STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

ASSOCIATION OF LAW ENFORCEMENT ALLIED SERVICES PERSONNEL (ALEASP), Complainant

vs.

CITY OF MILWAUKEE, Respondent.

Case 582
No. 70776
MP-4667

Decision No. 33322-A

Appearances:

Mark T. Baganz, Attorney, P.O. Box 1563, Brookfield, WI 53008-1563 and **Richard A. Cole, Jr.**, Attorney, P.O. Box 41, South Milwaukee, WI 53172-0041, appearing on behalf of Complainant.

Donald L. Schriefer, Assistant City Attorney, 800 City Hall, 200 East Wells Street, Milwaukee, WI 53202, appearing on behalf of Respondent.

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

On May 16, 2011, Complainant Association of Law Enforcement Allied Services Personnel (ALEASP) filed a Complaint with the Wisconsin Employment Relations Commission (Commission) asserting that Respondent City of Milwaukee (City) had committed prohibited practices within the meaning of the Municipal Employment Relations Act (MERA) by failing to present a tentative agreement reached between ALEASP and the City for ratification consideration by the City's Finance and Personnel Committee and Common Council. On July 5, 2011, the Commission appointed Matthew Greer, a member of its staff, as Hearing Examiner. The City filed its Answer and Affirmative Defenses on July 18, 2011 and hearing was held on the complaint on July 22, 2011 in Milwaukee, Wisconsin. The Parties submitted post-hearing written arguments in support of their positions, the last of which was received on October 24, 2011, thereby closing the record.

Being fully advised in the premises, I make and issue the following

FINDINGS OF FACT

1. Respondent City is an employer within the meaning of MERA.

2. Complainant ALEASP is a labor organization within the meaning of MERA and at all times relevant represented a unit of City employees for the purpose of collective bargaining.

3. The past practice of the Parties for ratifying tentative settlements of comprehensive collective bargaining agreements is for ALEASP to first submit the agreement to a vote by its membership. Then, if the agreement is approved by ALEASP's membership, the City's labor negotiator submits the agreement to the Finance and Personnel Committee for approval before it is submitted to the full Common Council for a final ratification vote.

4. The City and ALEASP began bargaining for a successor collective bargaining agreement in 2006 and reached a tentative agreement on January 7, 2011 for a contract effective from January 1, 2007 through December 31, 2009. As part of the tentative agreement, the Parties' bargaining teams agreed to recommend ratification of the tentative agreement. The City's labor negotiator led the City's bargaining team.

5. On January 19, 2011, the City submitted to ALEASP a draft of the updated contract language to reflect the terms of the tentative agreement, requested that ALEASP submit any corrections by e-mail, and indicated that it continued to review the document for any needed corrections. On January 20, 2011, the City sent another e-mail to ALEASP with an additional correction to the contract language. In an e-mail dated January 26, 2011, legal counsel for ALEASP informed the City that the ALEASP board "is continuing its review [of the tentative agreement] and has found some items/language which we need to discuss. Rather than piecemeal it, we will contact you when the review is done. In the meantime, will try and finalize this and then let you know about the exact date reference a date [sic] for voting by the members on the TA."

6. On February 11, 2011, the Governor announced that he would be introducing a law in the State Assembly that would eventually become 2011 Wisconsin Act 10 (Act 10).[1] Among its provisions, Act 10 eliminates nearly all collective bargaining rights for non-transit and non-protective service public employees employed by State and municipal governments, including the unit of employees represented by ALEASP.

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[1] I take notice of the timing of the announcement of the legislation to give context to the timeline of events that follow.

7. On March 2, 2011, legal counsel for ALEASP sent an e-mail to the City with an attached document regarding "potential language changes, issues, suggestions and clarifications as to the issues." The attached document concluded with a statement that "ALEASP CONTINUES ITS REVIEW." The City replied in an e-mail dated March 3, 2011 confirming that it received ALEASP's review document and that it understood that ALEASP would have further changes. ALEASP replied on March 6, 2011 that "[o]ther than for confirming the accuracy of the arithmetic percentages and calculations as to the increase in wages/monetary amounts and pay/salary figures in the materials you forwarded to ALEASP, there are no further changes or revisions to the document which was sent to you. If any arithmetic errors or miscalculations as to wages/monetary amounts and pay/salary figures are discovered, ALEASP will so advise."

8. As of March 6, 2011, the tentative agreement was in final form and ready for ratification by both Parties.

9. On March 11, 2011, the Governor signed Act 10. Act 10 initially was to go into effect on March 28, 2011, but, due to legal challenges and court action, did not go into effect until June 29, 2011.

