STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

OZAUKEE COUNTY LAW ENFORCEMENT EMPLOYEES, LOCAL 540, AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO, Complainant, vs. OZAUKEE COUNTY BOARD OF SUPERVISORS, PERSONNEL COMMITTEE, Respondent.	Case X No. 27280 MP-1181 Decision No. 18384-A

Appearances:
Lawton & Cates, Attorneys at Law, by John H. Bowers, 110 East Main Street, Madison, WI 53703 for the Union.
Lindner, Honzik, Marsack, Hayman & Walsh, Attorneys at Law, by Roger E. Walsh, 700 North Water Street, Milwaukee, WI 53202 for the County.

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

Ozaukee County Law Enforcement Employees, Local 540, American Federation of State, County and Municipal Employees, AFL-CIO, herein the Union, having filed a complaint with the Wisconsin Employment Relations Commission on January 2, 1981, alleging that the Ozaukee County Board of Supervisors, Personnel Committee, herein the County, had committed a prohibited practice within the meaning of the Municipal Employment Relations Act, herein MERA; and the Commission having appointed Douglas V. Knudson, a member of its staff, to act as Examiner and to make Findings of Fact, Conclusions of Law and Order pursuant to Section 111.07(5), Stats.; and hearing on said complaint having been held before the Examiner in Port Washington, Wisconsin on February 3, 1981; and the parties having filed briefs by May 22, 1981; and the Examiner, having considered the evidence and arguments of the parties, makes the following Findings of Facts, Conclusion of Law and Order.

FINDINGS OF FACT

1. That the Union is a labor organization and is the exclusive collective bargaining representative of all permanent regular full time sworn personnel employed by the Ozaukee County Sheriff's Department, excluding office clericals, supervisory, managerial, executive and confidential employes; and, that the Union maintains an office at 2323 North 29th Street, Sheboygan, Wisconsin 53081.

2. That the County is a municipal employer, which operates a Sheriff's Department, and, which maintains an office at the Ozaukee County Courthouse, P.O. Box 307, Port Washington, Wisconsin 53704.

3. That, on August 13, 1979, following the receipt of an interest arbitration award, the Union and the County executed a collective bargaining agreement for 1978-79, which agreement contained the following provision:

> ARTICLE XXIII
> DURATION
>
> THIS AGREEMENT shall become effective January 1, 1978, and shall remain in full force and effect up to and including December 31, 1979, and shall automatically be renewed for additional periods of one (1)

year thereafter, unless either party shall, not later than July 1, 1979, or July 1 of a subsequent year of termination, serve upon the other written notice of a desire either to negotiate modifications to or to terminate this Agreement. If either notice is given, this Agreement shall terminate as of December 31, 1979, or, if applicable, December 31 of a susequent [sic] year of termination. The party giving a notice of a desire to negotiate modifications shall submit its specific initial proposals by July 15 of such year and the other party shall submit its specific initial proposals by August 15 of such year, and negotiations will commence on a mutually agreeable date by September 15 of such year.

4. That in a letter to the County dated June 19, 1979, a business representative for the Union, Michael J. Wilson, stated, in part:

> Pursuant to ARTICLE XXIII - DURATION, the Union herein submits written notice of its intent and desire to negotiate modifications to the collective bargaining agreement.

That a copy of said letter was also sent to Helen Isferding, who was replacing Wilson as the Union's business representative; that on July 9, 1979, the County agreed to the Union's request for an extension of the July 15 date for the submission of its specific initial proposals, due to the then pending arbitration proceeding, and, that the Union did submit such proposals in conformance with the extended date of July 31, 1979, to which the parties had agreed.

