STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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**INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 965,** Complainant,

vs.

**PUBLIC UTILITY COMMISSION OF THE CITY OF RICHLAND CENTER,** Respondent.

Case 71
No. 70666
MP-4655

# Decision No. 33281-A

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**Appearances:**

**Mike Pyne,** Assistant Business Manager/Organizer, 701 Watson Avenue, Madison, Wisconsin, appeared on behalf of the Complainant.

**Steven Zach,** Attorney at Law, Boardman Law Firm LLP, 1 South Pinckney Street, Madison, Wisconsin, appeared on behalf of the Respondent.

## FINDINGS OF FACT, CONCLUSONS OF LAW, AND ORDER

International Brotherhood of Electrical Workers, Local 965 filed a complaint with the Wisconsin Employment Relations Commission, herein "Commission," on March 14, 2011, alleging that the Public Utility Commission of the City of Richland Center, herein referred to as "Respondent," committed prohibited practices within the meaning of Sec. 111.70(3)(a)4 of the Municipal Employment Relations Act, herein "MERA," by refusing to meet and confer with Complainant at reasonable times and reasonable places for the purposes of collective bargaining, and the Commission having on April 18, 2010, appointed Stanley H. Michelstetter II, a member of its staff, as Examiner, and the Examiner having held a hearing in Richland Center on May 4, 2011, and the parties having each filed post-hearing briefs the last of which was filed June 3, 2011. Having considered the evidence and arguments of the parties, the Examiner hereby makes and issues the following Findings of Fact, Conclusions of Law and Order.[1]

[1] The parties effectively corrected the identity of Complainant, Respondent, and the bargaining units in dispute during the course of the hearing. The Examiner has made the appropriate changes.

## FINDINGS OF FACT

1. International Brotherhood of Electrical Workers, Local 965, herein "Complainant," is a labor organization. It is the representative of two collective bargaining units, a craft unit and a non-craft unit, of employees of the Public Utility Commission of the City of Richland Center. The non-craft unit consists of two clerical employees. The craft unit consists of about four employees in the lineman classification.

2. The Public Utility Commission of the City of Richland Center, herein "Respondent," is an independent commission of the City of Richland Center. It employs various municipal employees and among its employees are the members of the collective bargaining units represented by the Complainant. Respondent operates a public electric utility in Richland Center, Wisconsin.

3. The City of Richland Center is a municipal employer, herein "City." District Council 40, American Federation of Labor, AFL-CIO, is a labor organization, herein "AFSCME." AFSCME is the collective bargaining representative of three bargaining units of employees of the City: 1 various employees of the Department of Public Works, 2 various City clerical employees, and 3 various employees employed in the City library. The Wisconsin Professional Police Association, herein "WPPA" is a labor organization. WPPA is the collective bargaining representative of various sworn law enforcement officers in the City's Police Department.

4. Respondent's electric utility function is partially funded by utility charges to its customers.

5. The Complainant and Respondent have been party to successive collective bargaining agreements, the last of which was for a term of January 1, 2008 to December 31, 2010. Article V, Section 3 thereof provides in relevant part:

> . . . within sixty (60) days prior to December 31, 2010 the Union may request discussion of desired changes herein by written notice to the Public Utility Commission . . . .

6. On August 10, 2010, Complainant served Respondent with a notice seeking to open the parties' collective bargaining agreement for changes.

7. The parties met and exchanged initial proposals on September 14, 2010, for an agreement with both bargaining units. Attorney Steven Zach acted as chief spokesperson for Respondent at all material times. City of Richland Center Mayor Larry Fowler and members of the City of Richland Center's Personnel and Insurance Committee were part of Respondent's bargaining team. Complainant's Assistant Business Manager Michael Pyne represented the clerical bargaining unit. Another of Complainant's Assistant Business Managers, Kemp Grutt represented the craft bargaining unit. The parties exchanged initial proposals. Complainant sought a three year agreement with wage increases of approximately three per cent in each year

of the agreement. Respondent proposed to extend the existing agreement for one year with no wage increase or other modifications. There was an angry exchange directed by Complainant's representatives at Respondent's representatives during that session. The parties have not had a face-to-face collective bargaining meeting at any time thereafter.

8. Zach requested at the end of the September 14, 2010, bargaining session specified in Finding of Fact 6 that Complainant afford Respondent an opportunity to meet with AFSCME and WPPA in order to exchange initial collective bargaining proposals before Respondent met with Complainant in another face-to-face collective bargaining session. Complainant had no further communication with Respondent until November 23, 2010. AFSCME has been unavailable to meet with Respondent at all times material to dispute. Respondent reasonably believed that Complainant had agreed to delay further face-to-face collective bargaining sessions until November 23, 2010. Respondent did not refuse to meet with Complainant for purposes of collective bargaining in the period September 14, 2010, to November 23, 2010.

