STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

BROWN COUNTY SHERIFF-TRAFFIC DEPARTMENT LABOR ASSOCIATION, Complainant, vs. BROWN COUNTY; DONALD J. HOLLOWAY, County Executive; and NORBERT R. FROELICH, Sheriff, Respondents.	Case CXL No. 28900 MP-1278 Decision No. 19314-A

Appearances:

Parins, McKay & Mohr, S.C., by Mr. Frederick J. Mohr, 415 South Washington Street, P.O. Box 1098, Green Bay, Wisconsin 54305, appearing on behalf of the Complainant.

Mr. Kenneth J. Bukowski, Corporation Counsel, Brown County Courthouse, Green Bay, Wisconsin 54301, appearing on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Brown County Sheriff-Traffic Department Labor Association, having on December 4, 1981, filed a complaint with the Wisconsin Employment Relations Commission alleging that Brown County, County Executive Donald J. Holloway and Sheriff Norbert J. Froelich had committed prohibited practices within the meaning of the Municipal Employment Relations Act (MERA); and the Commission having appointed Mary Jo Schiavoni, a member of its staff, to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and Order in the matter as provided in Section 111.07(5) of the Wisconsin Statutes; and a hearing on said complaint having been held on February 17, 1982 at Green Bay, Wisconsin; and the parties having filed post-hearing briefs, the last of which was received on March 31, 1982; the Examiner, having considered the evidence and arguments contained in the briefs and being fully advised in the premises, makes and issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. That Brown County Sheriff-Traffic Department Labor Association, hereinafter referred to as Complainant, is a labor organization with its principal offices located at 2760 Viking Drive, Green Bay, Wisconsin.

2. That Brown County, hereinafter referred to as Respondent County, is a municipal employer with its principal office located at 305 East Walnut Street, Green Bay, Wisconsin 54305; that Donald J. Holloway, who is and has been at all pertinent times the County Executive for Respondent County, is a municipal employer; that Norbert J. Froelich, who is and has been at all pertinent times the Sheriff for Respondent County, is an agent of the municipal employer; and that said named individuals are being sued in their official capacities as officials of Respondent County.

3. That at all times material hereto, Respondent County has voluntarily recognized Complainant as the bargaining representative for a unit consisting of "the enforcement personnel of the Brown County Sheriff-Traffic Department".

4. That Complainant and Respondent County were, for the period January 1, 1981 through December 31, 1981, parties to a collective bargaining agreement governing wages, hours, and conditions of employment of certain employes of Respondent County described in Finding of Fact 3 above; that said labor agreement contained provisions relating to fair share, job posting, and a grievance procedure which provided for final disposition of grievances through binding arbitration; and that said agreement also contained the following pertinent provisions:

ARTICLE 1. PURPOSE OF AGREEMENT

It is the intent and purpose of the parties hereto that this Agreement shall promote and improve working conditions between the County and the Brown County Sheriff-Traffic Department Bargaining Unit and to set forth herein rates of pay, hours of work, and other terms and conditions of employment to be observed by the parties hereto. In keeping with the spirit and purpose of this Agreement, the County agrees that there shall be no discrimination by the County against any employee covered by this Agreement because of his membership or activities in the Bargaining Unit, nor will the County interfere with the right of such employees to become members of the Bargaining Unit. The County retains all rights, powers, or authority that it had prior to this contract unless modified by this contract or state laws. Working conditions previously in effect shall not be reduced during the life of this Agreement provided they do not conflict with this Agreement.

ARTICLE 3. MANAGEMENTS RIGHTS RESERVED

Except as herein otherwise provided, the Management of the department and the direction of the working forces is vested exclusively in the Employer.

It is further agreed, except as herein otherwise provided, that the responsibilities of Management include, but are not limited to those outlined in this Agreement. In addition to any specified herein, the Employer shall be responsible for fulfilling all normal managerial obligations, such as planning, changing or developing new methods of work performance, establishing necessary policies, organizations and procedures, assigning work and establishing work schedules and of applying appropriate means of administration and control; provided however, that the exercise of the foregoing rights by the County will not be used for the purpose of discrimination against any member of the Association or be contrary to any other specific provision of this Agreement, and provided that nothing herein shall be construed to allow Management to affect wages, hours and conditions of employment of Association members as outlined in Section 111.70.

ARTICLE 9. MAINTENANCE OF STANDARDS

The Employer agrees that all conditions of employment in his individual operation relating to wages, hours of work, overtime differentials and general working conditions shall be maintained at not less than the highest standards in effect at the time of signing of this Agreement, and the conditions of employment shall be improved wherever specific provisions for improvements are made elsewhere in the Agreement.