10. On March 12, 2011, ALEASP's membership voted in favor of ratifying the tentative agreement. ALEASP communicated the results of the ratification vote to the City on March 12, 2011 and requested that the City put ratification of the tentative agreement on the agenda of the Finance and Personnel Committee and Common Council. On March 14, 2011, the City's labor negotiator replied that he would "be meeting with the Mayor tomorrow to discuss the situation." The labor negotiator did not inform ALEASP that he had reservations about forwarding the tentative agreement for ratification consideration.

11. On March 15, 2011, during the meeting between the Mayor and the labor negotiator, the labor negotiator recommended to the Mayor that the tentative agreement not be presented to the Finance and Personnel Committee and the Common Council for ratification consideration. In his view, the tentative agreement was "not in our best interest" due to Act 10. The Mayor accepted the recommendation.

12. On March 20, 2011, ALEASP sent an e-mail to the City offering assistance with ratification. The City did not respond to that communication. On March 24, 2011, two ALEASP members sent letters to the City's Mayor asking him to take action on the tentative agreement. On April 27, 2011, ALEASP members sent a letter to the City's police chief asking him to contact the Mayor to "determine where our contract stands." On May 4, 2011, another ALEASP member sent e-mails to some of the City's aldermen seeking their support in ratifying the tentative agreement.

13. The City never directly informed ALEASP that it would not submit the tentative agreement for ratification consideration and the tentative agreement was never presented to the Finance and Personnel Committee or the Common Council.

14. Had the City processed the tentative agreement consistent with the Parties' past ratification practice, the Finance and Personnel Committee would have considered the agreement during its meeting on April 7, 2011 and, if that Committee approved the agreement, it would have been scheduled for a vote in the Common Council at its April 12, 2011 meeting.

15. In a letter dated June 29, 2011, the City informed ALEASP that it was "compelled to terminate all agreements between the parties, including but not limited to the 2004-2006 Collective Bargaining Agreement, all Memoranda of Understanding, and all practices."

Based on the foregoing Findings of Fact, I make the following

CONCLUSION OF LAW

The City of Milwaukee violated its duty to bargain in good faith and thereby committed a prohibited practice within the meaning of Sec. 111.70(3)(a)4, Stats. and, derivatively, Sec 111.70(3)(a)1, Stats. by failing to present the tentative agreement for a 2007-2009 contract for ratification consideration in the City's Finance and Personnel Committee and, if appropriate, the City's Common Council.

Based on the foregoing Findings of Fact and Conclusion of Law, I make and issue the following

ORDER

The City of Milwaukee, its officers and agents, shall cease and desist from violating its duty to bargain in good faith with ALEASP and shall take the following affirmative actions to remedy the violations:

1. Within 30 days of the date of this Order, take action consistent with the Parties' past practice to present the tentative agreement for a 2007-2009 contract for ratification consideration in the City's Finance and Personnel Committee and, if appropriate, the City's Common Council.

2. The City's labor negotiator shall immediately sign and post the Notice attached to this decision as Appendix A in the workplaces of the employees represented by ALEASP for a period of not less than 30 days.

3. Within 20 days of the date of this Order, notify the Commission and Complainant of action taken to comply with this Order.

Dated at Madison, Wisconsin this 16th day of February, 2012.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Matthew Greer /s/

Matthew Greer, Examiner

<u>APPENDIX "A"</u>

<u>NOTICE TO CITY OF MILWAUKEE EMPLOYEES REPRESENTED BY ASSOCIATION OF LAW ENFORCEMENT ALLIED SERVICES PERSONNEL (ALEASP)</u>

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 ASSOCIATION OF LAW ENFORCEMENT ALLIED SERVICES PERSONNEL (ALEASP) by taking action consistent with past practice to present the tentative agreement for a 2007-2009 contract for ratification consideration in the City's Finance and Personnel Committee and, if appropriate, the City's Common Council.

Dated this ________________________ day of __________________, 2012.

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Labor Negotiator for City of Milwaukee

THIS NOTICE MUST NOT BE ALTERED OR COVERED BY ANY OTHER MATERIAL AND MUST REMAIN POSTED FOR NO LESS THAN 30 DAYS.