9. Complainant communicated with Zach by e-mail on November 23, 2010, requesting if the parties could find acceptable dates for a face-to-face collective bargaining session in December, 2010. Neither Zach, nor anyone on behalf of Respondent responded to the e-mail.

10. Pyne e-mailed Zach on January 19, 2011, with a list of available dates for a face-to-face collective bargaining sessions during the period February 7 to February 25, 2011. Zach responded on January 21, 2011, that he would inquire of Respondent's other representatives as to which of the pro-offered dates might be available for a face-to-face collective bargaining session.

11. The next communication between the parties occurred when Pyne communicated with Zach on January 26, 2011, to discuss why no dates had been forthcoming from Respondent. Zach responded by e-mail and indicated that the press of other business had delayed his response. Zach responded to Pyne by e-mail on January 28, 2010, that he was still checking with Respondent as to the dates offered by Pyne in February and stated in addition thereto:

> With respect to RC, I still do not have a date for an initial meeting with the AFSCME and their units. It may be worthwhile meeting with the linemen, but I am reluctant to meet with the utility clericals without the city clericals having had an initial session. Thoughts?

12. The next communication occurred between the parties when Pyne e-mailed Zach on February 8, 2011, and stated:

> I have not received any dates from you on returning to negotiations at the Richland Utility. Recently, you did share with us that you wanted to meet with the AFSCME group first before returning to the table with our two 965 groups and I know that you stated that you prefer to meet with the Craft group first. But, the last time we met in Richland Center was September 14, 2010 and this

> coming Monday will be February 14, 2011. So it will be 5 months without a single meeting on two 965 contracts that expired almost two months ago.
>
> I would like to see if we could get a date from you for both groups before next Monday expires. We are getting concerned calls from our members there due to the fact that we are just sitting idle. Could you see if there is some way we could get a date from you and the City to start moving again. We would like to see this accomplished like we said by next Monday or we may have to utilize an alternative method to get the parties back to the negotiating table. Thanks again for your cooperation

Zach responded thereto by e-mail dated February 9, 2011, stating that he was checking with Respondent's other representatives as to the dates the parties could meet for face-to-face collective bargaining negotiations. Respondent did not offer any potential dates for face-to-face collective bargaining with Respondent during the period following January 19, 2010.

13. On February 11, 2011 Governor Walker announced his proposal to change the collective public sector collective bargaining process (herein "Act 10" or "Budget Repair Bill").

14. On February 17, 2011, Respondent notified Complainant that it withdrew its initial proposal specified in Finding of Fact 7, above, for each bargaining unit.

15. On February 18, 2011, Gutt sent Zach an e-mail in response to that specified in Finding of Fact 14 which e-mail provided in relevant part:

> We are in receipt of your email (sic) concerning your decision to remove your previous offer of successor agreements however we expect to meet in order to negotiate toward a Successor (sic) agreement and will not negotiate through e-mail. We have and we continue to demand that you meet with us to negotiate a successor agreement for the agreements at . . . Richland Center Utilities.
>
> . . . . By Monday, February 21, 2011, please provide us with your available dates . . . within the next 2 weeks . . . .

Complainant continued to demand a face-to-face collective bargaining meeting at all relevant times thereafter.

16. Later on February 18, 2011, Zach responded by e-mail to Gutt's e-mail specified in Finding of Fact 14 in relevant part:

> I will get you some dates for the RC Utility and will schedule that session with you. If the legislation passes in its current form, we will deal with it at that time.

17. Between the e-mail specified in Finding of Fact 15 and March 8, 2011, Zach, Gutt and Pyne exchanged e-mails about informal concepts for a resolution of the collective bargaining agreement, but did not reach any agreement. On March 8, 2011, Zach notified

Complainant by e-mail in relevant part as follows:

> The City/Utility want to wait and to see what happens with the Budget Repair Bill before setting a negotiation date. With things in flux, they do not believe a session would be meaningful.

At all material times thereafter Complainant refused to meet with respondent at any reasonable time or place for the purposes of collective bargaining.

18. Near the end of April, 2011, Respondent met with the WPPA and agreed upon an extension of the WPPA collective bargaining agreement from January 1, 2010 to December 31, 2011, with a modest wage rate increase and no other changes.