ARTICLE 17. DISTRIBUTION AND CALCULATION

Overtime shall be distributed as equitably as possible depending on the particular work and skills involved. Any deviation from the norm of the department with reasonable consideration of the skills and departmental needs involved, shall be subject to the grievance procedure in that if an employee complaint by bargaining unit action, rather than individual, shall subject the overtime list to review. It is agreed that overtime to be legitimately allocated, must be

authorized by direction of the Sheriff or Traffic Chief or their designated representative for employees under their respective jurisdictions. The Sheriff and Traffic Chief will post a written statement indicating who the designated representatives are who may authorize overtime.

ARTICLE 52. TERMS OF AGREEMENT

This Agreement shall become effective as of January 1, 1981, and remain in full force and effect up to and including December 31, 1981, and shall renew itself for additional one year periods thereafter unless either party has notified the other party in writing that it desires to alter or amend this Agreement at the end of the contract period. The terms of this Agreement shall be from January to December 31 of each and every year. Provisions have been made to pay for the liability accruing under this contract.

5. That Respondent County and Sheriff Froelich had, from 1972 to the present, utilized various individuals as "special deputies" on over forty (40) different occasions; and that these special deputies were generally women relatives of bargaining unit officers who were called upon to serve as matrons in the transport of female prisoners, individuals with special skills needed by Respondent in selective cases such as divers and snowmobile mechanics, and retired male officers of Respondent County or other law enforcement agencies in the area, hereafter referred to as "retirees".

6. That during the time period from January, 1972 through December, 1981 Respondent County utilized male "special deputies" who were not necessarily "retirees" for duty at county fairs on at least eleven (11) separate occasions; that it utilized two (2) male special deputies on one (1) occasion to pick marijuana; that it utilized two (2) male special deputies on another occasion to check taverns for underage persons; and that it utilized occasional male special deputies for other diverse purposes.

7. That in addition to utilizing "special deputies" for the purposes described in Findings of Fact 5 and 6 above, Respondent County and Froelich utilized the above described retirees as follows during the period from January, 1972 through December, 1981:

Year	Special Deputy (Retiree)	Task	Occasions Utilized
1973	James Hogenson	Guard on Prisoner at Hospital	3
	Laurence May	Guard on Prisoner at Hospital	1
	Orville Thomas	Prisoner Transport	11
1974	James Hogenson	Guard on Prisoner at Hospital	8 (18 days)
	William Morgan	Guard on Prisoner at Hospital	1
	Orville Thomas	Prisoner Transport	5
1975	Harry Gigot	Guard on Prisoner at Hospital	1 (4 days)
	Michael Melotte	Guard on Prisoner at Hospital	1
	Orville Thomas	Guard on Prisoner at Hospital	1
		Prisoner Transport	1
	Robert Young	Guard on Prisoner at Hospital	1

Year	Special Deputy (Retiree)	Task	Occasions Utilized
1977	Orville Thomas	Prisoner Transport	4
1978	Orville Thomas	Prisoner Transport	3
1979	Milton Long	Prisoner Transport	4
	Richard Rice	Prisoner Transport	1
	Gary Smith	Prisoner Transport	1
	Milton Steeno	Prisoner Transport	1
	Orville Thomas	Prisoner Transport	1
1980	Milton Long	Prisoner Transport	1
1981	Ronald Johnson	Prisoner Transport	2
	Jackson Bush	Prisoner Transport	2
	Norbert Reinhard	Prisoner Transport	3

8. That the guarding of prisoners in the hospital and the transportation of prisoners, except where female prisoners are involved, is normally work performed by bargaining unit members represented by Complainant; that prior to November 16, 1981, the practice of Respondent County and Froelich with regard to the assignment of work relating to the guarding of prisoners at hospitals and the transportation of prisoners was to assign on-duty officers who were members of Complainant's bargaining unit to perform said work; that if it was determined that there were insufficient bargaining unit members on duty, Respondent County and Sheriff Froelich through their agents, called upon off-duty bargaining unit members to perform such work unless the prisoner to be transported was female; that if the prisoner was a female, Respondents requested a married officer to call upon his wife or another female relative to accompany him as a special deputy matron; that in the event that no off-duty bargaining unit members were available to perform the work, Respondents then called upon the retirees to serve as special deputies; and that the Complainant was aware of the procedure and did not object to said procedure at any time prior to November 16, 1981.