5. That on January 7, 1980, following the parties' failure to negotiate a 1980 agreement, the County filed a petition to initiate binding interest arbitration under Section 111.77, Stats.; that the Commission conducted an investigation, which was closed on February 26, 1980, thereby freezing the parties' final offers; that during their preceding negotiations, the parties had reached agreement on several modifications to the 1978-79 agreement, including a revision of Article 23, the duration clause, to reflect that the successor agreement would cover the period of January 1 through December 31, 1980; that an arbitrator was appointed to decide the two issues, i.e., holidays and wages, over which the parties remained in dispute; that said arbitrator conducted a hearing on May 23, 1980, during which the parties agreed to file written post-hearing briefs on or before June 19, 1980; that following four extensions of the filing deadline, all of which were requested by the Union, the filing of post-hearing briefs was completed on September 2, 1980; that the aribtrator's award was rendered on October 13, 1980; and, that the parties executed the 1980 agreement on November 5, 1980.

6. That the 1980 agreement contained the following provision:

ARTICLE 23
DURATION

> THIS AGREEMENT shall become effective January 1, 1980, and shall remain in full force and effect up to and including December 31, 1980, and shall automatically be renewed for additional periods of one (1) year thereafter, unless either party shall, not later than July 1, 1980, or July 1 of a subsequent year of termination, serve upon the other written notice of a desire either to negotiate modifications to or to terminate this Agreement. If either notice is given, this Agreement shall terminate as of December 31, 1980, or, if applicable, December 31 of a subsequent year of termination. The party giving notice of a desire to negotiate modifications shall submit its specific initial proposals by July 15 of such year and the other party shall submit its specific initial proposals by August 15 of such year, and nego-

tiations will commence on a mutually agreeable date by September 15 of such year.

7. That on July 9, 1980, Isferding sent a letter to the County stating the Union's intent and desire to negotiate modifications to the 1980 agreement for the year 1981; that Isferding further suggested that the submission of specific proposals be delayed until after receipt of the then pending arbitration award; that Isferding requested the County to advise her if it did not concur; that the County made no response to Isferding's letter; that on November 10, 1980, Isferding sent a letter to the County in which she suggested some dates for negotiations on a 1981 agreement; that by letter dated December 4, 1980 the County informed Isferding that the Union's failure to serve written notice on or before July 1, 1980 of its desire to negotiate modifications to the 1980 agreement, resulted in the renewal of said agreement for one year, and therefore, the County was declining the Union's request to negotiate modifications to the 1980 agreement; that in a letter dated December 9, 1980 Isferding again requested the commencement of negotiations; and, that on December 26, 1980, the County reaffirmed its refusal to enter into such negotiations.

8. That on January 2, 1981 the Union filed the instant prohibited practice complaint.

Upon the basis of the above Findings of Fact, the Examiner makes the following

CONCLUSION OF LAW

1. That the County's refusal to enter into negotiations with the Union over modifications to the 1980 agreement did constitute a refusal to bargain within the meaning of Section 111.70(3)(a)4 of MERA: and, that therefore the County did violate Section 111.70(3)(a)4 of MERA.

Upon the basis of the above and foregoing Findings of Fact and Conclusion of Law, the Examiner makes and enters the following

ORDER

IT IS ORDERED that Ozaukee County Board of Supervisors, Personnel Committee, its officers and agents, shall:

1. Cease and desist from refusing to bargain for the calendar year of 1981 with Ozaukee County Law Enforcement Employees, Local 540, American Federation of State, County and Municipal Employees, AFL-CIO, with respect to wages, hours and working conditions covering all regular full time law enforcement personnel in its employ.

2. Take the following affirmative actions necessary to effectuate the policies of the Municipal Employment Relations Act:

   (a) Upon request, bargain with Ozaukee County Law Enforcement Employees, Local 540, American Federation of State, County and Municipal Employees, AFL-CIO, with respect to wages, hours and conditions of employment, covering the employes set forth in Paragraph 1 hereof, for the calendar year 1981, and if agreement is reached, reduce same to writing.

   (b) Notify all employes by posting in conspicuous places in its offices, where employes are employed, copies of the notice attached hereto and marked "Appendix A". That notice shall be signed by the County and shall be posted immediately upon receipt of a copy of this Order and shall remain posted for thirty (30) days thereafter. Reasonable steps shall be taken by the County to insure that said notices

are not altered, defaced or covered by other material.

