STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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-B

Appearances:

Mike Pyne, Assistant Business Manager/Organizer, International Brotherhood of Electrical Workers, Local 965, 701 Watson Avenue, Madison, Wisconsin, 53713, appearing on behalf of the International Brotherhood of Electrical Workers, Local 965.

Steven C. Zach, Boardman & Clark, LLP, One South Pinckney Street, Fourth Floor, Madison, Wisconsin, 53703, appearing on behalf of the Public Utility Commission of the City of Richland Center.

ORDER ON REVIEW OF EXAMINER'S DECISION

On September 6, 2011, Stanley H. Michelstetter II issued Findings of Fact, Conclusions of Law and Order in the above captioned matter, wherein he concluded that the Respondent Public Utility Commission of the City of Richland Center had committed a prohibited practice within the meaning of Sec. 111.70(3)(a)4, and derivatively, Sec. 111.70(3)(a)1, of the Municipal Employment Relations Act. A timely petition for review was filed with the Wisconsin Employment Relations Commission pursuant to Secs. 111.70(4)(a) and 111.07(5), Stats. The parties submitted written argument in support of their positions, the last of which was received October 14, 2011. The matter was held in abeyance for a period thereafter while the parties unsuccessfully attempted to reach a settlement of the litigation.

For the reasons set forth in the Memorandum that follows, having reviewed the record and being fully advised in the premises, the Commission issues the following

ORDER

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

B. The Examiner's Finding of Fact 3 is set aside.

C. The Examiner's Findings of Fact 4-6 are adopted and renumbered Findings 3 - 5.

D. The Examiner's Findings of Fact 7-19 are set aside and the following Findings are made:

6. On September 14, 2010, the parties met and exchanged initial proposals.

7. Respondent believed that the Complainant intended to delay further face-to-face negotiations until November 23, 2010.

8. Between November 23, 2010 and March 8, 2011, the parties attempted to schedule additional sessions and were unsuccessful. They did exchange, via their respective representatives, various ideas and concepts for adoption of a new collective bargaining agreement. No collective bargaining agreement was reached.

9. On March 8, 2011, the Respondent notified Complainant that it did not wish to schedule an additional bargaining session. It reasoned that with the pending changes included in the Budget Repair Bill "things" were in "flux" and the Respondent desired to "wait and see" what would happen with the bill.

10. On March 11, 2011, the Governor signed the Budget Repair Bill (designated as Act 10).

11. On March 18, the Dane County Circuit Court issued a temporary restraining order restraining the implementation of 2011 Wisconsin Act 10. On May 26, 2012, the court issued a final decision voiding the Act.

12. On June 14, 2012 the Wisconsin Supreme Court issued a decision and order vacating the orders of the Dane County Circuit Court and declaring them void *ab initio*.

13. On June 29, 2011, following publication, 2011 Wisconsin Act 10 became effective.

E. The Examiner's Conclusions of Law 1 and 2 are adopted.

F. The Examiner's Conclusion of Law 3 is modified to read as follows:

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

G. The Examiner's Conclusions of Law 4 and 5 are reversed and the following Conclusion of Law is made:

4. Respondent did suspend bargaining with Complainant after March 8, 2011, but said suspension was reasonable and appropriate given the unsettled state of the law and thus did not violate Sec. 111.70(3)(a)4 or (a)1., Stats.

H. The Examiner's Order is reversed and the following Order is issued:

ORDER

The complaint filed in the above entitled matter is hereby dismissed.

Given under our hands and seal at the City of Madison, Wisconsin, this 13th day of June, 2012.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Scott /s/
James R. Scott, Chairman

Rodney G. Pasch /s/
Rodney G. Pasch, Commissioner

I dissent:

Judith Neumann /s/
Judith Neumann, Commissioner

City of Richland Center

MEMORANDUM ACCOMPANYING ORDER ON REVIEW OF EXAMINER'S DECISION

The Public Utility Commission of the City of Richland Center operates a small electric utility. The Complainant represents two collective bargaining units consisting of a total of six employees. The collective bargaining agreements expired on December 31, 2010 and the parties had initially exchanged proposals prior to the expiration. Various customary delays occurred for a variety of reasons prior to March 8, 2011.