9. That neither the collective bargaining agreement nor the parties' bargaining history establishes that the retirees are included in the bargaining unit represented by Complainant described in Finding of Fact 3; and that the retirees are accordingly, excluded from said unit.

10. That in September of 1981, Respondent County and County Executive Holloway received recommendations by private consultants who had studied the management of Respondents' Sheriff and Traffic Department; that said study included numerous suggestions as to ways to reduce the amount of overtime paid by Respondents to bargaining unit employes and specifically recommended the following:

> Criteria Should Be Established To Determine How Many Officers Should Be Assigned To Transport a Prisoner
>
> Two officers are not always required to perform this duty. Among the factors to be considered in making the determination are the status of the prisoner (i.e. convicted, pending trial, or mental case), the severity of the alleged crime, any previous record of escape attempts, the perceived threat to the transporter, and the distance of the trip. Application of these criteria should reduce the number of two officer escorts, thereby reducing the amount of overtime charged to this activity.

11. That upon completion of the study, Complainant sent the following letter to Gerald Lang, Respondent County's Personnel Director:

October 8, 1981

Mr. Gerald E. Lang
Personnel Director
Northern Building
305 East Walnut Street
Green Bay, Wi 54301

Re: Request to Bargain

Dear Mr. Lang:

Although I have voiced my desire to bargain the items contained in the recent study regarding the Brown County Sheriff-Traffic Department, I would like to make a formal written request at this time. I am of the belief that all items are bargainable except for the consolidation issue itself. However, I believe the effects of the consolidation issue would also be bargainable. Consequently, I make a formal demand to bargain any changes in regard to those items as set forth in the study.

Very truly yours,

Frederick J. Mohr

12. That prior to Respondent County's November 1981 Board meeting, Respondent Holloway spoke with Chief Deputy Sheriff Bernard Baye, Froelich's assistant, regarding what he considered to be excessive anticipated budget expenditures in the area of overtime and urged Baye to discover methods to curtail the overtime expenditures; and that Holloway specifically encouraged Baye to continue the use of retirees in areas such as prisoner transportation.

13. That from 1976 to November of 1981, the wage rate for all special deputies was four ($4.00) dollars per hour; that the 1976 rate was established by Respondent County's Protection Committee; and that Complainant did not participate in the establishment of the above rate.

14. That on November 4, 1981, Respondent County's Protection Committee raised the rate of pay for all special deputies to six ($6.00) dollars per hour; that Respondents did not give notice to or bargain with Complainant prior to establishing the new rate.

15. That on November 16, 1981, pursuant to Froelich's orders, Donald Van Straten compiled a list of retirees who were interested in performing the above-referred to work for six ($6.00) dollars an hour, and that Van Straten thereafter began to call these retirees initially without first calling the list of off-duty bargaining unit members to accompany on-duty officers in prisoner transportation and to relieve on-duty officers in prisoner guarding at hospitals; that these actions by Respondent County and Froelich changed the procedure with regard to the assignment of officers for prisoner transportation and the guarding of prisoners in hospitals; and that Respondents did not give notice to or bargain with Complainant prior to changing the assignment procedure referred to above.

16. That Complainant filed the instant complaint alleging that Respondents had violated Sections 111.70(3)(a)1, 4, and 5 of MERA by violating the parties' collective bargaining agreement, specifically the wage, job bulletin, and fair share dues deduction provisions; by unilaterally setting a wage for the retirees and by refusing to bargain with Complainant in setting the wage for retirees; and by discouraging law enforcement personnel from organizing for their mutual assistance and protection through the above actions; and that Complainant also sought and was awarded, in January of 1982, a temporary injunction by the Brown County Circuit Court enjoining Respondents from utilizing retirees for purposes of prisoner transportation, prisoner guarding and criminal process serving until final determination of this matter by the Commission.

17. That at hearing, Complainant raised and the parties thereafter addressed in their post-hearing briefs, an allegation that Respondents additionally violated Section 111.70(3)(a)4 by unilaterally changing the assignment procedure for prisoner transport and the hospital guarding of prisoners without bargaining with Complainant.

18. That at no time did Complainant file or attempt to file a grievance(s) relating to the allegations contained in Findings of Fact 16 and 17.

On the basis of the above and foregoing Findings of Fact, the Examiner makes and issues the following

CONCLUSIONS OF LAW

1. That Complainant did not exhaust or attempt to exhaust the grievance and arbitration procedure established by the collective bargaining agreement between Complainant and Respondent County with respect to any of its claims of breach of contract and, therefore, the Examiner will not assert the jurisdiction of the Commission to determine whether or not Respondents committed prohibited practices within the meaning of Section 111.70(3)(a)5 of MERA.

