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-B

Appearances:

Mark T. Baganz, Attorney, P.O. Box 1563, Brookfield, Wisconsin, 53008-1563, and **Richard A. Cole, Jr.,** Attorney, 1001 Madison Avenue, P.O. Box 41, South Milwaukee, Wisconsin, 53172-0041, appearing on behalf of the Association of Law Enforcement Allied Services Personnel (ALEASP).

Donald L. Schriefer, Assistant City Attorney, City of Milwaukee, 800 City Hall, 200 East Wells Street, Milwaukee, Wisconsin, 53202-3551, appearing on behalf of the City of Milwaukee.

ORDER ON REVIEW OF EXAMINER'S DECISION

On February 16, 2012, Matthew Greer issued Findings of Fact, Conclusions of Law and Order in the above-captioned matter, wherein he concluded that the Respondent City of Milwaukee had 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 to the City's Finance and Personnel Commission and, if appropriate, the City's Common Council.

A timely petition for review was filed with the Wisconsin Employment Relations Commission pursuant to Sec. 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 on April 26, 2012.

Having reviewed the record and being fully advised of the positions of the parties, the Commission makes and issues the following

ORDER

A. The Examiner's Finding of Fact 1 is amended to read:

1. Respondent City is an employer within the meaning of the Municipal Employment Relations Act.

B. The Examiner's Finding of Fact 2 is affirmed.

C. The Examiner's Findings of Fact 3 through 15 are set aside and the following Findings are made:

3. The City and the Union were parties to a collective bargaining agreement which expired on December 31, 2006.

4. The parties began bargaining for a successor agreement in 2006, but it was not until January 7, 2011 that the parties reached a tentative agreement.

5. As a part of the tentative agreement both side's bargaining teams agreed to recommend ratification of the tentative agreement.

6. Several draft agreements were exchanged and the delay in finalizing the tentative agreement extended into early March of 2011.

7. The legislative proposal which ultimately became 2011 Wisconsin Act 10 was introduced on February 11, 2011.

8. In early March 2011, the City's labor negotiator contacted the Union's legal counsel questioning the Union's continued delay in light of the pendency of the potential changes in collective bargaining.

9. On March 11, 2011, Act 10 was signed by the Governor and scheduled to go into effect on March 28, 2011. Subsequent legal challenges delayed the effective date until June 29, 2011.

10. On March 12, 2011 the Union voted to ratify the agreement and submitted it to the City.

11. The City's labor negotiator met with the Mayor on March 15, 2011, and recommended that the City not present the tentative agreement for ratification because it was "not in the best interests of the City". The Mayor agreed with the recommendation.

12. On June 29, 2011, the City formally notified the Union that it was compelled to terminate all agreements, practices, understandings and the 2004-2006 agreement.

D. The Examiner's Conclusion of Law is set aside. The following Conclusion of Law is made:

1. The City of Milwaukee did not violate its duty to bargain in good faith within the meaning of Sec. 111.70(3)(a)4, Stats., when it did not present for ratification the tentative agreement reached with the Association of Law Enforcement Allied Services Personnel.

E. The Examiner's Order is set aside. The following Order is made:

That the complaint herein be dismissed.

Given under our hands and seal at the City of Madison, Wisconsin, this 20th day of February, 2013.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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

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

I dissent:

Judith M. Neumann /s/
Judith M. Neumann, Commissioner

City of Milwaukee

MEMORANDUM ACCOMPANYING ORDER ON REVIEW OF EXAMINER'S DECISION

On December 31, 2006, the agreement between the Complainant Union and the City expired. The parties attempted to negotiate a successor agreement covering 2007 through 2009. On January 7, 2011, four years after expiration, a tentative agreement was reached.[1] Draft language was provided by the City and three weeks after the tentative agreement the Union was expressing the view that "some items/language" needed to be discussed. There continued to be back and forth between the parties relative to minor changes. In the meantime the political process was going forward in Madison. The Governor announced the introduction of Act 10 on February 11, 2011 and the bill was ultimately passed and signed by the Governor on March 11, 2011 and scheduled to go into effect March 28, 2011. On March 12, 2011 the Union ratified the tentative agreement.

A week or two before the passage, the City negotiator called the Union bargaining representative urging action in light of the pendency of the legislation that became Act 10. He further explained what he believed to be the consequences of the proposed law. Nevertheless the Union, showing no urgency, waited until March 12 to adopt the tentative agreement, one day after the Governor signed Act 10. On March 15, 2011, the City's labor negotiator recommended to Mayor Barrett that the City should refuse to adopt the tentative agreement because it was not in the best interests of the City. The Mayor accepted this recommendation and did not present the tentative agreement for ratification.

The examiner concluded that the City violated its duty to bargain in good faith as a result of its refusal to "process" the tentative agreement.

We disagree and conclude that the City's conduct did not evidence bad faith. The examiner failed to draw any distinction between the actions of the City negotiator (who was not an elected official) and the Mayor who ultimately was responsible for refusing to pursue approval of the tentative agreement. As the discussion infra demonstrates, that distinction is critical to an analysis of this matter under our prior case law.

The negotiator certainly had an obligation to advise the Mayor of the impact of Act 10 and to alert him that the new law might result in portions of the tentative agreement being rendered illegal. As a staff member reporting to the Mayor it was also obvious that he would be asked for a recommendation as to how the Mayor should proceed.