On March 8, 2011, the attorney representing the employer sent the following electronic communication to the union:

> The City/Utility wants to wait 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.
>
> I had passed on information regarding your proposal to extend the current contracts to the end of the year status quo. They were not interested in that proposal at this time.

On March 14, the union filed the complaint which gives rise to this matter.

On March 11, 2011, Governor Walker signed the Budget Repair Bill which became Act 10.[1] Obviously, that enactment dramatically changed the landscape of collective bargaining in the public sector in this state. Any comprehensive revision of law governing an existing relationship has the potential to create uncertainties. Additional uncertainties arose out of the decision of the Dane County Circuit Court to enjoin the publication of the Act thereby preventing (at least temporarily) its application to the parties in this matter and all other public employers in Wisconsin. Ultimately the Supreme Court in STATE EX REL OZANNE, *supra*, resolved the issue and the Act became effective on June 29, 2011. In the period between March 11, 2011 and June 29, 2011 there was a great deal of confusion as to the status of the law. While the Secretary of State was enjoined by the Dane County Circuit Court from publishing the law, the Legislative Reference Bureau went forward with publication. In the context of the then-pending litigation, Assistant Attorney General Steven Means, Executive Assistant to the Attorney General, was quoted as saying that the legislation was "absolutely" still in effect.[2] The Secretary of the Department of Administration, Mike Huebsch, publicly expressed his view that the law was in effect as to State employees as of the date of the Legislative Reference Bureau's publication.[3] The point is not whether they were correct but

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[1] The more detailed account of events leading to the passage are set forth in STATE EX REL OZANNE V. FITZGERALD, 2011 WI 43 ¶¶ 21-30, 334 Wis.2D 70, 798 N.W. 2D 436.

[2] http://news.yahoo.com/wis-republicans-face-hurdle-union-battle-20110330-003021-010.html.

[3] http://www.jsonline.com/news/statepolitics/118919719.html.

rather that conflicting opinions existed as to whether the law would have controlled negotiations in this case.

The examiner concluded, based upon the March 8 e-mail quoted above, that the employer's temporary suspension of bargaining pending the resolution of the legal status of the parties' bargaining rights constituted a violation of the employer's duty to bargain contrary to Secs. 111.70(3)(a)1 and (a)4, Stats. We disagree.

There can be no question that had Act 10 been in full force and effect upon its enactment it would have had a dramatic impact on this relationship. Matters that were previously subject to negotiation became prohibited subjects of bargaining. The almost universal practice of fair share deductions became unlawful. Labor organizations were required to obtain annual certifications by election and, in the case of these units, potentially as early as May 1, 2011. Sec. 111.70(4)(d)3.b., Stats.

With the imminent adoption of Act 10 clearly the strategy and approach to be used by both sides would be dramatically different. Had the injunction not temporarily halted implementation the parties would have been bargaining over increases in base wage rates and nothing else. After the injunction temporarily halted the implementation there was certainly the possibility that either the Court of Appeals or the Supreme Court would lift the injunction, thereby permitting the publication of the law. It was also well within the realm of possibilities that the appellate courts would have applied a decision upholding the law retroactively thereby rendering a collective bargaining agreement reached after March 21, 2011 void as to any subject other than base wages.

There is no question that some parties chose to use this period of time when the law was in limbo to reach agreements, each side presumably weighing the risk that the law would ultimately be implemented or not. Uncertainty in those circumstances fostered agreement.

We cannot however criticize a party that made a conscious decision to await the final resolution by the Supreme Court before engaging in continued bargaining. This is particularly true when the employer is a small utility sensitive to the needs of its rate payers. The union did not offer to treat Act 10 as being fully in force and had it done so, this might be a different case. The employer could have gone through the motions of several meetings to drag the process out until the Court resolved the issue but who would have benefited from that approach? Even if we assume that the parties here could have reached an agreement there may have been subsequent legal challenges to the agreement itself. The temporary suspension of bargaining in these small units was a prudent course of action.

While it is true that parties to municipal collective bargaining in the past on occasion faced uncertainty over funding, the customary approach was to delay bargaining until the

funding questions were resolved. After all, the parties always had petitions for interest arbitration as a way to spur further activity. It was not at all unusual under the previous law for negotiations to drag on months or years after the expiration date. The norm was to make subsequent agreements retroactive to the expiration date creating only minor inconvenience to the employees.