2. That by their conduct in this matter Respondent County and Respondents Holloway and Froelich did not independently commit a prohibited practice within the meaning of Section 111.70(3)(a)(1) of the Municipal Employment Relations Act.

3. That, inasmuch as special deputies are excluded from the bargaining unit of enforcement personnel represented by Complainant, Respondents had no duty to bargain with Complainant regarding their wages, hours, and working conditions and therefore by unilaterally establishing wage rates for special deputies including retirees, that Respondents did not commit a prohibited practice within the meaning of Section 111.70(3)(a)(4) of the Municipal Employment Relations Act.

4. That Respondents, by failing to bargain about the changing of a mandatory subject of bargaining when they, without giving notice to or bargaining with Complainant, unilaterally changed the past practice of prisoner transport and hospital prisoner guarding work assignments to a procedure wherein retirees were initially offered said assignments without first offering them to off-duty bargaining unit employes, did commit a prohibited practice within the meaning of Section 111.70(3)(a)4 and 1 of the Municipal Employment Relations Act.

Upon the basis of the above and foregoing Findings of Fact and Conclusions of Law, the Examiner makes and issues the following

ORDER 1/

IT IS ORDERED that the Respondents, by their officers and agents, shall immediately:

1/ Any party may file a petition for review with the Commission by following the procedures set forth in Sec. 111.07(5), Stats.

Section 111.07(5), Stats.

(5) The commission may authorize a commissioner or examiner to make findings and orders. Any party in interest who is dissatisfied with the findings or order of a commissioner or examiner may file a written petition with the commission as a body to review the findings or order. If no petition is filed within 20 days from the date that a copy of the findings or order of the commissioner or examiner was mailed to the last known address of the parties in interest, such findings or order shall be considered the findings or order of the commission as a body unless set aside, reversed or modified by such commissioner or examiner within such time. If the findings or order are set aside by the commissioner or examiner the status shall be the same as prior to the findings or order set aside. If the findings or order are reversed or modified by the commissioner or examiner the time for filing petition with the commission shall run from the time that notice of such reversal or modification is mailed to the last known address of the parties in interest. Within 45 days after the filing of such petition with the commission, the commission shall either affirm, reverse, set aside or modify such findings or order, in whole or in part, or direct the taking of additional testimony. Such action shall be based on a review of the evidence submitted. If the commission is satisfied that a party in interest has been prejudiced because of exceptional delay in the receipt of a copy of any findings or order it may extend the time another 20 days for filing a petition with the commission.

1. Cease and desist from refusing to bargain with Complainant by unilaterally discontinuing a past practice of offering prisoner transport and hospital guarding assignments to off-duty full-time bargaining unit employes before offering said assignments to retirees.

2. Take the following affirmative action which the Examiner finds will effectuate the policies of the Municipal Employment Relations Act:

   a. Immediately return to the status quo ante by restoring the past practice of offering prisoner transport and hospital guarding assignments to off-duty full-time bargaining unit employes before offering said assignments to retirees.

   b. Make whole the full-time bargaining unit employes who would have been offered the overtime assignments of prisoner transport which were performed by retirees pursuant to Respondents' unilateral change in the past practice since November 16, 1981.

   c. Upon request, bargain with Complainant the discontinuance or change of the practice of offering prisoner transport and hospital guarding assignments to off-duty full-time bargaining unit employes before offering said assignments to retirees.

   d. Notify all employes, by posting in conspicuous places on their premises, where notices to all employes are usually posted, a copy of the notice attached hereto and marked "Appendix A". Said notice shall be signed by an official of Respondents and shall be posted immediately upon receipt of a copy of this order. Said notice shall remain posted for sixty (60) days thereafter. Reasonable steps shall be taken to insure that said notice is not altered, defaced or covered by other material.

   e. Notify the Wisconsin Employment Relations Commission in writing within (20) calendar days following the date of this Order as to what steps have been taken to comply herewith.

IT IS FURTHER ORDERED that the complaint is dismissed as to all violations of MERA alleged but not found herein.

Dated at Madison, Wisconsin this 9th day of June, 1982.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Mary Jo Schiavoni
Mary Jo Schiavoni, Examiner

APPENDIX "A"

NOTICE TO ALL EMPLOYES REPRESENTED BY
BROWN COUNTY SHERIFF-TRAFFIC DEPARTMENT LABOR ASSOCIATION

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 employes that:

1. WE WILL immediately restore the past practice of offering prisoner transport and hospital guarding assignments to off-duty full-time bargaining unit employes before offering said assignments to retirees.