(c) Notify the Wisconsin Employment Relations Commission, in writing, within twenty (20) days from the receipt hereof as to what steps have been taken to comply herewith.

Dated at Madison, Wisconsin this 22nd day of July, 1981.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Douglas V. Knudson
Douglas V. Knudson, Examiner

APPENDIX A

Notice To All Employes

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

1. We will cease refusing to bargain with Ozaukee County Law Enforcement Employees, Local 540, American Federation of State, County and Municipal Employees, AFL-CIO over wages, hours and conditions of employment for calendar year 1981.

2. We will, upon request, bargain with Ozaukee County Law Enforcement Employees, Local 540, American Federation of State, County and Municipal Employees, AFL-CIO over wages, hours and conditions of employment for calendar year 1981.

Ozaukee County Board of Supervisors,
Personnel Committee

By _____
Chairman, Ozaukee County Board
of Supervisors, Personnel
Committee

Dated this _____day of _____, 1981.

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

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

Position of the Union.

The Union argues that as of July 1, 1980, no agreement was in existence, and therefore, it had no contractual obligation to notify the County by said date of its intent to modify the 1980 agreement. As of November 5, 1980, when the 1980 agreement was signed, it was impossible for the Union to comply with the July 1, 1980 date. Accordingly, the application of retroactivity to the July 1, 1980 date would be unreasonable, inconsistent with contractual principles governing labor relations, and, contrary to public policy.

There is no compelling reason why the July 1, 1980 date should have been strictly followed, since that would have required the Union to terminate a contract not yet in effect. Even assuming the Union had a duty to notify the County by July 1, 1980, the tardiness of the notice on July 9, 1980 was insignificant and did not prejudice the County's bargaining rights.

By waiting nearly five months before objecting to the timeliness of the notice, the County waived its right to rely on the notice requirement.

Position of the County:

The County contends that when the Commission closed its investigation of the petition for interest arbitration on February 26, 1980 thereby freezing the unresolved issues, the parties had completed their negotiations and knew that the terms of the 1980 agreement would include an updated notice requirement in Article 23, the duration clause. Accordingly, said requirement then became an enforceable contractual obligation to which the parties had agreed, rather than a retroactively issue.

The County further argues that the July 1 notice constituted an enforceable condition precedent. The parties should be bound by the negotiated provisions. Moreover, the Union had complied with an identical requirement in a similar situation in 1979.

If the Union really believed that the duration clause was unenforceable prior to November 5, 1980, then its letter of July 9, 1980 was not necessary. In fact, said letter did not request a waiver of the notice date, but rather, merely sought a delay in the submission of written proposals.

Since the Union's letter of July 9, 1980 was untimely, the County did not waive its right to later object to the notice on that basis. The Union never relied to its detriment on the County's failure to respond to said letter at an earlier date. The Union could not have legally refused to sign the 1980 contract following the arbitrator's award. Further, the arbitrator still would have been limited to selecting between the two final offers even if informed of the County's position on Article 23. Since the arbitrator selected the Union's final offer, it was not harmed by the arbitrator's lack of such knowledge.

Discussion:

Although the complete terms of the 1980 agreement did not become known until the arbitrator's award was issued on October 13, 1980, the County believes the Union should have served notice no later than July 1, 1980 of its desire to negotiate modifications to said agreement. The Union had served timely notice in 1979 of its intent to negotiate modifications to the then existing agreement, thereby preventing the automatic renewal of said agreement for another year. By its terms, the 1978-79 agreement expired on December 31, 1979. The parties did not execute a successor agreement to cover the 1980 calendar year