19. Governor Walker signed 2010 Wis. Act 10 on March 11, 2011. The publication of 2010 Wis. Act 10 was enjoined on March 19, 2011. 2011 Wis. Act 10 became effective July 1, 2011. Section 111.70, Stats, was again modified by 2011 Wis. Act 32, effective June 30, 2011.

Based upon the foregoing Findings of Fact, the Examiner makes the following

## CONCLUSIONS OF LAW

1. Respondent, The Public Utility Commission of the City of Richland Center, is a "municipal employer" within the meaning of Sec. 111.70(1)(j), Stats.

2. Complainant, International Brotherhood of Electrical Workers, Local 965, is a "labor organization" within the meaning of Sec. 111.70(1)(h), Stats.

3. Respondent did not refuse to meet with Complainant at reasonable times and reasonable palaces prior to March 8, 2011.

4. Respondent refused to meet with Complainant at reasonable times and reasonable places at all material times after March 8, 2011, for the purposes of collective bargaining, all within the meaning of Section 111.70(1)(a), of MERA as it was in effect until July 1, 2011.

5. By refusing to meet with Complainant at reasonable times and reasonable places, Respondent committed a prohibited practice within the meaning of Section 111.70(3)(a)4, and derivatively, Section 111.70(3)(a)1, of MERA as it was in effect until July 1, 2011.

Based upon the foregoing Findings of Fact, and Conclusions of Law, the Examiner makes the following

## ORDER

In order to remedy its violation of its violation Sections 111.70(3)(a)4 and 1 Wis. Stats., the Respondent shall:

a. immediately cease and desist from refusing to meet and confer with the majority representative of its employees as is required by law;

b. notify the employees represented by the Complainant, by posting in conspicuous places in the places were Respondent posts notices to its employees represented by Complainant copies of the Notice marked "Appendix A". The Notice shall be signed by a representative of the Respondent, and shall be posted immediately upon receipt of a copy of this Order and shall remain posted for a period of thirty (30) days. Reasonable steps shall be taken by the Respondent to ensure that said notices are not altered, defaced, or covered by other material;

c. Notify the Wisconsin Employment Relations Commission, in writing, within twenty (20) days following the date of this Order, as to what steps have been taken to comply with it.

Dated at Madison, Wisconsin, this 6th day of September, 2011.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Stanley H. Michelstetter II /s/

Stanley H. Michelstetter II, Examiner

**APPENDIX "A"**

**NOTICE TO ALL EMPLOYEES**

**CITY OF RICHLAND CENTER**
**INTERNATIONAL BORTHERHOOD OF ELECTRICL WORKERS, LOCAL 965**

Pursuant to an Order of the Wisconsin Employment Relations Commission, and in order to effectuate the policies of the Wisconsin Municipal Employment Relations Act, we hereby notify our employees that

WE WILL bargain in good faith with the International Brotherhood of Electrical Workers, Local 965, as required by law with respect to employees of the Richland Center Public Utility Commission whom they represent.

Dated this _____ day of _____ 2011.

_____
On behalf of Public Utility Commission of Richland Center

**THIS NOTICE MUST REMAIN POSTED FOR THIRTY (30) DAYS FROM THE DATE HEREOF AND MUST NOT BE ALTERED OR COVERED BY ANY OTHER MATERIAL.**

**PUBLIC UTILITY COMMISSION OF THE CITY OF RICHLAND CENTER**

**MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER**

**POSITIONS OF THE PARTIES**

**Complainant**

Respondent committed a prohibited practice within the meaning of Section 111.70(3)(a)4, Stats, and, derivatively, Sec. 111.70(3)(a)1, Stats, when it refused to meet at reasonable times and places with Complainant. The parties did not communicate between the exchanges of initial proposals on September 14, 2010 and November 23, 2010, when Complainant again requested that the parties schedule negotiations. The parties were unable to get together. Complainant next contacted Respondent on February 17, 2011, after the expiration of the agreement. Thereafter, Respondent refused to meet with Complainant. Respondent's excuses are neither relevant, nor accurate. Whether or not Respondent was successful in contacting AFSCME to exchange initial proposals, Complainant still expects Respondent to follow through on negotiations. Mayor Fowler's testimony shows he actually used the words "refuse to bargain." Respondent's argument that the introduction of Act 10 necessitated its refusal to meet is without merit. Other employers were able to do so and reach agreement. Complainant was prepared to make proposals. Complainant requests a finding that Respondent committed the disputed prohibited practices and affirmatively order Respondent to return to the bargaining table.