2. WE WILL make whole the full-time bargaining unit employes who would have been offered the overtime assignments which were performed by retirees but for our unilateral change in the past practice.

3. WE WILL, upon request, bargain with Brown County Sheriff-Traffic Department Labor Association prior to discontinuing or changing the past practice of offering prisoner transport and hospital guarding assignments to off-duty full-time bargaining unit employes before offering said assignments to retirees.

Dated this _____ day of _____, 1982.

By _____
Brown County

THIS NOTICE MUST BE POSTED FOR SIXTY (60) DAYS FROM THE DATE HEREOF AND MUST NOT BE ALTERED, DEFACED OR COVERED BY ANY MATERIAL.

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The complaint alleges that the Respondents violated the parties' collective bargaining agreement by unilaterally setting a wage rate for retirees who worked as special deputies, by failing to post jobs which were assigned to retirees and by failing to deduct "fair-share" dues from the retirees. The complaint additionally alleged that these acts were committed by Respondent Holloway to discourage bargaining unit employes from organizing for their protection and mutual assistance; and that Respondents refused to bargain with Complainant on behalf of the retirees.

While not specifically pleaded prior to the hearing, Complainant in its post-hearing brief also alleged, based on evidence adduced at hearing, that Respondents refused to bargain with Complainant prior to changing the assignment procedure for prisoner transport and for the hospital guarding of prisoners. 2/

Complainant's Position

Complainant maintains that the retirees are properly included in the bargaining unit, and the Respondents' unilateral establishment of a wage for them violated the parties' collective bargaining agreement. It further argues that by assigning the retirees to perform transport of prisoners prior to having offered these assignments to full-time bargaining unit members, Respondents have unilaterally changed a past practice without bargaining. The Complainant contends that the unilateral change in the procedure and the resulting denial of overtime affects both wages and working conditions of full-time bargaining unit employes and constitutes a prohibited practice under MERA.

Respondents' Position

Respondents argue that the Commission should dismiss the complaint in its entirety because the parties' collective bargaining agreement contains a final and binding arbitration provision and the Complainant has failed to exhaust the grievance arbitration procedure provided by the parties' agreement. Respondents maintain that the entire dispute is arbitrable and urge the Commission to refuse to entertain the Complainant's entire complaint.

With regard to the merits of the complaint, Respondents contend that retirees are not bargaining unit employes and that there has been a long history of using retirees and other special deputies for the transport and hospital guarding of prisoners. Respondents maintain that Complainant failed to prove that it made a bargaining demand of Respondents to negotiate the topics of prisoner transportation and hospital guarding. They also argue that Complainant failed to prove that Respondent County had an established past practice of calling full-time off-duty bargaining unit employes prior to contacting retirees. Finally, Respondents claim that they were entitled to make such a change in assigning retirees because of the management rights and maintenance of standards clauses in the parties' collective bargaining agreement and because the full-time bargaining unit employes suffered no layoffs or reduction of their regular hours.

Discussion

Despite contentions by Complainant and Respondents to the contrary, the underlying facts are simple and easily ascertainable. Record evidence, specifically Exhibit 6, clearly establishes a long-standing history of Respondent County's utilization of special deputies, including the retirees who are the subject of the instant dispute.

2/ The complaint also alleged that Respondents utilized retirees to serve criminal process but no evidence was offered in support of this contention and the Examiner confines her analysis to the transport and hospital guarding of prisoners work assignments.

Although Complainant's President, Michael Schroll, testified that he personally was unaware of the use of retirees in prisoner transport and hospital guarding until the fall of 1981, it is impossible to conclude that the Complainant was unaware of Respondents' utilization of retirees in these functions upon review of the number of occasions and situations in which the retirees were used as special deputies. Full-time bargaining unit employes were relieved by retirees in instances of hospital guarding or accompanied retirees in instances of prisoner guarding and thus they would have been fully aware of the utilization of retirees. Moreover, Chief Deputy Bernard Baye testified that he communicated the County's practice of utilizing retirees to Sergeant Gerend, an official in Complainant's Association, in 1980. Accordingly, it is concluded that Respondents, at least from 1972 to January of 1981, utilized retirees in the transport and hospital guarding of prisoners and that Complainant was aware of Respondent's practice in this regard.