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[1] While a delay of a few weeks between tentative agreement and ratification is not unusual a delay of over four years between contract expiration and the reaching of a new agreement is extraordinary. After a four-year delay the Union dragged out the final approval process for another two and one-half months. Contrary to the dissent the record does reflect that the Union dragged out the negotiations to avoid increased employee pension contributions and health care cost contributions agreed to by all other City employee unions. Tr. 65-66.

The examiner concluded that the negotiator should have expressed his concerns by urging rejection to the Finance Committee and Common Council rather than recommending rejection by the Mayor. We find that a distinction without a difference. Given the uncertainty surrounding the impact of Act 10 as well as the question of whether Act 10 would ultimately apply, we believe the City had good cause for refusing to proceed with the tentative agreement. Whether that result occurred because the Mayor chose not to pursue ratification or as a result of the Committee (or the full Council) rejecting the tentative deal is irrelevant.

The events giving rise to the change in circumstances were completely outside the control of the City of Milwaukee. There is no question that at the point in time this reversal of position occurred it was in the best interests of the citizens and taxpayers of the City of Milwaukee. Accordingly, we conclude dismissal of the complaint herein is warranted. Given the unique circumstances present in this case, it is difficult to attribute a lack of good faith to Mayor Barrett's decision in this matter. This is particularly true in light of the fact that there is no evidence he was a participant in the process leading to the tentative agreement.

Our dissenting colleague believes that prior Commission precedent establishes that once the union has ratified the tentative agreement, the employer's refusal to ratify is a per se violation of the duty to bargain in good faith. That is an inaccurate statement of prior precedent of this agency and would, on its face, be poor public policy.

Contrary to our dissenting colleague's view, there is no "ironclad" rule requiring absolute support of a tentative agreement reached by a bargaining committee. Elected officials who were not present when the tentative agreement was struck were always free to vote against the deal. Waunakee Community School District, Dec. No. 27837-B (WERC, 6/95) (holding that bargaining committee members absent from last session had no duty to support agreement.) Similarly in City of Columbus, Dec. No. 27853-B (WERC, 6/95) we held that a mayor was free to veto a tentative agreement ratified by the City Council because he was not a member of the bargaining team. As the opinion makes clear, the so-called "duty to support" tentative agreements grows out of our concern that one party not engage in "ambush tactics". In other words, an employer's agent who says one thing at the bargaining table knowing full well that in the end the political body will reject the deal is not bargaining in good faith. As the Commission observed, "such conduct, of course, serves only to create a bargaining relationship of distrust and chicanery between the parties and is destructive of collective bargaining." Waunakee Community School District, supra at p. 20. In the Columbus decision we not only excused the Mayor from the duty to support but we excused a council member who had participated at the table but was absent from the final session at which the tentative agreement was reached.

At most the decisions in Waunakee School and City of Columbus stand for the proposition that elected officials who were present at the bargaining table and voiced support of the tentative agreement could not change their minds during a subsequent ratification vote.

The dissent also relies on Hartford Union High School District, Dec. No. 11002-B (WERC, 9/74) but misstates the holding. The parties in Hartford had reached a tentative agreement and the Employer had conditioned its ratification upon review by the school board association and its legal counsel. We concluded that seeking outside review and insisting upon "implementation of the advice" violated the duty to bargain in good faith. Hartford is clearly inapposite to the circumstances present here.

Our case law does not suggest that public officials have an absolute duty to support a tentative agreement in all circumstances. Here there is no evidence to suggest any bad faith on the part of the City's negotiator, nor is there a suggestion of "ambush tactics" or "chicanery". Hamblin, the City's staff negotiator, fully supported the tentative agreement on January 9, 2011. Even after Act 10 was introduced in the Legislature he was urging the Union to proceed with ratification and he specifically alerted the Union to the hazards of waiting. These are hardly the acts of an untrustworthy negotiator or of one engaged in "chicanery". The record is also devoid of any suggestion that Mayor Barrett was a part of or approved the tentative agreement. It was Mayor Barrett who made the decision not to move forward with the process. Tr. p. 25. Barrett was under no obligation to support, recommend or refrain from pulling the pin on the tentative agreement. The dissent would read out of the law any required statutory approval by a body with the legal authority to do so. The "negotiator" (in this case Hamblin) may have a duty to support a tentative agreement but the decision-maker (Barrett) had no such duty. Hamblin had no authority as an agent of the municipality to bind it to any financial obligation absent an express delegation of such authority. Kocinski v. Home Insurance Company 154 Wis.2d 56, 452 N.W.2d 360 (1990); Holzbauer v. Safeway Steel Products 2005 WI App 240 288 Wis.2d 250, 708 N.W.2d 36.

Clearly it was the Mayor's call as to whether to submit this tentative agreement to the appropriate committee and then on to the full Common Council. Had the Council disputed the Mayor's decision not to advance the proposal they presumably could have taken some action. The record evidences no such action. The action complained of in this dispute was the ultimate decision of the Mayor not to advance this matter. His factotum, Hamblin engaged in no conduct exhibiting bad faith or "chicanery". He simply urged the Union to move this matter along mindful of the impending legislative changes.

