissions, rather than to the Commission or other "public officer," the time limits are closely entwined with the commission's responsibilities in managing/facilitating the int-arb process. Moreover, the applicable standards for determining whether time limits are mandatory or directory apply to any statutory time limits, as summarized by the court of appeals:

> In determining whether a statutory time limit is mandatory or directory, we consider several factors: the existence of penalties for failure to comply with the limitation, the statute's nature, the legislative objective for the statute and the potential consequences to the parties, such as injuries or wrongs.

STATE EX REL. MARBERRY, SUPRA, at 701.

As the court further explained in IN RE COMMITMENT OF ELIZABETH M.P., 267 WIS.2D 739, 755 (APP. CT. 2003), an "[i]njury occurs where an interest is violated," usually a liberty interest, such as involuntary commitment, as in ELIZABETH and MARBERRY, or a property interest such as forfeiture of a vehicle, STATE V. ROSEN, 72 WIS.2D 200 (1976), or time off work without pay pending a hearing, as in KAROW, SUPRA.

Applying these principles to the instant case yields a mixed result, but on balance favors construing the time limits as non-mandatory. On the one hand, it is likely that at least one purpose of the 1985 PFO amendment was to create more efficiency by infusing some structure into the initial stages of the process. Time limits are certainly consistent with a legislative sensitivity to timely resolution of municipal labor contracts, See Sec. 111.70(6), Stats. (If voluntary procedures fail, "the parties should have available a fair, speedy, effective and, above all, peaceful procedure for settlement...." (emphasis added)).

On the other hand, several other considerations undermine the wisdom of interpreting these requirements rigidly. First, the Legislature included no consequence or penalty for failure to comply with the PFO requirements, which, as stated in MARBERRY, SUPRA, is one traditional indication that the limits were not intended to be mandatory. Second, the Examiner correctly noted that compliance with the PFO requirement is not referenced in either the definition of "collective bargaining" in Sec. 111.70(1)(a), Stats., or in the refusal to bargain prohibited practice description in Sec. 111.70(3)(a)4 or (3)(b)3, Stats. Thus, like the Examiner, we see no legislative authorization for the Commission to enforce the requirement as a *per se* prohibited practice. CF. MILWAUKEE PUBLIC SCHOOLS (MURILLO), DEC. NO. 30980-C (WERC, 3/09) (holding that denial of the right to representation referenced in Sec. 111.70(4)(d)1 was not enforceable as a prohibited practice under Sec. 111.70(3)(a)1, in part because it was not included in the description of rights protected under that prohibited practice). Third, while either or both parties in any given bargaining situation may have or feel a special need for speed, that is not the type of liberty or property interest to which the courts have shown particular sensitivity in construing a statutory time limit as mandatory. Compare MARBERRY, ELIZABETH, ROSEN, and KAROW, SUPRA. While time is important for many reasons in municipal collective bargaining, we cannot conclude that a statutorily-cognizable "injury" will inherently result if a PFO is delayed beyond the time limits set forth in the statute.

Most significantly to us, a rigid construction of the PFO requirements would clash with the fundamental purpose and design of the interest arbitration procedures. Efficiency may have been at least one goal of the 1985 amendments, but the overriding goal of the interest arbitration procedures themselves, as stated in Sec. 111.70(6), Stats. is peaceful and voluntary resolution of labor disputes. Section (4)(cm) was enacted in response to municipal sector strikes during preceding years. When enacted, the interest arbitration procedures were accompanied by explicit injunction authority against and severe penalties for illegal strikes. See Sec. 111.70(7m), Stats. The statutory procedures and MERA as a whole emphasize the primacy of voluntary dispute resolution through negotiation and mediation. The vast majority of interest arbitration petitions result in voluntary settlements after Commission mediation. See INFORMATIONAL PAPER NO. 96, DISPUTE RESOLUTION PROCEDURES FOR MUNICIPAL EMPLOYEES (Legislative Fiscal Bureau, January, 2009), at 25-26. Although the process could culminate in litigation, where strict adherence to time limits tends to be more crucial, the PFO exchange occurs at the outset, well prior to the litigation phase of the proceedings. The exchange inaugurates a period of mediation and therefore, in our view, should be implemented in a manner that facilitates mediation. Mediation, unlike litigation, is ill-suited to rigid procedural devices whose enforcement may simply add impediments and side quarrels to the parties' existing disputes.

The practices that have developed around the PFO exchange bear out the practical wisdom of interpreting the statutory requirement flexibly. As this record reflects and as the Examiner noted, the parties and the Commission have generally taken a casual attitude toward the PFO, both as to content and as to timeliness. Although the Commission's regulations require the petitioner's PFO to contain the petitioner's "latest proposals on all issues in

dispute," ERC 32.05 (3)(k), WIS. ADM. CODE, it is common for both the initial and responsive PFOs to consist of the latest overall package they have proposed, rather than to reflect the most recent movement on every issue. Indeed, in the instant case, one of the District's objections was that NESPA's PFO, once submitted, was virtually identical to its initial proposal the previous spring. In addition, as noted above, the investigation/mediation process generally includes exchanging a series of preliminary or tentative final offers before a "single, ultimate final offer" from each party is certified for arbitration (as the matter is settled). Thus, PFOs generally only set the stage for the Commission's mediation effort, rather than playing a significant role in the unlikely event the matter does not settle voluntarily.