We acknowledge that some municipal employers reached agreements during the four-month period between passage and implementation. We suspect many more took a "wait and see" approach as did the employer here. In our judgment this cautionary approach simply cannot be deemed to be a refusal to bargain.

Our decision is not intended to authorize protracted delay or other tactics designed to avoid the duty to bargain. It is simply a recognition of the fact that it is poor public policy to require employers and employees to make important decisions without a clear understanding of the law governing this relationship.

Under the unique circumstances here we believe a temporary suspension of negotiations to allow for the resolution of significant matters of law with a direct impact on the bargaining process does not constitute an unlawful refusal to bargain.

Dated at the City of Madison, Wisconsin, this 13th day of June, 2012.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Scott /s/
James R. Scott, Chairman

Rodney G. Pasch /s/
Rodney G. Pasch, Commissioner

City of Richland Center

DISSENTING OPINION OF COMMISSIONER NEUMANN

This is an exceptionally straightforward case. There are two essential facts, and they are undisputed:

1. At all relevant times – before and after the "Budget Repair Bill" (Act 10) – the Employer had a duty to engage in collective bargaining with the Union, i.e., in the words of the statute, a duty "to meet and confer at reasonable times, in good faith, with the intention of reaching an agreement." (Sec. 111.70(1)(a), Stats., emphasis added).

2. On March 8, 2011, the Employer notified the Union that it would not meet until they "see what happens with the Budget Repair Bill." The Employer asserted its view that a meeting while things were "in flux" would not be "meaningful."[4]

As noted almost 20 years ago, "It is, of course, impossible for parties to bargain collectively unless they meet for that purpose. Thus, it is axiomatic that good faith bargaining includes a responsibility of the parties to meet at reasonable times." Jerome Filbrandt Plumbing and Heating, Inc., Dec. No. 27045-C (WERC, 9/92) (Hempe, dissenting on other grounds).

Unlike the typical refusal to bargain case, where the Commission must examine a series of ambiguous behaviors to decipher whether a party is unlawfully avoiding negotiations, Edgerton Fire Protection District, Dec. No. 30686-B (WERC, 2/05), no intricate factual

[4] The majority's Finding of Fact 8 seriously misstates the extent to which meaningful bargaining had occurred prior to March 8, 2011 and the extent to which the Employer was proactive in any attempts to negotiate. The only bargaining session that occurred was the initial exchange of proposals on September 14, 2010. Any efforts during the following five months to get back to the table were initiated and pursued by the Union. The Union sought negotiating dates in an e-mail on November 23, 2010, to which the Employer did not respond at all. On January 19, 2011, the Union proposed an array of dates, which the Employer's negotiator promised to circulate for a response from his team but which remained unanswered. On January 26, 2011, the Union again sought dates. At that time, the Employer suggested it might be better to wait for the AFSCME negotiations. On February 8, 2011, the Union again initiated an effort to nail down some dates and pointed out that Union members were becoming restive. The Employer's representative responded that he would check on dates, but never got back to the Union on that. The Budget Repair Bill (Act 10) was proposed on February 11, 2011, and on February 17 the Employer notified the Union that it (the Employer) was withdrawing the offer that it had on the table, but did not offer an alternative. While I agree with the Examiner and the majority that, based on the Commission's somewhat indulgent circumstantial test for good faith bargaining, Edgerton Fire Protection District, Dec. No. 30686-B (WERC, 2/05), the Employer's pre-March 8 conduct was not so dilatory as to be unlawful, the record does not support the majority's assertion that the parties "did exchange, via their respective representatives various ideas and concepts for adoption of a new collective bargaining agreement." To the contrary, there were virtually no substantive exchanges between the one and only meeting in September 2010 and the Employer's withdrawal of its initial proposal on February 17, one week after the introduction of Act 10.

Investigation is necessary here. The Employer was under a duty to meet with the Union at the relevant time and indisputably refused to do so. This case, therefore, presents an issue that seldom arises: are there any circumstances that can justify an outright refusal to comply with a statutory duty to meet, and, if so, are they present here?