Most negotiators are fully aware that tentative agreements are just that – tentative. There is rarely any incentive for a negotiator to retreat from an attempt to "sell" the agreement to an elected body charged with the ultimate authority to approve. The same can be said for union negotiators relaying a tentative agreement to the full membership. Repeated rejections of tentative agreements certainly can create an atmosphere of distrust and uncertainty making future negotiations difficult. There is no history of such behavior on the part of City of Milwaukee and the events leading to the Mayor's action are unlikely to reoccur.

Unlike our dissenting colleague, Mayor Barrett did not have the benefit of hindsight when making the decision not to advance the tentative agreement. We, of course, now know that our Supreme Court chose not to apply Act 10 retroactively. In March of 2011, however, the question of whether and when Act 10 would take effect was very much in doubt. The bold statement that between March 15, 2011 and June 29, 2011 the previous law was in full force and effect can only be made with the benefit of hindsight. On March 14 or 15 when the Mayor decided not to pursue ratification there was no Dane County Circuit Court injunction in place. The Secretary of State could have published the next day and such action would have rendered the entire agreement illegal.

The new law's effective date is very much relevant. Had the City ultimately ratified the agreement after the effective date, it would have been approving a completely unlawful agreement. The dissent derisively dismisses any concerns about the legality of the agreement. We prefer to ratify the view that elected officials should avoid entering into illegal contracts and exercise caution when in peril of doing so.

The dissent also argues that Hamblin and Mayor Barrett were only concerned with whether the City could get a "better deal" post-Act 10, and had no other legitimate concerns, Hamblin's testimony includes repeated references to both cost impact and concerns over legality and effective date. Tr. 34-37. Furthermore, even if cost was the sole factor, isn't it appropriate for elected officials to demonstrate a paramount concern over the financial implications of their decisions?

Dated at Madison, Wisconsin, this 20th day of February, 2013.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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

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

City of Milwaukee

DISSENTING OPINION OF COMMISSIONER NEUMANN

This should not be a difficult case. It is controlled by longstanding legal principles which were applied correctly by the Examiner. A party's negotiators are required to submit and support a tentative agreement (TA) through the ratification process. Here there is no question that a complete written TA had been reached, that it was conditioned only upon ratification, that the Union ratified, and the City thereafter intentionally refused to do so. The City's excuse – that Act 10 might soon take effect – is untenable, since nothing about Act 10 presented any real practical obstacle to taking a ratification vote between mid-March and June 16, 2011. As the Examiner explained:

> 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.

Despite the simplicity of this case, the majority's opinion has so confused the issues and distorted the precedent that it necessitates a comprehensive response. Let's start with the facts. Although the pertinent facts are uncomplicated, undisputed, and set forth accurately by the Examiner, the majority has set aside the Examiner's findings without so much as an explanatory footnote. The majority offers a "re-do" of the facts, complete with irrelevant/unsupported assertions, apparently with the sole purpose of making the Union's conduct look culpable.

For example, the majority makes several direct and indirect references to the fact that it took a long time for the contract in question to reach tentative agreement, several more weeks to reduce it to writing, and some additional weeks for the Union to ratify.[2] The City also harps on this point, but it is completely irrelevant. The City does not claim, the parties did not litigate, and there is no evidence that the Union was unlawfully dilatory, nor (though irrelevant) is there any evidence that the Union was solely responsible for the length of the negotiations. The City argues that if the Union had ratified more quickly, the contract could have been completed before Act 10 came into play, but even the City does not claim that this somehow justified the City's refusal to ratify. It is therefore wholly immaterial how long it took the parties to reach the tentative agreement and/or whether there was any inordinate delay on the part of the Union. Nonetheless the majority refers in three of its 12 findings to a

[2] Bargaining over successor labor agreements occasionally extends well beyond the titular termination date of the agreement under negotiation, as occurred here (the contract expired more than a year before it was agreed upon). While the City apparently settled most or all of its other 07-09 contracts by early 2010, the City does not accuse the Union of any bad faith delays in the negotiations leading up to this TA, nor does this record suggest such. It is also well within the norm for parties to take six or seven weeks to reduce a tentative agreement to writing. Thus the majority's focus on the length of time it took to finalize the agreement and submit it for City ratification is both speculative and immaterial.

supposed "delay" in finalizing the tentative agreement, attributes that delay entirely to the Union in Finding 8, and refers again in the majority memorandum to the parties reaching an agreement "four years after expiration."

Exactly what is the majority trying to suggest - that if it takes a long time to reach an agreement, then one of the parties can renege without penalty? These repeated irrelevant allusions in the majority's "facts" seem designed solely to suggest that the Union somehow deserved to have the City derail the agreement. Needless to say, that manner of rendering findings does not instill confidence in the majority's neutrality.