Both the statute and the Commission's rules recognize the importance of flexibility by placing responsibility in the assigned Commission/investigator to manage the process as suits each situation. We agree with NESPA that Sec. 111.70(4)(cm)6.am., Stats., indicates a legislative intention to leave compliance issues regarding the interest arbitration process in the hands of the commission and its agents:

> … If in determining whether an impasse exists the commission finds that the procedures set forth in this paragraph [i.e., (4)(cm)] have not been complied with and such compliance would tend to result in a settlement, it may order such compliance before ordering arbitration. …"

The Commission's rules similarly place primary control over the process in the hands of the assigned investigator. See ERC 32.09(2), WIS. ADM. CODE. In our view, the Commission's responsibility for overseeing the interest arbitration process, including its central goal of limiting the disputes that must be decided in arbitration, is best served by interpreting the statutory PFO requirements in a flexible and directory manner.

For the foregoing reasons, we conclude that it would not serve the basic purpose of MERA in general or section (4)(cm) in particular to hold that the PFO time limits are mandatory or that a deviation in and of itself violates the law.

B. Whether NESPA's Delay Constitutes Bad Faith Bargaining

The District also argues, and the Examiner agreed, that -- even if not a *per se* violation --NESPA's "inordinate delay" in this case in submitting its PFO was sufficient to constitute bad faith bargaining in violation of Sec. 111.70(3)(b)3, Stats. We agree that it is theoretically possible for a party to submit a PFO in a manner that is so indicative of bad faith or so intentionally in derogation of the other party's needs as to violate the duty to bargain in good faith. However, contrary to the Examiner's view, the record falls short in this case of showing that NESPA's conduct regarding its PFO, albeit well outside the statutory time limits, was in bad faith or significantly impeded the District's ability to bargain.

As NESPA points out, the Examiner himself was inconsistent in his treatment of the PFO issue. On the one hand, he stated that "the failure to file a preliminary final offer in a timely fashion, in and of itself, did not extend the length of the case …" (Examiner's Decision at 23). He further concluded, when discussing the District's claim that NESPA had been unlawfully dilatory in scheduling the mediation meetings, that the District bore some responsibility for failing to communicate directly with NESPA's known bargaining representative Trimbell, and that the District did not convey "any real urgency for a quick meeting." Accordingly, he saw no bad faith in the meeting delays. In contrast, as to the PFO, which, if anything, figured less prominently in the District's communications than the desire for meeting dates, the Examiner did not view any of these factors to have a mitigating effect on whether NESPA's conduct was unlawful.

More important to us, however, is our conclusion that the record does not support the Examiner's factual conclusion that "NESPA ignored the District's request for a preliminary final offer for two and one-half months … ." On the contrary, as set forth in detail in footnote 3, above, little evidence indicates that NESPA should have known, prior to early September, shortly before the scheduled investigation meeting, that the District had a special interest in receiving the PFO at any particular date. The record further amply supports NESPA's contention that the delay in formulating the PFO related to NESPA's good faith need to work with experienced WEAC negotiators, since NESPA itself had never previously participated in interest arbitration.

Most important, in our view, is the fact that the District did not enlist the assistance of the Commission investigator in aid of its asserted need for the PFO prior to early September, nor did NESPA disregard any requests or requirements of the Commission or its investigators. While, in late July and early August, the District appropriately communicated with the Commission's investigator regarding its desire for an August mediation meeting, those communications do not appear to have included demands or requests for NESPA's PFO. Not until August 28, in an e-mail that was unintentionally misdirected and not received by Trimbell until September 4, did the District assert any urgency regarding the PFO. On September 8, a newly appointed Commission investigator replaced Gallagher, who had retired, and directed NESPA to provide its PFO by September 9, and NESPA did so.

As articulated above, both the statute and the Commission's regulations place primary responsibility on the investigator to manage the investigation process and to identify and meet the parties' needs, whether exchanging proposals or setting meeting dates. The statutory process, especially its focus on obtaining voluntary mediated settlements, is best served by channeling such requests through the Commission investigator, who is in the best position to assess and manage the situation in a way that will foster settlement. Thus, it would be difficult to conclude that a party is acting in dilatory bad faith as to particular elements of the interest arbitration process absent some evidence that the aggrieved party has resorted to the Commission for assistance and/or that the offending party has disregarded the Commission's or investigator's attempts to move the process forward.

We also note the District's argument that its ability to prepare for the mediation on September 15 was harmed by not receiving NESPA's PFO until September 9. We do not doubt that the District may have found it useful to have NESPA's PFO earlier, perhaps, as requested, by the September 4 Board meeting, but the District has not borne its burden of demonstrating substantial or significant harm from the timing of the PFO. As the District itself has complained, and as is frequently the case with PFOs, NESPA's PFO was not particularly enlightening as to what positions NESPA might actually take in the mediation or in its eventual final offer. The District has not demonstrated that receiving the PFO on September 9 prevented the District from communicating with its Board or formulating proposals and responses during the September 15 mediation. We note that, even if actual significant harm had occurred, it would be difficult to find that NESPA had bargained in bad faith simply by causing harm, absent an intention or strategy to do so, which is absent here. Here, however, there has been no showing of significant harm.

Accordingly, we conclude that NESPA's delay in this case was not in violation of its duty to bargain in good faith.

CONCLUSION

For the reasons set forth above, the District's complaint is dismissed in all respects.

Dated at Madison, Wisconsin, this 19th day of October 2010.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/
Judith Neumann, Chair

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

Commissioner Terrance L. Craney did not participate

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