Contrary to Respondents' assertion, the record also reveals that prior to November 16, 1981 retirees were not utilized until the full-time off-duty bargaining unit employes had been contacted and declined the hospital guarding and prisoner transport assignments. Both Chief Deputy Baye and Captain Donald Van Straten testified that, prior to November 16, 1981, if Respondents did not have enough on-duty officers to fulfill the above assignments they would contact an off-duty officer or officers to perform hospital guard duty or accompany an on-duty officer for prisoner transport. Both indicated that retirees were called when they could not find any full-time off-duty bargaining unit employe willing to take the assignment. Van Straten further testified that on November 16, 1981, he was ordered by Sheriff Froelich to abandon the above procedure, to compose a list of retirees willing to perform the above referred to functions, and to call these retirees first without previously contacting full-time off-duty bargaining unit employes and offering them the assignment. Based on the fully credited testimony of Baye and Van Straten, it is apparent that Respondents changed their past procedure with regard to the use of retirees in the hospital guarding and transportation of prisoners. Such a change substantially affected the amount of overtime previously enjoyed by full-time bargaining unit employes and effectively curtailed overtime opportunities with regard to assignments in the two aforementioned areas.

The evidence of record, specifically Complainant's Attorney's letter of October 8, 1981, 3/ indicates that Complainant was concerned about the loss of any overtime opportunities which might result from the management consultants' study recommendations and the above letter was sufficient to place Respondents on notice that Complainant wished to bargain over any contemplated changes which would affect the bargaining unit employes as a result of the recommendations made in the study.

Breach of Contract

As Respondents have correctly pointed out in their post-hearing brief, it is the Commission's policy not to assert its jurisdiction to determine the merits of breach of contract allegations when a collective bargaining agreement providing for final and binding arbitration of such disputes exists and said procedure has not been exhausted. 4/ In the instant case, the parties' agreement provided for final and binding arbitration. Complainant, however, did not attempt to grieve the alleged breach of contract violations and did not submit any evidence which would excuse its failure to grieve same. 5/ Accordingly, the Examiner will not

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3/ In its post-hearing brief, Complainant refers to an October 22, 1981 letter which was never offered or admitted into evidence.

4/ Oostburg Joint School District No. 14, (11196-A) 11/72; Winter Joint School District No. 1, (17867-C), 1981.

5/ The Examiner rejects the Complainant's argument, raised at hearing, that Respondents' allegation that Complainant failed to exhaust the grievance procedure is barred as res judicata. Complainant failed to present sufficient evidence to prove that said defense was fully litigated or considered on its merits at the temporary injunction hearing before the Circuit Court.

assert the Commission's jurisdiction to determine the merits of any of the allegations contained in the instant complaint alleged to be a violation of Section 111.70(3)(a)5 of MERA.

Respondents, however, also urge that the Commission should refuse to assert jurisdiction with regard to the alleged violations of Section 111.70(3)(a)4. Generally, where the complaint alleges an independent violation of refusal to bargain in good faith, pursuant to Section 111.70(3)(a)4 of MERA, and the collective bargaining agreement contains a provision which arguably may be violated by the conduct involved, the Commission will defer to arbitration. 6/ While even a cursory review of the parties' agreement suggests that the dispute could be determined by criteria contained in pertinent provisions of the collective bargaining agreement, the Examiner will not defer. 7/ The Commission has not adopted Collyer as a standard for deferral of Section 111.70(3)(a)4 allegations. Moreover both the unilateral change of retiree wages and assignments procedure allegations of violations of Section 111.70(3)(a)4 were fully litigated and argued by the parties. Additionally, the Section 111.70(3)(a)4 allegation raised at hearing and addressed by the parties in their post-hearing briefs requires a determination as to whether the Respondents' actions involved a mandatory or permissive subject of bargaining. 8/ Accordingly, the Examiner will consider the Section 111.70(3)(a)4 allegations on their merits. The Examiner, however, will only refer to the parties' agreement insofar as it is necessary to determine whether Respondents violated 111.70(3)(a)4 and will refrain from interpreting any provisions unnecessary to the consideration of these allegations.

Refusal to Bargain

The complaint alleges that Respondents violated Section 111.70(3)(a)4 of MERA by refusing to bargain with Complainant regarding the hours and wages of the retirees. The record reveals that Respondents' Protection Committee set the wages of the retirees at four ($4.00) dollars per hour in 1976. There is no evidence that Complainant participated in establishing the wage rate at that time. Nor is there any evidence that Complainant claimed to represent these retirees or bargained with Respondents on their behalf at any time from 1972 to the time of the instant dispute.