The relevant undisputed facts can be summarized objectively and chronologically as follows:

> On January 7, 2011, the City and the Union reached a complete meeting of the minds (in labor parlance, a "tentative agreement") on a 2007-2009 collective bargaining agreement, subject only to ratification by both parties. Between January 7, 2011, and March 6, 2011, they exchanged written drafts that reflected no material disputes; on March 6 an agreed-upon written document was ready for ratification.
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> On February 11, 2011, while the parties were putting their tentative agreement into writing, Governor Walker introduced the legislation that became 2011 Wisconsin Act 10, which, when it took effect, would eliminate collective bargaining except as to "base wages" for these and most other public employees. On March 11, 2011, after passage by the Legislature, the Governor signed Act 10. The earliest Act 10 could have gone into effect would have been on March 28, 2011, given the Secretary of State's stated intention to wait the maximum period of time to publish it, but before March 28, the law was stayed by a Wisconsin circuit court.[3]
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> On March 12, 2011 - well before the law either did or could have gone into effect - the Union ratified the collective bargaining agreement and submitted it to the City for its ratification. On March 15, 2011, still two weeks before the earliest possible Act 10 effective date, the City's chief negotiator recommended to the Mayor that the City stop ratification, because ratification would "not [be]

[3] The majority asserts that, "On March 14 or 15 when the Mayor decided not to pursue ratification … the Secretary of State could have published the next day, and such action would have rendered the entire agreement illegal." In fact, prior to Hamblin and the Mayor deciding to stop the bargaining process, the Secretary of State had already announced his intention to withhold publication for the full ten days. Accordingly, the majority's factual assertion is plainly wrong as to what City officials understood the situation to be on March 14 or 15. In addition, of course, once Act 10 was stayed on March 18, City officials had plenty of time to take a ratification vote. In any case, as explained below, the majority's argument - that the possibility of entering an agreement that might turn out to be illegal justified derailing the tentative agreement -- is both factually and legally groundless.

in the best interests of the City." The Mayor followed that recommendation and refused to place the matter before the City Council. The City did not notify the Union or the Council of the decision to stop the process.

On March 18, 2011, a circuit court enjoined Act 10, and this injunction remained in effect until the Supreme Court's decision on June 16, 2011.

Had the City followed its normal ratification process without deviating from its normal schedule of meetings, the City's Finance and Personnel (F & P) Committee would have considered approving the agreement on April 7, 2011, and, if so approved, the Common Council would have taken a ratification vote at its April 12, 2011 meeting.

Had the City proceeded to a ratification vote and the mayor signed the agreement, it would have expired retroactively by its own terms on December 31, 2009. Act 10 went into effect on June 29, 2011.

In short, the City decided to stop the process a full two weeks before what it knew was the earliest possible date Act 10 could have gone into effect and persisted in that conduct even after Act 10 had been stayed indefinitely and for the full 3 and one-half months before the law actually took effect.

The only justification the City claimed to have had at the time was that finalizing the agreement would not "be in the best interests of the City," by which, as City negotiator Hamblin testified, the City meant "We wouldn't have to pay the money and … the four corners of the contract would no longer exist." Nonetheless, the majority concludes that the City acted lawfully. These appear to be the majority's reasons:

(1) the status of Act 10 was unclear during this entire period of time; therefore, if the process went forward, if the Common Council approved the contract, and if the Mayor signed it, then the City might have entered into an "illegal" agreement;

(2) once Act 10 was in the picture, the City had a duty to its taxpayers not to move forward on the tentative agreement, because the TA gave the Union better terms than Act 10 would allow once it went into effect;

(3) though not argued by the City, the majority asserts that the Mayor's role in setting the City Council's agenda gave the Mayor unfettered discretion to impede the ratification process regardless of the City having reached a TA with the Union.

Under longstanding collective bargaining principles, these holdings are profoundly wrong.

1. The City had a per se, ministerial duty to put the TA to a ratification vote.

Section 111.70 (1)(a) of MERA requires the City "to meet and confer at reasonable times, in good faith, with the intention of reaching an agreement ... ." In decisions reaching back 40 years to the beginning of MERA, this Commission has interpreted that section to include an unequivocal duty: once a TA has been reached at the bargaining table, the parties' bargaining representatives must support that agreement through ratification by the municipal governing body. Former commissioner Marshall Gratz succinctly summarized the Commission's longstanding principle in a 1990 decision as follows:

> It is a refusal to bargain prohibited practice within the meaning of Sec. 111.70(3)(a)4 and 1, Stats., for a municipal employer's bargaining representatives to fail to follow through on agreements to present and recommend ratification of tentative agreements reached in collective bargaining to the municipal employer's governing body.

Oconto County, Dec. No. 26289-A (Gratz, 7/90), aff'd by operation of law, Dec. No. 26289-B (WERC, 8/90).

This uniquely public sector "duty to support" represents an accommodation between two important policies: on the one hand, the success of the bargaining process, which depends upon reliable mutual commitments across the table, and, on the other hand, the governmental body's voting autonomy. See Milwaukee Board of School Directors v. WERC, 42 Wis.2d 637, 652 (1969). In a hitherto unbroken line of cases as early as 1973 and as recent as 2011, the WERC has accommodated these policies by distinguishing between those officials who were instrumental in reaching the TA (typically, members of the municipal bargaining team) and those officials who were not. Officials in the latter category are free to oppose ratification and vote accordingly. Even officials who are involved in reaching the TA may retain the right to oppose it during ratification, so long as they have conveyed their dissent at the time the TA is reached. Otherwise the law imposes a virtually ironclad duty on each party's bargaining representatives to submit, recommend, and support the agreement at the ratification stage. See Adams County, Dec. No. 11307-A (Schurke, 4/73), aff'd by operation of Law, Dec. No. 11307-B (WERC, 5/73); Jt. School Dist. No. 5, City of Whitehall, Dec. No. 10812-B (WERC, 9/73); Hartford Union High School Dist., Dec. No. 11002-B (WERC, 9/74); City of Green Bay, Dec. No. 21785-A (Roberts, 10/84), aff'd by operation of law, Dec. No. 21785-B (WERC, 11/84); Oconto County, Dec. No. 26289-A (Gratz, 7/90), aff'd by operation of law, Dec. No. 26289-B (WERC, 8/90); City of Columbus, Dec. No. 27853-B (WERC, 6/95); Waunakee Community School Dist., Dec. No. 27837-B (WERC, 6/95); Milwaukee County,