The majority's answer to these questions is stated in terms that create a very slippery slope: either party may cease "to allow for the resolution of significant matters of law with a direct impact on the bargaining process." This answer is plainly wrong.

Certainly the whole state was thrown into political chaos between February and June 2011. Hundreds of municipal employers and unions found themselves in a state of uncertainty about the law. As discussed below, some of them were able to resolve the situation in a mutually acceptable way. While the majority speculates that "many more took a 'wait and see' approach as did the employer here," I would speculate to the contrary, as the instant case is the only Act-10 related refusal-to-meet case that the Commission received or, in any event, adjudicated.[5] While the Employer's desire for clarity was understandable, the majority has articulated an unprecedented principle that, in its very vagueness, may lead to considerable litigation. The majority's holding would countenance one side breaking off bargaining for an open-ended period of time and for a wide variety of circumstances – each of which would have to be sorted out afterwards as to whether they are so "unique" or significant as to justify refusing to bargain. In contrast, enforcing the law as it is written (i.e., simply requiring parties to "meet" a reasonable number of times) would not only facilitate settlement but establish a principle that is easy to understand and easy to follow.

As of March 8, 2011, the date on which the Employer "suspended" bargaining, no one could have predicted whether, when, or how the Act 10 chaos ultimately would resolve itself. The Employer's refusal to meet had no finite temporal parameters, but instead was open-ended. The majority's sympathy with the plight of the Employer might not seem quite so reasonable in retrospect if Act 10 had remained in "flux" for a prolonged period of time.[6] Unless the relative brevity of the period of "flux" is one of the "unique circumstances" the

[5] In addition to this speculation, the majority opinion includes profligate references to facts that are completely unsupported by the record. For example, the majority refers to quotes by an assistant attorney general and the Secretary of Administration stating opinions that are neither in the record nor properly subject to administrative notice. Sec. 227.45(3), Stats. As another example, the majority asserts without evidentiary basis that, faced with uncertainty over funding, "the customary approach was to delay bargaining until the funding questions were resolved," and that there were "not many" agreements reached during the four month period of uncertainty. Like the assertion that "Many more took a 'wait and see' approach as did the employer here," these are highly questionable factual assertions without anything in the record to support them. They are not appropriately included in an adjudicatory opinion.

[6] It is worth noting that the status of Act 10 remains unresolved even now, as that legislation is the subject of ongoing federal court litigation and some important provisions (such as the annual recertification elections and the outlawing of dues deductions) have recently been invalidated. WEAC, et al. v. Walker, et al., Case No. 11-CV-428 (W.D. Wis., Order issued 3/30/12).

majority uses to justify this unprecedented holding (a circumstance the Employer could not have known at the time of its refusal), there appears to be no inherent limit on the length of time one party could lawfully and unilaterally "suspend" negotiations.

More importantly, it is commonplace for parties in the public sector to negotiate under conditions of uncertainty, especially as to the quite crucial issue of funding. Funding almost always depends upon contingencies outside the parties' control, such as the amount of state aid and/or whether a referendum will pass. Parties may mutually agree to suspend bargaining in light of contingencies. Absent such mutual agreement, as illustrated in the Hald case discussed below, parties are expected to try to handle these uncertainties at the bargaining table – often through simple contingency language. It is important to remember that the duty to bargain does not require parties to reach agreement, but only to engage in a good faith effort to do so. Obviously, as Commissioner Hempe commented in Filbrandt Plumbing, supra, if parties do not meet they preempt the possibility of a successful compromise. Hence the existence of even very significant uncertainties has never excused one party's unilateral refusal to meet and the majority has cited no case law to that effect.

In fact, case law reflects few situations where one party delayed bargaining until an external condition resolved itself, but the one case I found provides reasoning that is squarely on point. In Henry M. Hald High School Association, 213 NLRB 463 (1974), the employer, a religious school, refused to bargain with the union over a wage reopener until the U. S. Supreme Court decided a case regarding aid to parochial schools that would significantly affect the school's resources. The employer argued that bargaining would have been futile because it would have had to refuse any union offer given the potential demise of its resources. The NLRB flatly rejected that excuse:

> It is clear that while the law does not require an Employer or a union to make concessions on its bargaining position, it does require the parties to meet or to communicate in an effort to negotiate their differences. It can hardly be expected that such differences could be resolved in the absence of such bargaining communication in good faith … Nor can it reasonably be maintained … that such a delay was necessary, reasonable, or unavoidable, because Respondent could have bargained with the Union on the basis of its current financial status, as it was ultimately compelled to do; or it could have bargained tentatively on the prospect of its receipt of governmental aid.