CITY OF MILWAUKEE

MEMORANDUM ACCOMPANYING FINDING OF FACT, CONCLUSION OF LAW, AND ORDER

ALEASP's Complaint alleges that the City engaged in prohibited practices under Secs. 111.70(3)(a)4 and 1, Stats. of the Municipal Employment Relations Act (MERA) by refusing to take action to present the tentative agreement for a 2007-2009 collective bargaining agreement that was reached with ALEASP on January 7, 2011 for ratification consideration in the City's Finance and Personnel Committee and Common Council. I find that the City committed the alleged prohibited practice.

Section 111.70(3)(a)4, Stats. makes it a prohibited practice for an employer "[t]o refuse to bargain collectively with a representative of a majority of its employees in an appropriate collective bargaining unit." Section 111.70(1)(a), Stats. defines collective bargaining to include the mutual obligation "...to meet and confer at reasonable times, in good faith, with the intention of reaching an agreement...." Implicit in this requirement is that the Parties move the tentative agreement through the ratification process in order for it to become final if ratified by both Parties.

There is no dispute that the City and ALEASP reached a tentative agreement for a 2007-2009 contract on January 7, 2011. There is also no dispute that Act 10 was not in effect on that date nor that the Parties were legally competent to reach the tentative agreement on that date. Therefore, the issue narrows to whether the City failed to bargain in good faith when it refused to take action on the tentative agreement pursuant to the Parties' past ratification practice as described in Finding of Fact 3.

The City faults ALEASP for showing no urgency in bargaining or finalizing the 2007-2009 contract until it became apparent that Act 10's implementation was imminent. While that allegation might be relevant to defend against a claim that the City failed to proceed expeditiously to consider ratification of the tentative agreement, in this case the allegation is that the City failed to go forward with the process at all. As such, I find that neither Party's conduct prior to ALEASP's ratification vote on March 12, 2011 is relevant to the prohibited practice alleged here. Whatever bargaining history occurred prior to reaching the tentative agreement does not diminish the facts that a valid tentative agreement was reached on January 7, 2011 and that ALEASP ratified the agreement on March 12, 2011. Therefore, the relevant timeframe for determining whether the City violated its duty to bargain in good faith during ratification commenced on March 14, 2011 when the City received notification that ALEASP had ratified the tentative agreement. *See* COLUMBIA COUNTY, DEC. NO. 33144-A (Davis, 1/12).

On March 15, 2011, the day after it received notification of ALEASP's ratification of the tentative agreement, the City decided not to forward the tentative agreement to the Finance and Personnel Committee and the Common Council for ratification consideration. Few actions are more important, and basic, to good faith bargaining than conducting a ratification vote on a tentative agreement for a contract reached in bargaining. To allow one party to unilaterally abandon a tentative agreement by refusing to take a ratification vote undermines that process in a fundamental way. The City cites no authority to support its conclusion that it could unilaterally decide not to process the tentative agreement for potential ratification and I am unaware of any such authority.

The City does argue that it is excused from the duty to take ratification action on the tentative agreement because it had good cause for not taking such action. In support, it points to the political and legal uncertainty regarding Act 10 and its effective date that was present at the same time that the City normally would have been considering the ratification of the tentative agreement. There is no doubt that public sector labor law was in a state of upheaval and uncertainty in the first half of 2011 with the introduction of Act 10, a law that would fundamentally change the legal obligations of parties in public sector collective bargaining.

The Commission has "occasionally noted the possibility that some unanticipated intervening event or other 'good cause' could justify reneging upon a commitment to support a tentative agreement," but that such exception was only a "theoretical possibility" and that "it does not appear from our review of the cases that the Commission has ever decided a case on that basis." MILWAUKEE COUNTY, DEC. NOS. 33001-D, 32912-E, 32913-E (WERC, 5/11) at FN 3. However, the good cause exception has only been discussed in situations where bargaining team members who do not object to a tentative agreement at the time the agreement is reached subsequently withdraw support during the ratification process. *See, e.g.*, MILWAUKEE COUNTY, *supra.* There is no support in Commission precedent for a good cause exception that would justify failure to take a ratification vote and let a tentative agreement languish indefinitely.

If the labor negotiator believed that he had good cause to urge rejection of the tentative agreement, he could have expressed those concerns to the Finance and Personnel Committee and Common Council during the ratification process.[2] The good cause exception might then excuse his withdrawal of support for the tentative agreement, but it does not provide cover for refusing to take ratification action on the tentative agreement. Once the City made the decision not to take action to consider ratification, it was no longer bargaining in good faith with the intention of reaching an agreement.

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[2] There is no evidence that any member of the finance and personnel committee or Common Council were on the City's bargaining team, or that any member of those bodies authorized the terms of the tentative agreement at issue here.