Dec. 33001-D, 32912-E, and 32913-E (WERC, 5/11), aff'd in pertinent part sub nom., Milwaukee County v. WERC and District Council 48, AFSCME, Case No. 11CV012137 (February 27, 2012).[4]

The Commission occasionally has suggested hypothetically "that some unanticipated intervening event or other 'good cause' could justify a party in withdrawing support for a TA. Milwaukee County, supra, and cases cited therein. As noted in Milwaukee County, those occasional comments were always *dicta*. The Commission has never actually excused a party's negotiating team from supporting a tentative agreement on which there has been a full meeting of the minds. Thus, in an apt example, the Commission rejected the excuse that subsequent review of the tentative agreement revealed an illegal provision, City of Columbus, supra; or that the tentative agreement depended upon subsequent detailed calculations that turned out to differ from the assumptions at the time of the tentative agreement, Oconto County, supra. Very recently, in Milwaukee County, supra, we required the employer's negotiators to support and vote for the tentative agreement even though, prior to ratification, the County Executive had made it clear he would veto the agreement.

In any case, as the Examiner correctly observed, even these hypothetical references to a good-cause exception have been made only in the context of a bargaining team member's failure to recommend or vote for a tentative agreement. As he stated, "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."

The Examiner also aptly noted that post-TA changes in circumstances that might affect the governing body's attitude toward the TA can be discussed during the ratification process and therefore cannot be a reason to avoid the ratification process. The governing body is not bound to vote in favor of the TA (unless, of course, a majority of the governing body's

[4] The majority opinion badly misleads, both as to the duty-to-support principle reflected in these cases and as to my alleged views about that principle, in an attempt to minimize the strength of the principle itself. The majority's own summary of the rule is bizarrely off-base: "At most the decisions from Waunakee School and City of Columbus stand for the proposition that elected officials who were present at the bargaining table and voiced support of the tentative agreement could not change their minds during a subsequent ratification vote." It is true that the issue frequently arises with respect to how elected officials must vote, but surely the majority is aware that bargaining representatives who are not elected officials (such as Hamblin) are fully subject to the rule of these cases. Surely also the majority does not believe that the duty to support is limited to voting, rather than submitting, supporting, and recommending. Every case refers to "bargaining representatives" or "bargaining committee" and describes the duty as "to sponsor and support ratification" or "to present and recommend ratification." Of course each case considers a slightly different aspect of the rule, and of course sometimes the allegations are held unsubstantiated, but the rule itself remains crystal clear throughout. Thus, as the majority mentions, one of the holdings in Columbus was that the mayor had no duty to support the TA even though he had been present when the agreement was reached and made positive remarks about the TA at that time. We recently clarified this aspect of the Columbus decision, noting that the mayor in that case was exempt from the duty to support because (a) he was not a member of the bargaining team and (b) because it was clear that his comments had not been instrumental in the union agreeing to the TA. See Milwaukee County, supra, at 17-19.

members were involved in the bargaining that led to the TA). The majority, however, reveals its near-contempt for the governing body's ratification role by its remarks regarding this point:

> The examiner concluded that the negotiator should have expressed his concerns by urging rejection to the Finance Committee and Common Council rather than recommending rejection by the Mayor. We find that a distinction without a difference. … Whether [refusing to proceed with the tentative agreement] occurred because the Mayor chose not to pursue ratification or as a result of the Committee (or the full Council) rejecting the tentative deal is irrelevant.

Majority Memorandum at 5. If the majority sees no difference between recommending a "no" vote at a ratification meeting and refusing even to hold such a meeting, the majority is not looking very hard. For one thing, the majority is assuming that the Council would have rejected the TA. Had a ratification meeting been held and Hamblin expressed his (in my view, baseless) concerns, the elected members of the F & P Committee and the Common Council might still have voted for the agreement. By not even holding the meeting, Hamblin and the Mayor cynically precluded any potential usurpation of their goal. This reflects significantly less "good faith" on their part than merely expressing concerns and letting the chips fall where they may in the vote itself.[5]

The Examiner thus implied – and I would explicitly hold – that a public employer's duty to bargain in good faith includes a per se, ministerial duty to process the TA through ratification. There is no "good cause" for refusing to put a TA before the governing body for a vote.

2. Even if a "good cause" exception applies, the City had none.

Assuming that a "good cause" exception could apply to the ministerial act of submitting an agreement to discussion and vote, the instant circumstances do not meet that standard.

a. The confusion surrounding Act 10 and possibility of an "illegal" contract was not "good cause."