Although the complaint alleges and the Answer admits that Complainant is the certified representative of all non-supervisory law enforcement personnel, the Examiner, having reviewed the recognition clause of the parties' agreement and the Commission's records, takes administrative notice that no such certifiction by the Commission exists. Further, the Examiner notes that the collective bargaining agreement, which in the absence of a Commission certification defines the unit conclusively, makes no reference to special deputies. Moreover, the bargaining history of the parties has been to exclude the special deputies from inclusion in the bargaining unit. Complainant never bargained on their behalf in the past. The Examiner therefore concludes that special deputies, including the retirees, are excluded from bargaining unit represented by Complainant. Because the Complainant does not represent the retirees, Respondents had no duty to bargain with Complainant over the November 4, 1981 wage increase for special deputies.

While not specifically alleged in the pleadings, evidence adduced at hearing revealed that Respondents had unilaterally, without giving notice to or bargaining with Complainant, changed the assignment procedure on November 16, 1981. At that time they began to call retirees for prisoner transport and hospital guarding assignments when additional help was necessary without first offering these assignments to full-time off-duty bargaining unit employes. Although Complainant did not formally amend its pleadings, neither party at hearing objected to the introduction or admission of such evidence. Additionally both parties addressed this Section 111.70(3)(a)4 allegation in their post-hearing briefs, Respondents having received Complainant's brief prior to filing their own brief and failing to object in their brief to the consideration of this evidence by the Examiner. The Commission will decide an issue even though it is not specifically pleaded where

6/ School District of Menomonie, (16724-B) 1/81.

7/ Compare: Collyer Insulated Wire, 192 NLRB 837 (1971).

8/ School District of Menomonie, supra.

it is fully litigated at the hearing and no objections are raised. 9/ Under the circumstance described above, where the issue has been fully litigated and no objections raised, the Examiner will address the merits of this allegation.

The Commission has concluded that the Municipal Employer's duty to bargain under Section 111.70(3)(a)4 of MERA includes an obligation to bargain in good faith with the employes' bargaining representative before making a change during the term of the parties' collective bargaining agreement which is primarily related to employes' wages, hours or conditions of employment or which will have an impact thereupon when implemented. 10/ In the instant matter, Complainant alleges that Respondents' unilateral change in the above-detailed assignment procedure primarily affected the wages, hours and conditions of employment in two respects. First, it asserts that the method of assignment to jobs is in and of itself a condition of employment. Secondly, it stresses that the change in assignment procedures resulted in bargaining unit employes being denied overtime which had previously been available to them, thereby substantially affecting their wages.

Conversely, the Respondents claim that no full-time bargaining unit employe has been laid off or reduced in hours as a result of their change in procedure. They claim the change to be within their managerial prerogative as described in the management rights and maintenance of standards clauses of the current agreement.

The Examiner is thus confronted with the question of whether Respondents' unilateral change in the assignment procedure which effectively resulted in the elimination of overtime in these areas for full-time bargaining unit employes is a mandatory subject of bargaining. The Wisconsin Supreme Court in United School District No. 1 of Racine Co. v. WERC 11/ stated that the test to be applied under MERA to determine whether a subject is a mandatory or permissive subject is ". . . whether a particular decision is primarily related to the wages, hours and conditions of employment of the employes or whether it is primarily related to the formulation or management of public policy." In the instant situation, Respondents' decision removed job assignments which had previously been offered to and performed by bargaining unit employes at an overtime rate from said bargaining unit employes and awarded said assignments to casual employes, the retirees, at a substantially reduced rate. The job assignments or tasks themselves remained unchanged and necessary to the accomplishment of the municipal employer's mission.

In applying the test set forth above, particularly in view of the effect of Respondents' actions upon the bargaining unit employes who had previously been offered the work, the Respondents' decision to unilaterally change the past practice in job assignment for prisoner transport and hospital guarding must be considered as being primarily related to the wages, hours and working conditions of employes and therefore a mandatory subject of bargaining. 12/ The Commission's

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9/ National Warehouse Corp., Milwaukee County Circuit Court 9/52; Home Lumber & Improvement Co. (334) 10/52.

10/ City of Beloit, (11831) 9/74; aff'd in relevant part, nos. 144-272 and 144-406 (Dane Co. Cir. Ct.) 1/31/75, app'd to Wis. Sup. Ct.; aff'd 6/1/76; Oak Creek-Franklin School District No. 1, (11827) 9/74; aff'd no. 144-473 Dane Co. Cir. Ct.) 11/75.

11/ 81 Wis. 2d 89 (1977).