**Respondent**

The Employer denies that it committed the prohibited practices alleged. The correct legal standard is that Complainant is required to show by a preponderance of the evidence from the totality of the circumstances that the Employer's conduct amounted to subjective bad faith. The fact that the Employer and Union have not met for the purposes of collective bargaining for a long period of time does not equate with a failure to bargain. There is a reasonable explanation for these delays. The delays break down into two parts; that which occurred before Act 10 was introduced (February 11, 2011) and that which occurred after it was introduced. The parties met and exchanged initial proposals September 13, 2010. Respondent told Complainant that it wanted to meet with AFSCME and the WPPA to obtain their initial proposals for the City units. There was no communication between the parties until November 28, 2010.[2] Complainant requested on November 28, 2010, to Respondent to see if the parties could meet in December. Complainant again communicated on January 19, 2011, with its available dates in February. Thereafter, the parties exchanged e-mails through February 9, 2011. Respondent bargained in good faith in its conduct by:

[2] Respondent's reference to November 28 is actually to a November 23 e-mail.

1. agreeing to meet with Complainant to exchange proposals earlier than the parties normally met;
2. making a *bona fide* offer which remained on the table until February 17, 2011;
3. reasonably waiting until it had an initial proposal exchange in its other bargaining units:
4. reasonably attempting to arrange for meetings from November 28, 2010, through February 9, 2011;

Complainant never filed for mediation or interest arbitration during this period.

Respondent's desire to wait for resolution of the legal issues involving Act 10 do not constitute a violation of Section 111.70(3)(a)4, Stats. The introduction of Act 10 put Respondent, like other municipal employers, in a unique position which included, without limitation, having to make a decision whether to negotiate an agreement which would delay the effect of Act 10 or refuse to enter into such agreements. The record reflects that Respondent did not take that responsibility lightly, but made a considered judgment based upon obtaining legal advice. It engaged in e-mail exchanges with Complainant during this period which Complainant acknowledged was an exchange of proposals. Respondent's actions, particularly in the light of the fact that it continued to communicate with Complainant and considered a settlement proposal, were reasonable. Respondent asks that the complaint be dismissed in its entirety.

## DISCUSSION

Complainant alleges that Respondent committed a prohibited practice within the meaning of Section 111.70(3)(a)4, Stats, and, derivatively, Section 111.70(3)(a)1, of the MERA as it existed prior to the July 1, 2011, effective date of 2011 Wisconsin Acts 10 and 32.[3]

Section 111.70(3)(a)4 of MERA makes it a prohibited practice, in relevant part, to refuse to bargain collectively with a representative of a majority of its employees in an appropriate collective bargaining unit. Section 111.70(2) of MERA provides in relevant part:

> "Collective bargaining" means the performance of the mutual obligation of a municipal employer, through its officers and agents, and the representative of its municipal employees in a collective bargaining unit, to meet and confer at reasonable times, in good faith, with the intention of reaching an agreement, or to resolve questions arising under such an agreement, with respect to wages, hours, and conditions of employment . . . . The duty to bargain, however, does not compel either party to agree to any proposal or requires the making of a concession.

[3] All statutory references herein to portions of Section 111.70, Stat, are to those provisions as they existed prior to June 29, 2011, unless otherwise expressly noted by the term "modified."

The Commission has long recognized that a refusal to meet at reasonable times and places is itself a prohibited practice under Sec. 111.70(3)(a)4 or Sec. 111.70(3)(b) , of MERA and/or it may also be evidence of a pattern of unlawful bad faith.[4] Where there is a dispute as to whether a party has actually "refused" to meet, the Commission applies its long-standing test of the "totality of the circumstances" to determine if the delay is occasioned by sound business reasons and has occurred in good faith. An inordinate delay of bargaining is strong evidence of improper conduct.[5] In determining the totality of the circumstances, the Commission seeks to distinguish between legitimate, short –term delays in which parties reasonably disagree over arrangements from, for example, dilatory tactics. [6] A refusal to meet undermines the confidence of unit employees in their representative and weakens the unity of the group. Inordinately long delays not explained by reasonable circumstances were held to constitute a prohibited practice of refusing to meet.[7] A party may not condition meeting upon matters unrelated to wages, hours and working conditions.[8]

The factual occurrences are not in dispute, but the inferences from them are. The parties stipulated that the Examiner might take judicial notice of the enactment and legal process which took place from the introduction of Act 10 and Act 32. The gravamen of this dispute is Respondent's refusal to meet with Complainant on and at all times after March 8 in the context of a situation in which the parties had not met at all since the prior September.[9] In that regard, it is undisputed that Respondent has refused to meet with Complainant at all material times since March 8, 2011. Because part of the analysis in this case rests on an assessment of the existence of dilatory tactics, I apply the broader totality of the circumstances test.