The City and the majority first contend that the confusion around Act 10, and its shifting possible effective dates, made ratification too dangerous because the contract could turn out to be "illegal." There may have been confusion, but there was never any reasonable danger. Even the confusion is exaggerated by the City. The City argues in its briefs that the March 15 decision to stop the process was based on information "from high-ranking DOA and DOJ personnel" that the law would be published by the Secretary of State and therefore take effect on March 26, which was "before the first day on which the agreement could have been

[5] It is not necessary to decide in this case whether Hamblin lawfully could have urged the Mayor or other elected officials to vote against the agreement during the ratification process, because the process never got that far. I note, however, that, on this record, I see no "good cause" for Hamblin to withhold support and recommendation of the TA the City had reached with the Union. The record reveals nothing about the Mayor's role in authorizing or reaching the TA and therefore nothing as to what his legal duty may have been to support it thereafter.

presented to the F & P Committee." This argument is disingenuous. The comments from "DOA and DOJ personnel" that appear in this record occurred on March 28 and 29 and obviously could not have influenced Hamblin or the Mayor on March 15. Moreover, while the F & P Committee did not have a regularly scheduled meeting until after March 26, the record contains no evidence that the committee "could not" have met before that date. As it turned out, of course, no special scheduling was necessary and the agreement would have been voted upon in the ordinary course of business had the City simply moved forward.

More importantly, it was (or should have been) a lot more dangerous to the City's legal liability to violate its clear duty under the collective bargaining law than to ratify a contract that might turn out to be unenforceable depending on Act 10's eventual effective date. If the Commission majority were making the correct decision in this case, the City would now be facing the possibility of considerable back pay with interest. In contrast, there is no serious argument that the City could have suffered financial consequences if it somehow turned out that the City had ratified this TA after Act 10 went into effect. Indeed, labeling such a contract "illegal" is deceptively imprecise. The City does not claim that, for the whole two and one-half months it refused to ratify, it was under the belief that Act 10 was in effect. It can only claim that Act 10 might have turned out to be in effect at some point during that time. In the unlikely event that Act 10 turned out to take effect retroactively at some point before the City's ratification vote, then the City would not have had authority to enter into some of the provisions in the instant TA. The sole consequence would have been a set of null, void, and unenforceable contract provisions. The contract itself, in particular its wage provisions, would have been enforceable and would have served as a platform for the subsequent "base wage" negotiations permitted by Act 10. While the majority archly states its preference for "the view that elected officials should avoid entering into illegal contracts and exercise caution when in peril of doing so," the majority is willfully blind to the fact that only portions of the contract might have turned out to be "illegal," and, moreover, that it was only the Union that could have been harmed by the unenforceability of those portions. The City simply had nothing (legitimate) to lose by moving forward to vote on the contract despite the confusion surrounding Act 10.

It bears noting that, to the extent the City was concerned that Act 10 might retroactively negate this contract, that concern is utterly baseless. Every version of Act 10, from the one proposed by the Governor to the one put into place on June 29, 2011, expressly postponed the law's applicability until the expiration of existing contracts.[6] It was obvious from the very beginning that the City could lawfully ratify and implement the instant contract any time before Act 10 took effect and the contract would be enforceable. It further bears noting that it has long been commonplace for collective bargaining parties who are concerned about iffy circumstances outside their control to negotiate contingency language to handle those concerns. See discussion in Public Utility Commission of the City of Richland Center, Dec. No. 33281-B

[6] See 2011 Wisconsin Act 10, Sections 9332 and 9355.

(WERC, 6/12) (dissenting opinion of Commissioner Neumann at 9-10); Henry M. Hald High School Association, 213 NLRB 463, 475 (1974). Trying to negotiate contingency language might have been a truly "good faith" approach to the problem, but the City did not broach that possibility.

Finally, the worries the City vociferously expresses in its briefs about how Act 10 could have affected this contract evoke particular skepticism because, at the same time that it was just too confused to put the instant TA to a ratification vote, the City was continuing the bargaining process with another unit, all the way through interest arbitration proceedings that did not finish until late in the spring of 2011.

b. The City's supposed "duty to the taxpayers" to get a better deal was not "good cause."

Hamblin's stated basis for the March 15 decision had nothing to do with concerns about Act 10's effective date, about the difficulty of scheduling meetings, or about the potential illegality - as such - of any contract provisions. To the contrary, the reason he gave to the Mayor and to the Commission was brief and consistent: ratification "would not be in the best interests of the City …," which, as he explained at hearing, meant that the City could get a better financial deal if Act 10 took effect.[7] This explanation is certainly plausible and doubtless true. Hamblin and the Mayor looked at the situation and decided that the City might not have to be stuck with this contract if and when Act 10 went into effect and this, from a strictly fiscal point of view, would have been in the City's best interests. Surely, however, "good cause" for withdrawing from a TA cannot mean the possibility of the reneging party getting a better deal.