until November 5, 1980. During their negotiations for a 1980 agreement, the parties had agreed, prior to reaching impasse over wages and holidays, to modify the duration clause from the 1978-79 agreement by revising the dates therein to reflect a duration of one year, which would cover the 1980 calendar year. Thus, the County correctly asserts that as of February 26, 1980, the parties knew what the exact terms of the duration clause in the 1980 agreement would be. However, said agreement was not in effect on July 1, 1980. Therefore, those modifications of the 1978-1979 agreement, including the duration clause, which the parties had agreed to place in the 1980 agreement, did not become effective until November 5, 1980, when the 1980 agreement was executed. Thus, it is clear that there was no agreement in effect on July 1, 1980. Moreover, it was impossible for the Union to still comply with the notification date of July 1, 1980 after the 1980 agreement was executed on November 5, 1980. Because of that obvious impossibility of performance, the notice requirement at issue herein will not be enforced retroactively. The Commission adopted a similar approach in a decision wherein it refused to make retroactive application of a new provision creating a just cause standard for non-renewals, since such an application would have then negated an action by an employer, which action was otherwise proper prior to the date of the execution of the collective bargaining agreement involved. 1/ Accordingly, the Examiner rejects the County's arguments which, if accepted, would have required the Union to comply with a provision of an agreement not in existance at the point in time compliance allegedly had to occur.

The Examiner now turns to the issue of whether the tentative agreements reached by the parties during their negotiations became part of the status quo. 2/ Inasmuch as the parties had agreed during negotiations to modify the duration clause by altering the dates therein, said provision was not subject to the requirement that an employer must maintain the status quo of conditions contained in the expired agreement. Although such modifications were not susceptible to subsequent unilateral change, those modifications first became enforceable contractual provisions when they were incorporated into a complete agreement, which event occurred on November 5, 1980. Items, on which tentative agreement has been reached by the parties during their negotiations, do not become enforceable provisions of a labor agreement until the parties have reached an accord on a total agreement incorporating the tentatively agreed-to items. Such was the status of the duration clause in the 1980 agreement. Therefore, the duration clause was not in effect on July 1, 1980.

There is nothing in the record to support a finding that the County's bargaining rights were prejudiced by not receiving a notice prior to July 1, 1980, of the Union's intent to negotiate modifications to the 1980 agreement for implementation in 1981. It is extremely doubtful that the parties could have conducted meaningful negotiations for a 1981 agreement prior to the receipt of the arbitrator's award establishing the terms of the 1980 agreement. The County's failure to respond to the Union's letter of July 9, 1980 would indicate it was of a similar opinion.

Contrary to the County, the Examiner does not find controlling the fact that the Union did give notice to the County prior to July 1, 1979 in a situation similar to the one existing herein. Such notice appears to have been a courtesy, rather than a requirement. The Union's letter of July 9, 1980 was of a similar nature. Neither the status of the 1980 agreement, nor the foregoing conclusions, would have been altered by the absence of such a letter.

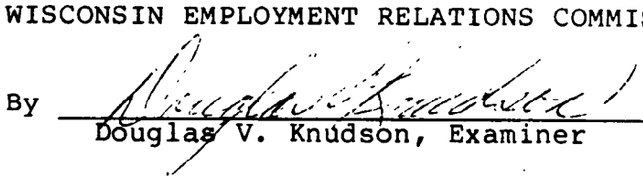
1/ Joint School District No. 15, Barnevald (12538-B) 11/75.

2/ School District No. 6, City of Greenfield (14026-B) 11/77.

It is concluded that the Union's failure to give the County a written notice of an intent to negotiate modifications to the 1980 agreement prior to July 1, 1980, a date in advance of the execution of said agreement, did not cause that agreement to automatically be renewed for another year. Further, the County's refusal to negotiate with the Union over a successor agreement to the 1980 agreement, following the Union's request for such negotiations on November 10, 1980, breached the County's duty to bargain as provided for in Section 111.70(3)(a)4 of MERA.

Dated at Madison, Wisconsin this 22nd day of July, 1981.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By 
Douglas V. Knudson, Examiner