12/ While the Commission has never addressed the issue of an employer unilaterally eliminating overtime, this issue has arisen in cases involving the National Labor Relations Act, as amended. See, for example, Central Missouri Electric Cooperative, Inc., 222 NLRB 1037 (1976) where the employer unilaterally discontinued standby pay and transferred this work previously performed by bargaining unit employes to an answering service; Willamette Industries, Inc., 220 NLRB 707 (1975) and Colonial Press, Inc., 204 NLRB 852 (1973) where the employers adjusted schedules to eliminate overtime; and Master Appliances Corporation, Inc., 158 NLRB 1009 (1966).

decisions involving the subcontracting of work previously performed by bargaining unit employes also lend support to the conclusion that Respondents' decision to change the assignment procedure is a mandatory subject of bargaining. 13/

Respondents' argue that they possessed the authority to make and implement the change in the past practice because of Article 3, the management rights clause in the parties' collective bargaining agreement. Although not specifically stated as such, this is essentially a contractual waiver defense. Generally speaking the municipal employer is relieved of its duty to bargain with respect to subjects which are embodied in the terms of the agreement and subjects as to which the employe representative has waived interim bargaining by reason of the parties' bargaining history or by specific language in the parties' agreement. 14/ A waiver of substantial legal right, however, should be explicit and not be lightly inferred. 15/ Moreover, the Commission will not find a waiver of a statutory duty to bargain concerning a particular subject absent clear and unmistakeable language requiring that result, 16/ or a bargaining history which would require that result. 17/

Thus, Respondents' waiver argument must be rejected. Article 3 fails to serve as a sufficient defense to Respondents' action when viewed together with Articles 1 and 9 of the parties' agreement. This management rights provision contains numerous clauses subjugating the authority retained by management to other provisions of the agreement. Articles 1 and 9 are explicit statements prohibiting the County from reducing working conditions during the term of the agreement and in fact requiring the County to maintain wages, hours, overtime differentials and general working conditions at not less than the highest standard in effect at the time of signing the agreement. These two articles, place substantial limitations upon Respondents' managerial prerogatives as defined in Article 3 and thus render Respondents' contractual defense inadequate. Moreover, there is no evidence of a bargaining history which would suggest a waiver by Complainant of its right to bargain on this subject. Complainant's letter of October 8, 1981 clearly demonstrates that it was concerned about job assignment at least in the area of prisoner transport and wished to bargain about anything which might affect bargaining unit employes' overtime.

Interference

Complainant argues that Respondents, by their unilateral actions, attempted to interfere with, and coerce municipal employes in the exercise of their rights as guaranteed by Section 111.70(2) in violation of Section 111.70(3)(a)1 of MERA. Complainant, however, failed to present any evidence to establish that Respondents' actions were calculated to discourage bargaining unit employes from organizing for their protection and mutual assistance. Therefore, the Examiner finds that Respondent did not independently violate Section 111.70(3)(a)1 of MERA and dismisses that portion of the complaint. 18/

Remedy

Having found that Respondents unilaterally changed an existing past practice of job assignment which is a mandatory subject of bargaining, the Examiner orders Respondents to return to the status quo ante by restoring the past practice and to bargain at the request of Complainant any decision to discontinue or change the past practice.

13/ Unified School District No. 1 of Racine Co. (12055-B) 10/74, aff'd Wis. Sup. Ct., supra.; New Richmond Joint School District No. 1, (15172) 7/77.

14/ Nicolet Jt. High School Dist. No. 1, (12073-B, C) 10/75.

15/ City of Green Bay, (12311-B) 4/76.

16/ City of Green Bay, supra.

17/ City of Appleton (Police Dept.), (14615-C) 1/78.

18/ The Examiner, however, having found a violation of Section 111.70(3)(a)4 has accordingly found a corresponding violation of Section 111.70(3)(a)1.

The Examiner also orders a make whole remedy for off-duty bargaining unit employes who would have been offered overtime but for Respondents' unilateral change in the practice. 19/ The record indicates that prisoner transport assignments were made to retirees in November and December of 1981 and that thereafter the Complainant secured a temporary injunction barring Respondent from offering the affected job assignments to retirees.

In its prayer for relief, Complainant requests that Respondents be ordered to abide by the terms of the 1981 labor agreement. Inasmuch as the Examiner has not asserted the Commission's jurisdiction with regard to the Section 111.70(3)(a)5 allegations, the Examiner declines to order such relief.

Dated at Madison, Wisconsin this 9th day of June, 1982.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Mary Jo Schiavoni
Mary Jo Schiavoni, Examiner

19/ The parties' agreement appears to provide some guidance as to which bargaining unit employes should receive overtime pay.