The majority poses the question, "even if cost was the sole factor, isn't it appropriate for elected officials to demonstrate a paramount concern over the financial implications of their decisions?" The answer seems obvious: of course not! The City cannot use its own desire to save money as a reason for reneging on a deal – any more than it could use such an argument to justify breaching a contract. The City is only *one party* to the collective bargaining relationship. From the standpoint of the other party, the tentative agreement retained its full value; indeed, having a settled contract would have postponed for these employees (some of

[7] The majority's statement that "the negotiator had a duty to alert the Mayor to the fact that the tentative agreement might well include provisions which were unlawful," and the majority's claim that Hamblin expressed concern to the Mayor about "legality and effective date" as well as cost, are not in tune with the record. This is clear even from perusing the portion of the record to which the majority has referred (TR 34-47). It is clear that Hamblin consistently and repeatedly testified that what he told the Mayor at the time was that it would "not be in the best interests of the City" to move forward with ratification. He also repeatedly testified that what he meant by this advice to the Mayor was that the City could get a better deal on salary and could also avoid other matters "within the four corners of the contract," such as pension and health insurance costs, because those items would no longer be negotiable once Act 10 went into effect. Hamblin was forthright throughout his testimony that his goal was to forestall ratification in order to reap the financial benefits that would accrue to the City if Act 10 went into effect before the instant contract was ratified. Hamblin never mentioned any concern about some kind of extraneous liability for entering into an "illegal contract." The majority's assertions are misleading and inaccurate.

the lowest-paid in the City) the drastic effects of Act 10 and established a higher "base wage" for future bargaining after Act 10 went into effect. Imagine if the tables were turned and some outside occurrence favored the Union – let's say the intervening election of pro-union Council members. If the Union representatives then decided not to support the TA – and not even to put the matter to a ratification vote – but insisted upon renegotiating a better deal, would the majority consider the Union to have engaged in good faith bargaining?[8]

It is not surprising that the City would have a one-sided view of its own strategic interests. What is surprising and disappointing is that the majority – entrusted with neutrality in enforcing the law – adopts the same one-sided view: that the City's interest in getting a better deal is good cause for reneging on a fully formed tentative agreement. This is absurd and undermines confidence in the agency.

c. The Mayor did not have unfettered discretion to "pull the pin" on the TA before ratification.

The majority asserts that, even if Hamblin (the City's chief negotiator) had a duty to support the TA, "Clearly it was the Mayor's call as to whether to submit this tentative agreement to the appropriate committee and then on to the full common council." Further, "Barrett was under no obligation to support, recommend or refrain from pulling the pin on the tentative agreement." And, "Had the Council disputed the Mayor's decision not to advance the proposal they *presumably* could have taken some action." (emphasis added).

These unprecedented assertions are bald of factual support or legal authority. It is implicit in this record that the Mayor's office had some role in placing the TA on the appropriate Council agenda. But we do not know the parameters of this responsibility or whether it is discretionary in some meaningful way. Nothing in this record tells us whether, when, or how the Council could have taken action to bring these matters before themselves. What we do know is that neither Hamblin nor the Mayor affirmatively notified anyone, including the Council, that they had decided on March 14 or 15 to stop the ratification process. The Union, wondering what was holding things up, eventually began to ask questions and communicate with some Council members. Some Council members may have had conversations with Hamblin, but Hamblin had no specific recollection of when or with whom any such conversations occurred, nor what precisely he may have conveyed. Thus the majority is disingenuous in asserting that there was any adequate communication or authentic ratification opportunity on the part of the Council once Hamblin decided simply to stop the process.

[8] To ward off further "straw men" by the majority, I realize that this analogy is not on all fours with the instant case because here the outside occurrence (confusion surrounding Act 10) allegedly affected the enforceability of the contract. I have already explained, above, that this was a bogus worry. In this section, I am responding to the majority's separate holding that the City was somehow entitled or duty-bound to use this opportunity to reduce its costs.

Proving the negative (that the Mayor does not have such unfettered discretion as to a TA reached by his own fully-authorized negotiator) is always difficult, but it is worth noting that no municipal executive has asserted such authority in the 40-year set of cases decided by WERC, spanning untold thousands of municipal contract negotiations. Even in this case, it is not the City that claims such, but the majority on its own instincts. That alone makes it an exceedingly unwise premise for a decision of this significance.

It would also be exceedingly poor policy. The long-established process for good faith bargaining (accommodating the twin policies of governmental voting autonomy and the need for reliable bargaining commitments) has clear and specific steps: (1) the negotiators reach a TA; (2) officials of both parties who were instrumental in reaching that TA submit the TA for and support ratification; (3) ratification meeting is held and vote is taken; (4) if authorized in a particular municipality, and if the executive was not himself instrumental in reaching the TA, the executive may veto. See generally, Milwaukee Board of School Directors v. WERC, 42 Wis.2d 637, 652 (1969), and footnote 5, above. Every fact situation the Commission has addressed in its "duty to support" line of cases either asserts or assumes that the step following the TA is ratification by the governing body. A corollary and ironclad principle is that a party's negotiating team will be assumed to have authority to reach an agreement, unless limitations are expressly conveyed to the other party:

> Whitehall and Hartford establish that the advice of an attorney can provide bargaining team members with a "bona fide" reason to withhold support for a tentative agreement they previously reached if the other party is given proper notice during bargaining that such advice will be sought and the existence of the tentative agreement is subject to that advice.

City of Columbus, Dec. No. 27853-B (WERC, 6/95) at 16.

In this context, whoever has the intervening clerical role of scheduling the meeting and/or setting the agenda must be viewed as having a purely ministerial role, not another discretionary step in the bargaining process – unless, of course, the City's negotiator had informed the Union, prior to reaching the TA, that a ratification meeting would be contingent upon the Mayor's approval. The onus would be upon the City to establish such an important contingency regarding this TA, which obviously the City did not do here. This prong of the majority opinion is especially wrongheaded.