Based upon the facts and circumstances, Respondent was engaging in dilatory tactics from at least January 19, in part because of the inappropriate language of Complainant at the end of the September 14, 2010, collective bargaining session. Part of Respondent's expressed reason for not meeting after January 19, 2011, was its desire to have an initial meeting with AFSCME. Respondent did desire that the meeting occur first. However, as of March 8, 2011, it was not a controlling factor. The parties had successfully negotiated their past collective bargaining agreement even though Respondent had not been able to meet with AFSCME.[10] Respondent successfully negotiated an agreement with the WPPA in the disputed negotiation cycle.[11]

At all times after March 8, 2011, Respondent's refusal to meet was partially motivated by Complainant's use of inappropriate language toward the end of the September 14, 2010 bargaining

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[4] For example, dilatory tactics were assessed by the "totality of the circumstances" standard in MARQUETTE COUNTY, DEC. NO. 31257-A (Gratz, 10/05), *aff'd. by operation of law*, DEC. NO. 31257-B (WERC, 11/05).

[5] MILWAUKEE BOARD OF SCHOOL DIRECTORS, DEC. NO. 15203-A (Yaeger, 12/81), aff'd.

[6] C.A. STARKWEATHER & SONS, INC., DEC. NO. 4360 (9/56); MEMORIAL HOSPITAL ASSOCIATION, DEC. NO. 10010-A (Flieschli,8/71) p.27, note 9, aff'd in rel. part DEC. NO. 10010-B (WERC, 111/71);

[7] MILWAUKEE BOARD OF SCHOOL DIRECTORS, DEC. NO. 15197-A (Yaeger, 12/81), aff'd DEC. NO. 15197-D (WERC, 12/81).

[8] WALWORTH COUNTY, DEC. NO. 12691 (WERC, 5/74) [insisting on public negotiations].

[9] Prior to March 8, Respondent could reasonably have believed that Complainant was accepting its reasons for delay.

[10] References to the transcript of proceedings are marked "tr." See, tr. p. 105.

[11] See, tr. p. 107.

session. That factor cannot justify a delay as extreme as that involved herein.



I conclude that Respondent refused to meet with Complainant as required by Section 111.70(2) primarily because it wanted to avoid reaching an agreement with Complainant and also to avoid discussing its reasons for doing so in front of Complainant's bargaining team. Collective bargaining, like most negotiation processes entail mutual consideration of, and planning for, changing circumstances. The circumstances surrounding the introduction of Act 10 presented a serious, but not impossible, challenge in bargaining. The refusal in this case does not relate to substantive wages, hours, and working conditions, but simply to avoiding discussion and possible agreement. If it is necessary at all to view the reasonableness of Respondent's actions, the evidence does indicate that there were a range of potential alternative proposals to consider, the parties were both aware that there were, and had they had the experience to consider them.[12] The parties have had a history of using contingent provisions such as the "me, too" provision relating clerical wages to similar positions in the AFSCME bargaining unit. The finances of the electric utility are different than the finances of the City of Richland Center in that the electric utility is at least partially financed by the rate-payers. Complainant was entitled to discuss whether or not that should or would affect Respondent's thinking. Respondent entered into an agreement with the WPPA at the height of the uncertainty concerning 2011 Wis. Act 10. As noted above, even if the parties were unable to reach an agreement, they would have had an opportunity to have heard Respondent's reasons for its decisions and to have explored the alternatives. Respondent's actions had a tendency to undermine the confidence of unit employees in their collective bargaining representative. Respondent's actions were a violation of its duty to meet with Complainant at reasonable times and reasonable places for collective bargaining as defined in Section 111.70(2), Stats. Respondent, therefore, committed a prohibited practice within the meaning of Sec. 111.70(3)(a)4 and, derivatively, Section 111.70(3)(a)1, Stats.

The usual remedy for this violation must be modified because of the subsequent amendments to Section 111.70, Stats. In this regard, Respondent no longer has a duty to negotiate a comprehensive collective bargaining agreement with Complainant for either bargaining unit. It is appropriate to order the Respondent post a notice to employees which notice is modified to reflect the changed circumstances. It is also appropriate to order Respondent to bargain as required may be required by law.

Dated at Madison, Wisconsin, this 6th day of September, 2011.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Stanley H. Michelstetter II /s/
Stanley H. Michelstetter II, Examiner

[12] See Finding of Fact 15, above.

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