Therefore, I conclude that the City bargained in bad faith by not taking action consistent with past practice to consider the tentative agreement for potential ratification. To remedy that violation, the City must move the tentative agreement into the ratification process. In this case, I find that it would have been consistent with past practice for the City to have put the tentative agreement on the April 7, 2011 agenda for consideration in the Finance and Personnel Committee and, if approved, scheduled for a vote in the Common Council during its April 12, 2011 meeting.[3] Act 10 was not in effect on those dates and did not bar the City from taking those actions.

The City argues that Act 10 limits the Commission's remedial authority in this case to requiring the posting of a notice and an order to bargain over base wages up to the Consumer Price Index – the sole remaining subject of bargaining permitted by Act 10 for general municipal employees.

Act 10 became effective on June 29, 2011. Every relevant fact surrounding the tentative agreement occurred prior to Act 10's effective date. Negotiations were concluded and the tentative agreement was reached on January 7, 2011. The contractual language was finalized by March 6, 2011. ALEASP ratified the agreement on March 12, 2011. Even the agreement's expiration date – December 31, 2009 – had long since passed. Most significantly, the City engaged in its central act of bad faith bargaining on March 15, 2011 when it decided not to submit the tentative agreement to the ratification process. Act 10 cannot be interpreted to reach back and justify this act of bad faith bargaining.

I am also unconvinced by the City's position that Act 10 was arguably in effect on March 28, 2011 because the Wisconsin Supreme Court rendered "void *ab initio*" a lower court's injunctive order blocking implementation of Act 10 in STATE OF WISCONSIN EX REL. OZANNE V. FITZGERALD ET AL., 2011 WI 43 at par. 6, 334 WIS.2D 70, 798 N.W.2D 436 (WIS. 2011). Whatever the Court meant by the "void *ab initio*" language, it is clear that it didn't intend a retroactive effect of Act 10 to March 28, 2011. The plurality noted that the Secretary of State had yet to publish the law in the official state newspaper, but that "[d]ue to the vacation of the circuit court's orders," he was free to do so. 2011 WI 43 at par. 10. Chief Justice Abrahamson also noted in the

[3] The City could have rushed the tentative agreement to the Finance and Personnel Committee on March 18, 2011 and, if approved by that committee, to the Common Council on March 23, 2011. However, I am convinced that doing so would have required the City to expedite the usual ratification process. The record establishes that the agenda for Finance and Personnel Committee meetings are set a week in advance and it takes a couple of days to prepare a tentative agreement for Committee consideration. The duty to bargain in good faith does not extend so far as to require one party to expedite its normal ratification process at the request of the other party. Therefore, I conclude that the City did not violate the duty to bargain in good faith by failing to submit the tentative agreement for ratification on a schedule that would have allowed the agreement to be finalized before March 28, 2011, the first date that Act 10 was thought to have gone into effect.

first sentence of her concurring and dissenting opinion that "I agree that the Budget Repair Bill is not in effect." ID at par. 74.[4]

Limiting the remedy as the City suggests would not serve "to effectuate the purposes of the municipal labor statutes." WERC V. CITY OF EVANSVILLE, ET AL., 69 WIS. 2D 140, 230 N.W.2D 688 (WIS. 1975). The remedy as ordered is necessary to put the Parties in the same position they would have been absent the City's bad faith bargaining. Doing so requires the City to take action on the tentative agreement as it existed in April 2011 when the City would have taken action pursuant to the Parties' past ratification practice. Ordering anything less would allow the City to benefit from its bad faith bargaining.

ALEASP requests an award of costs and expenses, including reasonable attorneys' fees in this matter but does not cite any basis for such an award. I find that such an award is not warranted in this case.

CONCLUSION

For the foregoing reasons, I find that Respondent committed a prohibited practice within the meaning of Sec. 111.70(3)(a)4, Stats. and, derivatively, Sec. 111.70(3)(a)1, Stats.

Dated at Madison, Wisconsin this 16th day of February, 2012.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Matthew Greer /s/
Matthew Greer, Examiner

[4] Because the tentative agreement at issue here had been negotiated, agreed upon, and ratified by ALEASP prior to the implementation of Act 10, this case is distinguishable from PUBLIC UTILITY COMMISSION OF THE CITY OF RICHLAND CENTER, DEC. NO. 33281-A (Michelstetter, 9/11), petition for review filed, where the parties were in the midst of negotiations when Act 10 came into play. The Examiner in that case ordered the respondent to bargain as "may be required by law."

EMG/dag