2. Clearing away some debris in the majority opinion.

The majority opinion is unfortunately clouded with debris that not only obscures its own reasoning but utterly distorts mine.

First, the majority's various perorations to the City's subjective "good faith" are completely irrelevant. The applicable "duty to support" line of precedent has nothing to do with subjective "good faith" on the part of any City official. Doubtless Hamblin believed "in

good faith" that he could get a better deal once Act 10 was enacted than he had gotten in the TA. Doubtless he had engaged in good faith bargaining before he decided not to pursue ratification. None of this is pertinent to whether he violated the law by not supporting ratification of the TA thus reached.

The majority is confusing the duty-to-support line of cases with a completely different line where a party's subjective "good faith" is the pertinent inquiry. The latter cases arise where the parties have been unable to reach agreement and one party blames the impasse on the other party's failure to undertake negotiations with the requisite "intent to reach agreement." A circumstantial inquiry ensues into the accused party's statements, dilatory conduct, and so forth, that took place during the course of negotiations. See Edgerton Fire Protection District, Dec. No. 30686-B (WERC, 2/05) at 25-26, and cases cited therein. Once an agreement has been reached, as here, it becomes irrelevant how the parties conducted themselves during the bargaining. It is per se bad faith bargaining to renege on a TA, perhaps especially so where, as the majority points out is true here, the TA is a result of good faith bargaining.

Not only has a subjective "good faith" standard never previously been applied during the ratification stage, it would make little sense to do so. Here, for example, the majority notes that the City negotiator Hamblin had shown his "good faith" by urging the Union to ratify at some point prior to stopping the City's ratification process. Does the majority mean that, as long as Hamblin was for the agreement before he was against it, he is entitled to derail it now that he doesn't like it? The majority also notes that the City has not been shown to have a history of reneging on tentative agreements. Assuming that is so (and the issue was not remotely litigated here), is the City ipso facto permitted to renege on this one? This begs the question, how many times should a party get to renege during the course of a relationship before such reneging is illegal - once, twice, ten times? [The answer under Commission case law is "none."] The majority also makes much of the fact that Hamblin and the Mayor were not themselves responsible for the Act 10 confusion; it was all "outside of their control." Again, what is the point of this argument – that, it was permissible for them to seize an opportunity to renege on a deal, just because someone else created the opportunity? These aspects of the majority opinion are nonsensical and staggeringly at odds with basic bargaining principles.

An even more annoying distraction is the way the majority characterizes my views in various absurd ways and then criticizes the absurdity of my views. For example, "Our dissenting colleague believes that prior Commission precedent establishes that once the union has ratified the tentative agreement, the employer's refusal to ratify is a per se violation of the duty to bargain in good faith." Also, "Contrary to our dissenting colleague's view, there is no 'ironclad' rule requiring absolute support of a tentative agreement reached by a bargaining committee." And, "Our case law does not suggest that public officials have an absolute duty to support a tentative agreement in all circumstances." Also, "The dissent would read out of the law any required statutory approval by a body with the legal authority to do so."

Of course, I have neither expressed nor implied any such silly views. I do not claim that the governing body must ratify just because the Union has ratified. Nor that officials who have not participated in reaching the TA have any duty, let alone an "ironclad" or "absolute" duty, to support the TA during ratification. I certainly have not "read out of the law" the governing body's legal authority to approve the contract – to the contrary, the whole point of this opinion is that the governing body was entitled to vote. Indeed, by refusing even to put the matter to the governing body, it is the Commission majority that seeks to hog-tie the governing body.

Conclusion

I would hold, as did the Examiner, that the WERC's longstanding case law, establishing a virtually per se duty to support a tentative agreement, required Hamblin and the Mayor to forward the tentative agreement to the appropriate public bodies for ratification proceedings. Nothing in Act 10 or its circumstances posed any legitimate obstacle. The City violated the law in failing to do so.

As to remedy, I would affirm the Examiner's order requiring the City to proceed through the ratification process with Hamblin and any other officials who were instrumental in reaching the TA being required to present it and support it for ratification. While Act 10 would preclude such action prospectively after June 29, 2011 (the effective date of Act 10), this remedy is entirely retrospective and retroactive. The contract in question, as mentioned earlier, if ratified by the Council, would have expired by its own terms in December 2009. Such retrospective and retroactive relief serves the Commission's principal remedial purpose of placing parties in the position they would have been in, had the unlawful conduct not occurred. See generally, Green County, Dec. No. 20308-B (WERC, 11/84); Ozaukee County, Dec. No. 30551-B (WERC, 2/04). Act 10 was not in effect during the relevant period of time (March through June 2011). Just as a municipal employer may be compelled to arbitrate a grievance that arose under a contract that pre-dated Act 10, even though the arbitration itself would occur after Act 10 (which forbids grievance arbitration), Stevens Point School District, Dec. No. 33905-A (Carlson, 9/12), the City may be compelled to comply with an order directing it to take action that solely effectuates rights that existed prior to Act 10.

Dated at Madison, Wisconsin this 20th day of February, 2013.

Judith Neumann /s/
Judith Neumann, Commissioner

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