Id. at 475.

Here, for a period of several months the situation was unclear as to the subjects over which the parties could lawfully negotiate. But there was never a period during which there was any question that the Employer had a fundamental duty to meet, if only over "base wages." The Employer claims that meeting would not have been "meaningful" during this period of time, and the majority endorses and even exaggerates that claim by conjuring up the

specter of numerous pointless meetings "dragging out the process." These claims are pure speculation. As the majority itself recognized, some parties reached agreements during the period of time in question here; to the extent there was a concern about legality or enforceability of those agreements, they negotiated contingency language.[7] Without even one meeting to explore each other's perspectives and flexibilities for reaching an agreement, how could the Employer – much less the Commission majority – be so certain that meeting with the Union would have been pointless?[8]

Nor, despite the short duration of the Employer's refusal to meet is this a tempest in a teapot. As the Employer doubtless was aware, there were weighty consequences for having a contract in effect at the time Act 10 took effect. Act 10, both as proposed and as enacted, contained provisions that would postpone the Act's effective date until any existing contracts expired. Some municipal employers and unions, presumably interested in maintaining labor relations stability while adjusting to the impact of Act 10, took the period of "flux" between February and June as an opportunity to reach agreements. These agreements may have taken various forms, from merely renewing the predecessor agreement with no pay increases or changes to voluntarily incorporating the pension and health insurance changes that Act 10 would eventually require. It is possible to imagine a great variety of other potential compromises. Importantly, parties with existing contracts had the benefit of a contractual grievance and arbitration procedure until those contracts expired, when Act 10 would render such procedures unlawful. Thus, even agreements that might be viewed as concessionary as to wages and benefits would at least preserve some labor relations harmony during the initial period following Act 10. Some employers as well as unions found value in that.

Of course, we have no idea in this case what the Union, or for that matter the Employer, might have proposed or been willing to accept in order to extend labor harmony, because the Employer preemptively refused to talk or listen. The Union, if not the Employer, deserved a chance to try to obtain a contract which, if nothing else, would postpone the dramatic effects of Act 10. Neither we nor the Employer can simply presume that such talks would have been meaningless.[9]

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[7] In WEAC, et al. v. Walker, et al., Case No. 11-CV-428 (W.D. Wis.), the WERC, as a defendant, is in receipt of affidavits submitted by the union plaintiffs attesting to the fact that contingency provisions were negotiated during the period of time that the Employer here was refusing to meet and describing examples of such provisions.

[8] The majority's speculation about "several meetings to drag out the process" is silly. The duty to bargain has always been subject to a standard of reasonableness regarding number and length of meetings, especially if there is a genuine issue of futility. See generally, Filbrandt Plumbing, supra; Campbellsport School District, Dec. No. 30585 (WERC, 3/03). Here the Employer is certainly not in a position to complain about having been compelled to meet too often (see footnote 1, above).

[9] The majority's statement that the outcome of this case might have been different if the Union had offered "to treat Act 10 as being fully in force" is particularly galling. The Employer did not make this argument and might have been embarrassed to do so, given that its own refusal to meet was categorical, did not invite or propose any conditions, and preempted a platform in which the Union might have explored such compromises.

In sum, the Employer had a duty to meet and refused to meet. Its excuse – that the law was in flux – has never been and fundamentally cannot be a lawful justification, because uncertainties, confusion, and contingencies are commonplace in collective bargaining and can be handled effectively in that forum. The duty to bargain in good faith does not require agreement, but it does require a reasonable effort to reach one, whatever the external conditions. By refusing to meet, the Employer foreclosed any possibility that options could be discussed. I would hold that the Employer per se violated its duty to bargain in good faith by refusing to meet with the Union on and after March 8, 2011.

Dated at Madison, Wisconsin this 13th day of June, 2012.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/
Judith Neumann, Commissioner

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No. 33281-B